

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND CASE NO. 36 OF 2021

**MUNGA LEKETO MUNGA KIVUYO (As Administrator of
The Estates of the Late Leketo Munga Kivuyo).....PLAINTIFF**

VERSUS

LOSERIAN LOISULIE SEPERE LUKUMAI

@ LOSERIAN LEKETO MUNGA..... DEFENDANT

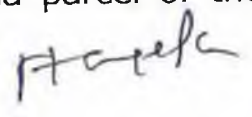
RULING

19.04.2022& 28.04.2022

N.R. MWASEBA, J.

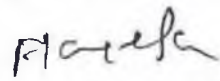
The plaintiff, **Munga Leketo Munga Kivuyo (As Administrator of the Estates of the Late Leketo Munga Kivuyo)**, filed an action against the defendants jointly and severally seeking the following orders:

- i. That, the suit land is part and parcel of the estates of the late Leketo Munga Kivuyo.



- ii. That, your Honourable Court be pleased to declare that whole proceedings of the trial Tribunal in Application No. 9/BKK/2018 of Kimnyak Ward Tribunal, Appeal No. 85 of 2019 of the District Land and Tribunal of Arusha at Arusha and Execution in Misc. Application No. 121 of 2020 null and void.
- iii. That, permanent order be given to restrain the Respondent and his agents from owning, possessing or occupying and disposing the suit premises/land.
- iv. The costs of this suit.
- v. Payment of general damages as it will be assessed by this Honourable Court.
- vi. Interest of 7% at the decretal sum from the date of judgment till payment of full amount.
- vii. Any other relief(s) and order(s) where your Honourable Court deems fit to grant.

Prior to the hearing of this suit, counsel for the defendant raised one point of preliminary objection as follow:

- i. That, the dispute at hand is *res judicata* contrary to Section 9 of the Civil Procedure Code, Cap 33 R.E 2019. 

At the request of parties, the preliminary objection was disposed of by way of written submissions. Ms Judith A. Reuben, learned advocate represented the defendants whereas Mr Lectony L. Ngeseyan, learned advocate represented the plaintiff.

Arguing in support of the PO, Ms Reuben based on **Section 9 of the CPC**. She submitted that the plaintiff herein lodged Land Application No. 9/BKK/2018 before Kimnyak Ward Tribunal where the subject matter was the same and upon determination of the dispute the defendant was declared a lawful owner and later the plaintiff appealed before the District Land and Housing Tribunal vide Appeal No. 85 of 2019 which was dismissed. Thereafter, the defendant filed execution before the same tribunal via Misc. Application No. 121 of 2020, an application which was never objected by the plaintiff and for that reason the tribunal's broker was appointed and the disputed property was handed over to the defendant (See annexure LL1 Collectively, annexed to their WSD).

She submitted further that, to their surprise the plaintiff came before this court using a different name of Munga Leketo Munga Kivuyo as the administrator of estate of Leketo Munga Kivuyo and abandoning his factual names of Mungayo Leketo as it appears in Land Application No.

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85 of 2019 and Misc. Application No. 121 of 2020. Further to that, under paragraphs 8, 9 and 10 of their plaint, the plaintiff admitted that he once sued over the same property in dispute.

Additionally, under part (ii) of the claimed relief the plaintiff submitted that:

"That your honourable court be pleased to declare that whole proceedings of the Tribunal in Application No. 9/BKK/2018 of Kimyak Ward Tribunal, Appeal No. 85 of 2019 of the District Land and Housing Tribunal for Arusha at Arusha and Execution No.121 of 2020 null and void."

More so, if the plaintiff was dissatisfied with the said cases he could have opted for an appeal before the high court of Tanzania and not to file a fresh suit claiming the previous cases to be nullified which is contrary to **Section 38 (1) of the Land Disputes Courts Act**, Cap. 216 R.E 2019. The plaintiff herein is using a backdoor to insert the same claim which were already determined on merit (See Annexure LL1 Collectively). Thus, it was their submission that the matter at hand is *res judicata* and it ought to be dismissed with costs.

Responding to the defendant's submission supporting the preliminary objection, the plaintiff's counsel submitted that *res judicata* is not a pure

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point of law. They submitted so as the raised PO need evidence which is against the famous case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd** [1969] AE 696. To buttress his argument, he also cited the case of **Cowto (T) Ottu Unions and Others Vs. Hon. Idd Simba and Other** (2002) TLR, at page 88 and **The Soitsambu Village Council vs Tanzania Breweries Limited and Tanzania Conservation Limited**, CAT- Civil Appeal No. 105 of 2011 (Unreported) where in both cases the court insisted that a PO needs to be free from facts calling for proof or requiring evidence to be adduced for its verification. Thus, *res judicata* does not qualify to be a preliminary objection on point of law as it needs evidence to justify the same.

