

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

LAND APPEAL NO. 11 OF 2022

(Arising from LAND APPLICATION NO. 13 OF 2019, THE DISTRICT LAND AND HOUSING
TRIBUNAL FOR TANGA)

FLORA PETER JOSEPH.....APPELLANT

VERSUS

HAMISI MMASA.....1ST RESPONDENT

NATIONAL MICROFINANCEBANK PLC.....2ND RESPONDENT

NUTMEG AUCTIONEER AND

PROPERTY MANAGERS CO. LIMITED.....3RD RESPONDENT

PETER JOSEPH MSANGI.....4TH RESPONDENT

JUDGEMENT

Mansoor, J:

Date of JUDGEMENT- 21ST OCTOBER 2022

Flora Peter Joseph, "Flora" the appellant herein, and Peter Joseph Msangi, the 4th respondent in the case are husband and wife. Flora filed a case at the District Land and Housing Tribunal for Tanga "DLHT", against her husband as the 4th respondent, National Microfinance Bank plc. "the Bank, as the 2nd respondent, the Auctioneer, as the third respondent, and the buyer, one Hamisi Mmasa, as the 1st respondent. Flora



claims that the house located at plot no. 246 Block E Kwanjeka Nyota Area in Tanga City "the house" is the matrimonial property, and so it should not have been auctioned by the Bank. She applied before the DHLT for the orders that the house be restored to her as the matrimonial house, the auction be nullified and the sale of the house to the 1st respondent be set aside. She also applied for the eviction of the 1st respondent from the house. The case before the DLHT was not determine on merits, and it was dismissed for being Res Judicata. The DLHT had held that previously there was Land Case No. 55 of 2017 between Hamisi Mmasa vs NMB Bank, Nutmeg Auctioneers, and Peter Joseph Msangi in which the house located at Plot no. 246, Block E, Kwanjeka Nyota Area in Tanga was declared to be the property of Hamisi Mmasa who bought it from the Auction conducted by Nutmeg Auctioneers acting under the instructions of the Bank. The Chairperson of the DLHT had decided that the application before it was Res Judicata as the matter in the suit was directly and substantially in issue in a previous case, and the

issue of who is the rightful owner of the house in dispute was finally determined by the exparte judgement issued in the previous case i.e. in Land Case No. 55 of 2017 determined by the competent Tribunal, the District Land and Housing Tribunal for Tanga since 2017.

Flora was aggrieved with the decision of the District Land and Housing Tribunal; she preferred an appeal. During the appeal, she was represented by Ms Ernesta Chuwa and Mr Thomas Kitundu of Divine Law Chambers. During the hearing of the Appeal, Advocate Thomas Kitundu took the lead. He submitted on all the eight grounds of appeal raised in the Memorandum of Appeal.

The first ground in the appeal is that since the appellant was not a party in the previous suit, she has the right to institute a fresh suit on the subject matter for her rights needs to be determined by the Court/Tribunal. The Counsel argues that the appellant herein had two remedies, one she could have filed the objection proceedings under Rule 57 of Order XXI of

the Civil Procedure Code, or she could file a fresh suit since she was not aware of the existence of the execution proceedings. The Counsel cited the case of **Kangaulu Mussa vs Mpungati Mchondo (1984) T.L.R 348**, where Hon Judge Lugakingira (as he then was) said "*as a matter of practice a person may bring a fresh suit where he could also have proceeded by way of objection*".

The appellant's counsel argues that since the appellant came to know of the existence of the previous case at the time of her eviction from the suit property, she had the right to institute a fresh case for determination of her rights.

Regarding the 2nd ground of appeal, Advocate Thomas Kitundu argues that even though the appellant was not a party in a previous suit, but she ought to have been served with the summons of the suit. He says, the appellant should have been served as the wife of the 4th respondent as provided under Regulation 6 of Land disputes Act, G.N. No. 174 of 2003. The Appellant said there was no service to the 4th respondent or

any member of the family in the previous suit, and therefore she should be allowed to file a fresh suit on the subject matter which was determined in a previous suit.

The third ground of appeal is that the appellant has the right to be heard, and she cannot be heard through her husband. To buttress his arguments, the Counsel referred this Court to the case of **Margwe Erro and others vs Moshi Bahalulu, CA Vivil Appeal No. 111 of 2014**, at page 4 where the Court held that the appellant had the right to institute the case on the same subject matter.

