

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
THE SUB - REGISTRY OF MWANZA  
AT MWANZA  
LAND CASE NO. 29 OF 2023**

**JOEL NYAMAGENI KISIBIKE-----1<sup>ST</sup> PLAINTIFF**  
**MWANDU JOHN MATENDELE-----2<sup>ND</sup> PLAINTIFF**  
**MASANJA SONDA ( REPRESENTED BY DAUDI SIMON MABENGA) ---- 3<sup>RD</sup> PLAINTIFF**  
**BRUNO MAKUJA JANGU-----4<sup>TH</sup> PLAINTIFF**  
**RAMADHANI YAHYA MWESIGA-----5<sup>TH</sup> PLAINTIFF**  
**NGULU LUNEGEJA SENI-----6<sup>TH</sup> PLAINTIFF**

**Versus**

**JULIUS NYAGA NJOLOLO-----1<sup>ST</sup> DEFENDANT**  
**SANDU MBOJE-----2<sup>ND</sup> DEFENDANT**  
**LUTONJA MASHILINGI-----3<sup>RD</sup> DEFENDANT**

**RULING**

*Sept. 4<sup>th</sup> and 15<sup>th</sup>, 2023*

**Morris, J**

The six plaintiffs above are claiming ownership of 60 acres farms located at Nyakafulu Village, Mbogwe District in Geita Region (elsewhere the **suit property**). The case has, however, been preliminarily challenged under three points of objection (PO) from the 1<sup>st</sup> defendant. The subject defendant contends that the suit is unmaintainable because: **one**, no proper description of the suit property; **two**, the proper remedy for the plaintiffs is objection proceedings; and **three**, the court is *functus officio*.

When the matter came up for hearing of the foregoing PO, the Court raised another point, namely, whether or not the case is not *res judicata*. I ordered all preliminary issues to be argued for and against by parties. Mr. Fredrick Kakurwa, learned advocate, represented the plaintiffs. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were represented by Messrs. Bakari Chubwa and Amos Gondo, both learned Counsel respectively. The 3<sup>rd</sup> defendant appeared in person, unrepresented.

Regarding the court-raised point, Mr. Chubwa argued that this case is *res judicata*. He argued that the present case involves the suit property which was subject of appeal No. 1 of 2021 before this Court at Shinyanga. The latter case was resolved amicably by parties therein (defendants above) per the deed of settlement which was attached to the plaint. Further, the Order of the Court therefrom was, too, attached to the 1<sup>st</sup> defendant's written statement of defense (WSD).

According to him, because the previous case was heard and determined by the court with competent jurisdiction, the present proceedings are *res judicata*. He referred to section 9 of ***the Civil Procedure Code*** Cap 33 R.E. 2019 (***the CPC***); and the case of ***Petrux***

***Service Stations Ltd v NMB and Another***, Misc. Land application No. 86 of 2020 (unreported) to buttress his stance.

Thereafter, he submitted in support of the 1<sup>st</sup> defendant's PO. For the first ground, he argued that the plaintiffs have not given proper description of the suit property. As an example, he cited paragraphs 3, 10 -15 of the plaint and argued that the same indicate that the plaintiffs' claim is 60 acres. However, such acres are not jointly owned. That is, the plaint discloses sizes of pieces of land belonging to each and individual plaintiff but no demarcations/boundaries are provided.

Consequently, the counsel asserted further that the decree which will result from the present proceedings is not likely to be executed for want of specificity of individual pieces of land. He also argued that, under Order VII Rule 3 of ***the CPC***, the suit land must be properly described. Then he made further reference to the case of ***Mwanahamis Habibu and 7 Others v Justine Ndunge Justine Lyatuu and 173 others***, Land Case No. 130 of 2018 (unreported).

Regarding the 2<sup>nd</sup> point of objection, it was submitted by Mr. Chubwa that the 1<sup>st</sup> defendant got the plot in dispute through a full and complete legal process. Consequently, the plaintiffs under Order XXI

(rules 57 to 62) of **the CPC**, had a suitable remedy: to commence investigations of their titles through objection proceedings. And that, if they were unsuccessful in the objection proceedings, they would institute a fresh suit. He referred me to the case of **Kangaulu Mussa v Mpung'ati Mchodo** [1984] TLR 348.

