IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 28 OF 2022

(*Originated from Execution No. 1334 of 2022 at the District Land and Housing Tribunal for Kinondoni (Hon. Rugarabamu, Chairman*)

NASSORO JUMA NASSORO.....APPLICANT

VERSUS

MOHAMED ISSA HINCHA..... RESPONDENT

RULING

Date of order: *20.09.2022*

Date of Ruling: *26.09.2022*

KADILU, J.

The Applicant has filed an application in this Court for revision of the decision of Kinondoni District Land and Housing Tribunal at Mwananyamala in Execution No. 1334 of 2022 before Hon. L.R. Rugarabamu, Chairman dated 06.06.2022. He is trying to move this Court to reverse and set aside the said decision and substitute it with fair and just directives as circumstances allow.

The dispute started in 2016 in the Ward Tribunal of Mabwepande where the parties were contesting over ownership of a piece of land. Before the dispute was determined by the Tribunal, the parties agreed to settle out of court whereby they prepared a Deed of Settlement that was registered by the Ward Tribunal as decree of the trial court on 23.3.2017 marking the end of the dispute. According to the Deed of Settlement, it was agreed that Nassoro Juma Nassoro was to remain with his land measuring 3 acres and Mohamed Issa Hincha had to be given the remaining land.

Subsequently, numerous applications were filed at the District Land and Housing Tribunal for Kinondoni at Mwananyamala that is, Land Application No. 598 of 2018 before Hon. Chenya dated 05.09.2018, Misc. Land Application No. 38 of 2018 before Hon. Chenya dated 27.11.2018, Misc. Application No. 645 of 2019 before Hon. Chenya dated 27.11.2019 and Misc. Application No. 928 of 2019 dated 23.10.2020. All of them were decided in favour of the Respondent for reasons stated in each particular decision. Thereafter, the Applicant filed Land Revision No. 46 of 2020 in the High Court (Land Division) before Hon. Mgeyekwa, J., in quest of reversal of the Execution Order No. 645 of Kinondoni District Land and Housing Tribunal. Hon. Mgeyekwa J. quashed and set aside the said execution order and its

resultant decision. She remitted the file to the District Land and Housing Tribunal for execution before another Chairman. In execution, the Chairman was required to comply with the terms of the Deed of Settlement, not otherwise.

On 08.02.2022, Kinondoni District Land and Housing Tribunal at Mwananyamala (Hon. L.R. Rugarabamu) ordered the disputed land to be measured and allocated to the parties in accordance with the Deed of Settlement. That order was executed by a Court Broker on 11.02.2022. The District Land and Housing Tribunal issued an order on 06.06.2022 directing the parties to respect the boundaries as demarcated by the Court Broker. Aggrieved by the said execution, the Applicant filed Land Revision No. 28 of 2022 before this Court seeking for reversal of the Tribunal's order dated 06.06.2022.

The application is preferred under the provisions of sections 41 and 43 (1) (b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and is supported by affidavit of the Applicant. In this application, the applicant is represented by Mr. Kessy Ngau, learned Counsel and the Respondent is represented by Mr. Peter Madaha, Advocate.

Having observed that the 2nd ground of the Respondent's Counter Affidavit raises *res judicata*, the Court directed the learned Advocates for the parties to address that point first as it touches jurisdiction of the Court to determine the application. The 2nd ground of Counter Affidavit reads:

> *"...The issue of ownership of the landed property was already adjudicated and determined by a court of competent jurisdiction that is, Mabwepande Ward Tribunal through a Deed of Settlement dated 12.2.2017 signed by both parties and their witnesses which marked the dispute to an end and each side remained in his land. Further that, this case is functus officio because it was heard and determined by the same court before Mgeyekwa, J., in Land Revision No. 46 of 2020."*

The learned Advocate for the Respondent submitted first by stating that this Court has no jurisdiction to entertain the matter as it was determined to the finality by Mabwepande Ward Tribunal where the matter was settled amicably between the parties out of court way back in 2017. The Deed of Settlement was presented to the Ward Tribunal whereby an order was issued on 23.3.2017 finalizing the dispute between the Applicant and the Respondent. The learned Counsel stated further that this point was raised by way of preliminary objection in Land Application No. 598 of 2018 before the District Land and Housing Tribunal for Kinondoni in which Hon. R.L.

Chenya (Chairman) sustained the objection and dismissed the application with costs.

The learned Counsel referred this Court to the provisions of s. 9 of the CPC [Cap. 33 R.E. 2019] which provides as follows:

> *"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."*

The learned Counsel submitted that looking at the cases filed by the Applicant after amicable settlement of the dispute, it is evident that the parties, the subject matter, the issues and prayers are the same. He argued that since the dispute was resolved through amicable settlement between the parties and the settlement was registered by the court of competent jurisdiction (Ward Tribunal), then the case was decided to the finality and the principle of *res judicata* prevents this court from entertaining the same. He cited the case of *Wakf & Trust Commissioner (as Administrator of the Estate of the late Zawadi Said) v. Abbass Fadhili Abbass & Another* [2003] TLR 377, in which the Court of Appeal held that the issue of jurisdiction is

fundamental and it can be raised at any time in proceedings. It was the contention by the Counsel for the Respondent that by filing the listed cases, the applicant contravened s. 9 of the CPC and s. 42 of Tanzanian Evidence Act [Cap. 6 R.E. 2019] which provides that:

> *"The existence of any judgement, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial."*

He further made reference to the case of *Peniel Lotta v Gabriel Tanaki & Others* [2003] TLR 312 in which the Court of Appeal observed that the purpose of s. 9 of the CPC is to bar multiplicity of suits and guarantee finality of litigations. He insisted that litigations should not be allowed to continue endlessly as it is a settled principle of law that litigations should reach to an end.

