IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 18 OF 2023

(C/F District Land and Housing Tribunal for Arusha at Arusha, Application No. 124/2020)

SALAMA SAFARI LODGE LIMITED.....APPELLANT

VERSUS

JUVENAL SENEN MOSHA & 6 OTHERS .....RESPONDENT

JUDGMENT

17th November, 2023

D. D. NDUMBARO, J

This appeal is a Land dispute that originated from District Land Housing tribunal application No. 124 of 2020 between Juvenal Senen Mosha and six others who are members of the same family against Salama Safari Lodge Limited and Senen G. Mosha who is the father of the applicants, whereby the applicants claimed against 1st respondent their father selling the family land to the 1st respondent without involving the family. The district land and

housing tribunal ruled out that the sale does not involve the consent of the wife therefore void.

Dissatisfied with the decision appellant now hereby appealing against the decision of the land housing tribunal and lodged 6 grounds of appeal:

1. The chairman erred in law and fact for failure to consider application no.49 of 2012 being res judicata to application no. 124 of 2020
2. The chairman erred in law and fact acting without jurisdiction as he was functus officio to entertain the matter
3. The chairman erred in law and fact by determining the matter in favour of the applicant who never appeared in the tribunal to testify on his case contrary to the case of John Siringo and 20 others Vs Tanzania Road Agency and another Civil Appeal No. 171/2021
4. The chairman erred in law and fact by failing to determine all framed issues
5. The chairman erred in law and fact holding dispute land is family property without adduced evidence
6. The chairman erred in law and fact for holding 1st appellant is Bonafede purchaser

On the submission of 1st ground, the appellant argued, the matter was the res judicata. The tribunal entertained the land application no. 124 while there was case no. 49 of 2012 which was determined by a competent authority with the same part and same subject matter which was finally determined. Further application no. 49 was never challenged before the court. The said application was determined in favour of the applicant; and supported his argument by section 9 of the Civil Procedure Code which was retaliated in the case of **Paniel Lotta vs Gabriel Tamaki TLR,** 2003 page 312 which contemplates 5 conditions as the subject matter are the same, having the same part privies claiming under them parties litigated under the same title in the former suit, decide by competent court, and the matter finally ruined.

Argued that case no. 49 of 2012 was the same as case No. 124 of 2020, case No. 49 was determined on its finality by the competent court. Therefore, the matter is incompetent.

On the second ground appellant considered that the matter is functus official, he cited the case of **Karori Chogoro vs Wait Hache Werengo**, Civil Appl. No. 164 of 2018 Page 9, that Application No. 49 of 2012 was determined on its finality but the same court determined Application No. 124

of 2020. The decision of application no.49 was not challenged either by appeal or by revision.

The trial court determined the matter in favour of the person who never attended the tribunal, there were 7 applicants only 3 out of 7 attended before the court, four of them never attended but the tribunal gave a decision in their favour, in support of the argument, he cited the case of **John Siringo and twenty others vs Tanroads and Ali.**

The appellant further argued that the trial chairman failed to determine all issues framed as to whether there was a sale agreement between the 1st and 2nd appellant. The trial chairman on page 5 of the proceedings held that the contract was void but did not determine whether there was an existing agreement. It is our view that issued No. 2 as whether the existing agreement is not determined.

On the 5th ground trial magistrate held disputed property is a family property without any evidence, it's the principle of law that the burden of proof lies to those who allege section 110(1) and 112 of the Law of Evidence Act cap 6 further, there were 7 applicants on the case but only three came to testify before the court yet trial chairman give judgment in favour of all 7. The respondent then tendered two exhibit P1 which was clan meeting

minutes which shows the land belonged to the respondent (appellant now) who later allocated it to his 4 sons upon the conditions contained in exhibit P1, and the appellant now was in a position to retain the land, no proof showing that the suit land is not belong to 1st appellant. In those facts, it is clear that the suit land was not family property but belonged to 1st appellant. In supporting his argument cited the case **Jasson Samson Rweikiza vs Novatus Rwechenguka Nkwama,** Civil Appl. No. 305 of 2020.

On the 6th ground argued, the trial chairman failed to rule that the 1st appellant is a bona-fide purchase, it is the position of law that one cannot take possession without a title. The land in dispute was registered land, through the sale agreement, the appellant took the initiative and testified on the sale agreement and made an inquiry as the property was for 2nd appellant who had the right to dispose. The chairman declared sale was illegal without considering that the 2nd respondent was bona fide, supporting his argument on the case of Mohamed Kanji vs Mac Group Ltd, Civil Appeal no. 39 of 2022, page 19 2nd paragraph. 1st appellant made an enquiry to satisfy that the Land in dispute has no issue, the trial chairman did not consider that 1st appellant was a bona fide purchaser.

Responding to the submission, the counsel for the respondent argued the res judicate was raised in the trial tribunal, if it was raised the chairman could have agreed to be listed among the listed issues. In support of his argument he cited the case of **Kibwandu Mindentooo Ndosi vs Mtei Bus Service Ltd, p**age 6 further no summons was issued in application np 49 of 2012.

