

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

MISC. LAND APPLICATION NO.9 OF 2021

*(Originating from the High Court of Tanzania at Mtwara in Land Case
No.2 of 2021)*

ISMAIL AHMADI MNAKOLE.....1ST APPLICANT
MOHAMEDI ABDALLAH CHAMPUNGA.....2ND APPLICANT
ALLY ATHUMANI KULOWEKA.....3RD APPLICANT
HASSAN SELEMANI MTAMBALIKA.....4TH APPLICANT
SAID ISMAIL MWAVA.....5TH APPLICANT
ABDALLAH AJALI HEMED.....6TH APPLICANT
MARIAMU YUSUFU MTAMBALIKA.....7TH APPLICANT
OGA SAID OGA.....8TH APPLICANT
SOFIA LITIMBA.....9TH APPLICANT
FIKIRA HAMISI NALYANGA.....10TH APPLICANT

VERSUS

NALIENDELE COLLEGE OF AGRICULTURE

(MATT).....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

14/6/2022 & 18/8/2022

LALTAIKA, J.:

This ruling emanates from an application for issuance of an interim order of restraining the respondents or their agents or any one acting on their behalf from cultivating, trespassing to the suit land or dealing with it

in any manner whatsoever pending hearing of the main suit. This application has been brought under Order XXXVII R 1(a), sections 68 and 95 of the Civil Procedure Code [Cap 33 R.E. 2019] and any other enabling provisions of the law.

The application is supported by joint affidavit of the applicants depicting the reasons for the application. The application has been vehemently resisted by the respondents vide their joint counter affidavit sworn by Ms. Getruda Christopher Songoi, learned State Attorney. Moreover, the counter affidavit of the respondent was accompanied with the Notice of Preliminary Objection on Point of law that the application is *res judicata* hence this ruling for the Preliminary Objection on point of law.

On 14/6/2022 this matter came for hearing whereby all applicants appeared in person, unrepresented while the respondents were represented by Ms. Getruda Christopher Songoi, learned State Attorney. The parties agreed to dispose of this matter by way of written submissions and I am glad that both complied with the order of the court to that effect.

Arguing in support of the preliminary objection, the learned State Attorney submitted that *res judicata* is the principle that provides that when a matter has been finally adjudicated upon by a court of competent jurisdiction it should not be re-opened or challenged by the original parties or their successor in interest. To back up her submission, the learned State Attorney cited section 9 of the Civil Procedure Code which provides for *res judicata*. The learned State Attorney contended that the principle of *res judicata* seeks to promote the fair administration of justice and honest and to prevent the law from abuse. Ms. Songoi stressed that the principle of *res judicata* applies when a litigant attempt to file a

subsequent lawsuit on the same matter after receiving a judgment in a previous case involving the same parties.

Ms. Songoi argued further that the applicants herein above filed a Miscellaneous Land Application No.32 of 2021 under Order XXXVII Rule 1(a) and section 68 and 95 of the Civil Procedure Code [Cap.33 R.E. 2019] by way of Chamber Summons and prayed for the following orders. One, this Honourable Court to issue an interim Order restraining respondents their agents or anyone acting on their behalf from cultivating, trespassing, to the said disputed property lands or dealing with it in any manner whatsoever pending hearing of this application and final determination of the main application. Two, that the cost of this application be provided for. Three, any other relief this Honourable court may deem just to grant.

The learned State Attorney submitted that she opposed the application because this matter had already been decided by this court (Honourable Dyansobera, J) on the 2nd November 2022(sic) vide Misc. Land Application No.9 of 2021 which had the same parties of Ismail Ahmad Mnakole and 9 Others against the Naliendele College of Agriculture (MATT) and the Attorney General. The learned State Attorney contended that the applicants had the same prayers as in Miscellaneous Land Application No.32 of 2021 making the current application *res judicata*.

Furthermore, the learned State Attorney averred that the doctrine of *res judicata* could be invoked only if five conditions were fulfilled namely that (i)the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit,(ii) the former suit must have been between the same parties or privies claiming under them,(iii)the parties must have litigated under the same

title in the former suit,(iv)the court which decided the former suit must have been competent to try the subsequent suit and (v) the matter in issue must have been heard and finally decided in the former suit. To support her argument, Ms. Songoi cited the case of **Yohana Dismass Nyakibari and Another v. Lushoto Tea Company Limited and 2 Others** CA No 90 of 2008 (unreported).

It is Ms. Songoi's submission that the five principles stated in the above cited case fit the present matter because it has same parties, same cause of action, the same was decided by this court competent to try the matter and the issue was decided to its finality by Hon. Dyansobera J. The learned State Attorney pointed specifically to page 6 of the ruling where this court stated that "accordingly, the first limb of the respondents' objection is upheld and this, in my view, suffices to dispose of the whole matter."

The learned State Attorney went on and argued that in the instant matter the applicants were the same parties in Miscellaneous Application No.9 of 2021 and jointly applied for injunction as in this application and the matter was determined and finalised on merit. To this end, the learned State Attorney stressed that all elements of res judicata are proved without doubt that the present application is res judicata to Misc. Land Application No.9 of 2021 and Land Case No.2 of 2021 must proceed.

Finally, Ms. Songoi argued that every litigation must come to an end and the doctrine of res judicata bars the party to come to the court on the same issue as it was stated in the case **Paniel Lotha v. Tanaki and Others** [2003] TLR 312 where it was stated that "the objective of the Doctrine of res judicata is to bar the multiplicity of the suits and guarantee

finality to litigation. It makes a conclusive judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit." Also, the learned State Attorney further cited the case of **Zedem Investment Limited and 2 Others v. Equity Bank (Tanzania) Limited**, Misc. Civil Application No.456 of 2020.

