

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

MISCELLANEOUS LAND APPEAL NO. 15 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Lushoto at Lushoto in Land Appeal No. 48 of 2020 from Mgwashi Ward Tribunal in Land Case No. 30 of 2020)

RAJABU HASSANI.....APPELLANT

-VERSUS-

SAIDI AMASHI.....RESPONDENT

J U D G M E N T

Date of Last Order:-04/03/2022

Date of Judgment:-07/03/2022

AGATHO, J.:

In this appeal, the Appellant is dissatisfied with the decision of the District Land and Housing Tribunal for Lushoto at Lushoto in Land Appeal No. 48 of 2020 and originating from the Ward Tribunal of Mgwashi in Land Case No. 30 of 2020.

Briefly, the facts that gave rise to the instant appeal are that the Appellant herein instituted a land case at the Ward Tribunal of Mgwashi in Lushoto District against the Respondent claiming that the Appellant had encroached and cultivate into his land. The Ward Tribunal having resolved the dispute decided in favour of the Appellant declaring him to be the lawful owner of the land in dispute.

The Respondent was dissatisfied with the decision of the Ward Tribunal and decided to appeal to the District Land and Housing Tribunal for Lushoto at Lushoto. At the Appellate Tribunal, it was discovered that the matter had already been heard and decided vide Land Application No. 280 of 2009 at the Ward Tribunal of Mgwashi, the Respondent was declared the lawful owner of the land in dispute and there was an execution order thereto via Misc. Application No. 23 of 2012.

The Chairperson ruled that the matter is *res judicata*, consequently, the proceedings and decision of the Ward Tribunal were nullified.

The Appellant was dissatisfied with the decision of the District Land and Housing Tribunal hence appealed to this Court on the following grounds;

1. *That the appellate Tribunal erred in law and in fact by declaring the Respondent the lawful owner of the disputed land basing on the facts which were not pleaded in the Trial Tribunal.*
2. *That the Appellate Tribunal wrongly reversed the decision of the trial Tribunal basing on the unproved facts at the Trial Tribunal.*
3. *That the Appellate Tribunal erred in law and in fact by holding the matter to be res judicata basing on a Ward Tribunal decision which was nullified by the District Land and Housing Tribunal.*

4. That the Appellate Tribunal was biased against the Appellant herein.

In the appeal, the Appellant prays for the following orders;

(1) The judgment, decree and orders of the of the Appellate and Trial Ward Tribunal be nullified.

(2) The Appellant to have the costs of the appeal and the proceedings in the Tribunals below.

In determining the Appellant was represented by Mr. Ally Kimweri while the Respondent was represented by Mr. Banoba, Advocates.

Regarding the first ground of appeal, the Appellant's counsel submitted that there is nowhere the Respondent pleaded the issue of *res judicata* at the Ward Tribunal where the matter originated and that the Appellant is considered to have been taken by surprise. To strengthen his argument, he referred the case of **Makori Wasaga v Mwaikambo and another [1987] TLR 88** on the ground that a party is bound by his pleadings.

The Respondent's counsel however submitted that the issue of *res judicata* was raised as revealed on page 1 of the typed proceedings of the Ward Tribunal though was not considered, and the Tribunal did not lead the witness to prove that he acquired the land through execution order.

The Counsel added that the District Land and Housing Tribunal (DLHT) for Lushoto as the first appellate Tribunal is empowered to reconsider the legality of the proceedings and the decision of the trial Tribunal and that under Section 34 (1) (b) of the Land Disputes Courts Act [Cap 216 R.E 2019] the DLHT can receive additional evidence if any and Regulation 10 of the Land Disputes Courts (Regulation), G.N. No. 174 of 2003 allows additional evidence before the close of hearing.

In his rejoinder, the Counsel for the Appellant submitted that the Respondent was led while testifying but he did not tender the document to prove how he acquired the land, instead he tendered it at the appellate level and the same was received while without notifying the Appellant and the DLHT did not indicate the reasons for receiving the document in record which was improper.

The Appellant's counsel added that the execution (*"filisi"*) was not related to the land dispute but was a cattle dispute and therefore should not have been considered to give right to the Respondent.

