

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

MISC. LAND APPEAL NO.26 OF 2023

(Appeal From the Ruling and orders of the DLHT for Chato vide Misc. Land Application No. 25 of 2021; Originating from the decision of the Lusahunga Ward Tribunal vide Land Case No. 118 of 2019.)

JULIUS KAGOMA APPELLANT

VERSUS

GORDIANI KABIGUMILA RESPONDENT

JUDGMENT

10th November & 22nd November 2023

MUSOKWA, J

This is a land dispute emanating from Lusahunga Ward Tribunal, Case No. 118 of 2019 initiated by the respondent. It is alleged that the respondent herein purchased the suit land from the appellant in 2005. However, in 2019 the respondent was required by the village authorities to vacate the land, on the basis that he was a trespasser to the appellant's land. Upon hearing of the matter, on 31.12.2019 the Ward Tribunal entered judgment in favour of the respondent.

It is further alleged that before the matter was instituted by the respondent at the Ward Tribunal on 22.10.2019; another suit on the same subject matter and between the same parties had been instituted on 08.10.2019 by the appellant herein, at the District Land and Housing Tribunal at Chato (DLHT), being Land Case No. 21 of 2019. Further, that

the DLHT had issued a letter dated 04.11.2020 to the Ward Tribunal directing that the Ward Tribunal should stay the case No. 118 of 2019 pending the determination of Land Case No.21 of 2019. However, the Ward Tribunal proceeded with determination of the matter and entered judgment on 31.12.2019.

In the DLHT, an application for revision, Misc. Land Application No. 11 of 2020 was filed by the appellant herein, with the prayers that the DLHT should call for the records and proceedings of the Ward Tribunal (case No. 118 of 2019) in order to determine their legality. The said application for revision was on 03.11.2020 struck out with costs for being time barred. Determined in his quest to claim title to the suit land, the appellant herein filed another application, Misc. Land Application No. 53 of 2020 before the DLHT for extension of time to file for revision. The application was successful and upon being granted extension of time, the appellant filed Misc. Land Application No. 25 of 2021, seeking revision of the decision of the Ward Tribunal.

The respondent, before the hearing of Misc. Land Application No. 25 of 2021 on merits, had raised a preliminary objection contending that the said application for revision had been filed out of time. However, the preliminary objection was disregarded by the DLHT and the application

for revision was on 24.08.2021 granted in favour of the applicant. Aggrieved and alleging that the DLHT erred to proceed to determine the application before determining the preliminary objection, the respondent preferred Land Appeal No. 28 of 2021 before this court. Convinced on the existence of procedural irregularity in the conduct of the DLHT to determine the impugned application on merit, prior to determining the preliminary objection, this court quashed the proceedings and decision of the DLHT in Misc. Land Application No. 25 of 2021 and remitted the matter to the DLHT, for the determination of the preliminary objection by another chairman. It was further directed that should the preliminary objection be overruled, then the DLHT should proceed to determine the matter on merit. This decision was issued by this court on 07.10.2022.

In adherence to the directives of this court, the DLHT determined the preliminary objection raised against Misc. Land Application No. 25 of 2021. The preliminary objection was sustained and the said application was dismissed for being *res judicata*. Aggrieved, this appeal has been preferred against the said decision and three grounds of appeal have been advanced as follows:

- 1. That, the trial tribunal erred both in law and in fact to hold that Misc. Land Application No. 25 of 2021 was Res Judicata without taking into account the reality that after Misc. Land Application*

No. 11 of 2020 was struck out on 30.11.2020, the appellant was subsequently granted an extension of time on 30.4.2021 through Misc. Land Application No. 53 of 2020 hence filed Misc. Land Application No. 25 of 2021.

- 2. That, the trial tribunal misdirected itself to make a finding that after Misc. Land Application No. 11 of 2020 was struck out, the only remedy for the appellant was to prefer an appeal, thereby overlooking another available option to apply for a grant of an extension of time an avenue that was seized by the appellant through filing Misc. Application No. 53 of 2020 prior to filing Misc. Land Application No 25 of 2021 which is properly before the trial tribunal.*
- 3. That, the learned Chairman erred both in law and in fact to make a finding that the DLHT for Chato lacked jurisdiction to hear and determine Misc. Land Application No. 25 of 2021.*

When the matter was called for hearing, the parties prayed for the court to permit the disposal of the appeal by way of written submissions, preference of which followed the schedule set by this court.

