

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

LAND CASE NO.71 OF 2019

MARY MWAKAJINGA.....1ST PLAINTIFF
JUMA ATHUMANI.....2ND PLAINTIFF
PETER PETER JUNIOR.....3RD PLAINTIFF
SABINA MAOPE.....4TH PLAINTIFF
DAVID MAGANGA.....5TH PLAINTIFF
MARIA YOHANA.....6TH PLAINTIFF
ROBERT MATHIAS.....7TH PLAINTIFF
ADAM AFRIKA.....8TH PLAINTIFF
ANA MARKO.....9TH PLAINTIFF
YOHANA NGADAI.....10TH PLAINTIFF
BERNARD GEORGE.....11TH PLAINTIFF
GODFREY SWAI.....12TH PLAINTIFF
MSHAM BAKARI.....13TH PLAINTIFF
ABDALLAH MAJID.....14TH PLAINTIFF
SALAMA MHAMED.....15TH PLAINTIFF
HAMZA RASHID16TH PLAINTIFF
WARTER MUSHI.....17TH PLAINTIFF
MATRIDA LUKAMA.....18TH PLAINTIFF

VERSUS

NYASO ENTERPRISES COMPANY LIMITED....1ST DEFENDANT
THE REGISTERED TRUSTEES OF
GOOD NEWS FOR ALL MINISTRY.....2ND DEFENDANT
THE REGISTRAR OF TITLES.....3RD DEFENDANT
THE STATE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

V.L.MAKANI, J

This ruling is in respect of preliminary objections that were raised by the defendants. The 1st and 2nd defendants raised preliminary objections on points of law as follows:

- 1. That the suit is res judicata. The plaintiffs are bound by the principle of estoppel per rem judicatum.*
- 2. That the suit is bad in law for having being filed before the expiry of the statutory period.*
- 3. That the statutory period has a forged rubberstamp of the receipt of the same.*
- 4. That what is stated in paras 13, 14, 15, and 16 are not particulars of fraud and misrepresentation hence this suit is incompetent.*
- 5. That the suit against the 3rd defendant is incompetent as it contravenes s.13, 14,101 and 102 of the Land Registration Act, Cap 334 RE 2002 (**Cap 334**).*
- 6. The plaint contravenes Order VI Rule 4 and Order VII Rule 1(e) of the Civil Procedure Code Cap 33 RE 2002 by not giving particulars of the dates in para 5,7 and 8 and has misrepresented the particulars of fact in para 15 of the plaint.*
- 7. That the 4th defendant does not exist.*
- 8. That in the absence of an order appointing PETER PETER JUNIOR as the agent of the plaintiffs the address of the plaintiffs for the purposes of this suit is disputed.*

The 3rd and 4th defendants also raised two points of preliminary objection that:

- 1. The case is untenable for being res judicata.*
- 2. The plaint is defective as it contravenes the provision of Order VI Rule 14 of the Civil Procedure Code, Cap 33 RE 2018(sic) of the Laws of Tanzania.*

With leave of the court the preliminary objections were argued by way of written submissions. Submissions on behalf of the 1st and 2nd defendants were drawn and filed by Mr. Barnabas Luguwa, Advocate and for the 3rd and 4th respondents the written submissions were drawn and filed by the Mr. Stanley Mahenge, State Attorney. The Plaintiffs jointly drew and filled their own submissions.

Mr. Luguwa used his first 8 pages to give the history of this suit and the likely supporting authorities. On the first point of preliminary objection, he submitted that the plaintiffs in Land Case No.71 of 2019 are seeking for an order that this court should nullify the judgment and decree of Hon. Arufani, J in Land Case No. 128 of 2012 was heard and determined inter-partes on 20/04/2018. He said that, the plaintiffs made further prayers for the court to declare that the suit land belongs to the plaintiffs and other orders whose effect is the eviction of the 1st defendant from the suit land. He said that, if the plaintiffs have been offended by the decision in Land Case No.128 of 2012, the only remedy is either to appeal or prefer revision for those

who were not parties to the case. He supported his position with the case of **Mwasiti Ally vs. Diamond Trust Bank Tanzania Ltd, Civil Case No.53 of 2016 (HC-DSM)** (unreported).