The Respondent's Counsel argued that the Applicant is misleading the Court to come to a conflicting decision and which is bad in law. According to him, Judges of the same court are not allowed to give conflicting decisions over similar issues unless it is absolutely necessary. He supported his contention by the case of *ULC (Tanzania) Ltd. v. National Insurance Corporation and & Another* [2003] TLR 212. The learned Advocate maintained that the

application before this Court is *res judicata* and he prayed the preliminary objection to be upheld and the application to be dismissed with costs.

Mr. Kessy Ngau, the learned Counsel for the Applicant started by praying the Applicant's affidavit and reply thereto to be adopted as part of the application. He stated that this application is not *res judicata* because the cases being referred to by the learned Counsel for the Respondent were filed in the District Land and Housing Tribunal, not in this Court. He elaborated that even where the parties to the said cases appear to be the same, the cause of action in each case was different from the other just as it is in the application at hand.

He alleged that the basis of this application is Revision No. 46 of 2020 in which the High Court (Land Division) found that Execution No. 1334 contravened the Deed of Settlement. He said that the controversial was caused by the directive of the Chairman of the District Land and Housing Tribunal (Hon. L.R. Rugarabamu) requiring the Court Broker to measure again the disputed land before allocating the same to the Applicant and the Respondent.

He pointed out that *res judicata* has been defined in several cases such as *Gaper Kasubi v Hassani Juma Matola & 7 others*, Land Appeal No. 145 of

2018, High Court Land Division at Dar es Salaam (unreported), where it was stated that for the two cases to be *res judicata*, two elements must exist. Parties to the two cases must be substantially the same, the cause of action should be substantially the same and the former suit must be determined to finality by a court of competent jurisdiction. He said that none of the cases listed by the learned Counsel for the Respondent has ever determined the dispute between the Applicant and the Respondent to the finality and that explains the reason why the Applicant has filed the present application.

The Counsel for the Applicant maintained that the current application is a new case in this Court, hence the principle of *res judicata* is not applicable in the prevailing circumstances. He submitted that the Respondent's objection based on *res judicata* has to be dismissed with costs.

In rejoining, the learned Counsel for the Respondent urged this Court to ignore the case referred to by the Applicant's Counsel because it was decided by another Judge of the High Court thus, it is not a binding authority. He said that the decision of this Court in Revision No. 46 of 2020 cannot be said to have resolved the dispute between the parties as the same was finalized by the Settlement Deed in 2017. As such, what the Court did in Revision No. 46 of 2020 was not order of retrial, but the proper execution of Deed of

Settlement. He therefore emphasized that the application is affected by the principle of *res judicata* and he prayed the Court to dismissed it with costs.

Having analyzed the facts of the case and submissions of the learned Counsel for the parties, I now venture into the question whether or not the application is *res judicata*. It is a well settled legal position that in order for the plea of *res judicata* to successfully operate, the following conditions must be proved, namely: (i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim; (ii) 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; (iii) the party in the subsequent suit must have litigated under the same title in the former suit; (iv) the matter must have been heard and finally decided; (v) the former suit must have been decided by a court of competent jurisdiction.

As correctly pointed by the Counsel for the Respondent, the rationale behind the doctrine of *res judicata* is to ensure finality in litigation and to protect an individual from multiplicity of court actions. The leading authorities on the doctrine include *Umoja Garage v NBC Holding Corporation* [2003] TLR 339,

Stephen Wassira v J. Warioba & AG [1996] TLR 334 and *Peniel Lotta v Gabriel Tanaki & Others* [2003] TLR 312.

From the submissions by the learned Advocates, it is apparent that the applicant's main claim is that the 2017 Deed of Settlement cannot be said to have determined the matter to the finality because it was not executed properly. He is dissatisfied by the order of the District Land and Housing Tribunal directing the disputed land to be measured again instead of allocating it to the parties as agreed in the Deed. There is nowhere in record or submissions that the Applicant is claiming that he did not consent to the Deed of Settlement or that the disputed land was measured wrongly by the Court Broker.

In my considered view, it was mandatory for the Broker to measure the land again before allocation to the parties to ensure compliance with what was agreed in the Deed of Settlement which specifically indicated that the Applicant was entitled to 3 acres. Provided that the size which each of the parties was entitled to was allocated to him, it is irrelevant whether or not the land was measured again. From the foregoing, this court finds that the execution of the Deed of Settlement determined the dispute between the parties to the finality.

This fact was well articulated by the Counsel for the Respondent and is clearly reflected in the ruling of Kinondoni District Land and Housing Tribunal in Land Application No. 598 of 2018. In the result, I am also satisfied that the application is *res judicata* and I hold as such. Having established that the parties settled their dispute out of court in 2017 and registered the Deed of Settlement to the Ward Tribunal, it is apparent that the Applicant's argument dismissing *res judicata* has no legs to stand on. Therefore, I proceed to dismiss the application with costs. It is so ordered.

THE HIGH COURT OF TANZANIA ★ LAND DIVISION ★

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M. J. KADILU,
JUDGE
26.9.2022.

Court:

Ruling delivered on 26th September, 2022 in the presence of Mr Kessy Ngalu advocate for the applicant, Mr. Peter Madaha advocate and Mr. Adam Kasegenya advocate for the respondent present in person.

THE HIGH COURT OF TANZANIA ★ LAND DIVISION ★

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M. J. KADILU,
JUDGE
26.9.2022.