

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

LAND APPEAL NO. 182 OF 2020

*(Arising from Land Application No.7 of 2019 of the District Land and
Housing Tribunal for Temeke)*

**DICKSON GABRIEL.....1ST APPELLANT
MARIA MMAMBIA KABAGUZI.....2ND APPELLANT
VERSUS**

**OSCAR G. KABAGUZI.....1ST RESPONDENT
JAMES JACKSON MARO.....2ND RESPONDENT
HARROLD DAVID MUSHI.....3RD RESPONDENT
ULRICK JOHN SHIRIMA.....4TH RESPONDENT**

J U D G M E N T

Date of Last Order:10.05.2022

Date of Judgment:31.05.2022

T. N. MWENEGOHA, J.

The instant appeal is based on the following grounds; -

- 1. That, the learned trial chairman erred in law and fact by sustaining a preliminary objection and dismissing the application on the ground that it is res judicata while disregarding the provisions of Order XXA Rule 62 of the Civil Procedure Code, Cap 33 R. E. 2019;**
- 2. That, the learned trial chairman erred in law and fact by holding that, pursuant to decision of the trial District Land and Housing Tribunal in Misc. Land Application No. 254 of 2015 and the decision of the High Court in Land Appeal No.**

94 of 2009, the case against the respondent had been wrongly filed afresh by the Appellants;

3. That, in the circumstances of the case, the legal ownership that was claimed by the appellants against the respondents over the landed property had not been finally to have held that the matter in controversy was not res judicata for determination of the same between the appellant and Respondents.

The appeal was heard by way of written submissions, Method K Gabriel, learned counsel appeared for the appellants while Advocate While William Mosabi represented the 2nd-5th respondents. The 1st appellant conceded to the appeal.

In his submissions in support of the appeal the appellants counsel consolidated all three grounds and argued them together. He insisted that, in terms of section 9 of the Civil Procedure Code, Chapter 33 R. E. 2019, the case before the District Land and Housing Tribunal for Temeke vide Land Application No. 7 of 2019 was not res judicata. That, the former case the 1st appellant was not a party to the said case which concerned objection proceedings (Misc. Application No. 254 of 2008). That, the dismissal of Misc. Application No. 254 of 2008 which was insisted by the 2nd appellant do not preclude her from instituting a fresh suit. That is what was done by the appellants by filing Land Application No. 7 of 2019. That, under Order XXI Rule 62 of the Civil Procedure Code, Cap 33 R.E. 2019, the appellant was right to file a fresh suit.

In reply, the counsel for the 2nd to 5th respondents maintained that, the trial tribunal was right in deciding that the case was res judicata. That, the appellants are trying to mislead the court that the former case was in respect of objection proceedings while it was not. The same was filed under Order XXI Rules 64 and 88(1) and other enabling provisions and concerned the sale of the suit property. That, objection proceedings are filed under Order XXI Rules 57, 58, 59, 60, 61 and 62. Therefore in absence of any objection proceedings made by the 2nd appellant, she cannot exercise the right of instituting a fresh case against the respondents. The application of Order XXI rule 62 is only when the former case was on objection proceedings.

In his rejoinder, the appellants counsel insisted that, the 2nd appellant's failure to cite properly the enabling provisions for objection proceedings didn't legally vitiate the said application not to amount to objection proceedings.

Having gone through the submissions of parties through their respective counsel and the records from the lower tribunal, the issue is whether the appeal has merit. The root of contention in the instant appeal is the decision of the trial tribunal to agree with the respondents in their objection that the case before it is res judicata. It is due to the act of the 2nd appellant who formerly insisted a case at the said tribunal vide Misc. Application No. 254 of 2008. The arguments of the appellants were that, the said case concerned objection proceedings, hence the appellants have rights under Order XXI Rule 62 to institute a fresh case. The respondents opposed this argument and insisted that, the said case was not about objection proceedings rather it challenged the sale of the suit property.

To resolve the issue, I went through the former case, Misc. Application No. 254 of 2008. The same was instituted under Order XXI Rule 64 and 88(1) of the Civil Procedure Code, Cap 33 R. E. 2019. For easy reference I will reproduce the said provisions as follows:-

64 "Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf, and shall be made by public auction in the manner prescribed."

88.- (1) "Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it."

Looking at the two provisions as quoted above, one cannot say that they are about objections proceedings. As argued by the counsel for the 2nd to 5th respondents, the said case aimed at challenging the sale of the suit property. The contention by the appellants that it was about objections proceedings is misconceived. The records are clear that the said case had nothing to do with objection proceedings, therefore, the appellants cannot take shelter under Order XXI Rule 62 and institute a fresh case. Under the said provision it has been stated that; -

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Therefore, it was wrong for the appellants to institute a new case which has the same subject matter, parties and reliefs already determined in Misc. Application No. 254 of 2008. This was only possible if the former case was for objection proceedings. Therefore, the findings of the trial tribunal in respect of Land Application No. 7 of 2019 was correct, the same is resjudicata. Hence this appeal is devoid of merits. The three grounds of appeal are rejected and the Appeal is dismissed with costs. The decision and orders of the District Land and Housing Tribunal for Temeke District are hereby upheld.

Right of Appeal Explained.




T. N. MWENEGOHA

JUDGE

31/05/2022