

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA**

LAND CASE NO. 10 OF 2023

SAMWEL NCHAMA 1ST PLAINTIFF
WEREMA NASHON GIBAYI 2ND PLAINTIFF
GIBAYI JACOB CHACHA..... 3RD PLAINTIFF
MATINDE CHACHA WANTAHE..... 4TH PLAINTIFF
MWITA NYAKINA..... 5TH PLAINTIFF
BHOKE MARWA BWANA..... 6TH PLAINTIFF

VERSUS

ISACK JOSEPH GIMENO..... 1ST DEFENDANT
(Administrator of Estate of the Late Samwel Gimeno)
NYANSINCHA VILLAGE COUNCIL 2ND DEFENDANT
TARIME DISTRICT COUNCIL 3RD DEFENDANT
ASSISTANT COMMISSIONER FOR LAND 4TH DEFENDANT
REGISTRAR OF TITLES 5TH DEFENDANT
THE ATTORNEY GENERAL..... 6TH DEFENDANT

RULING

28 August and 4th September, 2023

M. L. KOMBA, J.:

Plaintiffs herein are jointly suing defendants for the ownership of land situated at Nyansincha Village in Nyansincha Ward found in Tarime District within Mara region. That the certificate of title in respect of Farm No. 29, L. O 132946 located at Nyansincha village in Nyansincha Ward was unlawfully obtained thus plaintiffs prayed for judgment and decree against defendants as follows;

- a) Declaration that the plaintiffs are the lawful owners of a suit land.*
- b) A declaration that certificate of Title in respect of Farm No. 29, L. O No. 132946 located at Nyansincha Village, Nyansincha Ward, Tarime District in Mara Region was unlawfully obtained.*
- c) This honorable court be pleased to nullify certificate of Title in respect of Farm No. 29, L. O No. 132946 located at Nyansincha Village, Nyansincha Ward, Tarime District in Mara Region*
- d) Permanent injunction be issued against the 1st defendant from not interfering the plaintiffs herein to the peaceful enjoyment of the suit land.*
- e) Defendants herein jointly and severally be condemned to bear costs of this suit.*
- f) Any other relief(s) as this honorable court may deem fit and just to grant.*

On other hand the 1st defendant denied the allegation and prayed this court to dismiss the suit with costs. Moreover, in his WSD he raised a

Preliminary Objection on point of law which according to him render the plaintiff to be incompetent and ought to be dismissed on the following grounds;

- 1. That the plaintiff offends section 8 of the Civil Procedure Code, Cap 33.*
- 2. That the plaintiff offends section 9 of the Civil Procedure Code, Cap 33.*
- 3. The court is not clothed with jurisdiction to hear or entertain the suit at hand as it is time barred.*

As cardinal rule, Preliminary Objection once raised need to be determined, moreover, I find the issue of jurisdiction of this court is of paramount before I took further steps. **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, CAT at Mwanza.

When the suit was placed for hearing plaintiffs enjoyed the legal service of Mr. Edson Philipo while 1st defendant hired the legal service of Mr. Onyango Otieno, both being Advocates. Mr. Stewart Kamugisha and Abdalah Makulo, both State Attorneys was represented the 2nd, 3rd, 4th, 5th and 6th defendants.

It was Mr. Otieno who started to address this court on Preliminary Objection raised. He submitted that 1st defendant and 1st plaintiff has a

matter before District Land and Housing Tribunal of Tarime (the DLHT) it is registered as Land Application No. 27 of 2021 and was instituted 21/8/2021. The 1st defendant is the applicant and the 1st plaintiff is respondent the same has been annexed in WSD as an annexure. He said the 1st plaintiff has filed WSD to that effect and the matter is pending in that Tribunal and therefore he argue this matter is res sub judice.

Elaborating about res sub judice, Mr. Onyango submitted that the two courts are competent to issue reliefs and orders over plaintiffs and defendants who claim over the same title. The registered farm No. 29 with title No. 6527 was annexed to WSD.

In respect of the second limb of the Objection, Mr. Otieno submitted that the plaint offends S. 9 of the CPC that is res judicata as the same parties or any of them has dispute. In the case at hand, he elaborated that the 5th and 6th plaintiffs had Land Application No. 01 of 2007 in the DLHT Tarime and later on Land Civil Appeal No. 9 of 2009 in the High Court Mwanza. The 4th respondent in application No.01 of 2007 is the 5th plaintiff and the 6th plaintiff her husband had an issue with Samwel Gimeno who is now deceased and his estate is administered by the 1st defendant. To boost his argument Mr. Otieno cited the case of **Ambrose K. V. Okode vs. M/S**

Tanzania Telecom Ltd (TTCL) Revision No. 210 of 2020 Labour Revision at Dar es salaam at page 7 and 8 where it refers the case of **Paniellotta vs. Gabriel Tanaki** and others [2003] TLR 312 where five criteria for the doctrine of res judicata has been listed. In the case at hand the 5th and 6th plaintiffs were litigants in application No. 01 of 2007 who were claiming for ownership, he said the subject matter is the same farm No. 29 and the matter was determined by the court of competent jurisdiction.

