

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 07 OF 2022

(Originating from Application No. 12 of 2021 in the District Land and Housing Tribunal for Babati, at Babati)

LEORGADI MARANDU.....APPELLANT

VERSUS

DINADETHA ANDREW CHONDE RESPONDENT

JUDGMENT

19th May & 24th May 2023

Kahyoza, J.:

Dinadetha Andrew Chonde (the respondent) sued **Leorgadi Marandu** (the appellant) before the district land and housing tribunal (the tribunal) for declaratory decree that she is a lawful owner of the disputed land. The tribunal found in **Dinadetha Andrew Chonde's** favour. Dissatisfied, **Leorgadi Marandu** appealed. He is contending that the tribunal erred by not holding that the suit was *res judicata*, the tribunal ignored the appellant's evidence and that the tribunal relied on the respondent's weak evidence.

The issues for determination are-

1. was the suit *res judicata*?
2. did the tribunal ignore the appellant's evidence?
3. did the respondent prove her claim?

A brief background is that **Dinadetha Andrew Chonde** sued **Leorgadi Marandu** claiming that the suit land was her property. She alleged that she applied to Ndareta village authorities, which allocated the disputed land to her. After the disputed land was allocated to her, **Dinadetha Andrew Chonde** obtained a customary right of occupancy, which she tendered it as exhibit.

On **Leorgadi Marandu's** part, he stated that the suit land was his land and that Ngabolo Village Council and general Assembly, which allocated the land in dispute to him. He added that before the respondent sued him he had already sued the respondent's husband before the tribunal vide Land Application No 10/2017. He emerged a winner.

Given the above background, there are facts not disputed; **one**, that **Leorgadi Marandu** had a land suit in the tribunal between him and **Dinadetha Andrew Chonde's** husband and other people. It was land case No. 10/2017 and that he won the day; **two**, it is also clear that the suit land in Land Application 10/2017 before Kibaya district Land and Housing Tribunal is the same land subject of dispute in the present wrangle; **three**, there also no dispute that **Dinadetha Andrew Chonde's** husband, Mr. Steven Fisso was defending his wife's interest in Land Application 10/2017. Thus, his wife knew very well that her interest in the disputed land was in jeopardy and she kept tight-lipped. This is evident from Mr. Steven Fisso's evidence in Land Application 10/2017 where he (Mr. Steven Fisso) testified that-

"...in 2015 his wife by the name Dinadeta Andrew made application to the village Council for allocation of land for cultivation. He testified

that after consideration of her application, Ndareta Village Council and the Village General Assembly approved for allocation of 10 acres to my wife, Dinadeta. He added that other villagers who applied for allocation of land were allocated. He added that his wife paid Tshs. 25,000/= to the Village Council as allocation fee. Dw1 stated that after the allocation, they cleared the land and started cultivation."

I find it settled that **Leorgadi Marandu's** claim is based on the contention that he was allocated the disputed land by Ngabolo Village Council and General Assembly, whereas **Dinadetha Andrew Chonde's** claim is that the disputed land was allocated to her by Ndareta village Council and General Assembly. Thus, the disputed land was allocated by two different authorities to two different persons, this is a fulcrum of the dispute. It is therefore mandatory to resolve the wrangle between the parties, it was vital to find out which village Council and General Assembly had mandate to allocate the disputed land. Unfortunately, that issue was not raised neither before the tribunal, which entertained the dispute between **Leorgadi Marandu** and **Dinadetha Andrew Chonde's** husband nor before the tribunal which entertained the instant case. This Court, being the first appellate Court has no mandate to determine issues not canvassed by the trial court. I will desist to answer an issue which village authority had mandate to allocate the suit land.

The above said, I now consider the issues raised by the grounds of appeal. The appellant enjoyed the services of Mr. Ibrahim, advocate while the respondent appeared in person during the hearing of the appeal. They

made oral submissions. I will refer to the oral submissions while determining the issues.

Was the suit *res judicata*?

The appellant complained in the first appeal that the tribunal erred in law and fact not holding that the suit was *res judicata* since the dispute was adjudicated in Land Application No. 10 of 2017 before Kiteto District Land and Housing Tribunal. To support the ground of appeal, the appellant's advocate submitted that the appellant sued successfully the respondent's husband before the Kiteto District Land and Housing Tribunal. Later, the respondent sued the appellant before the same tribunal. The tribunal adjudged the respondent a lawful owner and declared the appellant a trespasser.

