IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MOSHI
AT MOSHI

LAND APPEAL NO. 28571 OF 2023

(Appeal from the decision of Moshi District Land and Housing Tribunal at Moshi dated 23rd April, 2020 in Land Application No. 121 of 2020)

NAIMAN OLEMKORO.....APPELLANT

VERSUS

1. MICHAEL LAZARO LENGERE.....1ST RESPONDENT
2. MATHAYO LAZARO LAIZER @LAITAYO.....2ND RESPONDENT

JUDGMENT

2nd May 2024 & 19th June,2024.

A.P. KILIMI, J.:

The appellant mentioned above initiated a suit at District Land and Housing tribunal at Moshi on 2020 via Land application No. 121 of 2021. In that application he was against respondents Michael Lazaro Lengere and Mathayo Lazaro Laizer Laitayo hereinafter first and second respondent respectively. Thereat he prayed a declaratory order that he was a lawful owner of the suit land measuring 4 ½ acres situated at Munge Hamlet within Munge village in Donyomuruak Ward, Siha District. He also sought for a permanent restraining order against the respondents from entering or dealing with the suit land in any manner whatsoever and the respondent be ordered to pay applicant general damage and cost for the application.

The respondents in their reply to the above application raised a Preliminary Objection on point of law ' PO' that the case was res judicata as it was already determined by the same tribunal with the land case No. 87 of 2011. The trial tribunal having considered the written submission by the parties sustained the said objection and eventually dismissed the applicant application by reasoning that the case was barred to be opened again as it was already decided by the same tribunal and thus it was res judicata.

Undeterred by the decision of the tribunal above, the applicant has preferred this appeal refuting that the matter was not res judicata basing on the following grounds;

1. That the Honorable Tribunal; Chairperson erred in law for failure to find that the suit was not res judicata as the matter in issue in land application No.121 of 2021 was not directly and substantially in issue in application No 87 of 2011, the parties were quite different, the parties were litigating under different title (the cause of action and subject matter were different) and the dispute between the parties have never been determined by the court of competent jurisdiction.
2. That the Honorable Tribunal Chairperson erred in law and fact for uploading the preliminary objection which highly depended on evidence to prove or disprove the same.
3. That, the learned tribunal Chairperson grossly erred in law and in fact by totally disregarding and not including and considering the appellant's arguments against the preliminary objection in this ruling and without assigning any sufficient

reason(s) hence depriving the appellant's right to a fair hearing or trial contrary to the law.

4. That the learned tribunal Chairperson grossly erred in law and in fact by deciding that, a decision of a suit against a child also binds a parent who was not a party thereto
5. That the learned tribunal chairperson grossly erred in law and in fact by holding that, the source of dispute in previous case and the subsequent suit is the same while the in the previous the source of the dispute was damage of crops by cattle trespass and the respondent in the previous suit had no claim whatsoever over ownership of the suit land.
6. That the Honorable Tribunal chairperson erred in law and fact for failure to find that, the appellant had right to file a fresh suit to claim his interest /rights over the suit land as he was not a party in the previous case nor being represented by any person in a previous suit.

In view of the above grounds, the appellant is praying this Court to quash and set aside both ruling and order of the trial tribunal, thereafter this court to make an order restoring Land application No. 121/2021 in the Tribunal Registry and direct the same be heard and determined on merits.

When the matter was placed before me for hearing, the appellant was represented by Mr. Thomas Emanuel Kitundu from Divine chambers advocate whereas the respondents were represented by Mr. Willence Elisongo Shayo both learned advocates.

Mr. Kitundu submission for the first ground was that the suit land which was in dispute in land application No.121/2021 was different with the previous land application No. 87/2011 as parties were different, the subject matter was also different and the boundaries were different. The counsel revealed that the suit land in land application No 87/2011 was based on unspecified land situated at Embukai village within Hai District while in land application No. 121/2021 it was a parcel of land measuring 4 ½ acres located at Munge hamlet in Munge village Donyomuruak ward, Siha District with the boundaries in East was Naiman Olemkoro, West-Bariri river Gulley. To make his point clear as what makes a case to be res judicata, the counsel relied on the following decisions, **Gerard Chuchumba vs Rector Itaga Seminary** [2002] T.L.R 213, **Yohana Dismas Nyakibari and Another vs. Lushoto Tea Company Limited and 2 others**, Civil Appeal No. 90 of 2008(unreported).