Submitting on the last limb of PO is that the case is time barred as that time limitation for land case is 12 years. Mr. Onyango submitted that in the plaint there is a title (Hati) of farm No. 29 which was issued on 1992. He said plaintiffs had knowledge of that title and in 2023 the matter and title has been forward to this court for redress. He found this to be misuse of court as it is more than 30 years since plaintiffs had knowledge. Mr. Onyango maintain that parties has a matter which is res sub judice as the matter is pending at Tarime DLHT and the matter is res judicata as parties had already solved their issues before a court of competent jurisdiction. Basing on that, Mr. Onyango prayed the suit be dismissed with costs.

In counter attacking the PO on the issue of time bared, Mr. Philipo submitted that the plaintiffs explained cause of action arose in year 2021

as before that, they were used to enjoy the land. He said another point is the issue need evidence on when the cause of action arose.

In respect of the issue of res sub judice he submitted that the case at hand has 6 plaintiffs and 6 defendants among them is the Government Institutions. He said parties are different and cause of action is different. The rest of defendants cannot be sued in lower courts so there is no suit in lower court as Attorney General cannot be sued in lower court. About res judicata Mr. Philip urge that S. 9 of the CPC directs judgment should be delivered over the same parties. The cited case of the High Court of **Ambrose Okode** directs that parties must be the same. There is no suit which involve the Commissioner for Land neither the Attorney General. He prayed this court to hear parties on merit so that to know the truth and prayed the PO to be overruled with costs.

During rejoinder Mr. Otieno insisted that in Land Application no. 27 of 2021 before DLHT Tarime the parties are the same and the case is in progress and the option available is to be stayed because if the two courts will issue different verdict it will create chaos as the 5th and 6th parties claim on the same tittle and therefore res judicata.

I am called upon to determine if the PO has merit.

To start with I must state out that for any preliminary objection to be sustained by the Court there must be true and pure points of law predicated on undisputed facts. As to what amount to true preliminary objection, the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v. Wend End Distributors Ltd and another** [1969] EA at page 100 Law J. A has this to state:

'So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as preliminary point of may dispose of the suit Examples are an objection as to the jurisdiction of the Court, or a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration'.

The Preliminary objection has been based under the CPC and find prudent to recite the relevant provision of the CPC as;

*Section 8. No court shall proceed with the trial of any suit in which the **matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or***

any other court in Tanzania having jurisdiction to grant the relief claimed.

Section 9. 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.

Starting with the point that the matter is res sub judice, Mr. Otieno submitted that 1st plaintiff and the 1st defendant has a matter in the Tribunal which is Land Application No. 27 of 2021, the suit is about farm No. 29 and the WSD has been filed. That means the suit is pending for hearing. Plaintiffs did not dispute this fact as they did not file reply to WSD. Reading words in section 8 of the CPC, the farm No. 29 is the same matter which is in dispute in both two suits and one of the party claims rights. For res sub judice to exist not necessarily both parties to be in both suits, it is enough for one party to be in suit so far as the subject matter is the same. I find 1st plaintiff and 1st defendant has a matter in DLHT Tarime over the farm No. 29 and therefore this court cannot entertain this suit at this stage.

For the res judicata, as elaborated section 9 of the CPC, the matter in issue here is title of farm No. 29, the 1st defendant had an issue with the 5th plaintiff at Tarime District Land and Housing Tribunal via application No. 01 of 2007 which was determined on 15th February, 2008 in favour of the 1st defendant. The decision attracted Land Civil Appeals No. 9 of 2008 and No. 2 of 2011 which was decided in 20 May, 2011 the appeal was dismissed. The two, tribunal and court were competent to determine the matter and it was determined to finality. The subject matter be the Farm No. 29 and the fact that 1st defendant and 5th plaintiff was involved in both cases, bearing in mind the wordings of section 9 that **'any of them claim litigating under the same title'** I find my hands are tied up. This court lacks jurisdiction to entertain the matter which was already determined by court of competent jurisdiction.

The two preliminary point of objection as analyzed are meritorious enough to dispose of the suit, this court will not entertain a suit which was already determined by a court of competent jurisdiction. The PO has merit and is hereby sustained. The suit is hereby dismissed with costs.

It is so ordered.

Right of Appeal explained.



NK
M. L. KOMBA

Judge

04th September, 2023

Ruling delivered in chamber before 2nd and 4th Plaintiffs who were represented by Mr. Edson Philipo and before the 1st defendant who appeared in person and 2 3 4 5 and 6th defendants were represented by Mr. Anesius Kamugisha and Abdalah Makulo State Attorneys.

NK
M. L. KOMBA

Judge

04th September, 2023