

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

**IN THE SUB REGISTRY OF KIGOMA
AT KIGOMA**

LAND APPEAL NO. 20 OF 2022

(Arising from Land application No.46 of 2021 of the District Land and Housing
Tribunal for Kigoma)

KALISTO BALILI APPELLANT

VERSUS

ZAINABU BUSIGE GEMA RESPONDENT

Date of Last Order: 14.02.2023

Date of Ruling: 17.03.2023

JUDGEMENT

MAGOIGA, J.

The Appellant, **KALISTO BALILI** aggrieved by the ruling of the District Land and Housing Tribunal for Kigoma dated 22.07.2022 now appeals against the said whole ruling of the trial Tribunal to this Court.

The record of appeal is loud and clear that the dispute between parties herein above dates back to 2014 vide Land Application No.68 of 2014 before the District Land and Housing Tribunal for Kigoma in which the appellant unsuccessfully sued the respondent vide its decision made on 19/05/2016. Aggrieved, the appellant appealed to the High Court at Tabora, which in its decision nullified the decision of the trial District Land and Housing Tribunal of Kigoma and advised the appellant, if wishes, to properly file a matter before any competent court. The appellant as such instituted Land Application No.46 of 2021 but which was dismissed



on preliminary objection that the matter is res judicata and for failure to institute the same before Ward Tribunal first.

Consequently and aggrieved, the appellant has come to this Court armed with three grounds of appeal faulting the trial Tribunal on the following grounds, namely:-

1. That the trial District Land and Housing Tribunal grossly erred in law and fact when struck out Land Application No. 46 of 2021 by basing on the preliminary objection raised by the respondent without considering that the case was not Res Judicata;
2. That could the trial District Land and Housing Tribunal consider that the letter from Mkongoro Ward Tribunal indicates the value of the suit land was estimated at Tshs.7,500,000/= the facts which obtained from the appellant, the same was over and above the pecuniary jurisdiction of the Ward Tribunal which is only Tshs.3,000,000/= the same could not struck out the appellant's case;
3. That the trial District Land and Housing Tribunal grossly erred in law and fact when it misdirected itself by sustaining preliminary objection and struck out Land Application No. 46 of 2021 on account that a letter from Mkongoro Ward Tribunal could not be

considered on preliminary objection as the same was based on evidence.

On the above grounds, the appellant prayed that this appeal be allowed and remit the file back to the District Land and Housing Tribunal for determination of the landed dispute on merits inter parties with costs.

Quite unusual practice in this sub registry and not even a requirement of the law, the respondent filed a reply to the memorandum of appeal strongly resisting the grant of this appeal and prayed that the instant appeal be dismissed with costs.

The appellant at all material time has been enjoying the legal services of Mr. Sylvester Damas Sogomba, learned advocate, while the respondent as well and at all material time has been enjoying the legal services of Mr. Omary Isa Gilagiza, learned advocate.

Mr. Sogomba arguing the first ground of appeal told the Court that, the Land Application No. 46 of 2021 was not res judicata because the decision, if any, by the Village Council was not a decision so to speak to make the application to have been heard on merits inter parties because what the village did was just mediation and it cannot be executed by any court. According to Mr. Sogomba, the High Court at Tabora directives were very clear that, if the

appellant wish to pursue the matter he may properly file the matter before any competent court. The competent Court, in the circumstances, where the subject matter was estimated to be Tshs.7,500,000/= was the District Land and Housing Tribunal and not the Ward Tribunal whose jurisdiction is limited only to Tshs.3,000,000/=.

The learned advocate went on arguing that no decision of competent court has ever been determined inter parties over the dispute land on merits.

In the foregoing reasons, the learned advocate for the appellant faulted the trial Tribunal's findings as erroneous and urged this court to allow this appeal on this ground.

On the second and third grounds jointly argued, it was his brief, focused and strong submissions of Mr. Sogomba that, whether the disputed land value is Tshs.7,500,000/= or Tshs.3,000,000/= was matter that needed evidence and do not qualify to be a preliminary objection. On that note, therefore, he equally urged that this Court finds the trial Tribunal erred to say the competent court was Ward Tribunal and wrongly made it a preliminary point of law.