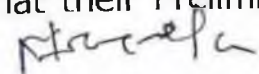
He added that the elements of *res judicata* are that the parties must be the same, the same suit and the same should have been heard and finally determined by the court of competent jurisdiction to try the same.

The parties in the present case are not the same as in previous cases, in the present case parties are: Munga Leketo Munga Kivuyo (As Administrator of the Estates of the Late Leketo Munga Kivuyo) vs Loserian Loisulie Sepere Lukumai@ Loserian Leketo Munga. And the previous case parties are Mungayo Leketo vs Loserian Leketo. *Harsh*

As for the suit property the same are different from that of the case of 9/BKK/2018 of Kimyak Ward Tribunal (See paragraph 3 of the plaint) and the land which was decided by Kimyak ward Tribunal is as per page 13 and 14 of the proceedings of the trial tribunal as per annexure LL1-colectively.

Mr Ngeseiyan submitted further that before raising the preliminary objection, the defendant's counsel ought to have read **Section 3A of the Civil Procedure Code**, Cap 33 R.E 2019 which is all about overriding objective. That the objection raised is not a preliminary objection anymore but rather, wastage of time and resources of this honourable court and parties to the suit. He cited the case of **Yakobo Magoiga Gichele Vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 and **Annathe Josephat Massawe and Ufoo Mushi & 80 Others Vs. The Board of Trustee of CCM at Hai District and The Executive Director Hai District Council** (both Unreported) where the Court of Appeal insisted on overriding needs for attaining the substantive justice. Thus, they prayed for the Preliminary Objection to be dismissed with costs.

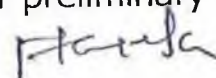
In a brief rejoinder, the defendant's counsel reiterated what was submitted in their submission in chief and added that their Preliminary



Objection emanated from the plaintiff's pleadings and from their prayers which originated from the matter already determined to its finality (See page 8, 9 and 10 of the pleadings). The cited case of **The Soitsambu Village Council** (supra) is distinguishable as in our case the plaintiff admitted in his pleadings that he once was sued by the defendant and one of his prayers was the nullification of the proceedings emanated from the case that is admitted having been dismissed for want of merit.

Further to that, the plaintiff cannot use different names to litigate on the same suit property as administrator of the estate as the matter was already decided and final verdict was made in respect of the said property. He also interposed that if the measurement of the suit property differs from the previous one why does the plaintiff need to nullify the proceedings of the Land Case No. 9/BKK/2018 of Kimyak Tribunal? In the end he cited the case of **Budugu Ginning Co. Ltd vs CRDB Bank Plc and 2 Others**, Civil Appeal No. 265 of 2019 (CAT-Unreported) to buttress his argument.

Having examined closely the submissions made by the learned counsels for both parties, the issues for determination are whether the point of objection raised meets the test of being a point of preliminary objection



as alleged by the plaintiff's counsel; and whether this matter is *res judicata*.

Describing the nature of what qualifies to be raised as a point of preliminary objection the court in the case of **Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd.** (1969) EA 696 at page 700 had this to say:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And at page 701 Sir Charles Newbold, P. stated that:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion". (See

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*also: Civil Application No. 40 of 2000 between Cotwu (T) m
Ottu Union & Another and Hon. Iddi Simba & 7 others
(unreported)."*

In our present suit, the counsel for the plaintiff submitted that the raised preliminary objection of *res judicata* does not qualify to be raised as one since it calls for evidence. However, this court does not agree with him. Since *res judicata* determines the jurisdiction of the court to determine the matter before it, the same qualifies to be raised as a point of preliminary objection.

Turning to the issue as to whether the suit was *res judicata* or not, I am of the considered view that in determination of whether or not a particular matter is *res judicata* the important issues to be examined includes determination of whether parties to the suit and issues involved are one and the same and if they were finally determined by a competent court.

The doctrine of *res judicata* is provided under **Section 9 of the Civil Procedure Code**, Cap. 33 R.E. 2019 which reads as follows:

*"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*

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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."

The above legal position has been affirmed in **Breenhalgh Mallard** [1947]2 All ER page 255 where the court observed:

"Res judicata for this purpose is not confined to issues which the Court is actually asked to decide but that it covers issues or facts which are so clearly part of the subject matter of litigation and clearly could be raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."