The respondent did not refute the contention that the appellant sued her husband successfully, but she contended that the appellant sued a wrong party. She stated in the written reply that the claim in Land Application No. 10 of 2017 was based on surveyed land with different size and that she was not a party. She submitted that she tendered exhibit to establish that she was the owner of the disputed land as the land was allocated to her by the village authorities and that she had a customary right of occupancy.

Res judicata as defined by the Court of Appeal in **Ester Ignas Luambano V. Adriano Gedam Kipalile**, Civ. Appeal No. 91/2014, "*is a fundamental legal doctrine that there must be an end to litigation. The objective is to bar multiplicity of suits and guarantees finality of litigation.*" The doctrine of *Res judicata* entails five conditions as stated in **Peniel Lotta**

v. Gabriel Tanaki and two others, Civil Appeal No. 61 of 1999 CAT (unreported) must exist which 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 title 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 been heard and finally decided in the former suit.*

The issue is whether the conditions existed in the instant suit. The tribunal made a ruling that the disputed land in the two cases were different. After, I carefully examined the record I wish to state that the tribunal was wrong to decide that the subject matter was different. It is on record that the appellant sued three respondents, one of them was the respondent's husband for trespass in Land Application No. 10/2017. The appellant's claim was for 30 acres against all the respondents in Land Application No. 10/2017. The claim against the respondent's husband was for 10 acres only. Thus, the size of the land which was subject of dispute in relation to the respondent's husband in Land Application No. 10/2017 is the same as in the present dispute.

In addition, the respondent's husband deposed that the land in dispute in Land Application No. 10/2017 was allocated to his wife by Ndareta village authority and that is the basis of the respondent's claim against the respondent. Not only that but also, the tribunal found that Ndarete Village Council took the appellant's land and re-allocated it to the respondent (Dinadeta Andrew). It is stated that-

*"After [we] visited the locus in quo together with parties the tribunal discovered that part of the applicant's [the appellant before this court] **land which was taken by Ndelata Village Council and re-allocated to the respondents falls within the land which was allocated to Dinadeta Andrew (the 1st Respondent's wife).... (Emphasis is added)***

The above quotation proves that the land in dispute was a part of the subject matter in Land Application No. 10/2017. Thus, the subject matter in the present suit was *directly and substantially* subject matter *in issue in the former suit* i.e. Land Application No. 10/2017.

The next question is whether the former suit was between the same parties or privies claiming under them. The respondent submitted that she was not a party to the former suit or application and that the appellant sued the wrong person. Indeed, the respondent was not a party to the former application (Land Application No. 10/2017), but her husband was sued as a trespasser. The respondent's husband claimed ownership of the disputed land as the land was allocated to the respondent, his wife. The respondent's husband refuted to be a trespasser. The tribunal found that-

"Therefore the 1st respondent who claims ownership of the dispute land under the umbrella of his wife Dinadeta Andrew and the 3^d Respondent are trespasser[s] to the applicant's land (the 1st applicant)."

Indisputably, the respondent was not a party but her husband was a party and claimed ownership because the respondent, his wife was owner of the suit land. I am of the firm view that much as the respondent was not a party, her husband who was her privy claimed or defended the claim under her title. Privy is defined by the **Essential Law Dictionary**, Amy Hackney Blackwell, Sphinx® Publishing An Imprint Of Sourcebooks, Inc.® Naperville, Illinois 1st Ed. 2008 as

*"a person who shares **privity** with another; a person with an interest in an action or property."*

And it defines privity as

*"a **relationship between parties that occurs when they share an interest in or right to some property** or matter, such as two people who enter a contract, or a deceased person and his or her heir, or two people who own the same piece of property one after the other."*

The respondent is privy to her husband as they shared interest in the disputed land. Thus, in law they are not the same person but they are privy. I find a second condition for the doctrine of *Res judicata* to apply proved

that the *former suit was between the same parties or privies claiming under them.*

A third condition is that *the parties must have litigated under the same title in the former suit.* The respondent in the present application and her husband in the former application litigated under the same title. The respondent alleged that the disputed land was allocated to her by Ndareta village Council and that her husband's defence was that the disputed land was allocated to his wife by Ndareta Village Council. Therefore they are claiming under the same title.

The fourth and fifth conditions to support the doctrine of *Res judicata* are that the *court which decided the former suit must have been competent to try the subsequent suit and the matter in issue must have been heard and finally decided in the former suit.* These two conditions are established. Both applications were determined by Kiteto district land and housing tribunal which was a competent tribunal and both application were heard to conclusion.

