IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 68 OF 2022

(Arising from Land Application No. 64 of 2022, of the District Land and Housing Tribunal for Moshi at Moshi)

NANCY MANASE KIDIN (As Administrator of the estate Of the late Manase Kidini) **..... 1ST APPELLANT**

NANCY MANASE KIDIN ..... 2ND APPELLANT

VERSUS

MBORANDUMI SILAA ..... 1ST RESPONDENT

SERGI MRAMBA ..... 2ND RESPONDENT

JUDGMENT

11/07/2023 & 27/07/2023

SIMFUKWE, J.

Before the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal) the appellants instituted a land dispute against the respondents herein claiming ownership against the respondents herein, of the suit land located at Ormelili village within Hai district in Kilimanjaro region.

Upon filing their Written Statement of Defence, the respondents through their learned advocate raised two preliminary objections to wit: that the matter was res judicata and that the matter was time barred. The two objections were sustained and the trial Chairman dismissed the application.

Aggrieved, the appellants herein appealed to this court on the following grounds:

1. *That, the learned trial Chairperson erred in law and fact by failing to properly apprehend the facts of the case hence reaching a wrong conclusion and dismissed the case at preliminary stage.*
2. *That the learned trial Chairperson erred in law and fact by giving a decision in favor of the Respondent while the claim by the Respondent through their joint defence if any was time barred.*

3. *That, the trial Chairperson erred in law and fact by finding that the Application was time barred despite the fact that the applicants have been in continuous and adverse occupation of the suit land for more than fifteen years.*
4. *That, the trial chairperson erred in law by pronouncing a decision without aid of assessors.*
5. *That the trial chairperson erred in law by recording proceedings and judgment in Kiswahili contrary to the law.*

During the hearing of this appeal which was by way of written submissions, the appellants were represented by Mr. Elikunda Kipoko, learned advocate while the respondents were represented by Mr. Willence Shayo, also learned advocate.

Supporting the appeal, Mr, Kipoko condemned the trial tribunal for deciding the matter which required evidence at the preliminary stage contrary to the law. He referred to the case of **Sino Logistics Co. Ltd vs Freco Equipment, Commercial Case No. 57 of 2020** (HC) to support his argument. He argued further that if the trial Chairman properly apprehended the facts of the case, he would not have found the matter to be time barred as well as being res judicata.

Supporting the ground that the matter was not time barred, Mr. Kipoko submitted that as per paragraph 6(a) of Application No. 64 of 2022 the cause of action arose in the year 2022.That, the applicant pleaded that they owned the suit land from 2008 and they were uninterrupted up to 2022 when the respondent showed up and started their claim over the suit land. On that basis, the learned advocate was of the view that the trial chairman would have ordered the case to go to full trial.

Submitting on the allegations that the matter was not res judicata, Mr. Kipoko submitted that the case which was decided in 2005 involved different cause of action, different time frame and different parties. He elaborated that the previous case arose in 2004 and it concerned purchase of the suit land while the cause of action in the present matter is trespass whereas the appellants are claiming ownership by long occupation from 2008 to 2022. Reference was made to the case of **Mussa Constantino Ndwangila vs Rajabu Athumani and 8 Others, Land Appeal No. 80 of 2017** (HC) to support his arguments. It was insisted that once the names of the parties are different then the doctrine of *res judicata* will not operate. He explained that in the previous case the parties were Nehemia Kidini vs Morandumi Silahaa & Elimeleki Silaa while in the present matter the parties are Nancy Manase Kidin and Sergi Mramba. The learned

counsel recited the case of **Mussa Constantino Ndwangila** to buttress the above position.

Also, the learned counsel referred to the case of **Registered Trustees of Chama cha Mapinduzi vs Mohamed Ibrahi Versi and Sons and Another, Civil Appeal No. 16 of 2008** in which the Court of Appeal held inter alia that where there are different parties then the doctrine of res judicata cannot not apply.

On the fourth ground of appeal, Mr. Kipoko faulted the trial Chairman for pronouncing decision without aid of assessors contrary to **Regulation 19(2) of GN No. 174 of 2003** which requires the Chairman before composing judgment, to require the assessors to give their opinions in writing and such opinions to be read to the parties before pronouncing the judgment.

Lastly, on the 5th ground of appeal Mr. Kipoko faulted the trial Chairman for recording proceedings and judgment in Kiswahili contrary to **Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules 2022 GN 66 of 2022** which requires all the proceedings to be recorded in Kiswahili except where the law governing the matter subject of litigation and the practice and procedure thereto are not available in Kiswahili language. He submitted

that the law governing this Application and the practice and procedure thereto are not available in Kiswahili hence the trial tribunal erred to deliver the judgment in Kiswahili.

