

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

LAND APPEAL NO. 21 OF 2017

PETER PAUL SEMWIJAH.....APPELLANT

VERSUS

INTERGRATED PROPERTY CONSULTANCY

COMPANY LIMITED.....1ST RESPONDENT

GRACE KAMBARA.....2ND RESPONDENT

ZEBBIO AUGUSTINO3RD RESPONDENT

TEACHERS DEVELOPMENT CO. LTD.4TH RESPONDENT

Date of last order: 10/7/2018

Date of Ruling: 26/7/2018

J U D G M E N T

MGONYA, J.

The Appellant herein instituted **Land Application No. 117 of 2016** at Morogoro District Land and Housing Tribunal whereby the trial Chairman dismissed the entire Application with costs in favour of all Respondents; for the reason that the Application is

Res Judicata and also that the same lacked pecuniary jurisdiction before Honorable Tribunal.

Aggrieved by the said decision, the Appellant herein appealed to this court on the following grounds;

1. Appeal to be allowed with costs;

2. This Honourable Court to order this matter to be tried denovo; and

3. Any other order (s) which this Honourable Court deem fit and just to grant.

During the hearing of this Appeal, the Appellant was represented by Advocate Azizi Mahenge who was holding brief for Advocate Chuwa who also had instructions to proceed with appeal hearing; whereas Respondents were represented by Mr. Giray the learned Counsel. The appeal was disposed urged by way of oral submissions.

Despite of appreciating the length and respected submissions by the leaned Counsels to this Appeal, it is not my intension to reproduce their submission, but instead, I will briefly state the parties concern to the instant appeal.

As stated in the 1st ground of appeal in the Appellant's Memorandum of Appeal, it is the Appellant's assertion that the trial Chairman wrongly dismissed the **Land Application No. 117 of**

2016 for the reason of it being ***Res judicata***. His reason being that the matter was not heard and determined to its finality. It is further alleged that, since that was the case, then the matter never met the legal requirement to be termed as ***Res judicata*** as per **Section 9** of the **Civil Procedure Code, Cap. 33 [R. E. 2002]** herein to be referred as **CPC**.

In the second ground, the Appellant's concern is on the Chairman fault to rely on the Sale Agreement between the 3rd and 4th Respondents which was annexed to the Respondents' Written Statement of Defense of which was not stamped, registered and that the same is not the Government official Valuation Report as required by law; to ascertain the pecuniary jurisdiction of the subject matter in the Appellant's Application in **Land Application No. 117 of 2016**.

From the above submission, the Appellant prayed the Court to allow the Appeal and order the matter be tried Denovo and make any other necessary orders as the court may deem fit and just to grant.

On the contrary, Mr. Giray the learned Counsel for Respondents was of the view that the matter in the Application was indeed the ***Res judicata*** as it is the fact that all Respondents to **Land Application No. 117 of 2016** were also the Respondents

to the **Land Application No. 199 of 2015** which was instituted by the Appellant earlier in the same Tribunal; which was also dismissed for lack of competent jurisdiction by the same Chairperson who dismissed the **Land Application No. 117 of 2016**; for the above stated reasons.

On the second ground which was directed to the fact that the trial Chairman was wrong on basing on the 3rd and 4th Respondents' Sale Agreement, the learned Counsel for the Respondents averred that the Hon. trial Chairman was correct in determining the pecuniary jurisdiction by using the Sale Agreement which was dully attached to the joint Respondents' Written Submission of Defense since the value of **Tshs. 203,000,000/=** was the correct value of the land in dispute as a Sale price regardless the stated value was not determined by the Government Valuer. It is from the said amount, the District Land and Housing Tribunal lacks the pecuniary jurisdiction as well stated and ruled by the trial Chairman in his decision in **Land Application No. 117 of 2016**.

The Respondents' Advocate thus supported the trial Chairman's decision requesting this court to dismiss the instant Appeal with costs.

Having carefully gone through the grounds of appeal as well as the submission from both parties, I have observed that the main issue to be determined is whether the District Land and Housing Tribunal erred in law by dismissing **Land Application No. 117 of 2016** for the reason of the same being *Res judicata* and that the Application lacked pecuniary jurisdiction to be entertained and determined by the District Land and Housing Tribunal.

Before proceeding with determining the instant grounds of Appeal, I am mindful and indeed let me acknowledge the fact that initially there was an advanced **Land Application No. 199 of 2015** instituted by the Appellant herein bearing the same parties and the same subject matter as well notified by the Respondents' Advocate in his submission. According to records, the said Application in which the same was dismissed for want of pecuniary jurisdiction before the Applicant instituted the second Application thereafter; that is **Land Application No. 117 of 2016**; whose decision is subject of this instant Appeal.

