

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

MISC. LAND CASE APPEAL NO. 5 OF 2023

(Originating from Application No. 40 of 2023 of the District Land and Housing Tribunal for Moshi at Moshi).

NDESHIMONI CHRISTOPHER SHOO (As Administratrix of the Estate
of the Late **Rhoda Kusarie Lema**) **APPELLANT**

VERSUS

PAULO URASSA **RESPONDENT**

JUDGMENT

07/11/2023 & 29/11/2023

SIMFUKWE, J.

The appellant appeals against the decision of the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal) in Application No. 40 of 2023 on the following grounds:

- 1. That, the Trial Tribunal erred in law and in fact in deciding the matter in favour of the Respondent basing on the*

Principle of Res Judicata while the parties are two different.

- 2. That, the Trial Tribunal erred in law and in fact in deciding the matter in favour of the Respondent basing on flimsy and contradictory evidence.*
- 3. That, the Trial Tribunal erred in law and in fact for not considering and giving weight to the evidence adduced by the appellant in her application and not giving her a chance to call her witnesses.*
- 4. That, the Trial Tribunal erred in law and in facts in decided (sic) the matter in favour of the respondent while the respondent failed to proof (sic) the case in the standard required by the Law.*

The appellant prayed that this appeal be allowed and the entire decision of the trial tribunal be quashed and set aside. That, this court be pleased to declare the respondent not to be the owner of the disputed land; and any other reliefs this court deem fit and just to grant.

The historical background of the matter is that Ndeshimoni Christopher Shoo, the Administratrix of the estate of the late Rhoda Kusarie Lema,

instituted a land case against the respondent herein praying the tribunal to declare that the respondent is a trespasser to the land measuring half an hectare which is located at Hai, Lyamungo Machame Mashariki; and also to declare the suit land as part of the estate of the late Rhoda Kusarie Lema.

The respondent raised the preliminary objection to the effect that the application was bad in law and incompetent before the trial tribunal for being res judicata. The objection was sustained by the trial tribunal whereby the application was dismissed. The appellant appealed to this court against the ruling of the trial court based on the above stated grounds.

At the hearing of this appeal which proceeded by filing written submissions, the appellant enjoyed the legal aid of Mawalla Advocates through the learned counsel Mr. Wilbard John Massawe, while the respondent enjoyed the service of Mr. Willence Shayo, the learned advocate.

Mr. Massawe argued the grounds of appeal jointly raising one issue to the effect that ***whether the application before the trial tribunal was res judicata as held by the trial Chairman.***

To bring the above issue at rest, the learned advocate submitted to the effect that the doctrine of Res Judicata is made applicable to proceedings in land courts by virtue of **section 9 of the Civil Procedure Code, Cap. 33 R.E 2019** read together with section **51 (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019**. He referred to the case of **Registered Trustees of Chama Cha Mapinduzi vs Mohamed Ibrahim Versi and Sons and Another**, Civil Appeal No. 16 of 2008 (unreported), in which the Court relied on **Mulla on The Code of Court Procedure**, Vol I, pp. 101, 123-124, 136, 155, 166; P. K. Majumdar; Commentary on the Law of the Code of Civil Procedure, 1908, 5 Ed. Pp. 146, 169 and at page 8 and 9 of the typed judgment, it was observed that:

"It is well settled law and leading authorities are at one, that for the plea of res Judicata to successfully operate, the FOLLOWING CONDITIONS MUST BE PROVED; namely,

- 1. the former suit must have been between the same litigating parties or between parties under whom they or any of them claim.*
- 2. 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.

- 3. the party in the subsequent suit must have litigated under the same title in the former suit.*
- 4. the matter must have been heard and finally decided.*
- 5. that the former suit must have been decided by a court of competent jurisdiction."*

Also, the learned advocate cited the case of **Peniel Lotta v. Gabriel Tanaki and Others [2003] T.L.R. 312** which was also relied upon by the trial Chairman in which it was held that, for res judicata to apply, all conditions must **"COEXIST."** That is to say, they must all be met **"CUMULATIVELY"**.