In respect to the second ground, Mr. Kitundu submitted on what preliminary objection should contain and cover. He submitted that what the tribunal did was not based on how PO should be determined as the tribunal evaluated evidence instead of focusing on whether the PO was a pure point of law or not. The counsel stated that res judicata itself were not to be

treated as a point of law because it needs evidence of facts to prove whether the matter was *res judicata* or not. To cement his argument, the learned counsel referred the decisions of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors LTD** (1969) E.A 696, **Shahida Abdul Hassanali Abdul Kassam vs. Mahed Mohamed Gulamali Kanji** civil application No 42 of 1999 CAT, **Hotels and Lodges (T) Limited vs The Attorney General (II) Chapwan Hotels Limited,** Civil Appeal No 27 of 2013, CAT **Agripa Fares Nyakutonya vs. Baraka Phares Nyakutonya** (PC) Civil Appeal No. 64 of 2022 (Both unreported).

For the third and fourth grounds, Mr. Kitundu submitted that the trial tribunal failed to consider his argument during a PO and what was held by the tribunal in land application No 87/2011 was not a judgment in rem rather a judgment in persona as it involved Lazaro Lengere and Julius Namkoro in their own capacity and it did not involve the appellant. To fortify his point, the counsel referred to the decision of **Mariam Ndunguru vs. Kamoga Bukoli & another** [2002] TLR 417. He further stated that the trial tribunal erred in holding that the decision against the son also binds his father, he submitted that such view was misleading as father and son each were separate individual.

In respect to the fifth ground Mr. Kitundu argued that, the source of dispute in the previous case was damage to crops by cattle in the land located at Embukoi village within Hai district, while the subsequent suit, the dispute was over 4 ½ acres located at Munge Hamlet in Munge village within Siha District. He further added that the respondents had no any interest to the previous suit because the present suit land was solely owned by the appellant.

I the last, which is the sixth ground of appeal, Mr. Kitundu submitted that since the appellant was not a party to the previous suit, he had the right to file the fresh suit over the subject matter or to file an objection proceedings under rule 57 of order XXI of the Civil Procedure Code. . To buttress his point the counsel referred to the decision of **Kangaulu Mussa vs. Mpungati Mchondo** [1984] TLR 248.

In reply, Mr. Willence Shayo resisted the appeal, and argued ground number 1st, 4th and 5th together as first limb and submitted that the Tribunal Chairman properly held and made decision in its ruling that the matter was *res judicata,* since the parties in land application were the respondent's father versus the appellant son and that the second respondent is the

administrator of the estate of the late Lazaro Lengere who was the applicant in the previous suit.

Mr. Willence also submitted that, the previous land application No. 87 of 2011, its cause of action was a trespass to the suit land whereby the issue raised by the tribunal was who was the lawful owner of the suit land and the respondent's father was declared to be the rightful owner. He stated further that in application for execution, the same piece of land (suit land) was listed as one of the deceased properties and since the tribunal decision were never appealed against, it was finally determined correctly by the tribunal, and hence it was barred to be opened again.

In respect to the provision of the law relied, Mr. Willence insisted further that such ingredients fit most under section 9 of the civil procedure code which list the ingredients for a suit to be *res judicata* as in the former application, the matter involved the applicant's father and the respondents father over the ownership of the same piece of land, wherein the Tribunal declared the respondent father to be the lawful owner of the suit land. The counsel stated further that, the title which was in dispute in land application No.87/2011 was the same which the applicant was disputing in land application No 121/2021.

Mr. Willence stated further that, the same was evidenced in the judgment attached to their written statement of defence where the issue of ownership was determined. To cement his pointthe counsel referred the decision of **Peniel Lotta vs. Gabriel Tanaki** and Others [2003] TLR 312 where the issue of res judicata was discussed as a bar to multiplicity of suits. He further invited this court to a decision of **Zuberi Paul Msangi vs. Mary Machui** Civil Appeal No. 316 of 2019, CAT Dares salaam (unreported).

The counsel for the respondent responded further that, the suit land was located in the same land, same village and with the same boundaries. He stated that the Embukoi village existed after institution of the former Application No. 87/2011 where Munge village was generated out of Embukoi village hence the applicant had been referring the same suit land within the same place in Munge village. The counsel relied on the decision of **Badugu Ginning Co. Ltd vs CRDB Bank Plc & Others** [2021] TZCA 158 (TANZLII).

In respect to the second ground Mr. Willence argued that for a matter to be res judicata, it must be on pure point of law. He submitted that the trial tribunal did consider the principles in **Mukisa Biscuits** (supra). He further stated that the issue of res judicata was not to be mixed with the

facts but it was by reading the application , the WSD and the annexed copy of the judgment of land application No. 87 of 2011.

Finally contending in respect to the third ground, Mr. Willence stated that the honorable trial tribunal did consider the submission of both parties before deciding the application and that the tribunal chairman was not required to reproduce the submissions in his ruling. Further in regard to the fourth ground the counsel stated that the applicant need not to file a fresh suit as it was already determined and being barred by the principle of res judicata. He then prayed for the court to dismiss the appeal with costs.