The last element of the PO relates to this court being *functus officio*. The counsel submitted that, the dispute over the suit property was decided in the previous proceedings by this Court at Shinyanga. Then, he referred to **Petrolux case** (*supra*) at page 10. To him, the question as to who is the rightful owner of the suit property was finally determined by this court (at Shinyanga). Thus, he argued in conclusion that this very court cannot redo or vacate its previous order. It is, accordingly, *functus officio*.

In reply, Mr. Kakurwa submitted that the suit is not *res judicata* because the plaintiffs herein were not parties to previous proceedings. He maintained that, under section 9 of **the CPC**, parties should be the same for *res judicata* to be invoked. In opposition of the 1<sup>st</sup> defendant's PO, he argued that the suit property was clearly and fully described in terms of location, size and boundaries. Therefore, in his view, no

obstacles are likely to ensue at the stage of execution of the court decree. Regarding the proposed remedy for the plaintiffs, Mr. Kakurwa submitted that objection proceedings are not pursuable in this situation. To him, objection proceedings are a remedy available only to matters that are pending execution of decree.

The plaintiffs made reference to the case of ***Jacqueline Jonathan Mkonyi and Another v Gausal Properties Ltd***, Civil Appeal No. 311 of 2020 (unreported) to reinforce the argument that no court order binds the whole world. Lastly, it was argued that for the principle of *functus officio* to apply several elements need be proved. The plaintiffs' counsel named some of such elements to include, involvement of same parties in both suits; and the dispute being over the same subject matter in the previous and present proceedings. He clinched by submitting that the cited elements are missing in the present suit. Hence, the doctrine of *functus officio* is not invocable hereof.

On his part, advocate Gondo joined hand with arguments of Mr. Chubwa that the matter herein is *res judicata*. However, the 3<sup>rd</sup> defendant submitted that the case before this Court at Shinyanga did

not involve any of the plaintiffs. Therefore, to him, and the two cases are different and this Court has mandate to hear the present suit.

I have intensely considered the submissions of parties. I will kick off with *res judicata* and *functus officio* doctrines. This exclusion is, to me, justifiable. The two principles are the integral part of this Court's jurisdiction. It is undisputed that, there was Land Case No. 20/2019 before Nyakafulu Ward Tribunal between the above defendants only. Thereat, the 1<sup>st</sup> defendant herein was declared the owner of suit property (60 hectares) against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The two latter defendants successfully appealed to the District Land and Housing Tribunal of Geita vide Land Appeal No. 27 of 2019. The 1<sup>st</sup> defendant was disgruntled. He, thus, appealed to this Court at Shinyanga [Misc.(sic) Land Appeal No. 1 of 2021]. Nonetheless, the parties to the subject appeal (now defendants herein) settled their dispute amicably. The deed of settlement thereof was filed on 9/6/2021 (annextures PE-01 to the plaint). Further, by the order of this Court at Shinyanga (annexure BRV-2 to the WSD of the 1<sup>st</sup> defendant); the said deed of settlement was adopted as decree of the court. In effect, the 1<sup>st</sup>



defendant was declared the lawful owner of 60 hectares as previously declared by trial ward tribunal.

The Court should now resolve whether this case is *res-judicata* the previous proceedings. For me to settled at a plausible conclusion, I take cognizance of five conditions under section 9 of ***the CPC*** which, when they co-existent, the subsequent suit becomes barred accordingly. I will reaffirm these conditions. **First**, in both suits the subject matter must be directly and substantially in issue. **Second**, the two suits must be between the same parties or privies claiming under them. **Third**, the parties should have litigated under the same title in the former suit.

The **fourth** condition is that, the court which decided the former suit must have been competent to try it; and **fifth**, the matter in issue in the subsequent proceedings must have been heard and finally decided in the former suit. See, also ***Badugu Ginning Co. Ltd v CRDB Bank Plc and 2 Others***, Civil Appeal No. 265 of 2019; ***Esther Ignas Luambano v Adriano Gedam Kipalile***, Civil Appeal No. 91 of 2014; and ***Peniel Lotta v Gabriel Tamaki and Two Others***, Civil Appeal No. 61 of 1999 (all unreported).