Moreover, the learned advocate submitted that the phrase *'Baada ya kusema hayo, mapingamizi ya awali ya kisheria yaliyowakilishwa na wajibu maombi yanakubaliwa na hivyo basi maombi haya yanatupiliwa mbali kwa gharama'* is against the law and has occasioned miscarriage of justice as the appellants failed to understand the legal meaning of the decision whether the application was dismissed or struck out and they are left as to what steps to be taken. He opined that since the word dismissed and struck out has two different meanings and attract different consequences, then the language used is unlawful which creates confusion and miscarriage of justice.

In the end, Mr. Kipoko prayed the court allow the appeal with costs. Also, he prayed the court to order the trial tribunal to hear the case on merit before a different chairperson with different set of assessors.

In reply, Mr. Shayo for the respondents argued the 1st and 3rd grounds of appeal together. It was submitted that the preliminary objections raised were on points of law whose facts were very clear that the Application was res judicata with Application No. 25 of 2005 before Siha Kati Ward

Tribunal and Appeal No. 25 of 2005 of the District Land and Housing Tribunal and that the matter was time barred.

Mr. Shayo notified this court that from the facts of the case and submissions, the following facts were and are not disputed:

First, that the applicant (the appellant herein) is the wife and administratrix of the estate of the late Manase Kidin.

Second, that the said Manase Kidin litigated with the first respondent on the same land vide Application No. 25 of 2005 before the District Land and Housing Tribunal for Moshi.

Third, that the former dispute between the late Manase Kidin and the first Respondent concerned ownership of the land which is currently the disputed land (cause of action was ownership of the same land).

Fourth; that the second respondent herein derives his rights from the 1st respondent having purchased the same from him (1st respondent).

Fifth, that the said dispute was conclusively determined in favour of the 1st respondent.

Mr. Shayo continued to narrate that it is not disputed that the said MANASE KIDIN litigated over the suit land for his interest and his family

against the 1st respondent and the 1st respondent litigated and sold the suit land to the 2nd respondent herein.

Submitting on the issue of res judicata, Mr. Shayo explained that the concept res judicata is a pure point of law which from the facts of the case it is clearly depicted. He cited and quoted **section 9 of the Civil Procedure Code Cap 33 R.E 2019** particularly Explanation VI. He continued to state that the basic object of this provision is to prevent the courts with jurisdiction from simultaneously entertaining and adjudicating two parallel litigations in respect of the same issue, cause of action, same subject matter and the reliefs prayed for. That, it aims to prevent the multiplicity of frivolous litigations and to avert inconvenience to the parties and give effect to this rule of Res judicata.

Mr. Shayo contended further that there is no doubt that the appellant herein is the Adminstratrix of the Estates and the wife of the late Manase Nehemiah Kidin who was the Applicant in the previous Application No. 25 of 2005 before Siha Kati Ward Tribunal and later in the Appeal before the District Land and Housing Tribunal for Moshi. The 1st respondent in this Application was also the Respondent in the previous Application and the 2nd respondent in this Application derived his rights over the land in dispute from the 1st Respondent herein (under the same title.)

It was asserted that, the case of **Registered Trustees of Chama cha Mapinduzi** cited by the appellant herein is distinguishable from the present case as in the present case in law the parties are the same.

Mr. Shayo prayed this court to serve the purpose of the rule of res judicata. He referred to the case of **PENIEL LOTTA V. GABRIEL TANAKI AND OTHERS [2003] TLR 312**, which held that:

> *"The doctrine of res judicata is provided for under section 9 of the Civil Procedure Code 1966 R.E 2019. Its object is to bar multiplicity of suits and guarantee finality to 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."*

Further reference was made to the case of **ZUBERI PAUL MSANGI vs MARY MACHUI, CIVIL APPEAL NO. 316 OF 2019** at pages 2, 6, and 10 of the Judgment where the Court of Appeal emphasized on the issue of Res judicata. At page 6 it was held that:

> *"Since in this matter the plaintiff is claiming the suit property against the same defendant whose title on the suit property is traceable from the said Caroline, this suit is res judicata."*

At page 10 it was further stated that:

> *"Being the administrator of the estate of his deceased father, the appellant could not be heard to re-open the same suit which had already been heard and conclusively determined by the Resident Magistrate's Court".*

