IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 57 OF 2019

ASHA ALLY KIPAMUNGU (As an Administrator of the Estate Of the Late MZALIA ALLY HAMISI MCHOPANGA) ..... APPELLANT

VERSUS

1. **SOPHIA ROMAN**
2. **IMAM HEMEDI** ..... **RESPONDENTs**
3. **SAID MKELE**

(Appeal from the decision of the District Land and Housing Tribunal for Kibaha District at Kibaha)

Dated the 28th day of April, 2016

in

Land Application No. 214 of 2019

JUDGMENT

S.M. KALUNDE, J.:

The appellant, **Asha Ally Kipamungu**, in her capacity as the administrator of the estate of the late Mzalia Ally Hamisi Mchapanga, lodged the present appeal on 11th April, 2019 challenging the decision of the District Land and Housing Tribunal for Kibaha District **("the DLHT")** dated 28th February, 2019 in **Land Application No. 214 of 2017 ("the application")**. In the said decisions the DLHT dismissed he appellants application with costs on the ground that it was re judicata to **Land**

Application No. 55 of 2015 at the Mapinga Ward Tribunal **("the Ward Tribunal")**. Aggrieved by decision of the DLHT, the appellant decided to lodge this appeal.

For purposes of appreciating the decision I am going to make, I find it appropriate to recapitulate the facts leading up to the present appeal. On 01st August, 2015 the appellants, in her personal capacity, filed Land Application No. 55 of 2015 before the Ward Tribunal claiming that the respondent trespassed into her land measuring 55 by 35 pieces located at Kiharaka in Bagamoyo District **("the suit land")**. Upon being served on 10th September, 2015 the 1st respondent raised a preliminary objection on a point of law that the appellant had locus to file the suit because the suit land belonged to her deceased son. The appellant was served with the preliminary objection and hearing of the objection was fixed for 22nd September, 2015. The appellant did not appear on the date fixed for hearing. The another was adjourned several times and subsequently, on 17th November, 2015 the ward tribunal delivered its decision striking out the application by sustaining the preliminary objection raised by the 1st respondent. In its decisions the ward tribunal made the following remarks:

> ***"... Baraza limeona mdai akishindwa kujibu pingamizi za mdaiwa hivyo kuipa nguvu pingamizi ya mdaiwa. Baada ya hayo Baraza***

limelitupa shauri hili na kumuachia huru mdaiwa katika eneo hilo sababu kuu;

1. ***Mdai hajajibu pingamizi za mdaiwa.***

2. ***Mdai hatokei katika baraza sababu za kutofika katika baraza huku akijua kuwa shauri amefungua dhidi ya mdaiwa...kauli ya baraza shauri limefutwa ..."***

Unbeknown to the 1st respondent and the ward tribunal, on 08th October, 2015, the appellant had been granted letters of administration as the administrator of the estate of the late Mzalia Ally Hamisi Mchopanga. Subsequent, to grant of the letters, on 15th February, 2018 the appellant filed unamended application against Sophia Roman, Imam Hemedi and Said Mkale (the 1st, 2nd and 3rd respondents). She claimed that around 2015 and 2016, the respondents invaded the suit land demolished the erected structures and prevented her from developing the suit land. She thus prayed for judgment and decree in the following terms.

(a) *A declaration that the application is the lawful owner of the land dispute;*

(b) *Permanent injunction restraining the Respondents from entering into the applicant's land in dispute;*

(c) *Costs; and*

(d) Any other relief as the tribunal may deem fit and just to grant.

On being served with the application, the 1st respondent filed their written statement of defence denying all the applicants claims. The 1st respondent claimed to be a lawful owner of the suit land having purchased it from one Robinson Kidede and Roza Robinson Kidede on 9th February, 2015. Together with the defence, the 1st respondent filed notice of preliminary objection on points of law, to the effect that:-

(i) The amended application as tie barred; and

(ii) That the another is res judicata.