In the totality of the above submissions, Mr. Sogomba prayed that this Court be pleased to allow this appeal with costs and order the file be returned to the trial Tribunal for determination before another competent chairman.

In reply, Mr. Gilagiza upon probed by the court whether the landed dispute has ever been determined by any competent court/tribunal to qualify to be res judicata, readily conceded that no such decision, however, he was quick to point out that much as the Village Council mediated the matter and six years elapsed since, then, to him, it amounts to decision and the appellant coming now is what the High Court judge called that the matter has "smell of res judicata". Basically, Mr. Gilagiza had no problem if the matter is returned to the trial Tribunal for trial inter parties. However, the learned advocate for the respondent prayed that in allowing this appeal and ordering the hearing of the dispute inter parties same should be done without an order as to costs.

On the issue of the estimated value of the disputed land, Mr. Gilagiza equally admitted that it was point that needed evidence as such did not qualify to be a preliminary objection on point of law.

In rejoinder, Mr. Sogomba rejoined that the issue of six years was not an issue before the trial Tribunal but has just cropped here in



this appeal and insisted that element of six years is not an ingredient of res judicata. Also, were his further arguments in rejoinder that much as the learned advocate for the respondent has conceded that he wrongly invoked the points and deliberately mislead the trial Tribunal, Mr. Sogomba insisted that costs should be awarded as prayed.

Having heard the less rivaling arguments of the learned advocates for parties and having gone through the record of appeal in lower trial Tribunal, without much ado, I find merits in this appeal. I will explain. **One,** As rightly argued by Mr. Sogomba and readily conceded by Mr. Gilagiza in both grounds of appeal preferred and argued, and rightly so in my own considered opinion, there is no res judicata principle in this landed dispute. Suffice to say quickly that the principle of res judicata is not a new legal problem in our jurisdiction. There is plethora of decisions by both the High Court and Court of Appeal of Tanzania on this point. In the case of **YOHANA DISMAS NYAKIBARI vs. LUSHOTO TEA COMPANY LIMITED, CIVIL APPEAL NO.90 OF 2008 CAT (UNREPORTED)** it was held that for the principle of res judicata to apply five cumulative conditions must exists. These are: **one,** the matter must be direct and substantially the same in both cases; **two,** the matter must be

between the same parties; **three**, parties must have litigated under the same title; **four**, the matter must be before a competent court, and **five**, the matter must have been heard and finally determined.

Guided by the above decision of the Court of Appeal, and given the undisputed facts that the first proceedings vide Land Appeal No.5 of 2017 were nullified by the High Court at Tabora; **one**, no doubt some conditions are missing, hence, no legal justification can safely be argued that in this appeal there was res judicata or "rather smell of res judicata as stated and unknown in law.

Two, the arguments by Mr. Gilagiza that much as the village mediated parties and six years have elapsed, then, is a decision so to speak, in my respective opinion, as correctly argued by Mr. Sogomba the argument of six years was not raised in the trial Tribunal and is not one of the conditions as such cannot be entertained now.

Before I pen off, let me by the way say this, Mr. Gilagiza upon probed by the Court on the two points of law raised and sustained by trial Tribunal whether were points of law readily conceded that, all points raised were not points of law. This, indeed, is another reflection how unwarranted raising of unmerited preliminary



objections are sources of delay in the administration of justice in our courts/tribunals and which can be avoided if a thorough research and understanding of the legal concepts are well understood. Advocates, in my opinion and advise, are expected of high assistance in the timely delivery of justice rather than being part of delay in the administration of justice by raising preliminary objection without proper research on any legal point.

On that note, I hereby without much ado, found the appeal merited and consequently quash the decision of the trial Tribunal with an order that this case file be immediately remitted back to the trial Tribunal and same be determined before another chairman competent to try the matter.

The appellant will have costs of appeal.

It is so ordered and directed.

Dated at Kigoma this 17th day of March, 2023.2.14



A handwritten signature in blue ink, consisting of a series of vertical strokes followed by a horizontal line and a flourish.

S.M. MAGOIGA
JUDGE
17/03/2023