Responding to the argument that in the subsequent Application the appellant claimed for long term occupation of the suit land, Mr. Shayo argued that it is a mere trick to depart from the truth and illegal renewal of cause of action. He explained that the cause of action is ownership of the suit land which is the same cause of action in the previous application. That, since in the previous litigations the purchase by the Appellants were found to be a nullity and they were not declared the owners of the suit land, the Appellants never occupied the land again. The learned advocate suggested that admitting the appellants' allegation on long occupation after the previous court's decision, will wrongly open a room for judgment debtors on land cases to reopen the suits alleging that even after the decision they continued to use the suit land and claiming that it is another cause of action while previously the owner was declared by the court.

Mr. Shayo referred the court to paragraph 6 (a) of the Application and argued that since the cause of action arose from 2005 then the matter is

time barred since the dispute was referred to the tribunal after almost 17 years contrary to **Part I Item 22 of the Schedule to the Law of Limitation Act** which requires suits for recovery of land to be instituted within twelve years from the date of accrual of Right of Action. That, according to **Section 3(1)** of the same Act the effect thereon is to dismiss the case as was rightly done by the trial chairman of the Tribunal.

Responding to the fourth ground which concerns pronouncing judgment without the aid of assessors, Mr. Shayo submitted that as per **Regulation 19(2) of the Land Disputes (The District Land and Housing Tribunal) Regulations** not in every decision the Chairman is required to be aided by assessors in making judgment. He was of the opinion that since on preliminary objections we obtain rulings and not judgment, then assessors were not required to opine.

Countering the fifth ground of appeal on the language used by the Trial Chairman, Mr. Shayo submitted that paragraph 66 of the Schedule to **GN No. 66 of 2022** provides that the proceedings should be recorded in Kiswahili except where the practice and procedures thereto are not available in Kiswahili. That, the practice of conducting land disputes proceedings in Kiswahili language holds water for years now hence the

practice is available in Kiswahili language hence the same was very correct to be written in Kiswahili.

Mr. Shayo was of the opinion that the same has not occasioned any injustice. Thus, the allegations that the appellant did not understand the meaning is an afterthought and misleading as the appellant is represented by the learned advocate. That, if the appellant did not understand the decision why then she preferred this appeal and developed those grounds and submissions. It was insisted that the decision was very proper, well-reasoned and understood by the appellant to the extent of opting this appeal.

The learned counsel referred the court to **section 45 of the Land Disputes Courts Act Cap 216 R.E 2019** which provides that:

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."*

In conclusion, Mr. Shayo urged the court to dismiss this appeal with costs.

In rejoinder, Mr. Kipoko distinguished the case of **Zuberi Paul Msangi** (supra) for the following reasons: First, he explained that the parties in the cited case were the same while in the present case the parties are different in that the 2nd appellant and the 2nd respondent were not parties in the previous case; ***Second,*** that the 2nd appellant has never litigated either against the 1st or 2nd respondent in any case. That, the parties are different given the fact that the 2nd appellant is suing in her capacity. He referred to the case of **Mussa Constantino Ndwangila** (supra) to support this point. ***Third,*** the cause of action is different in the previous case, as the dispute was over the purchase of the suit land which occurred more than 22 years ago while in the present case the 2nd appellant is claiming ownership after long and interrupted use of the suit land for more than 17 years as such the cause of action accrued on the year 2022. ***Fourth,*** lapse of more than twenty years of occupation of the suit land by the appellants gave rise to new cause of action different from that of 2005. He recited the case of **Mussa Constantino Ndwangila** (supra) to such effect.

Mr. Kipoko suggested that even if the parties were exactly the same still the aspect of time variance on accrual of cause of action which constitute

a new different cause of action will eliminate the operation of the doctrine of res judicata. He added that the facts at hand are different from the facts in the cited case of **Zuberi Paul Msangi** (supra) since in the present case the appellant has been in actual possession of the suit land for more than 22 years without any intervention by the 1st respondent who was in the previous suit.

Having gone through the grounds of appeal, submissions of both parties and the proceedings of the trial tribunal, I am of settled opinion that the appellants' grievances will be tackled by the following issues:

1. *Whether there were violations of the law in handling the application before the trial tribunal?*
2. *Whether the application before the trial Tribunal was res judicata?*
3. *Whether the application before the trial Tribunal was instituted out of time?*

The first issue on whether the trial Chairman violated the law in handling the preliminary Objection will discuss and resolve the 1st, 4th and 5th grounds of appeal. The rest of the issues will cover the other two remaining grounds of appeal.

