

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

LAND APPEAL NO. 61 OF 2022

ZAINABU MPINGAAPPELLANT

VERSUS

ALLY ALLY LIHETA RESPONDENT

JUDGEMENT

Hearing date on: 24/8/2023

Judgement date on: 30/8/2023

NGWEMBE, J:

The appellant Zainabu Mpinga is in this court, trying to challenge the decision of the district land and housing tribunal delivered by R.W. Mmbando on 12 May, 2022. The subject matter of the dispute is related to two disputing pieces of land which were surveyed and have certificate of ownership (Hati Miliki) No. 038ULG 38541 of 4.197 acres and another certificate (Hati Miliki) No. 038ULG38539 of 1.328 acres of land. Each one bears the true owner to be Ally Ally Liheta. Both pieces of land are located at Mbutu Hamlet in Ketaketa Village, Ketaketa Ward within Ulanga district in Morogoro region. The two certificates of ownership were issued to the respondent on 28th December, 2018.

According to the available records, the respondent claimed to own those two farms since 1960s used to cultivate rice, maize and other crops. In year 2018, he surveyed the suit land and was offered

certificate of ownership as referred above. However, on April, 2021 the appellant trespassed to the suit land, which triggered the respondent to complain to the village authority and later to police, but was advised to lodge his complaint to the district land and housing tribunal for Ulanga. As a result, the tribunal found the appellant unlawfully trespassed to the suit land without any colour of right. Consequently, the tribunal declared the respondent as rightful owner of the suit land.

Being aggrieved with such decision, the appellant under assistance of learned advocate Magreth John Simbi appeared in this court armed with three grounds of appeal namely: -

- (1) The trial tribunal erred in law and fact to hear and decide the matter contrary to the law;*
- (2) The chairman misdirected himself in law and in fact for failure to analyze and settle the relevant issues of the dispute between the appellant and respondent; and*
- (3) The tribunal erred in law and in fact for failing to consider the weight of the appellant's case as against that of the respondent in reaching its decision.*

On the hearing date, the appellant through Ms. Magreth John Simbi, argued all grounds by narrating the historical background of the dispute. However, she began by raising a point of law that the matter before the district land tribunal was res judicata. Justified her argument by referring this court to the land case No. 93 of 2022 which was before judge Chaba, whose judgement was delivered on 6th December, 2022. In the case before, Chaba J, the respondent was called Ayub Liheta while in this case is called Ally Ally Liheta though both names refer to

one and the same person. Added that the subject land in dispute is the same land and parties were the same. Therefore, this matter before, District land tribunal was res judicata for same was already adjudicated and was appealed to this court before Judge Chaba. Justified her argument by referring to the case of **Registered Trustees of Chama cha Mapinduzi Vs. Mohamed Ibrahim Versi & Sons, Civil appeal No. 16 of 2008.**

In arguing grounds 2 & 3 jointly, submitted that the evidence adduced during trial indicated that the appellant used the suit land since 1962 to date. That all witnesses testified during trial proved that the appellant was the owner of the suit land. Thus, rested by a prayer that, the appeal be granted.

In turn the respondent though was not represented but briefly argued strongly that he is the true owner of the suit land throughout up to the date he decided to involve village authority to survey his farms in year 2018. No any villager objected his survey of the farm. Resisted the allegations of change of names, by producing his certificates of title which both bears the name of Ally Ally Liheta. Above all he justified his denial by producing his voters registration card which had the name of Ally Ally Liheta. Further denied to have any land dispute with the appellant prior to this one at any tribunal or court of law. Thus, rested by a prayer to dismiss the appeal with costs.

In determining this appeal, the fundamental question is who is the lawful owner of the suit plot? Subsequent question is whether this appeal has merits. I think the doctrine of res judicata is well developed and settled in our jurisdiction, first it is statutory under section 9 of the **Civil Procedure Code**, and second through countless precedents.