Now, upon perusal of the trial court records in **Land Application No. 117 of 2016** and that of **Land Application No. 199 of 2015** before the District Land and Housing Tribunal of Morogoro, to appreciate the argument for and against the whole issue of *Res- Judicata*, I feel duty bound to reproduce the

provision of **Section 9 of the Civil Procedure Code Cap. 33** which the principle of "***Res Judicata***" is encapsulate. It provides:-

*"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 is mine]*

I am alive that the object and public policy behind the doctrine of ***Res-judicata*** is to ensure finality in litigation. My reference is made to the decision of the Court of Appeal of Tanzania in the case of ***UMOJA GARAGE VS. NATIONAL BANK OF COMMERCE HOLDING CORPORATION, Civil Appeal No. 3 of 2001*** (Unreported). Of course, it is also meant to protect an individual from a multiplicity of Litigation.

In celebrating the essential ingredients of the doctrine of ***Res-judicata***, I find it necessary to revisit albeit the requirements or sine quo non conditions for ***Res Judicata*** to operate couched by the Court of Appeal of Tanzania in the case of ***PENIEL LOTTA VS***

GABRIEL TANAKI AND OTHERS (2003) 2 EA where the following matters must exist:-

1st, the matter directly and substantially in issue in the subsequently suit must have been directly and substantially is issue in the former suit;

2nd, the former suit must have been between the same parties or privies claiming under them;

3rd, the parties must have litigated under the same title in the former suit;

4th, the court which decided the former suit must have been competent to try that suit; and finally or

*5th, the **matter in issue must have been heard and finally decided in the former suit.***

The above conditions have been also reflected and stated by number of prominent Authors, to mention but the few:

- 1. Mulla on the "Code of Court Procedure", Vol. I, pp 101, 123-24, 136,155,166 ;**
- 2. P. K. Majumdar "Commentary on the Law of the Code of Civil Procedure 1908", 5th Ed., pp 146, 169;**

3. ***A. N. Saha's. "The Code of Civil Procedure" Vol. I, 5th Ed., p 143;***
4. ***"Ganguly's Civil Court Practice and Procedure", 13th Ed. pp 165-169, 171; and***
5. ***Sheodan Singh vs. Daayaa Kunwar [1966] 4 SCR (300).***

Now the capital issue for determination in this ground is whether or not the **Land Application No. 117 of 2016** brought by Appellant was/is ***Res-judicata***.

In this context, the first condition that I take up for consideration is the identity of the parties. Since one of the element for ***Res-judicata*** speaks loud that the former suit must have between the same parties or privies claiming under them. Looking on the present case and the former suit, I have found that the first test has been met since the parties are the same.

Next element that arises to be tested on the operation of ***Res-judicata*** is that the parties must have litigated under the same title the dormer suit. Looking on the contest of the **Land Application No. 199 of 2015** and the contents of **Land Application No. 117 of 2016** both before the Morogoro District Land and Housing Tribunal, I am satisfied that the parties in the

present suit are litigated under the same title in the former Application. That this second test has also been met.

Another prerequisite condition is that the matter directly and substantially in issue in the subsequently suit must have been directly and substantially is issue in the former suit.

Looking in the records of **Land Application No. 117 of 2016 and that of Land Application No. 199 of 2015**, indeed the cause of action in respect of both Applications is the same which is for the Respondents' trespass to the landed property alleged to be the Appellant's land. So the present condition too is qualified.

Finally is the test that the ***matter in issue must have been heard and finally decided in the former suit.*** According to the records, I join hand with the Appellant's counsel that the **Land Application No. 199 of 2015** was not heard and determined to its finality. This is a very well-known fact to both parties and to the Tribunal which dismissed the **Land Application No. 117 of 2016** under the auspices of points of preliminary objection.

It is not enough to show that the subject matter and issues in the suit are the same as in the previous suit, and that a court competent jurisdiction pronounced a decision. It must further be shown that the decision finally decided the matters in dispute. As

was stated by Lord Porter in the Indian case of ***BHAGWASTI V RAM KALI (AIR) 1939 PC 133;***

"In order to successfully establish a plea of res judicata or estoppel by record it is necessary to show that in a previous case a court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in the later case."

The decision, therefore, must be on the merits, and it must be clear that the parties were heard or were given an opportunity to be heard before the decision on the merits was pronounced. If, therefore, a suit is dismissed on a preliminary point, which does not finally decide the rights and liabilities of the parties, then the Plaintiff cannot be said to have been heard on the merits, and so a subsequent suit is not ***res judicata***.