In principle, *res judicata* is not without the rationale behind it. The indispensable philosophy behind *res judicata* is three-fold: the public is interested in litigation that has an ending; a person should not be sued or prosecuted for the same subject matter which was previously determined to finality (in Latin; "*Interest rei publicae ut sit finis lium*"; "*Nemo debet bis vecali, si constant curiae quad sit pro una et eadem causa*", respectively); and to prevent multiplicity of suits (***Paniel Lotha v Tanaki and Others*** [2003] TLR 312).

In the matter at hand, it is evident that the land at issue is 60 acres which was directly and substantially at issue in the former proceedings; the issue of ownership was finally determined by this Court with requisite jurisdiction. In the interest of both precision and brevity, I will hastily find that all elements of *res judicata* are found in the present proceedings save for only issue. That is, whether parties in the former suit are the same parties or privies claiming under them and whether they were litigating under the same title in the former suit.

In the case of ***Badugu Ginning*** (*supra*), the Court of Appeal, quoting the ***Black's Law Dictionary***, expounded the word privy when



used in the doctrine of *res judicata* regarding similarity of parties. It held as follows:

*"Regarding the second condition that in the former and subsequent suits parties litigating must have been the same or privies claiming under them, the Black's Law Dictionary, 8<sup>th</sup> Edition 2004, at page 3798 defines the term 'privity' to mean: - 'A person having legal interest of privity in any action, matter or property; a person who is in privity with another.'"*

According to paragraphs 10 and 12 of the plaint, the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs are claiming to have had derived their respective titles from Nyaga Njololo - the 1<sup>st</sup> defendant's father by way of sale. They allege to have bought the same in 1989. In law, for the party to be held as claiming under the same interest, he must have acquired such interest subsequent to the former suit. See, for example, Mulla, ***Code of Civil Procedure***, 13<sup>th</sup> Edition, Vol. 1 p.77. Therefore, I have but to arrive to a conclusion that, parties in previous and present proceedings are not the same. Consequently, one of the conditions for the principle of *res judicata* to apply is lacking hereof. I will not invoke the doctrine here. On such basis, the court-raised point is not answered in affirmative.

I now turn to address *functus officio*. It is trite law that, when the court finally disposes of a matter, it ceases to have jurisdiction over the same. In the same vein, the judicial officer also becomes *functus officio* to determine matters conclusively determined by another judge. See the cases of ***Leopold Mutembei v Principal Assistant Registrar of Tittles, Ministry of Land, Housing and Urban Development and Another***, Civil Appeal No. 57 of 2017; ***Mohamed Enterprises (T) Ltd v Masoud Mohamed Nasser***, Civil Appl. No. 33/2012; and ***The International Airlines of the United Arab Emirates v Nassor Nassor***, Civil Appeal No. 379 of 2019 (all unreported).

In the present matter, this Court is once again invited to determine the issue of ownership of the suit property in favour of the plaintiffs. However, the same suit property herein was declared as belonging to the 1<sup>st</sup> defendant by this very Court at Shinyanga. If I were to determine the present suit on merit, it is obvious that there will be two judgements and decrees of this/same Court over the same property. It will not be lawful.

It has to be noted further that, I am not seized with jurisdiction to vacate the previous order of this Court (at Shinyanga) made in respect of the suit property. Read the case of ***Maria Chrysostom Lwekamwa v***



***Placid Richard Lwekamwa and Another***, Civil Application No. 549/17 of 2019 (unreported).

For all that I have demonstrated above, I find that this Court is *functus officio* in respect of the suit property. I thus, sustain the PO on such basis. As this element of the PO suffices to dispose of the matter, I have no justification to delve into the remaining points of objection raised by the 1<sup>st</sup> defendant. Henceforth, the 3<sup>rd</sup> limb of the PO is merited. I allow it by accordingly dismissing this case. Each party will shoulder own Costs. It is so ordered and right of appeal is fully explained to the parties.



**C.K.K. Morris**

**Judge**

**September 15<sup>th</sup>, 2023**

Ruling delivered this 15<sup>th</sup> day of September 2023 in the presence of Mr. Ramadhan Yahya Mwesiga, the 5<sup>th</sup> plaintiff; Advocate Amos Gondo for the 2<sup>nd</sup> defendant also holding the brief of Advocate Bakari Chubwa who represents the 1<sup>st</sup> defendant.



**C.K.K. Morris**

**Judge**

**September 15<sup>th</sup>, 2023**