Submitting in support of the appeal, Mr. Christian Byamungu, the learned counsel for the appellant asserted that the law provides an avenue where a matter is time barred. The avenue is to seek leave for extension of time, and the said avenue was resorted to by the appellant before the DLHT. The appellant's advocate proceeded to state that; upon the application for revision, Misc. Land Application No. 11 of 2020 was struck

out for being time barred, the subsequent filing of Misc. Land Application No. 53 of 2020 rectified the procedural irregularity, in which extension of time was granted for parties to pursue their substantive rights.

In support of his contention, he cited the cases of **Yusuf Shaban Matimbwa Vs. Exim Bank (T) Limited & Two Others**, Civil Application No. 162/16 of 2021; and **Yahaya Hamis Vs. Hamida Haji Idd & Two Others**, Civil Appeal No. 225 of 2018; and **Theobard Boniphace Tibahikao Vs. Elias Kashagama**, Land Appeal No. 36 of 2022. Mr. Byamungu, learned counsel, further contended that the case of **Hashim Madongo & Two Others Vs. Minister of Industry and Trade & Two Others**, Civil Appeal No. 27 of 2003 cited by the respondent in his reply to the petition of appeal is distinguishable as Misc. Land Application No. 25 of 2021 was struck out and not dismissed. He prayed that the appeal be allowed in its entirety and the proceedings and judgment of the DLHT be quashed and set aside.

Submitting in rebuttal, Mr. Kasaizi Andrew Kasaizi, the respondent's learned counsel who was instructed in drawing only, vigorously opposed the appeal asserting that Misc. Land Application No. 25 of 2021 was *res judicata* under section 9 of the Civil Procedure Code, Cap. 33, R.E. 2019 (CPC). The learned counsel argued that Misc. Land Application No. 11 of

2020 moved the DLHT under section 36 (1) (b) and (2) of the Land Dispute Courts Act, Cap. 216 to call and examine the record of the proceedings of the trial tribunal for the purpose of satisfying itself as to the legality, correctness and propriety of the judgment and proceedings. The respondent contended that the said application was filed out of time beyond the prescribed days as provided by the law.

The respondent proceeded to submit that Misc. Land Application No. 11 of 2020 which was seeking revision, was heard on merit and was struck out for being time barred. In that regard, the only alternative for the appellant was to appeal to a superior court; any other legal recourse taken by the appellant was illegal and the proceedings thereof contain irregularities. Resorting to file Misc. Land Application No. 53 of 2020, applying for extension of time to file a fresh application for revision, submitted by the respondent, was erroneous. According to the respondent, the best approach ought to have been to set aside the decision which struck out the application for revision.

The respondent alluded further that there was no legal justification for filing Misc. Land Application No. 25 of 2021, contending on the existence of errors on the said application, to the effect that the application was *res judicata* as it had already been struck out for being

time barred. The respondent argued further that the DLHT was *functus officio*, citing the decision of the Court of Appeal in **MM Worldwide Trading Company Limited & Two Others Vs. National Bank of Commerce Limited**, Civil Appeal No. 258 of 2017, which provides as hereinunder:

"...an order of striking out the suit in the former suit for being time barred amounted to a conclusive determination of that suit by the trial court, and that it is not open for a party to go back to the same court and seek extension of time as it happened in Hashim Madongo's case (supra), the substance of the matter must be looked at rather than the words used, that irrespective of the words used, the final order amounted to a conclusive determination, it was not open for the respondent to institute a fresh suit as it were, simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3 (1) of the Act. When the issue of limitation had been finally and conclusively determined. It became res judicata"
[Emphasis added].

In emphasis, the respondent averred that the DLHT rightly held that it had no jurisdiction to entertain Misc. Land Application No. 25 of 2021 as the subject matter therein had already been conclusively determined in Misc. Land Application No. 11 of 2020. The case of **Mrs. Rafikihawa**

Mohamed Sadik Vs. Ahmed Mabrouk & 32 Others, Civil Application No. 250/01 of 2019 was cited in support of his position. In concluding his reply, he submitted that this court should be pleased further to uphold the decision of the DLHT in Misc. Application No. 25 of 2021, whereby it was decided that the said application was *res judicata* and the DLHT was *functus officio*. Therefore, he prayed that this appeal be dismissed with costs.

The counsel for the appellant in his rejoining submissions generally adopted his submission in chief. Upon conclusion of the comprehensive submissions by the parties, the pertinent question to be determined by this court is whether or not the DLHT was competent to determine a suit founded on a subject matter which it had already held to be time barred. In other words, the issue for my consideration is whether, upon the DLHT striking out the former suit (Misc. Land Application No. 11 of 2020) for being time barred instead of dismissing it, it was open for the DLHT to entertain the second suit founded on the same subject matter and the same reliefs.

