

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY**

AT MUSOMA

MISC. LAND APPEAL NO. 126 OF 2021

**(Arising from the decision of the District Land and Housing
Tribunal for Mara at Musoma in Land Appeal No. 229 of 2020)**

BETWEEN

HASSANI MAYANI SALIBOKO APPELLANT

VERSUS

MNADA GEMUNGWANI MSHONGULI RESPONDENT

JUDGMENT

A.A. MBAGWA, J.:

This appeal emanates from the decision of the District Land and Housing Tribunal for Mara (the DLHT) in Land Appeal No. 229 of 2020 where the respondent herein was declared the lawful owner of the disputed land. Prior to Land Appeal No. 229 of 2020, the respondent lodged Land Application No. 8 of 2020 before the Ward Tribunal for Rigicha in Serengeti District. He claimed that the appellant trespassed on his land measuring eight (8) acres situated at Rigicha village in Serengeti District. The respondent paraded about five witnesses namely, Mnada

Gemungwani, Barnaba Mrigo Mgoye, Mnada Shabani Masaka, Julius Makonge Gamemu and Shoka Samson Wilanga. He further produced various documents including a letter dated 26/11/1995 from village land committee which formalized his ownership after he had cleared and used it for long time.

The respondent's account before the trial Ward Tribunal was that the respondent acquired the suit land since 1984 and that in 1995, he was formally allocated the same by the land village committee.

In contrast, the appellant disputed the claims. He called four witnesses to testify in his favour namely, Hassan Mayani Saliboko, Makula Maduhu Borenga, James Tung'usa Luseke and Mramba Mashini Mugisi. The appellant testified that he acquired the suit land since 1986 through clearance and he was using it for horticulture.

Upon hearing the parties and visiting *locus in quo*, the trial Tribunal decided the case in favour of the appellant by declaring him the lawful owner of the disputed land after three members out of five decided in his favour.

The respondent, Mnada Gemungwani was gravely dissatisfied by the decision of the trial Ward Tribunal hence he lodged an appeal (Land Appeal No. 229 of 2020) before the District Land and Housing Tribunal

(the DLHT). The DLHT overturned the decision by quashing the judgment and orders of the trial Tribunal and instead declared the respondent, Mnada Gemungwani a rightful owner of the disputed land.

This time, the appellant, Hassan Mayani Saliboko was aggrieved with the decision of the DLHT hence he lodged the appeal at hand. In the petition of appeal, he advanced five grounds of appeal which can be summarized as follows;

1. That, the first appellate Tribunal failed to determine that the matter is *res judicata*.
2. That, the first appellate Tribunal failed to notice that there are directions to the respondent to refile the Land Appeal No. 45 of 2013 after getting the trial proceedings.
3. That, the first appellate Tribunal failed to observe the principle of *functus officio*.
4. That, the first appellate Tribunal failed to analyze the evidence adduced before the trial Tribunal.
5. That, the first appellate Tribunal considered the principle of adverse possession in the controversial of the *res judicata*.

During the hearing of the appeal, the appellant was represented by Mr. Emmanuel Gervas, the learned advocate whilst the respondent fended for himself.

Before he made his submission in support of the appeal, the appellant's counsel prayed to drop the 3rd ground. He thus remained with the 1st, 2nd 4th and 5th grounds.

The appellant's counsel argued the 1st and 2nd grounds conjointly. He contended that the first appellate Tribunal failed to find that the case was *res judicata* with Land Application No. 23 of 2012 and Land Appeal No. 45 of 2013. He argued that this is because prior to the instant case there was Land Application No. 23 of 2012 before the Ward Tribunal for Rigicha in which the respondent sued the appellant. He added that the Ward Tribunal ruled in favour of the appellant hence the respondent appealed to the DLHT in Land Appeal No. 45 of 2013. He continued that the DLHT dismissed the appeal with leave to refile upon obtaining the proceedings of the Ward Tribunal for Rigicha. The counsel further submitted that the respondent did not comply with the order instead after seven years, the respondent instituted the suit afresh against the appellant.

The applicant's counsel went on submitting that the Ward Tribunal heard the matter afresh and still ruled in favour of the appellant and the

respondent again appealed to the DLHT where the DLHT ignored the issue of res judicata and declared the respondent a lawful owner.

The counsel contended that through reviewing the record, they have noted that section 9 of the Civil Procedure Code was violated. Referring to the cases of **Peniel Lotta vs Gabriel Tanaki and Others** [2003] TLR 312, **Umoja Garage vs NBC Holding Corporation** [2003] TLR 339, **Gerald Chuchuba vs Rector, Itaga Seminary** [2002] TLR and **Steven Wasira vs J. Warioba and Attorney General**, [1996] TLR 334, the appellant's counsel argued that the matter at hand is res judicata.