The fourth ground is that the appellant was not aware of the existence of Land Case No. 55 of 2017, and the case cannot be Res Judicata for this reason. The Counsel for the appellant states that under section 9 (1) of the Civil Procedure Code, and the case of **Gerald Chuchuma vs Rector Itaya Seminary, (2002) T.L.R.** at page 213, in which it gave conditions for the doctrine of Res Judicata to apply. In this case it was held that there must be judicial decision

pronounced by the competent court. The Counsel argues that the issues raised by the appellant in this case have never been determined in the previous suit, and that the subject matter and the issues in the subsequent suit are not the same issues determined in the previous suit. The Counsel argues that the issues raised in the case are that the auction was unprocedural and illegal, the money used by the 4th respondent to purchase the house was her money which she gave to the 4th respondent to pay the loan at the bank, and that the house was sold at an undervalue. The house is worth Tshs 56,000,000 but the 4th respondent bought it for only Tshs 11,000,000. The Counsel argues that these issues were not determined in the previous suit.

Regarding the 6th ground, the Counsel argues that the Chairperson of the DLHT ought to have determined that the house was sold at an undervalue, as in the case of **Peter Zakaria Samo vs EFC Tanzania M.F.C. Limited Land Cas No. 8 of 2016**, where the High Court held that under section 133 (1) of the Land Act, the mortgagor is required to fetch the

market value, and failure to do so is a breach and makes the sale illegal.

The 7th ground is that the auction never took place as required under section 134 (2) of the Land Act as the auction was never announced in English and Swahili Newspapers of wide circulation, and that this issue ought to have been determined by the District Land and Housing Tribunal in the case as these issues were not determined in the previous suit.

The 8th ground is that her husband signed the mortgage deed while he was not mentally fit, and so the issue whether the mortgage was signed by a fit and competent person to constitute a proper mortgage should have been determined by the Trial Tribunal as this issue was not determined in the previous suit.

The 1st respondent represented by Advocate Mohamed Kajembe said there is no dispute that the appellant and the 4th respondent are husband and wife and that the appellant borrowed Tshs 15,000,000 from the NMB Bank. It is also not

in dispute that the 4th respondent guaranteed the loan by mortgaging his house, which is the house in dispute located at Plot No. 246 Block E, Kwanjeka Nyota Area, Tanga, and the appellant failed to pay the loan, as a result the house was auctioned by the Auctioneer for realization of the loaned money. It is also not in dispute that the 1st respondent purchased the house from the auction.

Counsel Majembe states that the appellant is not permitted to file a fresh case for determination of an issue of who owns the house as that issue was already determined by the competent Tribunal in Land Case No. 55 of 2017. He said in the case of Kangaulu Mussa (supra) the Court decided at page 348 that the Court has discretion to determine or entertain a fresh suit which could be brought by way of objection. The Counsel argues that the appellant had her remedies under XXI Rule 88 of the CPC to set aside the sale. She also had the remedies under Order XXI Rule 57 of the CPC, as she ought to have filed the objection proceedings and the Court would have investigated the Title, but she was too late and the house was

already auctioned, and the Title is already transferred to the 1st respondent.

The Counsel argues that since the appellant was not a party to Land Case No. 55 of 2017, she was not supposed to be served with a summons to appear to a case to which she was not a party. The 4th respondent who is the husband of the appellant and a party to the previous suit was properly and adequately served. The Counsel also submits that the issues of executions need to be determined by the executing court, and no fresh suit is allowed. The Counsel referred the Court to section 38 (1) of the Civil Procedure Act, Cap 33 R: E 2002.

The Counsel supports the finding of the Trial Tribunal that the case filed by the Appellant at the Tribunal was Res Judicata as the subject matter of the suit, which is the question of ownership of the house in dispute, and issues of whether the auction was proper, and absolute were already determined by the competent court in a previous case and cannot be relitigated in a subsequent suit.

Counsel Eric Akaro who was representing the 2nd respondent argue that the Chairperson of Trial Tribunal was correct to determine that the case filed by the appellant is Res Judicata as the subject matter of the suit was already determined by the competent Tribunal in the previous suit. The Counsel refers the Court to the case of **Bagugu Ginning Co. Limited**, the case which was cited by the Counsel for the Appellant, where the court explained what amounts to Res Judicata, and that if the subject matter is already adjudicated upon by a competent court or tribunal in a previous suit, then the subsequent suit is Res Judicata, and since in this case the question of who is the lawful owner of the suit property was already determined by the competent court in a previous suit, then the suit filed by the appellant for the determination of the same issue is Res Judicata. The issue of whether the auction was legal and lawful was already determined in the previous suit, and so it cannot be relitigated in another suit. The Counsel argues that the relief's in the two suits are

similar, and if the suit filed by the appellant would be determined on merits, there was a danger of passing two contradictory decrees. The appellant should have implored the proper forum to have her rights determined by a competent court.

Regarding the issues raised in this appeal that the appellant gave the money to the 1st respondent, and that the 1st respondent had spent the money to purchase the suit house, or that she was not served with the summons to appear for hearing of Land Case No. 55 of 2017, the Counsel stated that these are new issues which were not determined by the Tribunal below, and these issues cannot be determined at an appellate stage since they were not determined by the Trial Tribunal. These issues cannot be raised as grounds of appeal.