On the 4th ground of appeal, Mr. Kipoko condemned the trial Chairman for pronouncing a decision without the aid of assessors. To the contrary, Mr.

Shayo argued that what was before the trial tribunal was a preliminary objection on point of law which required no opinion of assessors.

I am aware with **section 23(1) and (2) of the Land Disputes Courts Act** (supra) which requires the Chairman to seat with two assessors who shall be required to give out their opinions. Also, **regulation 19(1) and (2) of GN No. 174/2003** requires a chairperson to require each assessor present at the conclusion of the trial to give his/her opinion in writing.

Much as I am aware with the above provisions, I wish to differ with Mr. Kipoko's argument that the Chairman should hear the preliminary objection with the aid of assessors. As it is known a preliminary objection is based on pure point of law and the assessors have no knowledge on the point of the law raised. I am of considered opinion that the above cited provisions should be read together with **regulation 22 of the Regulations** which provides for powers of the Chairperson as follows:

> "*The chairman shall have powers to determine;*
>
> *a. A preliminary objection based on points of law*
>
> *b. …..*
>
> c. *…..″*

The plain meaning of the above provision is that the powers to determine preliminary objection as the case at hand is exclusively vested to the Chairman. This court in the case of **Fredrick Rwemanyira vs Joseph Rwegoshora (Land Case Appeal No. 13 of 2021) [2022] TZHC 2962 (12 April 2022)** [Tanzlii] at page 12 to 13 my learned brother Ngigwana J when he came across with the same situation as in this matter had this to say:

> *"In that respect I do not agree with Mr. Mutasingwa that the Chairman erred in law when sat and entertained the objections on points of law without the involvement of assessors because assessors are judges of the facts and not of law since they are not legal experts. See* ***Batholomeo Paulo Chiza versus Essau William Ndize and 3 others, Land Appeal No. 216 of 2017 HC-Dsm*** *(Unreported). The assessors' function in land matters is a bit like advisory jury, providing an opinion to the Chairman about their view of the evidence and not law. The presence of assessors during the trial, was not meant to increase the number of members but to ensure participatory decision-making process in land matters which seem to touch the*

community. The requirement is also meant, to ensure that justice process involves the community where the dispute arose, assist the chairman in reaching a judicious decision. See ***Finca Microfinance Bank versus Julietha Zacharia and another, Land Appeal No. 124 of 2020****. If at the end of the proceeding, the assessor will have no role to give his/her opinion, his/her presence in the proceeding is immaterial, that is why, as already stated, circumstances under which the Chairman should sit without assessors have been expressly stipulated under Regulation 22 of G.N No. 174 of 2003, and not otherwise and should be considered as an exception to the general rule."* [The underlined words are my emphasis].

Turning to the 5th ground of appeal which concerns the use of Kiswahili, it was Mr. Kipoko's argument that the Chairman contravened **Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules 2022 GN 66 OF 2022**. On the other hand, the learned advocate for the respondents had different opinion. He stated that **paragraph g** of the Rules provides for circumstances under which the proceedings should be in English.

With due respect to Mr. Kipoko, the introduction of **GN No. 66 of 2022** is to promote the use of Kiswahili and to make better understanding of the whole process of the court to the lay persons as most of them understand Kiswahili. The said law provides for circumstances and conditions for the use of English language. The law even requires the interpretation to Kiswahili language where the party or his representative does not understand English. Thus, as rightly submitted by Mr. Shayo under the Schedule of the said law, this application is not among the matters which should strictly be in English.

I have noted Mr. Kipoko's grievance that the said ruling is confusing as it is not known whether the matter was dismissed or struck out. Again, with due respect to the learned advocate, ***'Kesi kutupiliwa mbali'*** means the case has been dismissed. See (https://www.google.com/search?q=case+dismissed+meaning+in+kiswahili).

Be as it may, as suggested by Mr. Shayo, under **section 45 of the Land Disputes Courts Act** (supra) the decision of the trial tribunal cannot be altered on that basis since the appellant was not prejudiced.

