

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND APPEAL 59 OF 2022

(Arising from Application No. 33 of 2019 District Land and Housing Tribunal for Karagwe)

JOSEPH SEIKU MTABAZI.....APPELLANT

VERSUS

ALOYS KALIBA..... RESPONDENT

RULING

26th May and 26th June, 2023

BANZI, J.:

This is a ruling in respect of a Preliminary Objection on a point of law raised by Mr. Eliphazi Bengesi, learned counsel for the respondent to the effect that, Application No. 33 of 2019 at the District Land and Housing Tribunal for Karagwe ("the DLHT") is *res judicata* to Civil Case No. 8 of 2017 determined by Nyakasimbi Ward Tribunal.

Briefly, the records from both tribunals show that, in 2017 the respondent sued Anastazia Jeremiah over a piece of land located at Nyakasimbi village ("the suit land") claiming that she unlawfully took his land and gave it to the appellant, her son in law. The respondent contended that, after returning back from studies, he found a Post office in the suit land, but later he found the Post office surrounded by fence. When he interrogated the appellant on how he got the land, the appellant contended that he got

it from her father-in-law, Jeremiah Mtuta. As the father-in-law was already dead, the respondent tried to approach Anastazia Jeremiah who contended that the land was bought by her husband and he gave it to Jumbe Jeremiah and Savera Sekiko, the wife of the appellant. Reconciliation between the respondent and Anastazia bore no fruits, the respondent decided to sue her at Nyakasimbi Ward Tribunal. After a full trial, on 11/01/2018, the ward tribunal decided in favour of respondent. There was no appeal preferred by Anastazia against the decision of the ward tribunal.

Thereafter, the respondent filed Misc. Civil Application No. 13 of 2019 at the DLHT applying for execution of the decision of the ward tribunal. The DLHT allowed execution to be implemented. Upon being aware of that execution, the appellant through Application No. 33 of 2019, sued the respondent at the DLHT claiming that the land belongs to him contending to have bought it since 1992 from different people including his father-in-law. As far as the suit land is concerned, he claimed to get it from his father-in-law. After hearing the evidence, the DLHT decided in favour of the respondent on the reason that the appellant failed to prove ownership of the suit land.

Aggrieved with the decision of the DLHT, the appellant preferred the appeal before this court containing five grounds praying this court to allow the appeal and declare him the lawful owner of the suit land. However, Mr.

Bengesi raised the point of objection contending that Application No. 33 of 2019 at the DLHT was *res judicata* to Civil Case No. 8 of 2017 of Nyakasimbi Ward Tribunal.

At the hearing, Mr. Alli Chamani, learned counsel represented the appellant whereas the respondent had the legal services of Mr. Eliphazi Bengesi, learned counsel. Although for purpose of convenience, both preliminary objection and the appeal were argued jointly but this ruling will be focused only on the preliminary objection.

Mr. Bengesi in his submission argued that, at Nyakasimbi Ward Tribunal, the respondent sued Anastazia Jeremiah over the suit land and the ward tribunal decided in his favour and that decision was never appealed. However, when the respondent wanted to execute the decree granted by the ward tribunal, the appellant filed a fresh suit at the DLHT suing the respondent over that land. According to Mr. Bengesi, the decision of the ward tribunal is still in force. With that regard, the appellant ought to have set aside the said judgment before filing a fresh suit. However, since he did not do that, hence, a fresh suit filed at the DLHT and the proceedings thereafter, become *res judicata* to that of the ward tribunal. He supported his submission with the case of **Peniel Lotta v. Gabriel Tanaki and 2 Others** [2003] TLR 312.

In reply, Mr. Chamani stated that, the appellant who was not a party at the ward tribunal, his remedy was to file a fresh suit at the DLHT. He cited the case of **Rashid Kamulamba v. Christopher Kabika and Another**, Land Case Appeal No. 20 of 2010 HC- Bukoba (unreported). Also, he referred to the case of **The Registered Trustees of Chama cha Mapinduzi v. Mohamed Ibrahim Versi & Sons and Another**, Civil Appeal No. 16 of 2008 CAT at Zanzibar (unreported), and argued that, the fact that the property involved is one and the same does not necessarily render the cause of actions identical or convert the matters directly and substantially in issue in the two suits to be the same. He went further contending that the boundaries mentioned by the appellant at the ward tribunal are different from those mentioned by the respondent and the reliefs claimed are different. According to Mr. Chamani, there is no common interest between the appellant and his mother-in-law and the mother-in-law had never bequeathed the appellant the said land and it was neither a matrimonial property. In that regard, he insisted that the matter at hand does not fall under *res judicata*.