Equating the first condition with the present matter; that the former suit must have been between the same parties, Mr. Massawe stated that, the condition does not fit to the present case because; ***first***, by reading the Written Statement of Defense, Land Case Number/ Application Number 04 of 2017 at Machame Mashariki Ward Tribunal, the parties were one **Godfrey Elia Lema** and **Paul Ishikaeli Urassa**. The matter before the trial tribunal the parties were the Appellant herein, **Ms. Ndeshimoni**

Christopher Shoo as Administratrix of the Estate of the Late Rhoda Kusarie Lema against **Mr. Paulo Urassa**. He commented that these parties are not the same. That, even by observing the so-called purchase agreement annexed to the Defense by the Respondent dated 16th April 1994 and 23rd September 1998 the alleged vendors were **Mr. Tumsifu Kusirie Lema and one Mama Rhota Kusirie Makweka** jointly and the purchaser was one Paul Ishikaeli Urassa. There is nothing on record to show that Paulo Urassa is also Paulo Ishikaeli Urassa who purchased land from Tumsifu and Mama Rhota. That, this could not have been available, at least not as 'preliminary objection stage'. He was of the view that, had the trial tribunal carefully observed the proceedings and the documents, it would not have erroneously held that the parties were the same because even the purported sale agreement had different names all together.

On the second criterion for res judicata to stand, the matter must be the same substantially, it was Mr. Massawe's argument that the criterion does not exist in the present matter because of the following reasons: **One**, the land size in dispute allegedly claimed by the Respondent in the so-called previous suits at Machame Mashariki Ward Tribunal was 2.3 acres

as seen in the ruling in Misc. Application Number 166 of 2022 by Hon. H. L Lukeha dated 11th October 2022, page 1. On the other hand, paragraph 3 of the application filed by the Applicant at the trial tribunal the size of the suit land was indicated as half a hectare. He argued that, even if one was to convert ½ hectare claimed by the Applicant to acres to see if they are equivalent to 2.3 acres, it brings 1.2 acres which cannot be the same land, in size or boundary.

Two, nowhere in the purported decision of the Ward tribunal the land in question was described. That, even the drawings which appeared in the proceedings does not indicate/ establish which land was being referred to in Land Case No. 4 of 2017 of Machame Mashariki Ward Tribunal.

Three, while at the Ward Tribunal one Godfrey Elia Lema was fined after being sued for trespass, in the present application the appellant's prayer was for declaration of ownership; that, the land in question, as described is part of the estate of the late Rhoda Kusarie Lema.

Mr. Wilbard stated that, the findings by the chairman at paragraph 2 and 3 of page 5 of the typed ruling are not only illogical but incompatible with common sense. He said that, if it was Godfrey Elia Lema who had sued Paulo Urassa, then how come it was the latter who ended up filing

execution? He elaborated that if the said Godfrey Lema had lost the case, the order should have been ordinarily dismissal by the said **Baraza La Kata Machame Mashariki** and the suit would not have declared any owner. That would have left right of the parties undetermined. If anything, the decision of the Ward Tribunal does not even indicate who sued who and who got what rights.

Submitting in respect of the third condition that the previous suit must have been 'under the same title in the former suit; Mr. Massawe contended that by virtue of the response alluded above in respect of the first issue, this answers itself. He explained that, the present appellant is the administratrix of the estate of the late Rhoda Kusarie Lema who died in May 2017. As noted at the closing paragraph of the handwritten judgment of the Ward Tribunal of Machame Mashariki in Application No. 4 of 2017, the person who had been sued was not only disowned by the tribunal but also fined for acting on family affairs without authority. As already pointed out, the appellant was appointed in 2023 as administrator of the estate of her late mother and thus could not have taken the trial in 2017, assuming it was the same trial.

Regarding the factor that the matter must have been heard and finally decided, the learned advocate elaborated that, since there was nothing remotely related to the purported previous suit, then the question of whether it was determined to finality becomes redundant because even if it was, it must have been between different parties, different subject and different land. Thus, this factor fails as well.