On the issue as to whether the matter was res judicata or not, I am grateful and support the authorities cited by learned counsels which

discussed the concept of res judicata. The principle apart from being envisaged under **section 9 of the Civil Procedure Code**, the court in numerous decisions has expounded the said concept as cited by the learned counsels. For instance, the Court of Appeal has discussed in details the principle of res judicata in the case of **Badugu Ginning Co. Ltd vs CRDB Bank Plc & Others (Civil Appeal No. 65 of 2019) [2021] TZCA 158 (3 May 2021) [Tanzlii]**

Turning to the matter at hand, it is undisputed fact that the 2nd appellant was the wife of the late Manase Kidin who was the applicant in Application No. 17 of 2005 and later Appeal No. 25 of 2005. Thus, the appellant herein in her application was claiming as the wife and administratrix of the estate of his late husband Manase Kidin whose matter was determined in the previous suit.

The learned counsel for the appellant, suggested that the parties in the previous matter were different from the parties in the present matter.

I have carefully examined the parties in the applications with the third eye. With due respect to Mr. Kipoko, the alleged new parties in this case are Nancy Manase Kidin and Sergi Mramba. Though their names seem to be new in the present matter, I am of considered opinion that they are privies to the previous parties and they are claiming under the same title as

explained under **section 9 of CPC**. That is, the 2nd respondent bought the disputed land from the 1st respondent and for that reason, he cannot be termed as new party as he is privy to the 1st respondent. This was also observed in the case of **Badugu Ginning Co. Ltd vs CRDB Bank Plc & Others** (supra) at page 24 where the Court of Appeal held that:

> *"…the 3rd respondent is privy due to the fact that she bought the disputed property and hence, parties were the same."*

As far as the 2st appellant is concerned, I am of considered opinion that she is a privy due to the fact that she is claiming as a wife as well as the administratrix of her late husband as she explained herself under **paragraph 6(a)** of her Application that they purchased the suit land during the subsistence of their marriage. Therefore, the matter is *res judicata* since the land in dispute has been determined to its finality on part of the appellant's late husband in Application No. 25 of 2005 and in Appeal No. 25 of 2005. Entertaining this appeal and ignoring the previous decisions in the said suit will be like making the previous decisions useless and meaningless and the disputed land might have two decisions in respect of these parties which may attract more misunderstandings in the society.

Mr. Kipoko tried to submit that the subject matter is different and that the aspect of time variance as to when the cause of action accrued constitute a new different cause of action which will eliminate the operation of the doctrine of res judicata. With due respect to Mr. Kipoko regardless of the time which has lapsed, so long as the matter has been determined to its finality, the matter is res judicata. As rightly submitted by Mr. Shayo for the respondents admitting the appellant's allegation on long occupation after the previous court's decision, will open pandora box for judgment debtors to re-institute new suits on allegation that it is another cause of action since after the decision they continued to use the suit land.

Moreover, Mr. Kipoko submitted that the cause of action is different. That, in the previous matter the cause of action concerned purchase of the disputed property while in the present matter the cause of action is claims of ownership. Without further ado, I am of settled mind that the cause of action is one and the same and I will give reasons. First, annexure SM2 which was attached under paragraph 5 of the Written Statement of Defence, shows that the late Manase Kidini claimed ownership of the disputed land on the allegations that he bought the said land from one Ernest F. Silaa who is the relative of Mborandumi Silaa (1st respondent herein). That, the Ward Tribunal of Siha Kati found that the said sale was

illegal since Ernest F. Silaa did not obtain consent from his relatives. The 1st respondent was ordered to pay Manase Kidin (the husband of the 2nd appellant) Tshs 300,000/-. From these facts, it goes without saying that the issue of ownership has been determined to its finality and the appellant (the wife of Manase Kidin) cannot claim ownership over the same subject matter. Thus, the matter was res judicata as rightly ruled by the trial Tribunal.

Having resolved the issue of res judicata as such, then I find no reasons of discussing the ground on whether the matter was time barred or not.

Lastly, on the first ground of appeal, Mr. Kipoko was of the view that the suit should not have been dismissed at the preliminary stage since it required evidence to support the same. Mr. Shayo disputed this ground that the same was based on pure point of law which required no evidence to be determined.

I agree that a preliminary objection must be pure point of law as rightly submitted by Mr. Kipoko. Before the trial Tribunal, the respondents raised two preliminary objections to the effect that the matter was res judicata and that the matter was time barred. From the face of it, these are pure points of law. As discussed on the issue of res judicata, no evidence is required to substantiate the said preliminary objections since the facts

from the pleadings and its annexures are very clear and sufficed to dispose of the matter.

Basing on the above findings, I find no reason to fault the trial tribunal's decision. Thus, this appeal has no merits and I proceed to dismiss it with costs.

It is so ordered.

Dated and delivered at Moshi this 27th day of July 2023.

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

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

27/07/2023