Regarding the second ground of appeal, the Appellant's counsel submitted that there was no evidence to justify the fact that the Respondent obtained the land in dispute out of the execution order(degree) and that the same is his mother's origin. He referred to Section 110 of the Evidence Act [Cap 6 R.E 2019] and the case of

Abdulkarim Haji v Raymond Nchimbi and Joseph Sita [2006]

TLR 402 on the principle that he who alleges must prove.

The Respondent's counsel on his part submitted that the Respondent narrated how he obtained the land (farm) and that in Application No.23 of 2012 the Application for execution of decree was granted in Land Case No. 280 of 2009 since there was no appeal that was preferred, and the time had lapsed. The counsel for the Respondent maintained that there was no evidence at the Ward Tribunal as to how the Appellant acquired the land.

On the third ground of appeal, the counsel for the Appellant submitted that the Appellate Tribunal erred in law holding the matter to be *res judicata* though he referred to several cases in which the parties were involved.

The counsel further stated that there were contradictions of parties. That while in Wanga Village Council the parties were Rajabu Hassani v Ramadhani Rajabu, at the Ward Tribunal, the parties were Saidi Amashi v Rajabu Hassan. The counsel for the Respondent however submitted that the Land Case No. 30 of 2020 before Mgwashi Ward Tribunal was *res judicata*. Referring decided cases of **Salum Said Matumla v ECOBANC T. Ltd and Bilostar Debt Collectors Ltd, Civil Case No. 148 of 2015** at page 12 and the case of **Ester Ignas**

Luambano v Adriano Gedam Kipalile, Civil Appeal No. 91 of 2014 on the ground that when a case is *res judicata* then it cannot be entertained.

In his rejoinder, the counsel for the Appellant maintained that the land in dispute was the same but the Case No. 23 of the Korogwe District Land and Housing Tribunal was not found in the proceedings of the lower tribunal.

With respect to the fourth ground of appeal, the counsel for the Appellant contended that the District Land and Housing Tribunal was biased on the ground that the judgment was delivered basing on exhibits that were attached on the submissions (at the appellate level) and not on the proceedings of the Ward Tribunal. The counsel added that the exhibits since the exhibits were annexed to the rejoinder, the Appellant had no opportunity to counter. He proceeded submitting that reliance on exhibits that were annexed on submission was not only against the law but a bias on the Respondent. He referred the case of **Morandi Rutakyamirwa v Petro Joseph [1990] TLR 49 and TUICO at Mbeya Cement Company Ltd v Mbeya Cement Company Ltd & another [2005] TLR 41** contending that submissions are not evidence. The counsel for the Respondent

submitted that the District Land and Housing Tribunal rightly observed the law in receiving evidence.

In his rejoinder, the counsel for the Appellant reiterated that the procedures of receiving additional evidence were improper. In finality, he prayed the appeal to be allowed with costs.

In disposing this appeal, I am guided by the principle that this being a second appeal, the Court rarely interfere with a finding of facts by the trial court. This was held in the case of **Neli Manase Foya v Damian Mlinga, Civil Appeal No. 25 of 2002, CAT at Arusha**. See also the case of **Bushangila Ngóga v Manyanda Maige [2002] T.L.R 335 at page 336** where it was held that in the absence of misdirection or misapprehension of evidence, an appellate Court should not interfere with concurrent findings of fact of the two Lower Courts.

Now, regarding the grounds of appeal, I prefer to start determining the first and the third grounds of appeal since they are inter-related.

In the first ground of appeal, the Appellant stated that the Appellate Tribunal erred in law and in fact by declaring the Respondent the lawful owner of the disputed land basing on the facts which were not pleaded in the trial Tribunal.

In his submission he has stated that the Respondent did not plead the issue of *res judicata* at the Ward Tribunal. It is an elementary principle that new issue cannot be raised at the stage of appeal. This was held in the case of **Tanzania Cotton Marketing Board v Cogecot Cotton Company S.A. [2004] 132 at page 133.** However, I have gone through the records of the trial Tribunal and found that at page 3 of the original proceedings, it is clear that the Respondent was asked whether he had any copy of the judgment on execution of the decree. The Respondent admitted to possess the same though in the case file of the trial tribunal it is not found however there is a copy of the decision of Land Case No. 280 of 2009 of the Mgwashi Ward Tribunal between the same parties and the Respondent was declared the lawful owner of the land but the trial Tribunal did not consider that in reaching to its finding. In my view, the trial Tribunal ought to be cautious and make necessary order.