Having carefully considered the records of both tribunals, I find it pertinent to determine the preliminary objection which in my view is capable of disposing of the matter without touching the merit of the appeal. Thus,

the issue before me for determination is whether the preliminary objection has merit.

Section 9 of the Civil Procedure Code [Cap. 33 R.E. 2019] provides that:

"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 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."

Also, in the case of **Peniel Lotta v. Gabriel Tanaki and 2 Others** (*supra*) which was cited by Mr. Bengesi it was stated that:

"The doctrine of res judicata is provided for in section 9 of the Civil Procedure Code 1966. Its object is to bar multiplicity of suits and guarantee finality of litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit.

The scheme of section 9 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 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 heard and finally decided in the former suit."*

From the provisions of the law and the case cited, it is clear that even where the parties are not the same in the subsequent claim, but the subject matter is materially and substantively the same under the same interest, *res judicata* applies.

In the case at hand, it is clear that when the respondent was battling with Anastazia Jeremiah at the ward tribunal, the appellant being the son-in-law of Anastazia and being in contention as the occupier of the suit land after the same was given to him by Jeremiah Mtuta, his father-in-law, obviously, he was aware of what was transpiring thereat. Therefore, to protect his interest over the suit land, the proper way was to object the claim of the respondent or to be joined in that case so as to testify on how he got that suit land. After the decision of the ward tribunal, Anastazia and her son-in-law, the appellant who traces back his interest on the same suit land

stayed mute, which implies that they were satisfied with the decision of Nyakasimbi ward tribunal.

Furthermore, Mr. Chamani contended that the boundaries mentioned by the appellant are different from those mentioned at the ward tribunal and that the reliefs claimed are different. However, it is evident that, at the ward tribunal, the respondent was claiming the suit land which according to Anastazia, it belongs to her husband who gave it to the appellant. Although at the DLHT, the appellant claimed to have a large land including the land he bought from other persons, but as far as the suit land is concerned which is the centre of conflict between the appellant and the respondent, it is the same land which was the subject matter of the suit before the ward tribunal. In that regard, it is the considered view of this court that, the suit land between the appellant and the respondent is one and the same with what was in dispute at the ward tribunal between the respondent and Anastazia Jeremiah.

Lastly, Mr. Chamani contended that, the ward tribunal was not competent court for want of jurisdiction and hence, *res judicata* cannot be applied. He supported his submission by the case of **Edward Kubingwa v. Matrida A. Pima**, Civil Appeal No. 107 of 2018 CAT (unreported). It is undisputed that, for ward tribunal to be properly constituted in accordance with section 11 of the Land Disputes Courts Act [Cap. 216 R.E. 2019], it shall

consist of not less than four and not more than eight members. Unlike in the cited case of **Edward Kubingwa** where throughout the trial, the tribunal was presided over by three members, in the matter at hand, the composition of the ward tribunal which determined the first suit complied with the threshold of not less than four members and not more than eight members provided under section 11 of the Land Disputes Courts Act. Besides, if there is any irregularity concerning absence of woman member, the same can be saved by section 45 of the Land Disputes Courts Act because it did not occasion failure of justice. Thus, since the members were not less than four as required by law, it is the considered view of this court that, the ward tribunal was properly composed and hence it was a court of competent jurisdiction.

That being said, it is the finding of this court that, the suit land between the former suit before the ward tribunal and subsequent suit before the DLHT is materially and substantially the same. Second, although the parties are different but, the person who litigated and lost in the former suit is the wife of the person whom the appellant traced his interest over the same suit land; third, the parties herein are litigated under the same title within the same land; fourth, the tribunal which decided the former suit was competent to try the subsequent suit; and fifth the matter in issue in the former suit was heard and finally decided without any appeal or revision thereafter.

Therefore, with due respect to learned counsel for the appellant, the conditions mentioned in the case of **Peniel Lotta v. Gabriel Tanaki and 2 Others** (*supra*) co-existed and hence the suit before the DLHT was *res judicata*. Therefore, Application No. 33 of 2019 at DLHT was *res judicata* to Civil case No. 8 of 2017 of Nyakasimbi ward tribunal.

In that regard, I find the Objection raised with merit and it is hereby sustained. Whatever transpired before the DLHT is a nullity for being *res judicata*. Thus, I hereby invoke revisional powers under section 43 (1) (b) of the Land Disputes Courts Act and nullify the entire proceedings of the DLHT, quash the judgment and set aside the decree. Taking into consideration of the circumstances of the case, I make no order as to costs. It is so ordered.



I. K. BANZI
JUDGE
26/06/2023

Delivered this 26th June, 2023 in the presence of the appellant and Mr. Eliphazi Bengesi, learned counsel for the appellant.



I. K. BANZI
JUDGE
26/06/2023