IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND APPEAL NO. 49 OF 2021
(Originating from Land Application No. 43/2019 of the District Land and Housing Tribunal at Muleba)

PATRICE MUTAKYANGA.....APPELLANT
VERSUS
WILBROAD BARTHAZARY RWEGASIRA.....RESPONDENT

JUDGMENT

15th August & 15th August 2022

Kilekamajenga, J.

The appellant and respondent are relatives from the same clan who are contesting over a piece of land. It is alleged that, the appellant was allocated the land by the respondent's father who was the administrator of the estate of the appellant's grandfather. Therefore, the appellant received the land as a portion of inheritance since 1975 until in 2015 when a chain of disputes arose. The respondent on the other hand alleged to have received the disputed land from his father as a gift. In 2019, the respondent sued the appellant alleging that he (appellant) encroached into his (respondent) land. According to the application filed in the District Land and Housing Tribunal, the land is located at Bubanda Hamlet, in Bunywambele village in Ibuga Ward within Muleba District. The estimated value of the land is about ten million Tanzania shillings. After the filing of the application in the District Land and Housing Tribunal at Muleba, the

appellant resisted the case by filing a written statement of defence alleging that, the same dispute was previously determined vide Land Appeal No. 14 of 2017 which was decided on 24th June 2019.

During the trial of the case, the respondent summoned one witness apart from himself. The respondent (AW1) testified that, the appellant trespassed into his land in 2016; he got the land in 2010 as a gift from his father Balthazary Mulingula Karugendo who also inherited it from his father Michael Karugendo. The land measures 33 footsteps (width) and 78 footsteps (length). His testimony was supported with Faustine Mwombeki (AW2) who testified that, the land was given to the respondent in 2010. In his defence, the appellant alleged to be the respondent's young brother and that, he has possesed the same land for over 40 years since 1975. He further testified that, in 2015, he attempted to sell the land but the clan head objected. He applied to the Primary Court for leave to sell the land and he was so granted. He finally sold the land. The respondent's sister called Taisidia Barthazary and the head of the clan called Dominick Rwegoshora sued the appellant at Ibuga Ward Tribunal over the same land where he won the case. Taisidia and Dominick appealed to the District Land and Housing Tribunal where he also won the case. They proceeded to the High Court and the case was

decided in favour of the appellant. Immediately thereafter, the respondent filed the instant case in the District Land and Housing Tribunal at Muleba.

After the full trial of the case, the District Land and Housing Tribunal decided in favour of the respondent hence this appeal. The appellant advanced five grounds thus:

1. *That, the trial tribunal erred in law and facts by not taking into consideration the testimony of the respondent now the appellant concerning the judgement of Land Appeal No. 14/2017 of the High Court of Tanzania, judgment of Land Appeal No. 62/2016 of the District Land and Housing Tribunal for Muleba at Muleba and judgment of land case No. 10/2016 at Ibuga Ward Tribunal in which it shows that the appellant was having a case with Taisidia Bartazary who is the sister of the respondent and Dominick Rwegoshora who is the clan chairman basing on the same subject matter in which the inference should have drawn on favour of the appellant and not otherwise,*
2. *That the trial tribunal erred in law and facts by holding that the respondent now the appellant failed to call the applicant's father to substantiate his claims thus a misconception of facts and evidence while knowing that applicant's father who has been declared by the applicant now the respondent that his father passed away henceforth cannot be brought before the tribunal to testify.*
3. *That, the trial tribunal erred in law and fact by not taking into consideration that the respondent now the appellant has been using the suit land more than 40 years ago in which the applicant now the*

respondent has no claims against the appellant because the matter is time barred.

4. *That, the trial tribunal failed to evaluate the evidence in respect with the suit land in dispute henceforth the case was decided below the required weight of evidence hence unfair decision.*
5. *That, the trial tribunal erred in law and facts by pronouncing the judgment while the same was not dully constituted by reaching the decisions without taking into account the opinion of the assessors contrary to the law.*

During the hearing of the appeal, the appellant appeared in person and without legal representation. The respondent, who was also present in person, was represented by the learned advocate, Mr. Alli Chamani. In his oral submission, the appellant argued that, he owned the land for more than 40 years i.e from 1975 to 2015. He decided to sell the land to Projest Paul who is now developing it. The chairman of the clan called Dominick Rwegoshora and the respondent's sister called Taisidia Barthazary sued the appellant vide civil case No. 10/2016 at Ibuga Ward Tribunal where he won the case. They appealed to the District Land and Housing Tribunal vide Land Appeal No. 62 of 2016 where the appellant won the case. They appealed again to this court vide Land Appeal No. 14/2017 where the appellant won the case. The respondent filed the instant case over the same piece of land. The appellant urged the court to dismiss the appeal with costs.

Responding to the appellant's submission, Mr. Chamani, for the respondent, argued that the boundaries of the same land are not stated though it is the same land which was previously decided between the appellant and the respondent's sister. The counsel, however, insisted that the case is not res-judicata because the boundaries were not fixed. Thereafter, there was no substantial rejoinder from the appellant.

