IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 25 OF 2021

(Arising from Land Application No. 11 of 2020 of the Maswa District Land & Housing Tribunal)

NTOLOKI DANIEL NYANDA.....1ST APPELLANT
LUPELE NYANDA.....2ND APPELLANT

VERSUS

REUBEN ZABRON YEYEYE..... RESPONDENT

JUDGMENT

12th August & 31st October,2022

MKWIZU, J:

This appeal traces its origin from a claim of a piece of land measuring 16 acres alleged to belong to the late Zabron Yeyeye filed by an administrator of the said estate one Reuben Zabron Yeyeye at the DLHT. It is averred in the pleadings that the suit land is the property of the late Zabron Yeyeye since 1956 and that appellants without any colour of the right have encroached into the suit land. The claim was strongly denied by the appellant. The tribunal's decision in favour of the respondent concluded that the suit-land is the property of the late Zabron Yeyeye.

Appellants are aggrieved. They have come with this appeal on a total of 9 grounds of appeal boiling down into four complaints ***(i) the trial tribunal erred in law for adjudicating on the matter which is time-barred (ii) the application is res-judicata and abuse of courts process (iii)that respondent (original applicant) lacks***

locus stands to file the dispute(iv) failure by the trial tribunal to properly evaluate the evidence on the records.

This appeal proceeded by way of written submissions. The parties adhered to the submission schedule. I thank the parties for their detailed submissions.

Supporting the 1st complaint covered by grounds one of the appeals, appellants submitted that the trial tribunal erred in law to adjudicate a time-barred land dispute. They said appellants have been using the suit land since 1974 and therefore in terms of Part I item 22 and section 9 (1) of the Law of Limitation Act (Cap 89 RE 2019) the application was time-barred, filed 46 years after the accrual of the cause of action hence liable to be dismissed under section 3(1) of the same Act.

On the second, third, fourth and sixth grounds of appeal, appellants contend that the application that was brought at the trial tribunal was ***res judicata*** and an abuse of court's process. They argued that, the respondent's father, Zabron Yeyeye unsuccessfully in Land Application No 15 of 2011 and No 11 of 2011 at Kibuta Ward tribunal, Misc Land Application No. 9 of 2014 Misc. Land appeal No 89 of 2011 followed by Land Appeal No 35 of 2016 decided on 27/10/2016 at the High Court Mwanza. Citing section 9 of the CPC Cap 33 RE 2019 and passage from Mulla, Code of Civil Procedure (abridged) Lexis Nexis Butterworths Wadhwa, 2011, page 69, appellants invited the court to declare the dispute ***res-judicata***..

On the 7th, 8th and 9th grounds of appeal, the trial tribunal is blamed for failure to properly evaluate the evidence. They contend that the tribunal chairperson had in its decision ignored the evidence given by DW1 and

DW2 to the effect that the appellant had been in a legal occupation of the suit land for over 47 years without interruption. They argued that exhibit P2 is confusing and therefore irrelevant to the matter because in that decision by Nyashimo Primary Court in Civil Case No 15 of 1987, the respondent's father had litigated over a known piece of land without a description indicating whether the land in dispute is located in Nyamikoma Village or somewhere else. They in the end prayed for the court to allow the appeal with costs.

Responding to the appeal, the respondent submitted that the issue of time limitation has no base because as an administrator of the deceased's estate he in 2020 lodged the claims a result of encroachment of the deceased land after the demise of the owner of the suit land in 2010 hence withing the 12 years period.

Regarding the issue of ***res-judicata***, Mr Maligisa for the respondent said, it is a misconception because the matter in Application No 11 of 2020 is different from the previous land Cases No 15/2011 and 20 of 2011. He said the complaint in Application No 15 of 2011 was by Reuben Zabron Yeye against Ntoloki Daniel (1st Appellant) for disturbing the boundaries while Land Application No. 20 of 2011 against Lupele Nyanda (2nd Appellant) was resolved that each one has its own boundaries. He argued further that the decision, in Land Appeal No. 35 of 2016, by Maige J (As he then was) was against the decision by Silla Chairperson in Land Application No. 9 of 2014 declaring the suit ***res-judicata*** similar to the conclusion reached in Application No 89 of 2011 by Mwashambwa chairperson but not in connection to application No 15 and 20 of 2011 as maintained by the appellants.

Submitting on ground six of the appeal, the Respondent's counsel said, the appellant has failed to submit how the respondent's suit is an abuse of the court process. He said the lodging of Application No 11 of 2020 is a result of further invasion encompassing the whole respondent's land by the appellants which led to the respondent prosecuting the entire matter afresh in disregard of the earlier proceedings between the parties. He on this prayed for dismissal of the ground for lacking in merit.