In a brief rejoinder Mr. Kitundu reiterated his submission in chief, and further rejoined that the application No 121/2021 was different with the previous land application No 87/2011 as they had different boundaries ,different cause of action and the size location and that explanation done by the respondent counsel under part IV of section 9 of CPC was not applicable to the suit at hand as the suit land was exclusively owned by the appellant. Further the counsel stated that the decisions cited by the respondents all were distinguishable from the case at hand, save for the principles governing the principles of res judicata.

He stated further that the suit land in a previous application No. 87/2011 was for unspecified land situated at Embukoi village within Hai District with the following boundaries East road, west valley, south Naiman North Kisavai while the subject matter in land application no 121 of 2021 is a parcel land measuring 4 ½ acres located at Munge hamlet, munge village Donyomurak ward, Siha District with boundaries in East Naiman Olemkoro West Biriri river Gulley, South Julius Naiman and Losaa-kia water pipe, North Oltung'anikotok@Abraham Mulebo.

He replied further that the appellant was litigating under different title and that the respondent PO did not qualify to be a point of law but also added that the submissions in regard to PO by the appellant in the trial tribunal were totally disregarded.

After considering the rival submissions by both parties, the major issue for determination is whether the appeal at hand has merit.

In determining the raised grounds of appeal, in commencing with ground number one, the issue is whether the trial tribunal was correct in holding that the matter in application No. 121/2021 was res judicata after

the same tribunal considered that it was already determined conclusively by another application No 87 of 2011.

I am mindful of the principle of the res judicata that once the matter has been substantially decided under the same parties, same cause of action and same subject matter by the court of competent jurisdiction then it becomes barred from being re-instituted again as afresh suit and it is so to avoid multiplicity of suits as correctly argued by both sides. The law under section 9 of the Civil Procedure Code CAP 33 R.E 2019 provides that;

> "***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"*
>
> [Emphasis added]

The above provision was clearly expounded by the court of Appeal in **Peniel Lotta v. Gabriel Tamaki and two others,** Civil Appeal No. 61 of 1999 (unreported) where the court stated as follows:

> *"The scheme of section 9 therefore contemplates five conditions which when co-existent, will bar a subsequent suit. The conditions are:*
> *(i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.*
> *(ii) The former suit must have been between the same parties or privies claiming under them.*
> *(iii) The parties have litigated under the same title in the former suit*
> *(iv) The court which decided the former suit been competent to try the subsequent suit.*
> *(v) The matter in issue must have been heard and finally decided in the former suit."*

I had an ample time to peruse through the land application No 87 of 2011 and Land Application No 121 of 2021 both of District Land Tribunal of Moshi in order to grasp the basis of the trial tribunal ruling that the application were the same as it was already decided by the tribunal itself. Bearing in mind that this being the appellate court is vested with jurisdiction

to evaluate the evidence as if it was a trial tribunal and come in its own conclusion.

As per the evidence on record compared to submissions, it is undisputed fact that the respondents' father instituted a land application No. 87/2011 in the tribunal against the father of the appellant herein claiming the ownership of 4 ½ acres located at Embukoi village within Hai District where he was declared a lawful owner. The issue now is whether the same 4 ½ acres which was decided to be of the respondent's father are the same 4 ½ acres the appellant claims to own and which is located at Munge hamlet in Munge village Donyomuruak ward within Siha District.

To answer that I find it imperative to look on the evidence and pleading came with the record filed in this appeal. According to the first judgment in land application No. 87 of 2011 at the Tribunal, the judgment itself was silent on the demarcation and boundaries of the said piece of land as it generally ruled out that the respondent's father was the owner of the suit land. However, to draw the inference which is in first paragraph of the said judgment, the tribunal mentioned the Suitland to be a land situated at Embukoi Village in Hai District, which in my view cannot ascertain the real piece of land which was in dispute.

Whereas on looking on the amended application No. 121 of 2020 which was filed on 15/12/2020, on item 3 of the said application the appellant clearly stated the location of the suit land to be in Siha District and boundaries were stipulated thereon. To dispel any possibility of distortion, I find it apposite to reproduce item as reflected at page 1 item 3 of the said application;

> *"3.Location and Address of the suit land; a parcel land measuring four and a half acre (4 ½) approximately situated at Munge hamlet within Munge village Donyomuruak Ward, Siha District with the following boundaries; East Naiman Olemkoro (Applicant) West Biriri river Gulley, South; Julius Naiman and Losaa-kia water pipe, North; Oltung'anikotok@Abraham Mulebo."*

I have compared the above two suit lands in two applications above alleged to be the same. Apparently, they seem to be different. However, in his submission in this appeal Mr. Willence for the respondent contended that the suit land was located in the same land and in the same village with the same boundaries. He attempted to substantiate by saying that the Embukoi village was after institution of the former Application No. 87/2011 wherein

Munge village was generated out of Embukoi village hence the subsequent application had been referring the same suit land within the same place in Munge village.