With regard to 4th and 5th grounds of appeal, the appellant's counsel submitted that the first appellate Tribunal failed to evaluate the evidence thereby arriving at wrong decision for the appellant's evidence was heavier than the respondent's evidence. He further submitted that according to Ward Tribunal, PW2 James Tungusa said that the land in dispute was unoccupied from 1983 to 1986 and thereafter the appellant acquired the land by clearing it.

He added that the respondent contradicted with his witness. The counsel elaborated that Barnaba Mrigo Mgoye stated that the respondent's land which was located to him by the village council measured 26 acres while

the respondent said that his land is measuring eight (8) acres only. The counsel concluded by praying the appeal to be allowed with costs.

In reply, the respondent had no much to submit. He submitted that it is true that the case was re instituted after the first appeal failed to proceed due to unavailability of the Ward Tribunal's record. The DLHT Chairman directed the Ward Tribunal to rehear the matter after the proceedings in the first case was proved unavailable. He added that the decision of the DLHT was right and thus he prayed the court to dismiss the appeal for want of merits.

Rejoining, the appellant's counsel submitted that with regard to the respondent being allocated by the village council, he contradicted with his witness. And that with regard to the letter directing the Ward Tribunal to rehear the matter, they submitted that the Chairman acted wrongly because he had already made a ruling dismissing the appeal with leave to refile. The council added that the Chairman acted *functus officio*, he ought to review his previous decision.

Having heard the submissions of both parties and keenly navigated through the appeal record, the pivotal issues for determination are whether the first appellate Tribunal decided the matter which is res

judicata and whether the first appellate Tribunal failed to re-evaluate the evidence of the trial Tribunal.

Starting with the first issue of res judicata, Section 9 of the Civil Procedure Code provides for circumstances under which courts are barred from entertaining suits for being res judicata. It reads:

"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same 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 issue has been subsequently raised and has been heard and finally decided by such court."

It is the appellant's contention that, prior to the Land Appeal No. 229 of 2020 in the DLHT and Land Application No. 8 of 2020 in the Ward Tribunal for Rigicha, there was Land Appeal No. 45 of 2013 and Land Application No. 23 of 2012 involving the same parties and the same issue.

When I went through the appeal record and the documents submitted by the parties in the lower Tribunals, I did not find the copy of the judgment nor did I see the proceedings of the Land Application No. 23 of 2012 before the Ward Tribunal for Rigicha to justify whether the application

involved the same issues and the same parties as in Land Application No. 8 of 2020. Likewise, although there is the copy of the order in Land Appeal No. 45 of 2013 before the DLHT between the parties herein, the order does not explain in details which matters are at issue between the parties. The order is short and clear that *"The matter is hereby dismissed with a leave to refile open upon getting the trial proceedings"*. There is no other explanation on which matter is at issue.

In the case of **Badugu Ginning Co. Ltd vs CRDB Bank PLC & 2 Others**, Civil Appeal No. 265 of 2019, CAT at Mwanza it was held that;

"The law is accordingly well settled that to invoke the bar of res judicata, it is not necessary that the cause of action in the two suits should be identical. It is only required that the matters are directly and substantially in issue should be the same in both suits.... Every matter in respect of which relief is claimed in a suit is necessarily a matter "directly and substantially" in issue." [Emphasis added]."

The fact that there is no record of issues involved between the parties in the alleged previous case, I find it difficult to hold that the present case between the parties is res judicata.

I now move to the second issue that the first appellate Tribunal failed to re-evaluate the evidence. It is the trite law that, the duty of the first appellate Court/Tribunal is to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. See **Michael Joseph vs the Republic**, Criminal Appeal No. 506 of 2016, CAT at Tabora.

After going through the judgment of the first appellate Tribunal, I am satisfied that the DLHT properly re-evaluated the entire evidence of the trial Tribunal and came to its own findings that respondent, Mnada Gemungwani had proved to be the rightful owner of the disputed land as he tendered the document which shows that he was allocated the disputed land by the village council. Indeed, on balance of probabilities, the respondent's evidence weighs heavier than the appellant's evidence. In the event, I find the appeal devoid of merits and I consequently dismiss it. Each party should bear its own costs.

It is so ordered.

Right of appeal is explained.




A.A Mbagwa

JUDGE

06/10/2022

Court: Judgment has been delivered in the presence of appellant and respondent this 6th day of October, 2022


A.A. Mbagwa

JUDGE

06/10/2022