IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE APPEAL NO 54 OF 2019

(***Originating from Land Application No.123 of 2017 at the District Land and Housing Tribunal of Arusha and Miscellaneous Land Application No. 10 of 2019)***

GEORGE NUSRA FRISBY...APPELLANT

VERSUS

KEEN FEEDERS LIMITED..RESPONDENT

JUDGMENT

Hearing concluded.....08/11/2021
Judgment delivered..08/02/2022

GWAE, J

This judgment emanates from an order of the District Land and Housing Tribunal of Arusha (DLHT) delivered on 19th July 2018 sustaining the respondent's preliminary objection. The respondent's PO was based on a point of law that, the appellant's application filed in the DLHT registered as Application No. 123 of 2017 was a res-judicata since the same was determined in its finality for it was dismissed by the Court of Resident Magistrate for want of jurisdiction.

It is perhaps pertinent if I start with a brief factual background of the parties' dispute which eventually led to this appeal; it is recapitulated as

hereinafter; that, on the 20th day of April 2016, the appellant, George Nursra Frisby instituted a civil case in the Resident Magistrate Court of Arusha against the respondent, Keen Feeders Ltd. The appellant's suit was duly registered as Civil Case No. 48 of 2016. The contractual relation between the appellant and respondent was that of the landlord and tenant respectively and there was an agreement to that effect. It is further revealed that, the appellant's main claims against the respondent through his plaint was rent arrears and punitive damages.

Among issues framed for determination by the court of Resident Magistrate was whether the said Resident Magistrate's Court was vested with jurisdiction. In its judgment dated 25th day of April 2017, the learned Resident Magistrate (**Jasmin-Esq**) found that the Resident Magistrate's Court lacked jurisdiction to entertain the suit as invited by the respondent's counsel, consequently, the suit was dismissed and it was further ordered that each party should bear its own costs.

The records further demonstrate that on the 7th June 2017, the appellant filed a land dispute before the DLHT and the same was registered as Application No. 123 of 2017. However, the same was successfully objected by the respondent on the contentious point of law that is, the

applicant's application is a res-judicata as the same had been fully determined by the Resident Magistrate's Court which dismissed it. The tribunal further held that the remedy available in favour of the appellant was to file an application for review in the RM's court or by way of an appeal against the dismissal order instead of filing fresh land dispute to the DLHT.

Aggrieved by the decision of the DLHT, the appellant named herein filed this appeal purporting to be equipped with four grounds of appeal however the same constitute two grounds of appeal, namely;

1. That, the learned chairperson erred in law and fact by holding that the application was a res-judicata
2. That, the learned chairperson erred in law and fact by granting costs.

On the 21st October 2019 Ms. Fatuma Amri and Mrs. Mfinanga, both the learned counsel appeared for the scheduled hearing representing the appellant and respondent respectively. However, the parties' advocates sought and obtained the court's leave to argue this appeal by way of written submission.

It was the argument by the appellant's counsel that since the dispute before the RM's Court was not determined on merit, the matter before DLHT was therefore not a res-judicata and that requisite conditions stipulated under section 9 of the Civil Procedure Code, Cap 33 Revised Edition, 2002 (herein "CPC") were not met. He bolstered his submission by referring this court to the case of **Peniel Lotta v. Gabriel Tanaki**, Civil Appeal No. 61 of 1999 and **Ester Ignas Luyambano vs. Adriano Gedam**, Civil Appeal N. 91 of 2014.

Ms. Fatuma was also of the view that an order dismissing a suit for want of jurisdiction does not bar subsequent institution of the same case before a court or tribunal of competent jurisdiction of different forum save that it barred re-institution of the same suit in the same court.

As to the complained costs awarded by the DLHT, Ms. Fatuma argued that as per section 30 (1) of CPC, an order as to costs is discretion of an adjudicator but in the case at hand the respondent should disentitled with costs since his PO was based on delay caused by the respondent and that there was no proof of filing fees of the WSD before filing of notice of preliminary objection

Opposing this appeal, Mr. Mfinanga argued that rationale of section 9 of CPC is to have litigation came to an end. According to Mr. Mfinanga the conditions set in section 9 of CPC were met since in the former suit and the later, parties are the same and they are litigating under the same title, the same subject matter (arrears of rent) and that the matter was finally determined via a dismissal order since the parties' witnesses were paraded and added that the dismissal order has an effect of denying the applicant now appellant to go back to the same court. Morse so, he submitted that the appellant was precluded from presenting a fresh suit in respect of the same cause of action against the same party. He embraced his arguments with a decision in Alfred **Matei vs. Bwernard Shara and 3 others**, Misc. Civil Application No. 6 of 2009 (unreported-CAT).

According to the learned counsel for the respondent, as was held by the DHLHT's chairperson, the appellant ought to have appealed against the dismissal order to the court as the RM's court ought to not dismiss as dismissal presupposes that the competent matter has been disposed of. He then referred this court to a decision in **Elizabeth Mhinza vs. Paul Matiku Tubeti and another L**and Appeal No. 10 of 2020 with approval

of decision in **Ngoni Matengo Cooperative Marketing Union Ltd vs. Ali Mahomed Osman** (1959) EA 577

Arguing ground 2, Mr. Mfinanga stated that an order awarding costs is discretion, thus, the DLHT's chairperson properly exercised his statutory discretion.

In her rejoinder, the counsel for the appellant reiterated that the dispute was not a res-judicata since it was not enough to establish that the matter was directly and substantially in issue involving the same parties in the former and later case but it ought to be shown that the matter was finally heard and determined. she urged this court to make a reference to the case of **George Shambwe v. Tanzania Italian Co. Ltd** (1995) TLR 20.