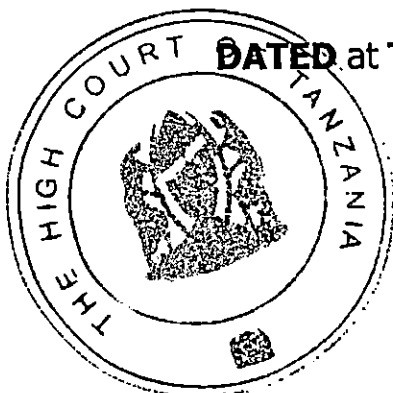
Secondly, although the Appellant have stated that the issue of *res judicata* cannot be raised at the stage of appeal, that is not correct since the issue of is directly connected with the issue of jurisdiction then the same can be raised at any stage. Once *res judicata* is proved the subsequent Court or tribunal is precluded from exercising its jurisdiction over the matter that has been conclusively and finally determine by

another Court/tribunal with competent authority. Being a point of law related to jurisdiction of the Court see the case of **Tanzania - China Friendship Textile Co. Ltd v Our Lady of the Usambara Sister [2006] T.L.R. 70 at page 71**. The Court cannot reopen the matter that was conclusively determined by another Court. See Section 9 of the Civil Procedure Code [Cap 33 R.E. 2019]. In this case, the Respondent testified at the trial Tribunal that he acquired the land from the execution order. From the above reasons, the first ground of appeal lacks merit. It is therefore dismissed.

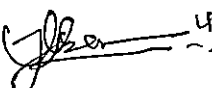
Regarding the third ground of appeal, having observed that the matter had already been determined and disposed of by the Ward Tribunal, the Chairperson rightly held that the matter was *res judicata* as this will lead to multiplicity of suits and abuse of Court in administration of justice. The same was held in **Stephen Masatu Wassira v Joseph Sinda Warioba and A.G. [1999] TLR 334**. The same was reiterated in **Gerald Chuchuba v Itaga Seminary [2002] TLR 213**.

Moreover, the fact that the Appellant's counsel stated that the District Land and Housing Tribunal for Korogwe ordered for re-trial be conducted by the Ward Tribunal and that the matter is not *res judicata*, that again is not correct. An order for re-trial was issued in the Land

Case between Rajabu Hassani and Ramadhani Rajabu in Appeal No. 102 of 2010, and not between Rajabu Hassani and Saidi Amashi, the judgment is annexed in the Ward Tribunal's case file. For those reasons it is not disputed that the Land Case No. 280 of 2009 is still valid since it was pronounced by the competent Tribunal and there is no decision to the contrary. Under that circumstance, it is correct that the matter at the Ward Tribunal, Land Case No. 30 of 2020 was *res judicata*. Moreover, I see no relevancy of determining the rest of the grounds of appeal since the above two grounds finally disposes the matter. This Court finds no reason(s) to interfere with the finding of the Appellate Tribunal. And in the end the appeal is dismissed with costs.



DATED at **TANGA** this 7th Day of March 2022.


U. J. AGATHO
JUDGE
07/03/2022

Date: 07/03/2022

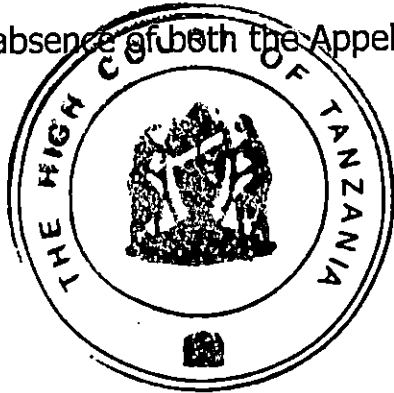
Coram: Hon. Agatho, J

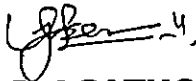
Appellant: Absent

Respondent: Absent

B/C: Zayumba


Court: Judgment delivered on this 7th day of March, 2022 in the absence of both the Appellant, and the Respondent.




U. J. AGATHO
JUDGE
07/03/2022

Court: Right of Appeal is available as per the law.




U. J. AGATHO
JUDGE
04/03/2022