

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

AT MUSOMA

LAND APPEAL NO. 93 OF 2021

*(Arising from the Decision of the District Land and Housing Tribunal for Mara at
Musoma in Land Appeal No. 193 of 2020)*

BETWEEN

CHUBA MOSSI APPELLANT

Versus

LUCAS CHAMA RESPONDENT

JUDGMENT

A. A. MBAGWA, J.:

This is an appeal against the ruling of the District Land and Housing Tribunal for Mara at Musoma (Hon. Makombe). The appellant instituted a land case against the respondent contending that the respondent has encroached his land and removed the boundaries therein.

It appears the parties had previously a similar dispute around the same area which started from the Ward Tribunal up to the High Court. As such, the appellant, Chuba Mossi was very clear in the pleadings to the effect that the land in dispute in the present matter is different from the one in the previous case. At paragraph 7(a) of the application, the appellant stated;

'That the land in dispute was never a subject matter in the former proceedings'

Upon service, the respondent raised a notice of preliminary objection to the effect that the matter is *res judicata* contending that the same dispute was once conclusively determined by the Ward Tribunal for Natta in Land Case No. 19 of 2018, Land Appeal No. 173 of 2018 in the District Land and Housing Tribunal for Mara, and finally in Miscellaneous Land Appeal No. 9 of 2019 in the Court of the Resident Magistrate of Musoma with Extended Jurisdiction. Having heard the parties on the preliminary objection, the trial Chairman (Hon. Makombe) in his ruling dated 17th September, 2023 sustained the objection thereby striking out the case for being ***res judicata***.

Aggrieved with the ruling of the DLHT, the appellant appealed to this court and lodged a petition containing three grounds as follows;

- 1. That given the facts in the pleading, the Hon. Tribunal Chairman erred on point of law to find that the matter was res judicata.*
- 2. The alleged change of names, the appellant having conceded that it was inadvertence and not a deliberate move, the trial Chairman misdirected himself to bank on such a misnomer as a ground to make him find that the appellant was hiding something mischievously.*

3. That since a point of law has to be self-proof, and since in the case at hand there were opposing views in regard to which land and since that was to be proved by evidence, the trial Chairman erred on point of law to find and order that the principle of res judicata was operative and applicable in the circumstances of the case in issue.

When the matter was called on for hearing, the appellant was represented by Baraka Makowe, learned advocate whilst Maula Tweve, learned advocate appeared for the respondent.

Submitting in support of appeal, Mr. Makowe combined 1st and 3rd grounds and argued them conjointly. Mr. Makowe submitted that the principle of res judicata refers to a situation where the suit was once conclusively determined by the competent organ over same issue and between the same parties. He said whether the matter is res judicata or not is a question of evidence. He continued that no evidence was adduced before District Land and Housing Tribunal rather the matter was decided based on the pleadings.

The appellant's counsel further submitted that the pleadings were clear that the subject matter in present case is different from the previous cases. He referred to paragraph 6 (a) in particular (ii) and (iii) of the application (plaint) and submitted that the appellant clearly pleaded that the respondent is advancing to the land which was not in dispute in the previous case. He thus

opined that the matter at issue is substantially different though the parties are the same. It was the counsel's argument that considering the nature of preliminary objection and the averments in the pleadings, the trial Chairman needed evidence in order to competently determine whether the matter is *res judicata* or not. In the event, the appellant's counsel invited the court be inspired by his argument and find that where evidence is required, the matter cannot be appropriately disposed of as preliminary objection.

Regarding the 2nd ground, the appellant's counsel submitted that the appellant conceded that he re-arranged the names as they appear as Mossi Chuba instead of Chuba Mossi. He said that in the previous case, the names appeared as Chuba Mossi but when the matter came to appeal in the District Land and Housing Tribunal the names appeared as Mossi Chuba. The counsel explained that the re-arrangement of the appellant's names was out of inadvertence. In conclusion, the counsel referred this court to the case of **George Shambwe vs Tanzania Tiba Italian Petroleum Limited** 1996 TLR 20, and submitted that the conditions for *res judicata* are missing in the instant matter.