After hearing both parties the DLHT **(Hon. S. L. Mbuga, Chairperson)** resolved that the application was not time barred. However, as for the question of res judicata, the DLHT encroached that the application before the DLHT was res judicata. Subsequently, the application was dismissed with costs. The appellant was aggrieved by the decision of the tribunal hence the present appeal.

The DLHT decision is impugned on three (3) grounds, that may be paraphrased as follows.

1. That the learned trial chairperson erred in law and fact in holding that the application was *res judicata*;
2. That the learned trial chairperson failed to analyze and evaluate the evidence on records leading to an erroneous decision; and
3. That the learned trial chairperson distorted the appellants submissions.

Hearing of this appeal was conducted by way of written submissions. I recognize both parties for their submissions but for the reasons which shall become apparent herein, I propose to start with the first ground of appeal.

In support of the appeal, the appellant submitted that, the doctrine of res judicata does not apply to every suit. She submitted that, for the doctrine to apply all the conditions set out under **section 9** of **the Civil Procedure Code, Cap. 33 R.E. 2019** must exist. Submitting on the substance, the appellant argued that parties in the suit at the DLHT were not the same as those at the ward tribunal.

Further to that the appellant intimated that before the ward tribunal she was suing in her personal capacity and that in the DLHT she was suing in her capacity as the administrator of the estate of the late Mzalia Ally Hamisi Mchopanga. Citing the Kenyan Court of Appeal case of **Coast Bus Services Limited**

vs. Samuel Mbuvi Lai CACA No. 8 of 1996, the appellant argued that, the principle that grant of probate is said to relate back to the date of death, does not apply to a grant of letters of administration, and, therefore, any acts done by a petitioner before the grant of letters of administration is made are not validated or authenticated by the making of the grant. Based on the above authority the appellant reasoned that since she did not have letters of administration the suit at the ward tribunal was instituted in her personal capacity but not as an administratix and hence she was suing in a different capacity.

Responding to the above submissions the Mr. Erasmus Buberwa, learned counsel for the respondent argued that, having lost Land Application No. 55 of 2015 at the ward tribunal, it was not proper for the appellant to institute a fresh case against the 1st respondent at the DLHT. The counsel was of the view that the appellant should have filed an appeal instead of a fresh case. The counsel added that, the appellant should have joined the 2nd and 3rd respondents in Land Application No. 55 of 2015 because by the time she filed the case she was aware of the facts giving rise to the subsequent case. To support her view, he cited the case of **Umoja Garage vs. National Bank of Commerce Holding Corporation** [2003] TLR 339. The counsel submitted that by the time the appellant was appointed as an administratix and instituted Land Application No. 214 of 2019, the 1st respondent

had already been declared a lawful owner of the suit property through Land Application No. 55 of 2015.

In rejoining, there was not much in substance, the appellant merely insisted to maintain his submissions in chief and contended that Land Application No. 55 of 2015 ended at preliminary stage and was not decided on merits hence filing Land Application No. 214 of 2019 was proper and that the subsequent suit was not res judicata. The appellant pleaded that the appeal be allowed with costs.

Having read the trial tribunal records and submissions of the parties for and against the appeal, the question for my determination is whether the present appeal is merited. The law relating to res judicata is provided under section 9 of **the Civil Procedure Code** (supra). The section reads:

> *"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 on which such issue has been subsequently raised and has been heard and finally decided by such court."*

The takeaway from the wording of section 9 is that, for res judicata to subsist the following elements must co-exist:

(i). The matter directly and substantially in issue has been directly and substantially in issue in a former suit;

(ii). The former suit must have been between the same parties or privies claiming under them;

(iii). Parties must have litigated under the same title in former suit;

(iv). Court which decided the former suit must have been competent to try that suit; and

(v). Matter in issue must have been heard and finally decided in the former suit.