I have heard the submissions of all the parties, it be noted that he 4th respondent being the husband of the appellant did not dispute the appeal as he represented the same interests as that of the appellant. Thus, the crucial question to be

determined by this Court is whether Land Case No. 13 of 2019 filed by Flora Peter Joseph against the respondents herein is Res Judicata.

I have seen the judgement of Land Application No. 55 of 2017 decided by the Chairperson of the DLHT for Tanga, Hon. D.W Mangure. The plaintiff in that case was Hamisi Mmasa who is the 1st respondent in this appeal. He claimed for a declaratory order that he be declared the lawful owner of the suit property, which is the house located at Plot No. 246 Block E, Kwanjeka Nyota Area, within Tanga Municipality. He also prayed to be given vacant possession of this property. The Tribunal declared Hamisi Mmasa the lawful owner of the suit property, the 4th respondent in this suit Peter Joseph Msangi was ordered to yield vacant possession of the suit property. Therefore, as to who owns the property, this issue was already determined by a competent Tribunal in Land Case No. 55 of 2017, the decision which has not been challenged by anybody, either by way of appeal or Revision. The DLHT reached into a conclusion that the suit property is the property

of Hamisi Mmmasi after deliberating the issue of whether the auction was lawful. Therefore, the issues regarding the auction, and the procedures undertaken by the Bank and the Auctioneer to sell the suit property were already determined by the competent Tribunal in Land Case No. 55 of 2017 and cannot be relitigated in a fresh suit by party to the suit or a stranger to the suit, as the decision binds everybody claiming any interests in the suit property. I agree that the appellant as the wife of the mortgagee has the right to be heard but she was not a party in the previous suit. The law is clear that only parties to the suit are served with the summons to either file the written statement of defence or summons to appear to defend the suit. The law referred by the Counsel of the Appellant regarding service of summons to the member of the family, that provisions of the law also provides that the summons is to be issued only to a party of the suit not to a stranger but the summons could be served through the wife or a member of the family, but that section did not provide that a person who is not a party to the suit needs to be served

with the summons to defend the suit. In any case, issues as to whether the summons was duly and adequately served on the opposite party of the case are not issues to be determined in a separate suit by a person who was not a party to the previous suit. The issues whether the summons was served or proved to be served are issues to be determined either on an application to set aside the exparte judgement or on an appeal by a party who was a party in the original suit. The issues whether the summons was duly served to the appellant are totally misconceived, and misplaced. I hold that the right to file fresh suit on a subject matter which was already determined by a court of competent jurisdiction in a previous suit is not available to a party to the suit or to any person who was not party to the suit, and if any person is aggrieved by the decision, the available remedy is to apply to set aside the exparte judgement or to appeal. The available remedy for the appellant in this scenario is not to file a fresh suit but she could have filed a Revision, and her rights regarding the subject matter would have been decided under the same suit

by way of Revision of the proceedings, Judgement and Decree of the previous suit i.e. Land Case No. 55 of 2017, as filing of a fresh suit for determination of a matter which was already determined in a previous suit is barred by Res Judicata. This was held in the case of **Mgeni Seif vs Mohamed Yahaya Khalfani, Civil Application No 104 of 2008**, Court of Appeal sitting at Dar es Salaam, in which Hon Justice Munuo J.A, had this to say, at page 5:

"In view of the fact that the applicant lost the objection proceedings in Civil Case No. 175 of 2001, and because she was not a party to the said suit, but is contesting the ownership of the house in dispute, not having a right of appeal, the only venue open for the applicant would be revision..."

Thus, the issue of who owns the suit property is Res Judicata since the competent Tribunal had already declared Hamisi Mmmasi the owner of the suit property. Issues of Auction and Sale of the Suit property to Hamisi Mmasi is also Res Judicata

since these issues have been determined by a competent Tribunal in a previous suit.


However, the issues of whether the mortgage was lawful or was signed by a competent and fit person, and issues of whether the money used by Hamisi Mmasi to purchase the suit property in the auction were the money given by the appellant to Hamisi Mmmasi, these issues have not been determined by the Tribunal in Land Case No. 55 of 2017, therefore, any party may institute a fresh suit in a court with competent jurisdiction to have these issues determined. However, since these two issues were combined in a suit which was Res Judicata, the order to hold that the suit No. 13 of 2019 was res judicata was correct as the court could not by itself amend the pleadings of the parties.

Consequently, based on the above, the appeal is unmeritorious, it is hereby dismissed with costs. The decision passe by the District Land and Housing Tribunal in Land

Application No. 13 of 2019 by Hon. E.R Mhina, the Chairman is hereby upheld.

DATED at TANGA this 21ST day of OCTOBER 2022




MANSOOR
JUDGE,
21ST OCTOBER, 2022