Mr. Massawe went on to argue that even if it is assumed that it was indeed determined as such, the determination was in relation to trespass as stated in the first page, last paragraph of the decision of Machame Mashariki Ward Tribunal in Land Case Number 2 of 2017 as follows:

*"Pia Godfrey Lema ametenda kosa kwa kumkashifu
Mchungaji Paulo Urassa kwa kusema wamba amevamia
eneo hilo wakati yeye siyo msimamizi wa mirathi ni
msemaji tuu."*

From the foregoing extract, Mr. Massawe said that two things become clear: One, the said Godfrey Lema was not appointed as administrator like the Appellant and thus could not have defended the estate of the late Mama Rhoda; Two, the suit was for trespass by the said Paul Ishikaeli Urassa.

On the last issue, the appellant's advocate focused on the issue as to whether the former suit was decided by a court of competent jurisdiction. He examined three aspects of jurisdiction, that is, pecuniary jurisdiction, time of institution of the suit and lastly, propriety of the parties. He averred that; the question of jurisdiction can be raised at any stage. He cited the decision of the Court of Appeal in **Yusufu Selemani Kimaro vs Administrator General and Others** (Civil Appeal 266 of 2020) [2022] TZCA 306 which quoted **Sarkar Law of Evidence** 111 Edition 2002 at page 848 where it was stated that:

"This section lays down that when one of the parties to a suit or other proceedings tenders or has put in evidence a judgment, order or decree under ss.40, 41 and 42, it is open to the party against whom it is offered TO AVOID ITS EFFECT on any of the three grounds specified in the section, without having it set aside, viz (a) the INCOMPETENCY OR WANT OF JURISDICTION OF THE COURT BY WHICH THE DECREE WAS PASSED; (b) that the judgment was obtained through fraud; or (c) that it was obtained by collusion."

Mr. Massawe informed the court that he is aware that in advent of the recent amendments made to the Act by the **Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021**, that the powers of the Ward Tribunals to inquire into and determine disputes arising under the **Land Act** and the **Village Land Act**. Also, the powers to order recovery of possession of land and other powers the Ward Tribunals used to have under sections 13 (2) and 16 (1) of the Act have been immensely stripped off by the said amendments. He referred to **Section 15 of The Land Disputes Courts Act** (supra) which provides:

*"Notwithstanding the provisions of section 10 of the Ward Tribunals Act, the jurisdiction of the Tribunal shall in all proceedings of a civil nature relating to land be limited to the **disputed land or property valued at THREE MILLION SHILLINGS.**"*

The learned counsel submitted that, under paragraph 3 of the Written Statement of Defense the respondent noted paragraph 4 of the application filed at the tribunal by the appellant herein. That paragraph stated and estimated the value of the suit property at Tanzania Shillings Twelve Million (12,000,000). In other words, the respondent agreed that

the value of the suit land is TZS 12,000,000.00 million. Even though nowhere in the decision of Machame Mashariki Ward Tribunal the value of the land in question was indicated, and assuming the value is what the parties agree on, which is 12 million, it follows therefore that, the then Machame Mashariki Ward Tribunal had no jurisdiction to entertain it and thus this test fails too.

Moreover, it was the observation of Mr. Massawe that the time limitation for recovery of land is **12 years** as per **item 22 of Part One of the Schedule to the Law of Limitation Act, Cap. 89 R.E 2019**. The land was supposedly and arguably purchased in 1994 and 1998 by the respondent. Thus, by the time the suit was filed in 2017 to recover it, conveniently after the vendor had just passed on, it was time barred. Thus, all proceedings which ensued thereon were a nullity and thus could not have triggered the Plea of Res Judicata. The tribunal, when was moved to execute the purported illegal decision in Misc. Application Number 166 of 2022, should have taken note of the commutative two reasons which render the Ward Tribunal and its decision without jurisdiction and revise it *suo moto* under **Section 36 (1) of the Land Disputes Courts Act** as

it was done by this court in the case of **Agripa Bakari Hosea vs Tumaini Nnko**, (Land Appeal No. 143 of 2022) [2023] TZHC 19959.