In response, the applicants jointly did not dispute the analysis of the elements of res judicata from different authorities advanced by the respondents' counsel. They conceded to it. The applicants went further and argued that this court is pleased to adopt the common law principle of exception of claims of continuing wrongs which is to the effect that despite that matter being res judicata still the defendants'/respondents' act or omission have been continuing affecting the plaintiffs/applicants.

The applicants stressed that this court may find it just and desirable to protect the applicants from the continuing wrongs of the respondents which affects them. In that regard, the applicants argued that it is just and reasonable for this honourable court to order the status quo be maintained pending determination of the main suit.

Moreover, the applicants submitted that their application is just and reasonable for this court to grant a temporary injunction/interim injunction order to maintain the status quo pending hearing of this application and the main suit. The applicants contended that it is important for the status quo to be maintained for whoever win this suit to find the disputed land in a good shape. The applicants stressed that the first respondent is still using the suit land by damaging the same.

In view of that submission, the applicants maintained that it is just and reasonable for this court as the custodian of justice and the only place where the applicants' rights will be protected is to issue an interim injunction order for the maintenance of status quo. To fortify their argument, the applicants referred this court to the case of **Prisila Jerome Mwakifuna vs. CRDB Bank Limited**, Civil Application No.91 of 2002(CA) where Munuo JA stated that an interim injunction order is valid for six months only and that the court granting injunction may from time to time extend such period for a further period which in the aggregate shall not exceed one year.

In addition, the applicants cited another case of **Tahfif Mini Super Market v. B.P. Tanzania Ltd** [1992] TLR 189 (CA) where Ramadhani, J A (as he then was) held that "that for the above reasons I am of the opinion that injunction should be granted and that the premises should immediately be restored to the applicant. It so order."

I have dispassionately considered the written submissions for and against the preliminary objection on the point of law that the matter is res judicata. First and fore most I thank the learned State Attorney for her submission which has covered how the doctrine of res judicata may be employed in a matter before the court. Even though the applicants have conceded that their application is res judicata praying this court to consider them and grant their application by the common law principle on exception to the doctrine of res judicata, I am still inclined to go a little further than that.

This court has taken the time to go through the Misc. Land Application No.9 of 2021 to find out what my learned brother in the bench His Lordship Dyansobera, J had decided. My findings revealed that the respondents herein opposed the application and filed their Notice of Preliminary Objection on a point of law. The respondent had two preliminary objections which reads, one the applicant has no legal limbs to represent and swear affidavit on behalf of others contrary to Order 1 Rule 8(1) and 12(1). Two, that the applicants sued the 1st respondent who is incapacitating to be sued or sue. This upheld both preliminary objections and proceeded to strike out the application with no order as to costs.

In line with the above decision of this court, I am convinced that the preliminary objection raised by the respondent is completely misconceived. Why? To answer this question, it is important to enlighten the parties on the meaning of the phrase "strike out", "striking out" or "struck out" as used by courts in our jurisdiction. The Court of Appeal in the case of **Yahya Khamis vs Hamida Haji Idd & 2 Others**, Civil Appeal No.225 of 2018 CAT, Bukoba (unreported) stated that: -

*"It is noteworthy that, in our laws, there is no clear/definite definition of what constitutes "striking out", "struck out" or "strike out". However, this Court in the case of **Juma Nhandi v. Republic**, Criminal Appeal No. 289 of 2012 (unreported) has endeavoured or tried to give explanation of the term "strike out" when making a distinction between "striking out" and "dismissing". While citing with approval the case of **Ngoni – Matengo Cooperative Marketing Union Ltd v. Ali Mohamed Osman** [1959] E.A. 577, in which the erstwhile Court of Appeal for East Africa discussed the distinction between "striking out" and "dismissing" an appeal, the Court had this to say in relation to "striking out":- "This Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this*

court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have dismissed it; for the latter implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used..." [Emphasis added].

Also, in another case of **Kagera Tea Company vs Usangu General Traders** (Civil Application 100 of 2009) [2012] TZCA 199 the Court of Appeal held that:

"That the application for extension of time was struck out for being incompetent because the affidavit supporting the Chamber Summons had a defective jurat. The learned advocate disagree on the consequences of the order striking out the application...With respect to both learned advocates, we are of the opinion that both arguments are misconceived. Since they both agree that the application in the High Court was declared incompetent and struck out, they implicitly agree that no substantive application has been placed before the High Court and decision on merits made thereat from which any further be taken. The only possible course of action open to the affected party was to file a fresh application if they so desired, and not to come to the Court of Appeal on either revision or appeal."

As intimated earlier, this court on 2/11/2021 did strike out Misc. Land Application No.9 of 2021 after upholding the preliminary objections on point of law raised by the respondents. Guided by the **Kagera Tea Company vs Usangu General Traders** (supra) the applicants were entitled to file a fresh application with no anomalies as pinpointed out by the respondents and conceded by this court in the former application. In fact, the applicants did what the law requires them to do by filing Misc. Land Application No.32 of 2021 on 26/11/2021.

To this end, the preliminary objection by the respondents is hereby dismissed with no order as to costs and the application should proceed to hearing.

It so ordered.



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika".

JUDGE

18.8.2022

Court:

This ruling is delivered under my hand and the seal of this Court on this 18th day of August, 2022 in the presence of the Ms. Getruda Songoi, the learned State Attorney for the respondents and the applicants who have appeared in person and unrepresented.



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika".

JUDGE

18.8.2022