I have considered the above in respect to Embukoi village giving birth of Munge village, are submissions from the counsel. It is a trite law submissions are not evidence, (See cases of **Morandi Rutakyamirwa vs. Petro Joseph** [1990] T.L.R 49] and **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government,** Civil Appeal No. 147 of 2006. In **Registered Trustees of the Archdiocese of Dar es Salaam's (**supra) the Court of Appeal had this to say in relation to submissions: -

> *"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

In view of the above law, in accordance to this matter at hand, **first**; this is an appeal wherein and obvious it was argued by submissions from the counsels of both parties, **secondly**, the application itself no. 121 of 2020 at the tribunal which this appeal emanates, it yielded into objection which was also heard by way of written submission. Therefore, the question remains unsolved as to whether the same was even divided as alluded above. Nevertheless, to my opinion the Honorable chairman could not have any evidence to evaluate and ascertain the above, because no evidence was tendered before him in respect to the fact that the said village was divided, therefore the above cannot prove that the suit land in Land Application no. 121 of 2020 is the same with the previous matter of Land Application No. 87 of 2011.

The above reasoning triggered me to step into ground number two in this appeal that the Honorable Tribunal Chairperson erred in law and fact for upholding the preliminary objection which highly depended on evidence to prove or disprove the same. From what I have endeavored to explain above, although it is true when you consider generally plea of Res Judicata seems to be an objection on pure point of law, but I think each case must be determined according to its circumstance, in this matter as alluded earlier

one of the conditions stated above requires the prove by evidence to be ascertained, thus the learned chairman was required to be keenly to the parameters of the said objection.

I am saying so, because it is a trite law determination of pure points of law is by looking at what the parties have stated in their pleadings and not from any other matters that are outside the parameters of the pleadings. This was stated in the case of **Hotel and Lodges (T) Limited vs Attorney General & Another** [2013] TZCA 319 (TANZLII) where the court of Appeal referred the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] EA 696. And observed that;

> *"We think that pure points of law for the purposes of determination of preliminary objections arising from suits must be found strictly within the parameters of the pleadings."*

(See also **Shahida Abdul Hassamau Kassam s. Mahed Mohamed Gulamau Kanji** Civil Application No. 42 of 1999, (unreported).

In view of the above, I am of considered view that the learned Chairman did not direct himself on the above principle, because what was before him was pleading of Application no. 121 of 2020, in my perusal the

document initiated the application filed at the trial tribunal as alluded above provided for demarcations of the suit land, whereas the amended written statement of the defence filed at the Tribunal on 26th February 2021 said nothing in respect to demarcation of the previous application of 87 of 2011 to be the same land with the later one. Therefore, it is my conclusion the objection by the respondents at the trial tribunal its disposal requires proving by evidence that those suit lands in two matters were the same. Thus, being so ceases to be preliminary objection on the eyes of the law. (See **The Soitsambu Village Council vs Tanzania Breweries Ltd & Tanzania Conservation Limited** Civil Appeal No.105 of 2011 Court of Appeal of Tanzania at Arusha (unreported). Having observed as above, I am settled that, since the submissions in this appeal and that which was made at the tribunal were not evidence as alluded above, it is difficult according to the pleadings and the two judgments of the tribunal to ascertain that, the said land in dispute claimed as per application no. 121 of 2020 is the same as the one which was the suit land in application number 87 of 2020 otherwise be proved by evidence in future.

In the final analysis, I, in the exercise of revisional powers vested in this Court by section 43(1)(b) of the Land Disputes Courts Act (Cap. 216,

R.E. 2019), the proceedings of the trial tribunal are hereby nullified and consequently its Judgment and Decree thereon is hereby quashed and set aside. Consequently, I order the Land application no. 121 of 2020 to be restored and proceed on merit forthwith before another District Land and Housing Tribunal Chairman. After considering the circumstances of the case, I order each party to bear its own costs.

It is so ordered.

DATED at **MOSHI** this 19th day of June, 2024.

A. P. KILIMI
JUDGE

Court: Judgment delivered today on 19th day of June, 2024 in the presence. Mr. Dennis Maro for Appellant and Mr. Willence Shayo for Respondents. Appellant and Respondents absent.

Sgd: A. P. KILIMI
JUDGE
19/06/2024

Court: Right of Appeal explained.

Sgd: A. P. KILIMI
JUDGE
19/06/2024