Finally, I find it evident from the record, that the application the subject of this appeal is *res judicata* to the former application which was between the appellant and the respondent's husband and other persons. The relief sought by the respondent had already been determined in the first application as the tribunal determined ownership of the disputed land. It was wrong and misuse of the due process, to call upon the tribunal to re-determine ownership of the same subject matter. I am of the view that the respondent's claim in the application, subject of this appeal cannot be maintained in law as the matter in issue is *res judicata.*

I uphold the first ground of appeal that the tribunal erred to dismiss the preliminary objection that the matter was *res judicata*. It should not escape our mind that the objective and public policy, behind the doctrine of *res judicata* is to ensure finality of litigation. It would be to circumvent the doctrine, if we allowed parties to sue on the same subject matter merely because the name of the parties is different ignoring a fact that the names may be different but they may be privy, like in the case at hand.

I agree that the respondent, the alleged owner may have been prejudiced by the order given in her absent as she was not a party. However, that fact alone does not permit her to file a fresh suit. The remedy available for the respondent was to apply for revision seeking a superior court to set aside the judgment which affected her interest without affording her a hearing. It is settled that if a party is adversely affected by orders issued in the proceedings to which he was not a party the remedy is to apply for revision. See **Mansoor Daya Chemicals Limited v. National Bank of Commerce Ltd**, Civil Application No. 464/16 of 2014 and **Ms. Farhia Abdullar Noor v. ADVATECH Office Supplies Ltd and BOLSTO Solutions Ltd**, Civil Application No. 261/16 of 2017. Both cases referred to the decision of **Halais Pro-Chemie Vs Wella A.G** [1996] TLR 269. I find it settled that a party to the proceedings before the courts subordinate to this Court may institute revision proceedings in the following circumstances; **one**, where, although he has a right of appeal, sufficient reason amounting to exceptional circumstance exists, which must be explained; **two**, where the appellate process has been blocked by judicial process; **three**, where

*there is no right of appeal exists; or **four, where a person was not party to the relevant proceedings.** (Emphasis is added).*

Dinadetha Andrew Chonde's act of instituting a suit after she learnt that there was a decree issued by the competent tribunal regarding the subject matter of this case instead of applying for revision, was not justified. **Dinadetha Andrew Chonde**, the respondent abused the court's due process as she used the court in a way which is significantly different from the ordinary and proper use of the court process.

Did the tribunal ignore the appellant's evidence?

The findings to the first issue is enough to dispose the appeal, all in all I move to consider the second ground of appeal. The appellant complained that the tribunal did not consider his evidence. The appellant's advocate submitted that the appellant deposed that he was allocated the dispute land by the village authority but the tribunal did not consider his evidence.

The respondent refuted the allegation and stated that the appellant had weak evidence. She submitted orally that the appellant did not tender exhibits to prove that he was allocated the disputed land as claimed. She added that on her part, she tendered minutes of the village authorities, and the customary right of occupancy to prove ownership. She had better evidence, she claimed.

There is no dispute that the respondent tendered documentary evidence that the disputed land was allocated to her by the Ndareta village authorities, which are the village Council and the Village Assembly. She also tendered a customary right of occupancy. As the record bears testimony, the

appellant defended the claim by adducing the evidence that the disputed land was allocated to him by Ngabolo Village Council in 2011. He tendered a copy of the judgment of the tribunal which found in his favour that the disputed land was part of the land Ngabolo Village authorities allocated. Thus, both, the appellant and the respondent gave strong evidence to establish ownership.

The tribunal found in favour of the respondent as it found her evidence heavier than that of the appellant. The tribunal based her decision on the evidence that the respondent tendered the customary right occupancy signed by the authorized officer and other officers as stipulated under section 25(2) of the **Village Land Act**, [Cap. 114 R.E. 2019]. The tribunal stated that the appellant had no document to the effect that the village authorities allocated to him the land in dispute. The tribunal found in favour of the respondent completely ignoring its findings in Land Application No. 10/2017 that the suit land was allocated to the appellant by the village authority of Ngabolo village. The tribunal did not analyze and consider the evidence on record showing that two different competent authorities allocated the disputed land to two different persons. It did not inquire whether it had justification to find one allocation justifiable without declaring the other allocation a nullity.

The tribunal was of the view that since the appellant did not tender document to show that the disputed land was allocated to him instead relied on a copy of the judgment his evidence was a mere statement. It concluded that it cannot buy a mere statement. He did not wish to rely on the judgment of the same tribunal as the disputed land was 100 acres while in the present

dispute the disputed land was only 10 acres. To say the least, I am not able to buy the tribunal's conclusion. Had the tribunal read its judgment it would have found that the tribunal in Land Application No. 10/2017 adjudicated on 10 acres stating categorically that land was allocated to the appellant by Ngabolo village authorities. The tribunal in Land Application No. 10/2017, held further that Ndareta village authorities took the land allocated to the appellant and re-allocated it to the respondent. Thus, the tribunal had no justification to dismiss the judgment of the same tribunal in Land Application No. 10/2017. I find it not established which village council between Ndaleta Village Council and Ngabolo Village Council had the right to manage the land in dispute as it is not established which village Council had the mandate to manage the disputed land. Section 8 of the Village Land Act, states-

"8.-(1) The village council shall, subject to the provisions of this Act, be responsible for the management of all village land."