As these tests have to tread concurrently, the failure of one test, disqualifies the Application to be termed ***Res-Judicata***. From the same, then it is my firm view that the learned Chairperson misconceived the concept of the ***Res Judicata*** which led him to the wrong decision. In the event, **the first ground of Appeal has merit and succeeds accordingly.**

On the second ground, that the Chairman fault to rely on the Sale Agreement between the 3rd and 4th Respondents which was annexed to the Respondents' Written Statement of Defense of which was not stamped, registered and that the same is not the Government official Valuation Report as required by law to ascertain the pecuniary jurisdiction of the subject matter in the Appellant's Application in **Land Application No. 117 of 2016**; I have the following observations.

First, in determining this ground, I see it wise to reproduce **Regulation 3(1) and (2) (d) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** which provides:

*"3 (1) Any proceeding to the Tribunal shall commence by an application **filled by an Applicant or his representative** or payment of the appropriate fees prescribed in the First Schedule of these Regulations.*

(2) An Application to the Tribunal shall be made in the form prescribed in the Second Schedule to these Regulations and shall contain:

*(d) **Estimated value of the subject matter of the dispute.***

The purpose of the above provision is for the Tribunal to ascertain if it has a pecuniary jurisdiction over the matter before it. That being the case, then the duty of stating the **estimated value of the subject matter of the dispute** is that of the Applicant and not Respondent. In the case where the Respondent differs the value of the disputed property as in the instant Appeal, the burden of proof shifts to the Respondent by him/her attaching the Credible Valuation Report duly accredited and approved by the Chief Government Valuer to his/her respected Written Statement of Defense; to be followed later in the Final Pre Trial Conference stage by framing the issue of whether the Tribunal has a pecuniary jurisdiction to entertain the suit within other framed issues; to be followed by proof of variance of the value during hearing where the said Valuation Report can also be tendered as evidence in support of the variance to prove the fact of jurisdiction. That is the procedure. Short of that, no any kind of evidence whatsoever can be taken by the Court/Tribunal to state or rather determine the true value of the property in dispute apart from the value stated by the Applicant in his Application as I have stated earlier. This is to prove the fact that Parties are bound by their own pleadings.

Having stated the above situation, I further state that the issues of the jurisdiction at the stage of instituting the matter before the Court or Tribunal does not need at all the scrutiny of

evidence especially on circumstances where there is a point of Preliminary objection. For the Trial Chairman going to the extent of scrutinizing the annexures to the Respondents' Written Statement of Defense to prove the value of the disputed land/property, the said act was a serious misconception since the one who needed to state the value of the suit was the Applicant as well provided under **Regulation 3 (2) (d) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003.**

From the above explanation, it is my firm view that the trial Chairman in deciding the preliminary objections raised in **Land Application No. 117 of 2016**, had totally misconceived the rules of scrutinizing the evidence searching for the value of the suit by using the annexed Sale Agreement which goes contrary to the rules of Preliminary Objection as observed in the Case of ***MUKISA BISCUIT MANUFACTURING CO LTD VS. WEST END DISTRIBUTORS LTD (1969)1 EA 696***; where it was held that:

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the **jurisdiction of the court**, or a plea of*

limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration”.

Further, in the case of **LEGAL AND HUMAN RIGHTS CENTRE AND ANOTHER VS. HON. MIZENGO PINDA AND ANOTHER, Misc. Cause No. 24 of 2013 High Court of Tanzania (Unreported) Hon. Tundu JK**, stated thus:

"The position of law is that the purpose of Preliminary Objection is to enable the Court to decide on the point of law based on ascertained facts that give rise to a pure pointy of law, which can be disposed of without the need for any further evidence."

Finally, as the trial Chairman erred by using the value which was not pleaded by the Applicant. It is from this explanation, **the second ground of Appeal too has merit.**

Due to the above observation and explanation, I proceed to invoke my revisionary powers and step into the shoes of the Trial Tribunal and proceed to make the following orders:

First, I proceed to set aside the entire proceedings and Ruling of **Land Application No. 117 of 2016;**

Second, order that the Application (**Land Application No. 117 of 2016**) be returned to the Morogoro District Land and Housing Tribunal as it is the competent Tribunal to try the matter for determination of the same on merits before the different Chairman.

In the end result, **the Appeal is hereby allowed with orders above.**

Each party to bear its own costs.

It is so ordered.

Right of Appeal Explained.



L. E. MGONYA
JUDGE
26/7/2018

COURT: Judgment delivered in the presence of Appellant in person and in absence of the Respondents/Respondent's Counsel; and Ms. Emmy B/C in my chamber today 26th day of July, 2018.



L. E. MGONYA
JUDGE
26/7/2018