In fine, the counsel prayed the court to allow the appeal, set aside the decision of Tribunal and order the respondent to bear the costs.

In reply, Ms. Maula Tweve initially opposed the appeal. However, on being probed by the court, Ms. Maula Tweve made u-turn and supported the appeal. She conceded that the previous dispute which was decided by the Ward Tribunal for Natta concerned three acres which the respondent alleged that they were encroached by appellant. She said that the present matter is about different piece of land which is not part of three acres which were the subject matter in the previous case. She thus prayed the court to allow the appeal and order the DLHT to proceed with the case on merits and determine who is the rightful owner of the suit premises.

In rejoinder, Mr. Makowe, having considered the concession by the respondent's counsel, prayed the court to order each party to bear its own costs.

I have dispassionately considered the arguments by the parties. I also took trouble to read the proceedings and judgments of the previous case to wit, the Ward Tribunal for Natta in Land Case No. 19 of 2018, Land Appeal No. 173 of 2018 in the District Land and Housing Tribunal for Mara, and finally in Miscellaneous Land Appeal No. 9 of 2019 in the Court of the Resident Magistrate of Musoma with Extended Jurisdiction.

It is clear that the present parties had dispute over land at the same area. In the previous cases as indicated above, the respondent, Lucas Chuma successfully sued the appellant Chuba Mossi for trespassing into his piece of land of about three (3) acres. In the opposite, in this case it is the appellant, Chuba Mossi who is suing the respondent, Lucas Chuma for trespassing into his land. Moreso, at paragraph 7(a) of the application, appellant clearly pleaded that the disputed land in the present suit is different from the one in the previous case.

It is a trite law that a preliminary objection should be based on a pure point of law which does not require evidence for the court to dispose it.

In case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors** [1969] EA 696 it was held;

"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 the exercise of judicial discretion'.

Furthermore, in the case of **Ali Shabani & 48 others vs Tanzania Roads Agency (TANROADS) & Another**, Civil Appeal No. 261 of 2020, CAT at

Tanga, the Court of Appeal while deliberating on the criteria for a preliminary objection on point of law, held;

"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence."

From the above decisions, it is common cause that for a point to qualify as a preliminary point of objection it should be able of being disposed of based on the facts in the pleadings without necessarily requiring evidence. Thus, the question is whether in the circumstances of the case at hand it was possible to ascertain whether the matter is res judicata to Land Case No. 19 of 2018 in Ward Tribunal for Natta, Land Appeal No. 173 of 2018 in the District Land and Housing Tribunal for Mara, and finally in Miscellaneous Land Appeal No. 9 of 2019 in the Court of the Resident Magistrate of Musoma with Extended Jurisdiction without requiring further evidence.

Upon going through the pleadings particularly at paragraph 7(a) where the appellant expressly stated that the land in dispute was never a subject matter in the former proceedings, it necessarily follows that one would need evidence to find out whether the subject matter in the present suit is substantially the same in the previous case. It was not proper for the trial

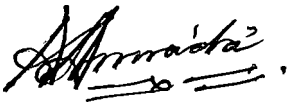
Chairman rule that the matter is *res judicata* in the presence of a clear averment that the subject matter is different from the previous case without further evidence. I therefore join hands with both counsel that, in the circumstances of the case, it was not convenient for the trial Chairman to rule that the matter is *res judicata* without hearing the evidence. Indeed, the objection lacked the qualities of being a preliminary objection worthy meaning.

All the above said, I find merits in this appeal and consequently allow it. The case file should be remitted to the trial District Land and Housing Tribunal for Mara to proceed from where it had reached before the ruling of 17th September, 2021. Each party should bear its own costs.

It is so ordered

The right of appeal is fully explained.




A.A. Mbagwa

JUDGE

08/06/2023