

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**PC. CRIMINAL APPEAL NO. 01 OF 2022**

*(Arising from Criminal Appeal No. 9/2021 before Kishapu District Court originating from Cr. Case No.66 of 2021 of Kishapu Primary Court)*

**BONIPHASE NGOBOKA.....APPELLANT**

**VERSUS**

- 1. KWILASA S/O MAIGE.....**
- 2. KUMALIJA S/O NGOBOKA**
- 3. SHIJA S/O FABRIKA.....**
- 4. SHEKA S/O ELIAS.....**
- 5. NGOBOKA S/O FABRIKA.....**
- 6. SHIJA S/O MITINJE**
- 7. LUGESHA S/O KAPAYA.....**
- 8. WILSON S/O DANIEL.....**

**RESPONDENT**

**JUDGMENT**

*16<sup>th</sup> May & 24<sup>th</sup> June 2022*

**MKWIZU,J:**

The dispute between the parties has a long history. According to the records, parties are related sharing the same father but different mothers. Appellant is a legal appointed administrator of his mother's estate while the 1<sup>st</sup> respondent is an administrator of his father's estate. At Uchungu Primary Court, 1<sup>st</sup> respondent had petitioned for letters of administration of his father's estate, the Late Ngoboka Luvumo who passed away on 18/5/2001 in Mirathi No 04 of 2021. The petition was objected to by the appellant Boniphase Ngoboka on the reason that the deceased's estate was distributed to his heirs immediately after his death in 2003. The objection was dismissed for lacking in merit. The probate Court came into a conclusion that respondent is eligible for the sought letters of

administration. It went ahead to grant letters of administration of the estate of the late Ngoboka Luvuno to the 1<sup>st</sup> respondent (petitioner by then) with instructions to collect and distribution of the deceased's properties to his heirs and file inventory within 30 to 90 days.

One of the deceased properties itemised for distribution was a piece of land located at Mwamangu, in Lubaga Village within Kishapu District, the centre of the parties' dispute in this Court. Appellant was aggrieved by the said distribution claiming the suit land to belong to his mother opposing the respondent's stance that it belongs to their father's estate. He then filed a criminal trespass case against the respondents registered as Criminal case No. 66 of 2021 before the Kishapu Primary Court.

Parties were heard and the trial court found that it had no jurisdiction to determine a matter that was conclusively decided upon by the Court of competent jurisdiction in Shauri la Mirathi No 4 of 2021. It however declared that criminal case ***Res judicata***.

Uncontented, appellant lodged his first appeal to the district court. The District Court Magistrate was of the view that since the issue of ownership of the suit land is yet to be determined, then criminal trespass could not stand for adjudication.

It seems appellant is still unconfutable; he has now lodged this present appeal pegged on three grounds that:

1. The trial court erred in law and fact to find respondent's not guilty unreasonably while the evidence was watertight

2. The trial court erred in law and fact to find respondent's not guilty with the offence charged and ignoring the evidence adduced during trial
3. The trial court erred in law and fact by not considering the judgement of probate case no 3 of 2021 and based on the judgement of probate case no 4 of 2021 of Uchungu primary Court which contributed to a wrong decision thereat.

During the hearing of the appeal both parties were in person without legal representation. In his submissions, appellant blamed the trial court for adjudging the matter res-judicata in disregard to his evidence. All the respondents had nothing to say, understandably so because they are lay persons without any legal background. They all left the matter to the court for a decision.

I have objectively considered the appeal and the two lower courts records. I agree with the 1<sup>st</sup> appellate court's observation that this appeal is unmerited. The whole matter hinges on the ownership of the piece of land. The Court has on numerous occasions held that the charge of criminal trespass cannot succeed where the ownership of land in dispute is not determined by a civil suit. Meaning that, criminal trespass is only maintainable where the ownership of the land in dispute has been resolved by the appropriate courts. See the case of **Sylivery Nkangaa vs Raphael Albertho** 1992 (TLR) 110.

In this case both the complainant and the respondents claim ownership of the land in dispute. The 1st respondent claims that it is his father's property while the appellant says it belongs to his mother's estate. The issue of ownership is yet to be determined in a civil suit. It is for that

reason alone, criminal trespass could not be entertained as rightly decided by the 1st appellate court. I am on this supported by the decision of **Ismail Bushaija vs Republic**, 1991 (TLR)100, where Chipeta J, (as he then was) said:

*"In my view, it is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is clearly in dispute between the complainant and the accused. As was pointed out by this Court in the case of **Saidi Juma v R** [1968] H.C.D. no. 158, cited by Mr Nasimire, when, in a case of criminal trespass, **a dispute arises as to the ownership of the land, the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership. That is exactly what the trial court should have done in the present matter.**"( emphasis added)*

This brings me to the issue of *res-judicata* raised by the appellant in his submissions. It is evident that having found the dispute between the parties resolved in Mirathi No 4 of 2021, the trial magistrate went ahead to declare the criminal case *res judicata*. This was a total misdirection on the part of the trial magistrate. The doctrine of *res judicata* only applies in civil cases. Thus, since the issue that was before the trial court was a criminal matter *res-judicata* doctrine was inapplicable. And even if the matter was of civil nature,, still the doctrine could not have applied because the dispute that was before Uchungu primary court was a probate

issue which went into resolving probate matters between the appellant and 2<sup>nd</sup> respondent only while the issue that was before the trial court was in respect to a different category of claim instituted against the 1<sup>st</sup> respondent and other seven individuals. The doctrine only applies where; the former suit is between the same parties ; the subject matter must be directly and substantially both previous and subsequent matter; Parties must be litigating under the same title in both suit; the matter must have been heard and finally decided and the former suit must have been decided by a court of competent jurisdiction.

As stated earlier on, this doctrine was misapplied in the present proceedings. I am thus fortified under the revision powers of this court to quash that part of the trial court's decision declaring a criminal proceedings res-judicata as I hereby do.

To this end, I hold that this appeal is misconceived and therefore it is dismissed. The parties are at liberty to file a civil suit before a proper forum for the determination of ownership of the suit land. And considering the relationship of the parties herein, that they are all the beneficiaries of the deceased estate, I order each to bear owns costs.

Order accordingly.

**DATED at SHINYANGA** this 24<sup>th</sup> day of June 2022.



**E.Y. MKWIZU**  
**JUDGE**  
**24/6/2022**

**Court:** Right of Appeal explained.



**E.Y. MKWIZU**  
**JUDGE**  
**24/6/2022**