

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**MOSHI DISTRICT REGISTRY**  
**AT MOSHI**  
**LAND APPEAL NO. 8 OF 2023**

**REGINALD DAMAS KOMU** (*As Administrator of the Estates  
of the Late DAMAS ALLY KOMU*) ..... **PLAINTIFF**  
**VERSUS**

**STEVIN KAAYA** ..... **1<sup>ST</sup> DEFENDANT**

**FELISTER ERNEST MARO** ..... **2<sup>ND</sup> DEFENDANT**

**RULING**

29<sup>th</sup> Sept. & 19<sup>th</sup> October 2023.

**A.P.KILIMI, J.:**

The plaintiff being the administrator of the estate of late Damas Ally Komu filed a suit against the defendants praying this court inter alia the declaratory orders that, the suit premises Plot No. 43 Block A, Farm 147/1 with Title No. 12918 located in Moshi Municipality, forms part of the estates of the late Damas Ally Komu and declaratory order that the Defendants hereinabove are trespassers over the suite premises.

In their jointly written statement of defence filed, the defendants raised a preliminary objection on the following point.

That, the suit is res judicata to Application No 23/2006 before District Land and Housing Tribunal, Moshi hence contravenes mandatory provision of Section 9 of the Civil procedure Code Cap 33 R.E 2019.

When this matter came before me for necessary orders, the plaintiff was represented by Ms. Juliana Mushi, advocate and the respondent was represented by Gidion Mushi, advocate it was agreed the above objection be argued by way of written submission.

The respondent counsel submitted in chief that, on 2006 the late Damas Ally Komu instituted a case before District Land and Housing Tribunal of Moshi "hereinafter DLHT" via application No.23/2006 where parties were Damas Ally Komu vs Scolastica Paul, which the respondent won a case thereon. However due to the death of respondent in that suit Scolastica Paul and the death of her advocate, it wasn't easy to have the copy of judgment and they were told by the Tribunal that the case file was misplaced. Further before the DLHT in application No 23/2006 the 2<sup>nd</sup> defendant mother won a case and the tribunal declared that the property belongs to her, so what was questioned by the late Damas Ally Komu was the house built therein, forgetting the facts that the said house forms part of the said land (*qui quid plantator solo solo cedit*).

The counsel then submitted that basing on section 9 of the Civil Procedure Code, Cap 33 R.E 2019, the land disputed in this suit and that land disputed in the application No. 23/2006 before DLHT are the same hence it is Res judicata. Also added that, 2<sup>nd</sup> defendant in this suit is the administrator of the late Scolastica Chuwa who was the respondent in the application before DLHT.

Thereafter, Mr. Gidion Mushi notwithstanding the objection he raised is only on res judicata, He added another preliminary objection indirectly on issue of non-joinder of parties on this case, he further said that the plaintiff did not join Registrar of Titles and Attorney General as necessary parties to this suit since the matter covers the issue of issuance of certificate of title. He further argued that, since the said suit premise has two Certificate of Titles, the joining of Registrar of Titles and The Attorney General is very important in this matter. Therefore, the hearing of those Authorities in respect to ownership is very necessary, to buttress his point he referred cases of **Abdulatif Mohamed Hamis vs Mehboob Yusuf Othman and Another**, Civil Revision No. 6/2017 and **Shaibu Salim Hoza vs Helena Mhacha as a Legal Representative of Amerina Mhacha**

**(Deceased)**, Civil Appeal No. 7/2012, Court of Appeal of Tanzania, (Both unreported).

In reply to the above, Ms. Juliana Mushi contended that the respondent counsel alleges that there was an application No 23/2008 between the late Damas Ally Komu, Faustin G Kiwia and Scolastica Paul before DLHT of Moshi, but he failed to attach the said application for the court to see whether the said application really exist so as res judicata to apply. She relied on the case of **Halfani Sudi vs Abieza Chichili** (1998) TLR 527.

Ms. Juliana Mushi further contended that, the case at hand parties are Reginald Komu (suing as administrator of late Damas Ally Komu) versus Stevin Kaaya and Felister Ernest Maro distinguished from application No. 23/2006 before the tribunal where parties were Damas Ally Komu, Faustin G Kiwia and Scolastica Paul, so parties does not relate. She also argued that since there is no proof of existence of application No 23/2006 and the parties are different hence res judicata principle cannot stand. To fortify this, she referred the case of **Rhobi Elia vs Khamisi Abdallah Mduma and 2 Others**, Land Case No 300/2023.

In respect to issue of non-joinder of parties, the counsel for Plaintiff referred Order 1 Rule 9 of the CPC Cap 33 R.E 2019 and the case of **Baranes Bank Ltd vs Bhagwandas** .AI.R (1947) All 18, and contended that, at this stage the court cannot go through the certificate of titles of parties since the same are evidence, therefore this point cannot fit to be preliminary objection as stated in **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd** (1969) EA 696, thus she prayed this objection be dismissed with costs.

Having considered the rival submissions above, one issue is necessary for disposal of this objection, that is whether this suit filed is res judicata. The principle of res judicata in our law is enshrined under section 9 of Civil Procedure Code (supra) which provides as hereunder;

*"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."*

Going through the submissions of both parties above, as rightly pointed by the plaintiff's counsel since the respondent did not attach the copy of the alleged decision of the said application No 23/2006, Hence it needs evidence for the court to determine whether the said application really exist or not, therefore, whether the previous matter involves same parties, same issues and if was determined on merit also need evidence to be proved. For foregoing facts, I am of considered opinion this preliminary objection fails to meet the test cherished in the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd. vs West End Distributors Ltd.** (supra), wherein Sir Charles Newbold P. had this to say at page 701: -

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."*

[Emphasis added]

Again, in the case of **Shose Sinare vs Stanbic Bank Tanzania Ltd & Another** [2021] TZCA 476 (TANZLII) at page 12 the Court of Appeal had this to say:

*"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertain application for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed point of facts or evidence."*

[Emphasis added]

Further the respondent added another preliminary objection during the submission that there was non-joinder of parties to the plaint which makes the suit defective. That the plaintiff should have added the Commissioner of Titles and Attorney General because the authority concerned issued in respect to the suit premise two Certificates of Titles. In my view this is an afterthought because it was not pleaded as objection in the defendant's pleadings and came to be raised during in the submission. With respect, counsel for the defendant misconceived about the settled principle that parties are bound by their own pleadings. To raise new issue during the

submission is to take the court and the opponent party into surprise which is not acceptable at all, and is hereby rejected.

In the circumstances and in support of the said principles above, I thus find this objection devoid of merit and consequently overruled with cost.

It is so ordered.

**DATE at MOSHI** this day of 19<sup>th</sup> October, 2023.



X

JUDGE

Signed by: A. P. KILIMI

**Court:** - Ruling delivered today on 19<sup>th</sup> October, 2023 in the presence of Ms. Juliana Mushi, Advocate for Plaintiff and Mr. Gideon Mushi, Advocate for all Defendants.

**Sgd: A. P. KILIMI**  
**JUDGE**  
**19/10/2023**