Without labouring much on this point, let me itemize the required ingredients of *res judicata* as was discussed in many precedents: -

- i. *The former suit must have been between the same litigating parties or between parties under whom they or any of them claim;*
- ii. *The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively;*
- iii. *The party in the subsequent suit must have litigated under the same title in the former suit;*
- iv. *The matter must have been heard and finally decided;*
- v. *That the former suit must have been decided by a court of competent jurisdiction.*

Those are key elements when all are complied with, form the doctrine of *res judicata*. The question is whether those elements fall within the disputant and the case which was before Judge Chaba. From the outset, this ground must fail because, parties to the alleged land dispute No. 93 of 2022 was between the appellant Zainabu Mpinga versus Ayub Liheta, while this appeal is between the appellant versus Ally Ally Liheta. The two are totally different persons, because Ally Ally Liheta proved his name by certificates of ownership of the two suit lands obtained on 28 December, 2018. Also he proved by showing this court a voters registration card which bears the name of Ally Ally Liheta. Moreover, the respondent disclosed that he never had any case with the appellant in respect to the land in dispute neither in any tribunal nor in any court of law. This court expected the learned advocate for the

appellant to counter those allegations by producing judgements decided by the land tribunal and or this court's judgement before judge Chaba which indicates the suit land being in dispute by the disputants. Even on rejoinder, the learned advocate failed to counter those arguments of the respondent.

As the law so requires, he who alleges must prove the allegations. For this court to apply the doctrine of res judicata, the learned advocate had noble duty to convince this court by referring to the above elements constituting the doctrine of *res judicata*. Failure to do so, this court cannot, but disregard it as mere allegations. Sections **110 and 111 of the Law of Evidence Act [Cap 6 R.E, 2002]** put the burden of proof to the appellant who raised the doctrine of res judicata. The two sections are quoted hereunder: -

Section 110, *"Whoever desires any court to give judgement as to any legal right dependent on existence of facts which he asserts must prove that those facts exist."*

Section 111. *"The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side"*

Those two sections infer that if there are existing legal issue or right(s), infringed by another person, the one who has that legal right should seek assistance of court to enforce against the other party who without colour of right, infringed his/her right. Therefore, the burden of proof lies on a person alleging it. It is equally elementary law that standard of proof, in civil cases is on balance of probabilities, and that burden of proof never shift to an adverse party until the party on whom

the onus lies discharges it. In respect to the first ground of appeal I would rest by dismissing it for lack of merits.

In regard to grounds 2 & 3 I, have gathered the arguments of the learned advocate together with the records of trial tribunal, obvious the answer is in negative. Notably, the process of survey until issuance of certificate (Hati ya Hakimiliki ya Kimila) is an open and participatory process. There is no clear explanation from the appellant as to where she was when the respondent surveyed his land until same was completed and Hati ya Hakimiliki ya Kimila was issued to the respondent. Without clear explanation from the appellant on this point, obvious no tribunal or court properly guided by law may accept mere words.

Reading the contents of the trial tribunal's judgement in pages 3 & 4, obvious the observation of the trial chairman was proper for the appellant failed to justify if at all she raised an objection when the said farms were surveyed. Above all, she failed even to justify under which capacity she was claiming that farm lands, was she claiming as the owner or as an administratrix?

In any event I find no difficulty to recognize who is the true owner of the farm land. In the case of **Amina Maulid Ambali and Two Others Vs. Ramadhani Juma (CAT), Civil appeal No 35 of 2019 RE 2019** the court discussed and provided guidance as per section 2 of **the Land Registration Act [CAP 33]**, which defines who is the owner of a landed property. For clarity the section is quoted hereunder: -

S.2 *"owner" means, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered;*

The provision is self-explanatory, the documentary evidences of the respondent which were admitted during trial, unopposed proof who is the rightful owner of the suit farm.

In our jurisdiction, the law is settled that, a person whose evidence is heavier than that of the other is the one who stands to win, as in the case of **Hemedi Said Vs. Mohamed Mbilu (1984) TLR 113**. I am settled in my mind, the appellant has no claim of right of whatever nature, rather she is stubborn and ill wisher of the respondent's rightful ownership of his farm land. This appeal is another marathon of continuing disturbance to the respondent with no justifiable cause.

For the foregoing reasons I proceed to uphold the judgement and decree entered by the trial tribunal that the suit farm land is owned by the respondent, thus this appeal is dismissed for lack of merits. In the circumstances, I find the respondent deserve costs from the appellant as I so order.

I accordingly Order.

Dated at Morogoro this 30th day of August, 2023.

 
P. J. NGWEMBE
JUDGE
30/08/2023

Court: Judgement delivered at Morogoro in Chambers this 30th day of August, 2023, in the presence of Ms. Magreth John Simbi, Learned Advocate for the Appellant and in absence of the respondent.

A. W. MBANDO
DEPUTY REGISTRAR
30/08/2023

Court: Right to appeal to the Court of Appeal explained.

A. W. MBANDO
DEPUTY REGISTRAR
30/08/2023