In this case, what seems to be a pertinent issue is hinged on the first ground of appeal on whether the instant case is *res-judicata*. Before further discussion, I wish to consider our law on the doctrine of *res-judicata*. **Section 9 of the Civil Procedure Code, Cap. 33 RE 2019** provides the doctrine of *res-judicata* that:

> *"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.*
>
> ***Explanation I:*** *The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.*

Explanation II: *For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.*

Explanation III: *The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

Explanation IV: *Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

Explanation V: *Any relief claimed in the plaint which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.*

Explanation VI: *Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."*

For the doctrine of res-judicata to apply, the following elements must exist: **First**, the matter in the subsequent suit must have been the matter directly or substantially in issue in the former suit. **Second**, the subsequent and former suit must have involved the same parties or the parties may be different (proxies or privies). **Third**, the parties or any of them must be claiming under the same title. **Fourth**, the former suit must have been conclusively determined. In other

words, for the doctrine of *res-judicata* to apply, there should be no pending appeal concerning the same matter otherwise it may invite the application of the doctrine of *res-subjudice*. **Fifth**, the former suit must have been decided by a competent court.

The doctrine of res-judicata is expounded further by **C.K Takwani 'Civil Procedure' 7th Ed. 2016 at 71** where he stated that:

> *'The doctrine of res-judicata is based on three maxims:*
>
> *(a) Nemo debet bis vexari pro una et eadem causa (no man shall be vexed twice for the same cause)*
>
> *(b) Interest reipublicae ut sit finis litium (it is in the interest of the State that there should be an end to a litigation); and*
>
> *(c) Res judicata pro veritate occipitur (a judicial decision must be accepted as correct).*

Therefore, the rationale behind the application of the doctrine of *res-judicata* is four fold. **First**, a person who has been sued in a competent court and the matter came to an end, he/she should not be taken to court again for the same cause of action. **Second**, for the interest and affair of the parties and the State at large, a litigation which is based on the same cause of action should come to an end. Of course, litigants whose suit has come to an end should rest and deal with other economic activities than labouring on the same matter over and over

again. Also, the courts should be left to deal with other issues rather than dealing with the same matter which was concluded by a competent court. **Third**, where a court has already given a decision on the matter, such a decision should be accepted as correct. Where a matter has been concluded by a competent court, no person is allowed to challenge that decision in court. **Fourth**, this principle is intended to protect the parties from multiplicity of suits.

In the instant case, the record clearly shows that, back in 2016, the appellant was sued by Dominick Rwegoshora (as the clan head) and the respondent's sister who claimed the same piece of land. In this case, the piece of land was located at Bubanda hamlet in the village of Bunywambele. After hearing the parties, the Ibuga Ward Tribunal concluded that:

> *'Kutokana na uchambuzi wa maelezo, baraza kwa pamoja wamekubaliana na ushahidi wa upande wa mdaiwa kwa sababu shamba alilo uza ni la baba yake ambalo amelimiliki kwa kipindi cha miaka arobaini...kwa hiyo mwenye shamba ni mdaiwa.'*

Therefore, in the Ward Tribunal, the appellant was declared the owner of the disputed land for the better reason that he owned the land for over 40 years. However, an appeal was preferred to the District Land and Housing Tribunal at

Muleba vide Land Appeal No. 62 of 2016 which also decided in favour of the appellant thus:

> *Having carefully perused the evidence on record, I am of the settled view that the trial court did not err either in law nor facts. The appellants in fact, being plaintiffs in the trial tribunal did not prove any ownership over the suit land. They just blamed the respondent for selling the clan land (suit land), without assigning any further explanation of ownership for their part (sic).'*

Still dissatisfied with the decision of the appellate tribunal, the parties reached this court vide Misc Land Case Appeal No. 14/2017 which also decided that:

> *'With the above expositions, I am in no doubt that the decisions of the lower Tribunals were correct and legally sound...The upshot of this is that the appeal is dismissed for lack of legal merit.'*

Two months after the decision of the High Court, the respondent filed an application before the District Land and Housing Tribunal at Muleba seeking to be declared the owner of the same piece of land. In the appellant's written statement of defence, he raised the issue of res-judicata and attached all the previous decisions concerning the disputed land. He also emphasized in his evidence but the trial tribunal did not bother hence decided in favour of the respondent. Before this court, the appellant raised again the flag of res-judicata. I have no doubt whatsoever to declare that this suit has complied with all the

ingredients of the doctrine of *res-judicata*. When the former suit came to an end, the respondent was estopped from filing the instant case because the court that decided the former suit was a competent court and the issue of ownership was conclusively determined. I hereby allow the appeal and quash and set aside the decision and proceedings of the trial tribunal for being *res-judicata*. The respondent should pay the costs of this case. It is so ordered.

Dated at Bukoba this 15th Day of August 2022.

Ntemi N. Kilekamajenga
JUDGE
15/08/2020

Court:

Judgment delivered this 15th August 2022 in the presence of the appellant and respondent all present in person. Right of appeal explained.

Ntemi N. Kilekamajenga
JUDGE
15/08/2020