

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

LAND APPEAL No.235 OF 2020

ELYUDI MPAGAME.....APPELLANT

VERSUS

RASHID SEKI.....1ST RESPONDENT

AMI H. SEKI.....2ND RESPONDENT

Date of last Order: 13.09.2021
Date of Ruling: 04.10.2021

RULING

V.L. MAKANI, J

This is the ruling in respect of the preliminary objection raised by respondents that.

"The Appeal is Res Judicata due to the presence and dismissed Land Appeal No.14 of 2013 between the same parties and against the same Judgment of Tribunal thereto (sic!)."

The court ordered that the application be argued by way of written submissions. Mr. Augustine Mathew Kusalika, Advocate drew and filed submissions on behalf of the respondents while Mr. David Shadrack Pongolela, Advocate drew and filed submissions in reply on behalf of the appellant.

Submitting in respect of the first point of preliminary objection, Mr. Kusalika said that Land Appeal No.14 of 2013 originated from the decision of the District Tribunal at Kilombero (the **Tribunal**) in Land Application No.25 of 2011 between the appellant and the respondent. That the same was determined by Hon. Mgetta, J and was dismissed for being hopelessly time barred. The appellant herein then filed a different Land Application No.14 of 2013 seeking for review and it was dismissed in February 2016. He said that respondent is wondering why the appellant filed this appeal over the same issues in respect of the decision of the Tribunal in Land Application No.25 of 2011. He insisted that the appeal at hand is therefore res judicata as the same matter was previously determined between the same parties via Land Appeal No.14 of 2013. That this court lacks jurisdiction to entertain the same matter. In support thereof, he relied on section 9 of the Civil Procedure Code, CAP 33 RE 2019 (the **CPC**) and the case of **Stiftung vs. Keeler Ltd (1966) 2 All ER 536**. He prayed for this appeal to be dismissed with costs.

In reply, Mr. Pongolela said that the respondent's submission is misconceived for basing on incorrect information. He said that the appellant being aware that he is out of time to file the instant appeal,

filed Misc. Application No.199/2019 for extension of time to appeal against the judgment of the Tribunal. That the application was granted. Being granted therefore the appellant filed the instant appeal. He insisted that the instant appeal is therefore competent. He relied on section 9 of the CPC. He said that for the matter to be res judicata three things must exist; parties and issues in the previous suit must be same to the present suit and that there must be a proof that the previous suit was heard and determined on merit. He said that this appeal was not heard on merit on any court of competent jurisdiction and therefore it is competent before this Court. That the issue of res judicata ought to have been raised during the application for extension of time. He added that there are serious irregularities in the Tribunal's decision and therefore the appellant should be accorded the right to be heard as it is a backbone in the interest of justice. He prayed for the preliminary objection to be overruled.

The main issue for determination is whether the preliminary objection raised by the respondents has merit.

It is not disputed that the Tribunal delivered the judgment on 10/01/2013. The appellant being dissatisfied appealed to this Court

on 25/03/2013, about 74 days and without leave of the Court. Consequently, the appeal was dismissed for being hopelessly time barred. It was not heard and determined on merit. The appellant cured the situation by filling Misc. Land Application No.199 of 2019 for leave to appeal to this court out of time. The same was granted on 23/10/2020. Being granted leave to appeal out of time therefore enabled the appellant to file this appeal. In the case of **George Shambwe Vs Tanzania Italian Petroleum Co. Ltd [1994] TZHC** the Court observed that:

"For a res judicata to apply, not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties, but it must also be shown that the matter was finally heard and determined by a competent court (emphasis supplied).

As started earlier, the appellant herein sought extension of time to file an appeal, and this was granted on 23/10/2020 vide Misc. Land Application No. 199 of 2019. As correctly stated by Mr. Pongolela the issue of res judicata was supposed to be raised during the application for extension of time. Since this was not raised at that time then the order to file an appeal out of time dated 23/10/2020 in Misc. Land Application No. 199 of 2019 giving raise to this appeal is the one that subsists. In any case, the respondent did not appeal against the

decision in Misc. Land Application No. 199 of 2019. The appellant having successfully applied for extension of time, he has therefore the right to file the appeal at hand so that it can be determined on merit. Res judicata cannot apply at this stage. It is on that basis that I find the preliminary objection raised by the respondent devoid of any merit and is hereby dismissed. Accordingly, the appeal shall proceed on merit. Costs shall follow events.

It is so ordered.


V.L. MAKANI
JUDGE
04/10/2021