On the second and third points of preliminary objection Mr. Luguwa said that, on 27/03/2019 the plaintiffs wrote a notice of intention to sue the government. He said that the suit at hand was filed on 14/06/2019 which is 79 days from the date of the notice of intention to sue the government. He relied on section 6 (2) and (3) of the Government proceedings Act, Cap 5 RE 2002. He further said, the rubber stamp on the said notice is dated 05/03/2019, exactly 22 days before the notice was written and before official search report which was appended to the said notice.

On the fifth point of preliminary objection Mr. Luguwa said that, the Registrar of Titles is also a quasi-judicial institution which is empowered to receive any complaint concerning the registration of land and to issue a decision determining the rights of the parties to the suit land. He relied on section 101 and 102 of the Land Registration Act CAP 334 RE 2019. He added that, the High Court has no jurisdiction over the party disputing the registration of the land in

the name of his adverse. He said that such dispute ought to be referred to the Registrar and if dissatisfied then they would have appealed to the High Court. He said that paragraph 10 and prayer 1 of the plaintiffs' plaint suggest that the case should have been preferred to the Registrar of Titles.

On the seventh ground, Counsel said that the title STATE ATTORNER GENERAL does not exist in any government establishment. Counsel dropped grounds number 4, 6 and 8. He prayed for the court to sustain the objections submitted thereon and the suit be dismissed with costs.

Mr. Mahenge argued the preliminary objections on behalf of the 3rd and 4th respondents. On res judicata he said that there is no dispute that in the Land Case No.128 2012 the plaintiffs among others prayed to be declared the lawful owners of the suit land. He said in the present case one of the plaintiffs' prayers is the declaration that they are the lawful owners of the suit land. He said that the matters which had been directly and substantially in issue in Land Case No.128 of 2012 are also directly and substantially in issue with the subsequent case. He added that some of the plaintiffs in this case were plaintiffs

in the Land Case No.128 of 2012 as pleaded in paragraph 6 of the
plaint. He said that the parties to the former suit were MARY
MWAKAJINGA as the 22nd plaintiff, JUMA ATHUMANI, MARIA YOHANA
was the 37th Plaintiff, ROBERT MATHIAS was the 34th plaintiff,
SALAMA MHAMED was the 16th plaintiff and MATRIDA LUKAMA was
the 36th plaintiff. He said that, though other parties in this case were
not parties in the former case but they are litigating under the same
title and common interest as in the former suit. He said that the
subject matter in the present suit was well covered in Land Case
No.128 of 2012. He relied on section 9 of the Civil Procedure Code
CAP 33 RE 2019 (the **CPC**) and the cases of **Umoja Garage vs. NBC
Holding Corporation 9203) TLR 339, Easter Ignas Luambano
vs. Adriano Gedam Kipalile, Civil Appeal No.91 of 2014 (CAT-
Zanzibar)** (unreported) and **Hassan Hiari Pagali vs. Sokoine
Maitei Kotemo, Land Case No.45 of 2017 (Land Division)**
(unreported).

Submitting on the second point of objection raised by the 3rd and 4th
respondents, the learned State Attorney said that it is the trite law
that the plaint has to be signed by the party or his respective advocate
according to Order VI Rule 14 of the CPC. He said that the plaint in th

is case have not been signed by the plaintiffs as required by the law.

In reply to the first point of objection on res judicata raised by all the four defendants, the plaintiffs said that, the issue of fraud and misrepresentation was not pleaded and decided by the court in the Land Case No.128 of 2012. He said that in this case they have not prayed to quash the former decision rather to set aside. He insisted therefore that the suit at hand does not qualify as res judicata. They relied on the case of **Mohamed Enterprises (T) Limited vs. Masoud Mohamed Nasser, Civil Application No.33 of 2012 (CAT-DSM)** (unreported).

On the second and third grounds of objection, the plaintiffs said that the said grounds have not qualified to be grounds of objection as the same needs to be proved by evidence and perusal from the annexed copies. They relied on the case of **Mukisa Biscuits Company vs. West end Distributors Limited (1969) EA 696**. They insisted that the suit was not instituted after the expiry of the period prescribed by the law.

On the fifth ground they said that, the contention that suit contravenes the Land Registration Act needs evidence to prove because the Registrar of Titles must issue notice to adjoining land and to public thus give way for any person interested in the land to object. They relied on sections 12(1), (2) and 13 of the Land Registration Act

On the seventh point of objection the plaintiffs said that they have failed to understand what the defendants mean in the main submission as the 1st defendant is Nyaso Enterprise Company Limited but not State Attorney General.

