

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

MWANZA

MISCELLANEOUS LAND CASE APPEAL NO. 100 OF 2008

**(From the Decision of the District Land and Housing Tribunal of Mwanza
at Mwanza in Land Case Appeal No. 87 of 2008 and Original
Ward Tribunal of Kitangiri Ward in Application No. 9 of 2008)**

JOYCE KAIZIREGE APPELLANT

VERSUS

ERICK SEMGAMBO RESPONDENTS

JUDGMENT

MWAMBEGELE, J.:

On 13.06.2007 the District Land and Housing Tribunal (henceforth the appellate Tribunal) dismissed the appeal filed by Joyce Kaizirege; the Appellant herein for want of merit. She was dissatisfied by the decision and therefore has appealed to this Court filing two grounds of appeal.

The appeal was argued before me on 29.10.2012. The Appellant was speaking through Mr. Kabonde, learned Advocate while the Respondent had the good services of Mr. Makwega, learned Counsel.

Mr. Kabonde for the Appellant argued the two grounds of appeal together. He submitted that the first application was filed in 2007 by the Respondent and the second one was filed in 2008 by the Appellant. He submitted that the parties in both applications were the same and in respect of the same subject matter. In the premises, Mr. Kabonde submitted that the appellate Tribunal ought to have realised that the second application which is the subject matter of this appeal, was *res judicata*. To buttress his argument, Mr. Kabonde cited the provisions of Section 9 of the Civil Procedure Code, Cap 33 of the laws.

On his part, Mr. Makwega, learned Counsel submitted that it is true there are two applications that were dealt with the Ward Tribunal of Kitangiri; one in 2007 and another one in 2008. But that the two applications were in respect of two causes of action: the first application that was filed in 2007 was filed by the Respondent who complained of trespass by the appellant while the second one was filed by the appellant over easement. In the premises, Mr. Makwega

submitted, the second application was not *re judicata*. He concluded that the District Land and Housing Tribunal was correct to arrive at the verdict as it did.

In a short rejoinder, Mr. Kabonde submitted that the issue of easement was dealt with in both applications. He thus submitted that the appellate Tribunal ought to have held that the matter was *res judicata*.

I have given due consideration to both rival arguments in this appeal. this appeal stands or falls on the whether the doctrine of *res judicata* is applicable in the circumstances of this case. The doctrine of *res judicata*, as rightly pointed out by Mr. Kabonde, is embodied in the provisions of Section 9 of the Civil Procedure Code, Cap 33 of the laws. The Section reads:

“Res judicata

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 provision further proceeds to elucidate as follows:

"Explanation I:

The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II:

For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

Explanation III:

The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint which is not expressly granted by the decree shall, for the

purposes of this section, be deemed to have been refused.

Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

These principles were well articulated by the Court of appeal; the highest court of our land in ***Yohana Dismas Nyakibari and Another Vs Lushoto Tea Company Limited and 2 Others***, Civil Appeal No. 90 (Court of Appeal - unreported) in which it was held:

"There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These 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 must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the

subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.”

In the instant case, the parties to the application filed in 2007 in Kitangiri Ward Tribunal christened B/K/KT/ 24/2007 (henceforth the 2007 application) were Erick Sengambo (Applicant); the Respondent herein and Joyce Kaizirege (Respondent); the Appellant herein. And from what I gather from the record it was in respect of easement.


In the application that was filed by the Respondent in 2008 (henceforth the 2008 application), it was between the same parties – the Appellant herein was the applicant and the Respondent herein was the Respondent. Again, from what I gather from the record before me, it was in respect of the same cause of action: easement.

In both cases in the Kitangiri Ward Tribunal, the subject matter of the applications was easement. In the 2007 application it was the Respondent who complained that the Appellant had built a wall which blocked neighbours who used the passage to go and fetch water. The appellant was ordered by the Ward Tribunal to demolish the wall which was the subject matter of the

complaints. In the 2008 application, it was the Appellant who filed the same complaining that the Respondent had blocked the Appellant to access her residence and access to water. It seems to me the two applications are in respect of the same parties over the same subject matter and that the former application was decided by a court of competent jurisdiction and no appeal was preferred against that the decision. I think this is a fit case in which the principle of *res judicata* ought to have been applied. In the premises, I find and hold that the appellate Tribunal ought to have held that the matter was *res judicata* and therefore ought to have proceeded to make necessary orders.

In the end result, this appeal is allowed. It is allowed with costs.

DATED at MWANZA this 2nd day of November, 2012


J. C. M. MWAMBEGELE
JUDGE