Regarding the blame on improper evaluation of evidence by the trial chairperson, the Respondent's counsel argued that the respondent had through documentary evidence managed to establish his ownership over the suit land well against the appellants who failed to bring witnesses in support of their position. He lastly prayed for the dismissal of the appeal with costs.

The rejoinder submissions are essential a repletion of the appellant's submissions in chief insisting that the suit was and still is time barred, re-judicata and an abuse of court process and finally that the trial chairperson failed to properly evaluate the adduced evidence.

I have with enthusiasm evaluated the appeal, parties' submissions, and records. The crucial issue here is whether the appeal is meritorious or not.

The first issue emerging from the first ground of appeal tasks this court to look at the accrual of the cause of action against the respondent and determine whether the land dispute subject of this appeal is time-barred or not. This point was first raised as submitted by the appellants as a point of objection in their written statement of defence but was dismissed for lacking merit.

It the legal position that claims for recovery of land of the deceased like any other civil claim starts to run from the accrual of the cause of action. And according to section 5 of the Law of Limitation Act [Cap. 89 R.E.2019], a right of action accrues on a date on which a cause of action arose. The section reads:

> *"Subject to the provisions of the said Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arose"*

And section 9 (1) of the same Act stipulates the time of the accrual of the cause of action against the deceased's land. The section reads:

> *"9. -(1) Where a person institutes a suit to recover the land of a deceased person, whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land,* ***the right of action shall be deemed to have accrued on the date of death****." (emphasis added)*

Item 22 of the First Schedule to the Law of Limitation Act provides for 12 years as the period of limitation for instituting proceedings to recover land which is in terms of subsection 2 of the section 9 reckoned from the date of dispossession.

> *"Where the person who institutes a suit to recover land, or some person through whom he claims, has been in possession of and has, while entitled to the land, been* ***dispossessed or has discontinued his possession****, the right of action shall*

be deemed to have accrued on the date of the ***dispossession or discontinuance.***"

The undisputed facts of the suit at the trial tribunal tell that the owner of the suit land died in 2010. The same year the appellants are according to the respondents' pleadings alleged to have committed the alleged trespass. It is also obvious that the suit at the trial tribunal was filed in 2020 by the legal administrator of the deceased's estate just 10 years after the demise of the alleged owner and therefore well within the time prescribed by the law. The first ground of appeal collapses.

The second issue is that the suit is ***res judicata*** and abuse of court process. The doctrine of Res-judicata provided for under section 9 of the CPC states as follows:

> "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."*

Elaborating on the applicability of the above section, the Court of Appeal in **Esther Ignas Luambano v. Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014 (unreported) quoting with approval its decision in **Peniel Lotta v. Gabriel Tamaki and two others**, Civil Appeal No. 61 of 1999 (both unreported) stated as follows:

> *"The scheme of section 9, therefore, contemplates five conditions which when co-existent, will bar a subsequent suit The conditions are:*

(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 have litigated under the same title in the former suit

(iv) The court which decided the former suit been competent to try the subsequent suit.

(v) The matter in issue must have been heard and finally decided in the former suit."

Arguing on the similarities of the subject matter, respondent counsel said, the issue in Application No 15 and 20 of 2011 was in relation to the invasion of boundaries of the suit land while in this matter the respondent's complaint was on the entire 16 acres of the land .And that the lodging of Application No 11 of 2020 is a result of further invasion encompassing the whole respondent's land by the appellants committed during the subsistence of the two matters before the Kibita Ward tribunal which led to the respondent prosecuting the entire matter afresh in disregard of the earlier proceedings between the parties. This argument however contradicts the respondents' own pleadings. Paragraph 6(i)(ii) (iv) (v) and (vii) of the respondent's application at the trial tribunal gives the historical base of the dispute and its description. The paragraphs read:

(i) *That, the applicant claims from the Respondent is a portion of land measuring sixteen (16) acres being the property of*

his deceased father the late Zabron Yeyeye. ...