Furthermore, the learned advocate averred that even if it is assumed that the land in purported previous suit is the same as the one at hand, then the said Godfrey Lema was in no place to take the trial on behalf of the late Rhoda Lema. As averred by the Appellant at the trial tribunal, the land being claimed was sold to the respondent by the Late Rhoda Kusarie Lema who died intestate on May 2017 four months before the said previous suit had been filed at Machame Mashariki Ward Tribunal by the said Godfrey Lema who was not the administrator of the estate of the said Rhoda Lema. Thus, he could not have locus standi to sue on her behalf. Also, the late Rhoda Lema being not party to that suit, no decision could have been passed against her without administrator of her estate being made a party thereto. That, in the case of **Agripa Bakari Hosea** (supra), having noted that the Tribunal executed the decision of the Ward Tribunal issued without jurisdiction, the court observed that the District Land and Housing Tribunal ought to have summoned the parties and require them to address it and then nullify the proceedings. Considering the three reasons on jurisdiction advanced above as to why the tribunal had no jurisdiction, Mr.

Massawe implored the court to exercise its powers under **Section 43 of the Land Disputes Courts Act** (supra) and quash the illegal proceedings in Miscellaneous Application Number 166 of 2022 and the resultant Appeal Number 98 of 2017 for emanating from nullity proceedings. He prayed the court to allow the appeal with costs.

In his reply, before responding to the grounds of appeal, Mr. Shayo narrated the background of the appeal which I will not reproduce.

He submitted that from the facts of the case and the submissions the following facts were and are not disputed: **First**, it is undisputed that Godfrey Elia Lema is a family member of the Appellant; **second**, it is not disputed that there was a dispute in Machame Mashariki Ward Tribunal between Godfrey Elia Lema and the respondent herein and Appeal No. 98 of 2017 which ended in favour of the respondent; **third**, it is not disputed fact that the said Godfrey Elia Lema as a family representative claimed that the suit land belonged to the late Rhoda Kusarie Lema; **fourth** it is undisputed fact that the former dispute between Godfrey Elia Lema and the respondent were on ownership of the land which is currently in dispute; **fifth**, it is undisputed fact that the second respondent herein (sic) derives his rights from the 1st respondent having purchased the same from

the first respondent and **sixth**, the fact that the said dispute was conclusively determined by the tribunals previously, is not disputed. He insisted that the said Godfrey Elia Lema litigated over the suit land for interest of the family of the said Rhoda Kusarie Lema.

Mr. Shayo continued to state that, res judicata is a pure point of law which from the facts of the case it is clearly depicted. He quoted the provision of **section 9 of the Civil Procedure Code** and **Explanation VI** of the said section. He argued that the basic object of this provision is to prevent the courts with jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same issue, cause of action, same subject matter and the same reliefs. That, it aims to prevent the multiplicity of frivolous litigations and to avert inconvenience to the parties.

It was alleged that, there is no doubt that the said GODFREY ELIA LEMA represented the family of Rhoda Kusarie Lema. That, he never claimed to be the owner of the property, but claimed the property was of the late Rhoda Kusarie Lema. Also, the appellant herein claims the same thing that the suit land is the property of the late Rhoda Kusarie Lema the question

which the court of competent jurisdiction answered it in the previous disputes.

That, the property right claimed by the Appellant herein is strictly traceable from the said Rhoda Kusarie Lema whose family had appointed the representative who litigated the matter. Mr. Shayo said that, the case of **Registered Trustees of Chama cha Mapinduzi** which was cited by the learned counsel for the appellant is distinguishable from the present case because in the present case, the parties are the same. To buttress the point of res judicata, the learned counsel referred to the case of **Peniel Lotta V. Gabriel Tanaki and Others [2003] T.L.R 312** and the case of **Zuberi Paul Msangi vs Mary Machui**, Civil Appeal No. 316 of 2019 which at page 6 held that:

"Since in this matter the plaintiff is claiming the suit property against the same defendant whose title on the suit property is traceable from the said Caroline, this suit is res judicata."

At page 10 of the judgment, it was held that:

"Being the administrator of the estate of his deceased father, the appellant could not be heard to re-open the same suit which had already been heard and conclusively determined by the Resident Magistrate's court."