The provisions of section 9 above have been amplified in various leading authorities in our jurisdiction including in the cases of **George Shambwe vs. Tanzania Italian Petroleum Company Ltd** [1995] TLR 21; **Stephen Wassira vs. J. Warioba & AG** [1996] TLR 334; **Peniel Lotta vs. Gabriel Tanaki & Others** [2003] TLR 314; and **The Registered Trustees, Chama Cha Mapindizi vs. Mohamed Ibrahim Versi and Sons and Another**, Civil Appeal No. 16 of 2008, CAT at Zanzibar (unreported). In **Peniel Lotta vs. Gabriel Tanaki & Others** (supra) the Court made the following observation

> *"The Doctrine of res judicata is provided for in section 9 of the Civil Procedure Code, 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties of their privies on the same issue by a court of competent*

jurisdiction in the subject of the suit. 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 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."

The question now is whether all the above cited conditions subsist in the present case. Mindful of the above authorities, the answer to that question is in the negative and I will illustrate, albeit briefly. I will thus direct my mind on the last issue. That is whether the matter in issue must have been heard and finally decided in the former suit. The answer to that is in the negative. As intimated earlier, when Land Application No. 55 of 2015 was filed the 1st respondent raised a preliminary objection on a point of law couched in the following terms:

"Mdai ameonekana eneo si lake ni eneo la mwanae aitwaye mzalia mchopanga ambae anasema kuwa hivi sasa ni marehemu kauli aliitoa kwa mw/kiti wa kitongoji hivyo kisheria ninaomba awasilishe vitu vifuatavyo ili Kisheria yeye ni mdai.

(i). Awasilishe hati ya kifo cha marehemu (ilikuthibitisha kifo)

(ii). Awasilishe mirathi ya marehemu

(iii). Kikao cha wanandugu kilicchokaa na kumteua msimamizi ili ni fuatilie ukweli wav yeti hivyo

(iv). Cheti cha kuzaliwa marehemu."

In essence the respondent stated that the suit land was not the property of the appellant, and that the owner of the property was her son who had since passed away and the appellant had not presented letters of administration to establish locus in instituting the case. The respondent then demanded a list of various documents to be supplied to prove that the appellant had been appointed as the administratix. As pointed out earlier, the preliminary objection was not heard on its merits because the appellant did not appear in the end the ward tribunal sustained the objection and struck out the suit. In its decision the ward tribunal stated:

> *"... Baraza limeona Mdai akishindwa kujibu pingamizi za mdaiwa hivyo kuipa nguvu pingamizi ya mdaiwa. Baada ya hayo Baraza limelitupa shauri hili na kumuachia mdaiwa katika eneo hilo ..."*

That paragraph may be literally translated as follows:

> *"... The tribunal have observed that the applicant has failed to reply to the objections raised by the respondent hence the objections remain unchallenged. That said, the tribunal strikes out the application and the applicant is free to stay on the suit land..."*

The counsel for the 1st respondent maintains that the above portion of the decision of the ward tribunal meant that the 1st respondent was declared the lawful owner of the suit land. With respect to the counsel, I think that is a misconception or interpretation of the said decision. The said application was not determined on its merits, it collapsed when the preliminary objection was raised. Apparently, the ward tribunal considered that the objection was merited and went ahead to strike out the application.

Further to that, it cannot be said that the application was heard ex-parte. That said, it cannot be said that the tribunal heard the testimony and received evidence from 1st respondent and resolved that he was the rightful owner of the suit land. A statement made by the Chairman of the ward tribunal that the 1st respondent was free to stay on the suit land was by means a declaration that the 1st respondent was the lawful owner of the suit plot, it a merely consequential order following striking out of Land Application No. 55 of 2015. I find merit in the first ground.

That said, I quash the proceedings and set aside the judgment of the District Land and Housing Tribunal for Kibaha District in Land Application No. 214 of 2019. As a way forward I order that the application be heard on merits before a new Chairperson and different set of assessors. The appellant shall have her costs.

It is so ordered.

DATED at **DAR ES SALAAM** this **30th** day of **JULY, 2021**.

S.M. KALUNDE

JUDGE