The appellant's learned counsel submitted that upon the application for revision, Misc. Land Application No. 11 of 2020 was struck out for being time barred, the subsequent filing of Misc. Land Application No. 53

of 2020 for extension of time was proper in law. Essentially, his argument was that since the DLHT used the words "struck out" it was possible to approach the same DLHT for extension of time as opposed to the word "dismissal". To support his contention, he cited the decision in the cases of **Yusuf Shaban Matimbwa** (supra); **Yahaya Hamis** (supra); and **Theobard Boniphace Tibahikao** (supra).

Unfortunately, when I perused the above cited cases, the same were not relevant to the issue before this court. The said cases merely deliberated on the distinction between the words "struck out" and "dismissal"; and the cases were indeed not related to the question of time limit and its consequences thereof. For instance, in the case of **Theobard Boniphace Tibahikao** (supra) the court stated that since the trial court had no territorial jurisdiction, the word "struck out" was appropriate as opposed to "dismissal". Again, in the case of **Yusuf Shaban Matimbwa** (supra), it was held that: -

*"Given the circumstances, we agree with the learned counsel that, **the proper remedy was to strike out the application for eviction instead of dismissing it** so as to enable the applicant a chance to file a competent application if need so arises." [Emphasis added].*

For emphasis, the case before me relates to the issue on whether the DLHT was competent to determine a suit founded on a subject matter which it had already held to be time barred. The DLHT in its judgement dated 31.05.2023 declared that the Misc. Land Application No. 25 of 2021 was *res judicata* to Misc. Land Application No. 11 of 2020. The doctrine of *res judicata* is provided under section 9 of the CPC as follows: -

"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".

The purpose of the principle of *res judicata* is to prevent multiplicity of suits and guarantee finality to litigation. In addition, it makes conclusive a final judgment between the same parties on the same issue by the competent court in the subject matter of the suit. The term "suit" applies to both main suit or application as rightly held by this court in the case of **Wambura Masawe Karera Vs. The Village Council of Mori & Another**, Civil Case No. 5 of 2020.

Looking at the nature of the prayers, both in Misc. Application No. 11 of 2020 (Hon. Colex) and in Misc. Application No. 25 of 2021 (Hon. Kapinga), using the same enabling provision, and having similar prayers relating to the issue of legality, correctness and propriety of the judgment and proceedings of the trial tribunal (Case No. 118 of 2019); the parties were the same, and the former application was conclusively determined by a competent court or tribunal. In that regard, the DLHT was correct to hold that the subsequent Misc. Application No. 25 of 2021 (Hon. Kapinga) was *res judicata*; the extended time through Misc. Application No. 53 of 2020 notwithstanding.

In the case of **MM Worldwide Trading Company Limited & Two Others** (supra), the Court of Appeal held that: -

*"...it is the substance of the matter that must be looked at rather than the words used. It is clear to us that irrespective of the words used, the final order amounted to a conclusive determination by the trial court **disposing of the former suit for being time barred. In our view, it was not open for the respondent to institute a fresh suit as it were, simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3 (1) of the Act.**"*

In the same case, it was further held by the Court of Appeal that: -

*"The above excerpt is directly relevant to the instant appeal in that **the order of striking out the suit in the former suit for being time barred amounted to a conclusive determination of the suit by the trial court**" ... it was not open for the respondent to institute a fresh suit as it were, **simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3 (1) of the Act...**the issue of limitation had been finally and conclusively determined. **It became res judicata**". [Emphasis added].*

As correctly submitted by the respondent that after the conclusive determination of Misc. Application No. 11 of 2020 on the issue of time limit; the legal recourse for the appellant was to appeal to the superior court. Thus, filing Misc. Land Application No. 53 of 2020 before the DLHT seeking for extension of time, to file a fresh application for revision was uncalled for. And the subsequent Misc. Application No. 25 of 2021 before the DLHT was undoubtedly *res judicata*.

By way of an *Obiter Dictum*, the records show that there is another Land Case No. 21 of 2019 pending before the DLHT between the same parties and involving the same issue or subject matter. In the light of the holding of this appeal, the decision of the Ward Tribunal in the Case No. 118 of 2019 between the same parties remains intact unless reversed subsequently. Therefore, the Land Case No. 21 of 2019

is potentially *res judicata* following a final and conclusive determination of case No. 118 of 2019 between the parties herein.

In consequence whereof, I find the appeal devoid of merits. I accordingly, dismiss it in its entirety with costs.

It is so ordered.

Right of appeal is duly explained to the parties.

DATED at **MWANZA** this 22nd day of November, 2023.



I.D. MUSOKWA
JUDGE