Mr. Shayo stressed that, all elements of res judicata are met in the present case. In respect of the first condition that the dispute must be between the same parties, Mr. Shayo was of the view that the appellant and the said Godfrey Elia Lema are within the limb of **explanation VI of section 9 of the Civil Procedure Code** (supra) and the respondent in the previous litigations is the same. That, the argument by the appellant that there is no proof that Paul Ishikael Urassa and Paul Urassa is the same person does not hold water unless if the respondent had disputed that fact. The summons was served to the same person and he appeared. Also, there is no dispute on the purchasing contract. The issue is whether the matter is res judicata.

On the second condition of subject matter; it was explained that the land in dispute between the parties is the same, which was previously litigated by the same parties under the same title. The boundaries or neighbours and the location stated is very clear in the execution. The appellant's

misleading tactic of writing different sizes of the suit land does not differentiate the suit land. The ill will of writing a different size does not warrant repetitions of litigations.

Further to that, Mr. Shayo stated that the argument by the appellant that the previous dispute was based on trespass is intending to mislead this court. That, it is clear that determination of trespass and ownership are inseparable in the circumstances as of the present case as before determination of trespass, the owner must be declared first. That, in the previous case the respondent herein was declared the owner hence the complainant was declared trespasser. In respect of the contention that if the said Godfrey Lema would have been the Applicant the same would have been dismissed, always takes another picture in Ward Tribunal where the tribunal always declares the owner.

On the third condition that the matter must be finally determined; Mr. Shayo was of the opinion that it is very clear from the annexure to the Written statement of defence that the matter was finally determined and the execution of the orders was complete.

On the issue of jurisdiction, Mr. Shayo submitted that it is very clear that during the hearing and determination of the said dispute, the Ward

Tribunal had jurisdiction over the suit land. He noted that, the matter was heard and determined before the Ward Tribunal in 2017 but currently the suit land is estimated to be valued 12,000,000 the estimation is not of 2017 but of the current market value.

In respect of jurisdiction due to time limitation, the learned advocate proposed that the contention by the appellant is totally misleading. That, time is computed from when the cause of action arose and not from when the land was purchased. He referred to **section 5 of the Law of Limitation Act Cap 89 R. E 2019**. He stated that, the cause of action never accrues from the date of purchasing the suit land as wrongly contended by the appellant. Mr. Shayo invited the court to refer to **section 45 of the Land Disputes Courts Act** (supra).

He prayed this court to dismiss the appeal with costs as it has no merit.

Rejoining on the issue of jurisdiction as contended by Mr. Shayo, the learned counsel for the appellant submitted that, neither the decision of the Ward Tribunal nor the judgment thereto indicated the value of the land. He contended that, the matter could not be resolved at the preliminary stage but evidence would be required to establish to ascertain the value of the land in question at the time.

Mr. Massawe distinguished the case of **Zuberi Paul Msangi** which was cited by Mr. Shayo on the following reasons:

First, in that decision, the previous suit was commenced by the late Ms. Caroline Machui and Edward Mbonea Msangi on the same piece of land prior to their demise. The subsequent proceedings which were deemed *res judicata* were re-opened and litigated by their respective administrators of their estates while in the present case, there was no pending dispute when the late Rhoda Kusarie passed away.

Secondly, unlike the description in that decision relied upon which was surveyed and indicated as Plot No. 81 Block B Part II, in the dispute at hand there is nothing to indicate that the decision of the Ward Tribunal and subsequent proceedings were in respect of the same land.

Three, in the decision relied upon, the parties' identities were clear and known. He asserted that the parties are entirely different in the present case not because of the Administrator but even identity of the parties.

Four, even assuming that it is the same land and parties, no rights of any of the parties were determined. Unlike the decision sought to be relied upon by the learned advocate for the respondent.

Mr. Massawe reiterated that the late Rhoda Kusarie never had any prior suit with the respondent. That, the conditions under **section 9 of the Civil Procedure Code** were not met and even the so-called former suit was fabricated by the respondent.