From the above provision of the law and the cited authority, this court is of the view that the essence of having this doctrine is to ensure that there must be an end to litigation and to bar multiplicity of suits from the same party or parties who may have a common interest.

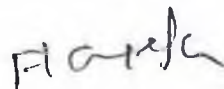
In the case of **Peniel Lotta Vs. Gabriel Tanaki and two others**, Civil Appeal No. 61 of 1999 CAT (unreported) also cited in the case of **Ester Ignas Luambano Vs. Adriano Gedam Kipalile**, Civil Appeal No. 91

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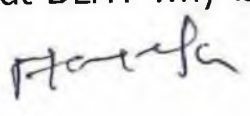
of 2014 CAT at Zanzibar it was stated that the scheme of **Section 9 of CPC** therefore contemplates five conditions which when co-existent, will bar a subsequent suit. The conditions are:

- 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 must have litigated under the same tittle in the former suit.*
- iv) The court which decided the former suit must have been competent to try the subsequent suit.*
- v) The matter in issue must have heard and finally decided in the former suit.*

However, in the current case of **Badugu Ginning Co. Ltd Vs CRDB Bank Plc and 2 others** (supra) the court held that:

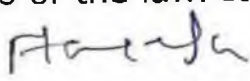
"It is our finding that parties were the same even if those two did not appear in the former suit, still the doctrine of Res judicata would apply in the circumstances." 

In our present suit, the plaintiff alleged that the current suit property differs from the previous case as well as the parties. It is clear from the record particularly paragraph 8, 9 and 10 of the plaint that previously the plaintiff claimed back his piece of land from the defendant by instituting a case No. 9 of 2018 at Kimyak ward tribunal. Thereafter, the defendant appealed against the said decision to the District Land and Housing Tribunal by instituting Land Appeal No 85 of 2019. The same was withdrawn by the defendant /appellant by then. Further to that, in his relief he prayed for the whole proceedings of Application No. 9 of 2018 at Kimyak ward Tribunal and Appeal No. 85 of 2019 at DLHT be declared null and void.

The cited paragraph proved that there was a previous suit between the parties herein over the same suit property which was filed by the plaintiff herein. Surprisingly, at the hearing of the preliminary objection the plaintiff denied that he was not involved in the previous suit and that the parties and the subject matter do differ. The question to be asked here is if the plaintiff was not involved in the previous application at Kimyak ward Tribunal and an appeal at DLHT why is he praying for the nullification of those previous suits? 

Thus, as it was contended by the defendant's counsel that the plaintiff herein decided to play with his names by using different names to make a claim looks like a different one. More so, even if the plaintiff is now claiming as an administrator of the estate of the late Leketo Munga Kivuyo still the suit property is the same, hence is barred from filing a fresh suit. The plaintiff was required to file an appeal challenging the decision of the trial ward tribunal rather than jumping to file a fresh suit. As it was held in **Badugu Ginning Co. Ltd's** case (supra) that even if a party did not appear at the former suit does not remove the doctrine of *res judicata* on a matter which has already been decided to its finality.

Next in my consideration is whether I should invoke the overriding objective principle so as to overrule the raised preliminary objection as suggested by the plaintiff's counsel. In the circumstances, since the matter is *res judicata*, it cannot be salvaged by applying the oxygen principle. As in the case of **Martin Kumaliya & 117 Others Vs. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (unreported), where the Court underscored the need to apply the overriding objective principle without offending mandatory provisions of the law. It observed as follows:



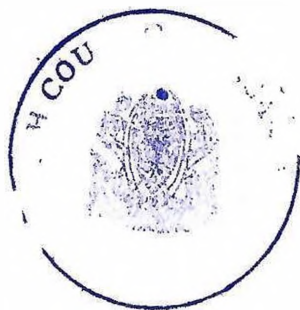
"While this principle is a vehicle for attaining substantive justice, it will not help a party to circumvent the mandatory rules of the Court."

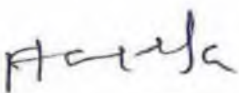
Thus, it is my considered view that the suit cannot be salvaged by invocation of the oxygen principle and ignoring the provision of Section 9 of the CPC.

So, for the foregone reasons, the raised preliminary objection is sustained for being meritorious. Consequently, the suit is hereby dismissed with costs for being *res judicata*.

It is so ordered.

DATED at ARUSHA this 28th day of April, 2022.




N.R. MWASEBA. J

JUDGE

28.04.2022