(ii)That, the ***land subject matter had been the property of the father of the applicant one Zabron Yeyeye*** *since 1956* ***the ownership which was also upheld in*** *the 1974's Operation Vijiji which same was* ***substantiated by the then village authorities vide their testimonies in the Land case No 15/1985, application No 15/2011 and 20/2011.***

(iv)That since before the demise of the late Zabron Yeyeye the 1st and 2nd respondents had been residing and having adjacent pieces of land near to the applicant's father's land ***where after his death they turned to claim ownership to the whole land.***

(v) That, however, the father of the applicant falls sick at the end of 2008 with a disease that marked his end ***on 9/10/2010 where the 1st respondent without claims of any right unlawful encroached disputed land and started selling the same*** *including to the 3rd and 4th respondents.*

(vii) That upon the appointment of the applicant as the administrator of the estate of the late Zabron Yeyeye, he had already filed an application No. 20/2011 against the 2nd respondent herein and had to defend the land application No.15/2011 as against the 1st respondent herein which both were prosecuted in his capacity thus however could not hold weight until on the legal advice on the legal capacity that resulted to the institution of this fresh application"

As indicated in the quoted part of the respondent own pleadings, the complained encroachment was committed in 2010 immediately after the death of his father followed by the filling of the Land application No 15 and 20 of 2011 which ended in the appellant's favour. Careful scrutiny of the above paragraph reveals that the subject matter in land applications

No 15 /2011 and 20/2011 is the same subject matter in land application No 11 of 2020 subject to this appeal. Apart from exposing to the tribunal the center of contention as ownership of the suit land, the respondent averment is to the point that the dispute was well settled in land applications Nos 15 and 20 of 2011 and that the only reason for bringing the same matter before the DLHT in land application No 11 of 2020 is because he filed the former application No 15 and 20 of 2011 in his personal capacity suggesting that he had no locus.

I have curiously considered the above submissions. The nature of the party's dispute in both the previous proceedings and the application subject of this appeal is well articulated by the respondent's pleadings quoted above. Read carefully, they give the conclusion that the subject matter, cause of action, and its accrual time in the application subject of this appeal are similar to the previous two applications directing to one end that the dispute that was placed before the DLHT through Land Application No. 11 of 2020 is the same dispute that was determined by the Kibita Tribunal in land Application No 15 and 20 of 2011 the decisions that have remained intact to date.

As admitted by the respondent's counsel, an attempt by the respondent to challenge the said decisions through Misc. Application No. 89 of 2011 proved futile. As the records would correctly demonstrate, Misc. Application No 89 of 2011 was dismissed for being incompetent. Respondent had also filed Application No. 9 of 2014 claiming the same suit land. The DLHT chairperson found among other things that the matter is ***res judicata*** for being decided by its tribunal and the Ward Tribunal. Part of its decision reads:

" ...Hence the application ... and the same ...was decided in this tribunal and the ward tribunal hence is ***res judicata*** *."*

The above decision was confirmed by this court, Maige J (as he then was) in Land Appeal No . 35 of 2016 where it was categorically stated that :

"...The appellant attempted to make use of the ward tribunal to recover the same but without success. His revision to the District Court did not change the story. There was no further attempt to ask for the intervention of this court in respect of the first motion. Therefore, ***the decision of the ward tribunal on the ownership of the suit much as it was not invalidated by District Land and Housing Tribunal on revision is still conclusive****. I do not see anything in the appellant's submissions to suggest otherwise*

...For the foregoing, it is my firm view that the trial tribunal was right in holding that the Application at the trial tribunal was res judicata to the decisions of the ***ward tribunal in cases numbers 15/2011 and 20/2011****..." (emphasis added)*

The Respondent's counsel's contention that the decision in Land Appeal No. 35 of 2016, by Maige J (As he then was) was not in connection to applications No 15 and 20 of 2011 is a misconception.

The respondent has never questioned the validity or otherwise of the decisions in respect of land applications No. 15 and 20 of 2011 and even that of Maige J. As I am aware, the settled principle guiding court's decision spells out that a court order must be obeyed unless and until it

has been set aside or varied by the court. This rule applies to court orders whether they are valid or invalid, regular or irregular. See the Court of Appeal decision in the **General Manager K. C. U. (1990) LTD v. Mbatama Rural Primary Cooperative Society**, Civil Application No. 1 of 1999 (unreported). The silent mode taken by the respondent echoes his satisfaction with the said decision otherwise he would have challenged the same through the legally established mechanisms, which include appeals and revisions. The obvious here is respondents' argument that the applications were filed without locus stand is an afterthought being brought to the court through a back door.

I find the second ground meritorious. The only conclusion obtained from the records is that the application at the trial tribunal is ***res judicata*** to Applications No 15 and 20 of 2011. And since this ground suffices to dispose of the appeal, I find no need to determine the rest of the grounds.

As a result, the entire proceedings are declared a nullity resulting in quashing and setting aside both the proceedings and the DLHT's decision with costs.

DATED at **Shinyanga** this **31st** day of **October** 2022.

E. Y MKWIZU
JUDGE
31/10/2022

Court: Right of Appeal explained

E. Y MKWIZU
JUDGE