I wish to remind the trial tribunal that section 35 of the **Law of Evidence Act**, [Cap. 6 R.E. 2022] mandates a court to make a reference to the evidence in the previous matter if the latter case is between the same parties of parties claiming under the same title as in the previous case. It states that-

35.-(1) Evidence given by a witness in judicial proceedings is relevant for the purpose of proving in subsequent judicial proceedings or in a later stage of the same judicial proceedings, the truth of the facts which it states in the following circumstances-

(a) N/A

(b) where, in the case of subsequent proceedings-

- (i) the proceedings are between the same parties or their representatives in interest; and*
- (ii) the adverse party in the first proceeding had the right and opportunity to cross-examine; and*
- (iii) the questions in issue were substantially the same in the prior as in the subsequent proceedings.*

The appellant's evidence showed that the land was allocated to him by Ngabolo Village tribunal and the tribunal found it reliable. It was entitled to find that there was evidence that the appellant tendered sufficient evidence. Thus, it was not justifiable to dismiss the appellant evidence without giving strong reason for doing so.

In the end, I find sense in the contention that the tribunal did not consider the appellant's evidence. I uphold the second ground of appeal.

Did the respondent prove her claim?

Lastly, the appellant complained that the tribunal did rely on the respondent's weak evidence to decide in her favour. The appellant's advocate submitted that the respondent tendered a receipt to show that the respondent paid for the disputed land. He argued that the receipt may have been fabricated.

The respondent opposed the submission that the receipt was fabricated. She submitted that she tendered minutes of village Authorities which allocated the disputed land and the receipt.

It is on record that the respondent's husband is an Agricultural Officer and he was at one time an acting Village Executive Officer although the tribunal recorded that he was a village council (sic). That fact alone does not prove that he must have fabricated the receipt. I am not able to buy the appellant's contention that the respondent's husband may have used his position to fabricate the receipt. It is trite law that the allegation of fraud in a civil case must be pleaded and proved specifically. See **Ratilal Gordhanbhai Patel v. Lalji Makanji [1957] E.A 314**, where the former Court of Appeal for East Africa stated thus-

"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

The Court of Appeal quoted with approval the stance former Court of Appeal for East Africa enunciated **Ratilal Gordhanbhai Patel v. Lalji Makanji** in **Omari Yusuph v. Rahma Ahmed Abdulkadr [1987] T.L.R 169** and in **City Coffee Ltd v. The Registered Trustee of Iloilo Coffee Group**, Civil Appeal No. 94 of 2018 (unreported), when faced with a similar situation, the Court stated thus-

*"....it is dear that regarding allegations of fraud in civil cases, the particulars of fraud, being serious allegation; must be specifically pleaded and **the burden of proof** thereof, although not that which*

*is required in criminal cases; of proving a case beyond reasonable doubt, **it is heavier than a balance of probabilities generally applied in civil cases.***

The appellant did not specifically plead *the particulars of fraud and prove them specifically to the standard of proof required.* Thus, the appellant's allegation that the respondent obtained the receipt fraudulent fails. I dismiss the third ground of appeal.

Eventually, I hold that the application was *res judicata*, **Dinadetha Andrew Chonde**, the respondent could not maintain an action against the appellant. I allow the appeal and dismiss the application before the tribunal for being *res judicata*. The appellant is awarded costs incurred to prosecute the appeal and to defend the application before the tribunal. The respondent may seek remedy in the proceedings in **Land Application 10 of 2017** before **Kiteto District Land and Housing Tribunal**.

It is ordered accordingly.

Dated at **Babati** this 24th day of May, 2023.



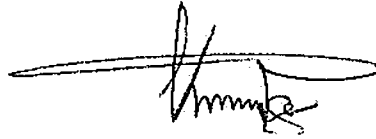
A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', written over a horizontal line.

J. R. Kahyoza

JUDGE

24/05/2023

Court: Judgment delivered in the absence of the parties but in the presence of Mr. TSolo Emmanuel for the respondent. Ms. Fatina (RMA) is present.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', with a long horizontal flourish extending to the left.

J. R. Kahyoza

JUDGE

24/05/2023