Replying to the second ground of objection which was only raised by the 3rd and 4th respondents, the plaintiffs said that, they have noted that the objection in the notice of preliminary objection is different from the objection in the submission. They said that while the former refers to contravention of the CPC Revised Edition of 2018, the submissions refer to the Revised Edition of 2019. They said that the latest Revised Edition does not exist in the legal system of Tanzania. They prayed for the preliminary objections to be overruled with costs.

In rejoinder, Mr. Luguwa reiterated his main submission and added that the rule in the case of **Mohamed Enterprises** (supra) is applicable only to cases where the parties disposed the suit by consent, settlement or compromise under Order XXIII of the CPC.

Having gone through the submissions by the parties, the issues for determination is whether the preliminary points of objection raised have merit. I will first address the objection of res judicata that was raised by all the four defendants. The defendants contended that the suit at hand is res judicata to Land case No.128 of 2012 which was conclusively determined by Hon. Arufani, J on 20/04/2018.

Res judicata is governed by section 9 of the CPC and the said section 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.

For res judicata to stand, the following ingredients must be proved:

- (i) *That the former suit must have been between the same litigating parties or between parties under whom they or any of them claim;*
- (ii) *That 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;*
- (iii) *That the party in the subsequent suit must have litigated under the same title in the former suit;*
- (iv) *That the matter must have been heard and finally decided;*
- (v) *That the former suit must have been decided by a court of competent jurisdiction.*

Now, were the parties in Land Case No.128 of 2012 the same as the parties in Land Case No.71 of 2019? From the records of both cases, the six plaintiffs appeared in this case were also plaintiffs in the land Case No.128 of 2012. To be precise the parties appearing as plaintiffs in both cases are:

- 1. MARY MWAKAJINGA.**
- 2. JUMA ATHUMANI.**
- 3. MARIA YOHANA.**
- 4. ROBERT MATHIAS.**
- 5. SALAMA MHAMED.**
- 6. MATILDA LUKAMA.**

These parties appear in both land cases together with other plaintiffs.

So, this condition about the same parties in the previous and

subsequent suit has been satisfied. The position of the parties who did not appear in the former case will be discussed later in this ruling.

The second element to be tested in the operation of res judicata is the identity of the subject matter in issue or causes of action. In this regard, the issue to look upon is the cause of action and reliefs in the previous and subsequent suit. In both land cases, the parties are claiming to be declared lawful owners of the land located in Mapinga area in Bagamoyo District. In that respect the matter in Land Case No.128 of 2012 is substantially the same as the matter before this court in Land Case No.71 of 2019. In other words, the foundation of Land Case No.128 of 2012 which was declaration of ownership of the suit land is also the same as in the present suit.

Another test in respect of the doctrine of res judicata is whether the decision in the previous suit was final. There is nothing on record to show that the decision in Land Case No.128 of 2012 has been challenged by way of appeal, revision or review. As it is now, since the said judgment has not been challenged, it means, it is still subsisting and thus it is final and conclusive.

The last test is whether the parties were litigating under the same title. The right to ownership of the suit land was claimed by the parties in the Land Case No.128 of 2012 and it is also the case in this subsequent suit; as such the parties in the Land Case No.128 of 2012 litigated under the same legal capacity as in this subsequent suit.

Now what is the position of those who were not parties in the Land Case No.128 of 2012 but appears as plaintiffs in the present case? The answer is very straight forward that they should apply for an application for revision of the Land Case No.128 of 2012. The reasons are simple, in that, in the judgment of Land Case No.128 of 2012, the plaintiffs' claim of ownership in respect of the suit land was dismissed. That means that the 1st defendant's right of ownership over the suit land subsist and has never been extinguished in any way. The 1st defendant has got the right over the suit land against the whole world (unless otherwise lawful extinguished). It is what is known as *right in rem*. Consequently, he has the right over those who were not parties to the Land Case No.128 of 2012. The only option for them to claim right over that suit land is through revision. They cannot institute another Land Case as it has already been fully determined, by the

court of competent jurisdiction and the decision thereto stands unchallenged.

In the final analysis, and for the foregoing reasons, I find that the subsequent suit has been hit by section 9 of the CPC and it is accordingly res judicata. This point of preliminary objection therefore has merit and it is upheld. That being the case, I find no reason to discuss the remaining preliminary points of objection as this one completely disposes of the whole case.

In the circumstances, the suit is hereby dismissed with costs for being res judicata.

It is so ordered.



V.L. Makani

V.L. MAKANI
JUDGE
07/12/2020