

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO.45 OF 2017

HASSAN HIARI PAGALI.....PLAINTIFF

VERSUS

SOKOINE MAITEI KOTEMO..... DEFENDANT

RULING

Date of Last Order: 19.03.2018

Date of Ruling: 31.05.2018

S.A.N WAMBURA, J:

Hassan Hiari Pagali instituted this suit against the defendant

Sokoine Maitei Kotemo for the following reliefs:-

- (a) An order that the defendant should be compelled to vacate to the Land at Hassan Hiari Pagali.*
- (b) An order for injunction to stop any development conducted by the defendant to the Land of Hassan Hiari Pagali.*
- (c) General damages as may be determined by the court.*
- (d) Costs of this plaint provide by the defendant.*
- (e) Any other reliefs this honorable Court deems fit and just to grant.*

However before the hearing of the suit, Mr. Nkwera learned counsel for the defendant raised the preliminary objection on a point of law to the effect that;

“That the plaintiff is defective due to being res judicata.”

The plaintiff appeared in person unrepresented.

With leave of this court, the preliminary objection was disposed of by way of written submissions. I thank both parties for adhering to the schedule.

In supporting the preliminary objection, Mr. Nkwera contended that the suit is res judicata because there was a suit at Msata Ward Tribunal with No. 202/2015. He stated that the said suit was filed by the plaintiff claiming that the defendant trespassed into his land measuring 20 acres.

That the facts in Case No. 202 of 2015 are similar to the facts of plaintiff's plaint in Land Case No. 45 of 2017 especially in paragraph 4 and 6(a) (1) and (11).

Mr. Nkwera further averred that even the parties before the Ward Tribunal and in Land Appeal No. 21 of 2016 at Kibaha District Land and Housing Tribunal are the same. He therefore prayed to this court to dismiss the suit with costs.

In rebuttable, the defendant did not submit any thing on the preliminary objection raised, but he rather submitted on the jurisdiction of the District Land and Housing Tribunal which is not the part of the objection.

Having carefully gone through the submissions from both parties, I have observed that the main issue for determination is whether this suit is *res judicata* or not.

The requirements of the doctrine of *res judicata* couched in the provision of **Section 9 of the Civil Procedure Code Cap. 33 R.E 2002** which provides as herein quoted: -

“Section 9 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 subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.

[Emphasis is mine].

The requirements of the doctrine of *res judicata* couched in the provisions of **Section 9 of Cap. 33 R.E 2002** are applicable in a particular case once the following five essential ingredients are proven to co-exist:

1. *The matter directly and substantially in issue in the subsequent suit must have been directly and substantially is issue in the former suit.*
2. *The former suit must have been between the same parties or privies claiming under them.*
3. *The parties must have litigated under same the title in the former suit.*
4. *The court which decided the former suit must have been competent to try that suit.*
5. *The matter in issue must have been heard and finally decided in the former suit.*

Moreover the court's decision, in the case of **GEORGE SHAMBWE VERSUS TANZANIA ITALIAN PETROLEUM COMPANY LTD [1995] TLR 21**, made the following proposition:-

*“For res judicata to apply not only it must be shown that the matter directly and substantially in issue in the contemplated suit is the same parties but also it must be shown that, **the matter was finally heard and determined by a competent court**”.*

[Emphasis is mine]

Now the controversy before me is whether the present suit is res-judicata as contended by Mr. Nkwera learned counsel for the defendant or not.

Having carefully gone through the learned counsel's submissions and on the basis of the plaint, it is evident that the facts in the plaintiff's plaint in this suit are similar to the facts of the plaintiff's claims in Complaint No. 202 of 2015 before Msata Ward Tribunal. Paragraph 4 and 6 (a) (i) and (ii) of the plaint clearly evidence that the cause of action alleged in this suit is the same as alleged

in the previous suit No. 202/2015 before Msata Ward Tribunal as well as Land Appeal No. 21/ 2016 of Kibaha District Land and Housing Tribunal.

The said complaint was already determined by the Ward tribunal on 31/12/2015 where the trial tribunal dismissed the plaintiff's application. Being aggrieved by the said decision the plaintiff herein appealed to the District Land and Housing Tribunal of Kibaha in Land Appeal No. 21 of 2016. The said tribunal on 20/10/2016 upheld the decision of the trial ward tribunal and dismissed the plaintiff's appeal with costs.

I note that the prayers which the plaintiff herein claimed before the Ward tribunal, are the same prayers prayed before Court.

Even the parties who were in the dispute are similar and the same to this suit. At the trial Ward tribunal the parties were **Hassan Hiari Pagali** and **Sokoine Maitei Kotemo** and in the instant suit it is the same plaintiff who instituted this suit claiming that the defendant trespassed into his land measuring 20 acres. It is the same land in dispute which was the subject matter before Msata Ward

Tribunal, and the matter was finally heard and determined by the competent tribunal.

It is my settled view that as far as the parties and the subject matter were the same and the dispute was finally determined, the plaintiff is stopped from filing a fresh suit on the same issue.

This is because after the courts with competent jurisdiction heard and finally determined the suit, the court become functus officio and cannot determine the same issue in dispute. The rationale behind this principle is that every litigation should come to an end, and the one who succeeds in the suit to enjoy the fruits of his/her success.

If the plaintiff was still aggrieved with the said decision he still had a remedy which was to appeal to this Court and not file a fresh suit.

Having said so, the preliminary objection raised by Mr. Nkwera is sustained.

The suit is accordingly struck out with costs for being res judicata.

S.A.N WAMBURA
JUDGE
31.05.2018