The appellant cited the case of **Panael Lotta Supra** which requires the appellant to be aware of the subject matter of a suit; and did nothing to join the suit, the case is not applicable in application 124 applicant was not aware, therefore res judicata is not applicable, further the parties to the application no. 149 of 2012 and 124 of 2020 different. There was no evidence to prove that the matter was res judicta.

On the second ground respondent faulted that, application no. 49 of 2012 was not similar to application No. 124 of 2020, this issue was never raised in the trial tribunal.

On 3rd ground, the tribunal did not say the land is matrimonial property rather it belongs to the 1st and 2nd appellant; the applicant failed to prove the case on the required standard.

On 4th ground, the respondent argued that the trial tribunal on page 5 of its judgment agreed that no agreement meant the judgment was void.

On the 5th ground argued that from the evidence on the record dispute land was acquired by the 2nd appellant and his wife before she died; the property acquired during the substance of marriage is matrimonial property, on that reason the trial tribunal held (in page 4 of judgment) the land belong to 2nd applicant who was administrator of the late wife and 2nd respondent who is the husband.

On the 6th ground faulted that, at the time when the disputed land was sold, the wife was alive but she was not involved, she never signed the purchase agreement of the said matrimonial property, therefore the sale was illegal pray this court to struck out application with cost.

On rejoinder on the issue of res judicata, the respondent never disputed the existence of application no. 49 2012, and he never disputed that the land in dispute is the same between the two applications. One of the conditions stipulated in the case of Paniel Supra on res judicate is there must be the **same party or privies claiming** under them. In application no. 49 of 2012 the parties were 1st appellant against 2nd appellant and 6 respondents; those 6 respondents being part of member of family form a

party of privy claiming for others. Pray court disregards the applicant's submission.

The issue of res judicata is new and ought to be raised during the trial, argued that, the issue is not new, in page 3 of the judgment of the trial court on 2nd para DW1 was cross-examined in chief said there was judicial notice 2 which was the judgment in application 49, it is not true that the issue was new. For those reasons maintained that application 124 was res judicata. The application was also functus officio that the trial chairman tried the matter which was tried on the same tribunal. He cited the case of **Richard Julius Lukambara Vs Isack Ntwa Mwanjira and Others TLR**, 2007, page 91 CAT to support his argument that, the matter is functus officio can raised even in appeal. The tribunal determined application no 104 of 2020 whereas there was application no 49 of 2012, with the same parts and the same matter. The best way was to challenge by the way of appeal or revision.

On 3rd ground argued that the cited case of **Rigon and others supra** shows the effect of non-compliance of procedure.

5th ground argued that the existence of a contract between the 1st and 2nd appellant was not determined. absence of the signature of the wife to

the signed contract and making the contract void was not the issue raised. it is clear that the ground on the non-existence of the contract was not determined.

On the 6th ground argued, the appellant conducted an enquiry to the village council to satisfy that the property belonged to the 2nd appellant; further, the 2nd respondent allocated the land to his four sons subject to the attached conditions, the responded reserved the right on the said land, he is under proper capacity to dispose of the land.

Going through the submission of the parties on the first ground the applicant raises of jurisdiction issue, as the matter is res judicata. That trial tribunal entertained the matter which previously was entertained by a Competent Court of competent jurisdiction. I went into court record determining the validity of parties' submissions as to res judicata.

Application No. 49 of 2012 was between

M/S Salama Safari Lodges

Vs

1. Nicomed Mosha
2. Gerald Senen Mosha

Whereby applicant declared to be lawful owner.

Application No.124 of 2020 parties are

1. Juvenile Senen Mosha;
2. Benadinah Patrick Khanya
3. Donista Gerbad;
4. Ester Senen Mosha;
5. Osbeg Senen Mosha;
6. Bosc Senen Mosha and
7. Nico Senen Mosha

VS

Salama Safari Lodges and Senen Mosha

Section 9 of civil procedure code Cap 33 shows courts are bared to entertain any matter which is finally determine by a court of competent jurisdiction as;

> *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 to litigate under the same title** in a court competent to try such subsequent suit or the suit in which such*

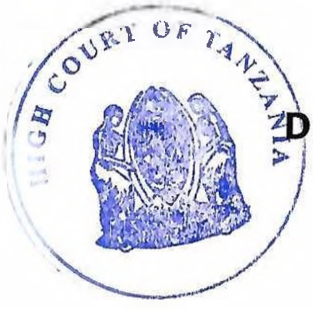
issue has been subsequently raised and has been heard and finally decided by such court.

This court observed that the parties to case No.49 of 2012 and No.2022 are the same and the subject matter is the same as per section 9 of Civil Procedure Code Cap 33 therefore the matter is res Judicata. The only remedy available to parties to challenge application no 49 is appeal or revision

I therefore quash the decision of the district Housing and Land Tribunal

Each part shall bear its own cost

DATED at **ARUSHA** on this 14th day of November 2023.



D.D NDUMBARO

JUDGE