Having summarised the parties' submissions and after going through the records, I concur with Mr. Massawe that the crucial issue which cut across all the grounds of appeal is ***whether the matter which was instituted before the trial Tribunal was res judicata?***

The objective of having the principle of res judicata is to bar multiplicity of suits and to have finality to litigation. The learned counsel of the appellant has exhausted a lot of authorities in respect of the issue of res judicata. As stated by the learned advocate, the concept of res judicata is envisaged under **section 9 of the Civil Procedure Code** (supra) which reads:

"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."

Before resolving the issue *whether the principle of res judicata was established or not*, it is trite law that a preliminary objection must be pure point of law and the court is not required to receive any evidence to verify the raised point of law. In the case of **Shose Sinare vs Stanbic Bank Tanzania Limited & Another (Civil Appeal 89 of 2020) [2021] TZCA 476** at page 12 it was emphasized that:

*"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 entertaining application for preliminary objections..."*

I had time to peruse the records particularly the pleadings which were filed before the trial Tribunal and came across with a photocopy of the proceedings of the alleged **Baraza la Kata ya Machame Mashariki**. The said proceedings do not reflect if it is from the said tribunal. Also,

there is no copy of the alleged decision from the said Ward Tribunal of Machame East for this court to confirm what it was all about, the parties to the said case and the cause of action thereto. It seems as conceded by the parties that one Godfrey Elia Lema instituted a matter before the said tribunal against the respondent herein. However, the final verdict of such tribunal is nowhere to be found in the case file. The capacity under which the said Godfrey Elia Lema instituted the matter is unknown. Therefore, it is difficult to conclude at this stage whether the matter which was instituted before the ward tribunal of Machame East was res judicata to the matter which was instituted before the trial Tribunal. The appellant herein implored the tribunal to declare that the suit land is part and parcel of the estate of the late Rhoda Kusarie Lema. It is not certain and it requires evidence to prove that this issue was transacted before the ward tribunal of Machame East and that the same was determined to its finality.

This court could have ordered evidence to be adduced. However, having in mind the fact that we are dealing with a preliminary objection, I abstain from ordering the same.

In absence of clear records from the parties' pleadings, I hesitate to conclude that the matter was res judicata as ruled by the trial tribunal.

The Court of Appeal in the case of **Alli Saidi Kurungu & Others vs Administrator General & Others** (Civil Appeal No. 148 of 2019) [2023] TZCA 17279 (Tanzlii) at page 19 held that:

"...when determining a preliminary point of objection courts of law do not do so from abstract. They have somewhere on which to peg their arguments. As we held in Ali Shabani and 48 Others (supra), the decision cited to us by the learned Principal State Attorney:

*"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that **no preliminary objection will be taken from abstracts without reference to some facts plain on the pleadings** which must be looked at without reference examination of any other evidence."*[Emphasis added]

In the instant matter, the pleadings do not contain plain facts to rely upon to decide whether the matter was res judicata or not. The learned advocates have given impressive arguments in their historical background on what had transpired. However, I am afraid to rely on their submissions to conclude that the matter was res judicata or not since their contentions are mere submissions from bar.

Be as it may, the alleged case which is termed as res judicata to the present matter was alleged to be instituted by one **Godfrey Elia Lema** while in the present matter, one **Ndeshimoni Christopher Shoo**, as Administratrix of the Estate of the Late Rhoda Kusarie Lema instituted the present matter. That alone sufficed to conclude that the matter was not between the same parties, hence, making the matter not res judicata. Apart from that, the sizes of the disputed land are different. In the former suit the size of the disputed land was said to be 2.3 acres, while in the instant matter, the size of the disputed land is half hectare.

On that basis, I am of considered opinion that it desires more evidence to prove whether the matter was res judicata or not. In the circumstances, I hereby quash the whole proceedings, decision and order of the trial Tribunal and order the dispute to be determined afresh on merit before

another Chairman according to the law. In the event, I allow the appeal with costs.

It is so ordered.

Dated and delivered at Moshi, this 29th day of November, 2023.



X

S. H. SIMFUKWE
JUDGE

Signed by: S. H. SIMFUKWE

29/11/2023