In the **1st ground,** I have carefully considered the parties' rival written submission and the records of both the RM's court and trial tribunal. I am of the view that, the matter, Application No. 123 of 2017 bearing the same prayer with the former appellant's suit No. 48 of 2018 is partly res-judicata. I am holding that view since the dismissal order entered by the learned Resident Magistrate was on the basis that, the RM's court lacked jurisdiction to entertain suit. She thus did not finally determine the

dispute between the parties. It follows that, it is patently clear from the records and parties' submissions that there is no contention that, the dismissal order made by RM's court did not determine the merit of the case though the parties were heard by the RM's court as correctly argued by the respondent's counsel.

That being the position, now therefore, the question that is to be posed is, whether the dismissal order grounded on the lack of jurisdiction precluded the appellant from instituting the dispute to the competent court or tribunal. As the doctrine applicable in this present dispute is res-judicata which provided under section 9 of the CPC which reproduced herein under for easy of reference;

> "9. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in **a court competent to try** such subsequent suit or the suit in which such issue has been subsequently raised and has been **heard and finally decided by such court** (emphasis supplied)".

In the strength of the above quoted provision of the law, I find that there is a clear preclusion from re-opening of a case involving the same

parties, the same issue under the same title and that was formerly heard and conclusively determined by a court of law or tribunal of competent jurisdiction. This position has been judicially stressed in a chain of decisions for instance in **Peniel Lotta v. Gabriel Tanaki**, Civil Appeal No. 61 of 1999, **Ester Ignas Luyambano vs. Adriano Gedam**, Civil Appeal N. 91 of 2014, **Gerorge Shambwev. Tanzania Italian Petroleum Co. Ltd** (1995) TLR 20, **Umoja Garage vs NBC Holding Corporation** (2003) TLR 339 and **Lotta v Tanaki and others Umoja Garage vs NBC Holding Corporation** (2003) TLR 339 just to mention few.

In our instant matter, it goes without saying that, the matter was decided only on the issue of jurisdiction, the decision which did not certainly determine the merit of the case because the RM's court, on the face of the parties' pleadings, clearly lacked jurisdiction. Thus, the doctrine of "res-judicata" as predicted under section 9 of CPC, in my decided opinion, would **not** apply since the RM's court was not a competent court nor did it finally determine the suit before it except that it received the parties' testimonies.

On the issue of dismissal order made by the RM's court, the proper order was either to reject or to strike out the appellant's suit. Had the

appellant re-filed the suit in the court of the same or concurrent jurisdiction with that of RM's court, it would follow that, the suit would be striped by the doctrine of re-judicata as his remedy to the dismissal order resulting from want of requisite jurisdiction was to appeal to the High Court of Tanzania to challenge the order or apply for review in the RM's court as was rightly held by the learned chairperson at page 4 of the typed judgment.

Since in our instant dispute, the former court (incompetent court) patently dismissed the appellant's suit for want of jurisdiction and since the appellant subsequently refiled the same in the later tribunal, competent tribunal, I am of the increasingly understanding that, the learned tribunal chairperson was not justified to dismiss it in terms of section 9 of the CPC as the same was clearly not decided in its finality nor was the RM's court competent to try the parties' dispute.

I am also of the view that, the word "dismissal order" should not be misconstrued or misused by a contention that, the matter was finally determined or that the dismissal order was conclusive. What one is supposed to be looked into is, the substance of the matter rather than the words used in the questionable order. The dismissal order made by the

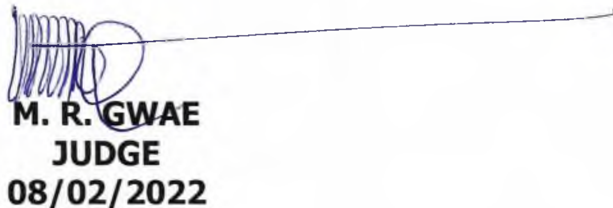
RM's court was vividly triggered by want of jurisdiction and not the merit of the case. It follows therefore, the incorrect wording of the order "dismissal" rather than an order striking out or rejecting the suit does not go to the root as far as appellant's act of re-filing it to the competent tribunal is concern. Therefore, dismissal order made on the ground that, the RM's court lacked jurisdiction (See a decision in **Essaji and others vs. Solanki** (1968) I EA 218)

The precedents cited by the learned counsel for the respondent, in my view, are distinguishable in sense that their facts are different from the present matter taking into account that the matter was evidently not finally determined. Had the mater being dismissed by the RM's court for being out of the prescribed time in accordance with Law of Limitation, Cap 89, R.E, 2002 or dismissed for want of merit, the appellant would **not** have an opportunity to re-file it in the DLHT. Now, as the dismissal order stands, had the learned chairperson keenly examined the substance of the order itself, that is lack of jurisdiction on the part of the Resident Magistrate's Court, he could have heard and determined the dispute on its merit rather than being tied by unnecessary technicalities. The first ground of appeal is therefore found to be meritorious.

As to the **2nd ground,** it is from outset as correctly submitted by the counsel for the parties that an order as to costs is discretionary in nature. In our case, the learned tribunal chairperson awarded costs in favour of the responded due to nature of his holding. He was thus legally justified to hold as he did.

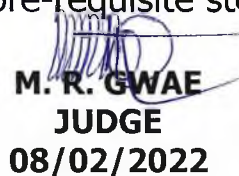
That being said, the appellant's appeal is thus allowed with costs. The DLHT's ruling with effect that the appellant's application is res-judicata is quashed and set aside. Matter should expeditiously be remitted to DLHT for continuation of hearing and determination of the parties' dispute on merit before a different DLHT's chairperson assisted by a different set of assessors

It is so ordered.



M. R. GWAE
JUDGE
08/02/2022

Court: Right of Appeal and is pre-requisite steps of appeal explained



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