

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

LAND APPEAL NO. 171 OF 2021

(Originating from Land and Housing Tribunal at Ilala in Land Application No. 275 of 2018)

SIMPHROSA PAUL MREMA.....APPELLANT

VERSUS

ROSE MAIKO MKUPASI.....1ST RESPONDENT

JOSEPH PAUL MREMA.....2ND RESPONDENT

Date of Last Order: 29.03.2022

Date of Ruling: 09.05.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by SIMPHOROSA PAUL MREMA. She is appealing against the decision of Land and Housing Tribunal at Ilala (the **Tribunal**) in Land Application No. 275 of 2018 (Hon. Mgulambwa, Chairperson).

The appellant was dissatisfied with the decision of the Tribunal which dismissed her application on a preliminary objection and filed this appeal on the following grounds:

- 1. That the honourable Chairperson erred in law and in fact in holding that the Land Application the subject matter of the proceedings was res judicata.*

- 2. That the honourable chairperson erred in law and in fact in relying on conjecture that the land subject to the Land Application is matrimonial property, a matter that the appellant was not given right to be heard as she was not party in matrimonial proceedings (sic).*
- 3. That the honourable Chairperson erred in law and in fact in failing to hold that fresh Land Application was the only remedy available for the appellant who is aggrieved by the dismissal order in objection proceedings.*

The appellant prayed for the appeal to be allowed and the decision of the Tribunal be quashed, and the orders made therein be set aside. She also prayed for Land Application No. 275 of 2018 be heard on merit, costs of this appeal and any other order the court may deem fit.

With leave of the court the appeal was argued by way of written submissions. Submissions on behalf of the appellant were drawn and filed by Mr. Roman Selasini Lamwai, Advocate; while submissions in reply on behalf of the 1st respondent were drawn and filed by Mr. Richard Mathias Kinawari, Advocate. The 2nd respondent drew and filed his submissions in reply personally.

As for the first ground Mr. Romani Lamwai stated that the issue as to who were parties in the matrimonial proceedings is clear from the court record as it involves the 1st and 2nd respondents. He said the Tribunal and the Primary Court acknowledged that the appellant was not a party to any matrimonial proceedings at the Primary Court and in the appeal at the High Court PC Civil Appeal No. 39 of 2011 (before Hon. Muruke, J). He further said it is clear from the proceedings that in the application subject of this appeal, the appellant (then applicant at the Tribunal) prayed to be declared the lawful owner of the house which the Primary Court declared a matrimonial property. But in these proceedings the appellant was not heard. Mr. Roman Lamwai relied on the case of **Gerard Chuchuba vs. Rector. Itaga Seminary [2002] TLR 213** which outlined the elements that must exist for the doctrine of *res judicata* to be operative.

Mr. Roman Lamwai further said the Primary Court proceedings were not on ownership of property, it only presumed that the 2nd respondent owned the property and went on dividing the said property as a matrimonial property. Mr. Roman Lamwai said the issue that needs to be determined is whether Land Application No. 296 of 2016, Madai ya Ndoa 28 of 2010 is *res judicata* Land Application No.

275 of 2018 which is subject of this appeal. He said Land Application No. 296 of 2016 was struck out which makes the decision not final as required by the doctrine of *res judicata*. As for Madai ya Ndoa No. 28 of 2010 and the subsequent appeals and applications, the appellant herein was not a party, and the issues are subsequent to Land Application No. 275 of 2018 subject of this appeal. He said the Chairperson was therefore wrong to sustain the preliminary objection. He prayed for this ground to be allowed.

As for the second ground, Mr. Roman Lamwai adopted what he said in the first ground and added that the appellant herein who is the rightful owner of the property was not heard in the matrimonial proceedings as she was not party to the proceedings. He said since the appellant was not party to the matrimonial proceedings then her rights and interest over the suit property were not protected thus it was wrong for the Chairperson to dismiss the application on *res judicata*. He prayed for the court to hold that the Chairperson was wrong to sustain the preliminary objection and allow this ground.

As for the last ground Mr. Roman Lamwai submitted that it is not in dispute that the Chairperson also referred to the objection

proceedings filed and then dismissed by Hon. Haule, RM at Ilala District Court. Mr. Roman Lamwai called for the aid of Order XXI Rule 62 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**). He said the appellant was dissatisfied with the decision of the District Court after it was ruled that it had no jurisdiction. So the appellant decided to file Land Application No. 296 of 2016 at the District Tribunal which was struck out and thereafter filed Land Application No. 275 of 2018 which is subject of this appeal. He thus said the Chairperson's finding that dismissal of the claim under objection proceedings constitute *res judicata* was an error of interpretation of Order XXI Rule 62 of the CPC read together with the case of **Gerard Chuchuba** (supra). Mr. Roman Lamwai concluded by praying that the appeal be allowed, and for the court to make orders as prayed in the Memorandum of Appeal.

Submitting on behalf of the 1st respondent, Mr. Kinawari stated that section 9 of the CPC provides for *res judicata* and covers disputes which are already determined by a competent court. The provision also covers even those who are not party but with condition that they have interest as in section 9, Explanation VI of the CPC. He also relied on the case of **Lotta vs. Taruki & Another [2003] EA 556** where the court of appeal said the doctrine of *res judicata* do not find only

parties to the suit but also to the person who are aware of the pending proceedings and know the parties who are litigating and their interest in the case under consideration. He said the case of **Gerard Chuchuba** (supra) is distinguishable because in the circumstances at hand the appellant was aware of the proceedings and in the cited judgment it was held that the principle of *res judicata* bind parties who are not party to the proceedings but are aware of the proceedings. He said it is not in dispute that the subject matter of the dispute was already determined by the Primary and High Court either expressly or impliedly as the appellant was aware, and or she ought to have been aware that the proceedings of these courts had already determined the subject matter in dispute. He further pointed out that the 2nd respondent had not appealed to the Court of Appeal.

Mr. Kinawari argued the second and third grounds together. He said since the appellant was not a party to the original proceedings, the appellant had another avenue of filing an application for revision to the Court of Appeal to revise the decision of the High Court (PC Civil Appeal No 39 of 2011). To support his argument, he cited the cases of **M/S NBC Limited vs. Salma Abdallah & Fausa Abdallah, Civil Application No. 2001** and **Halima Hassan Marealle vs.**

PSRC & Tanzania Gemstone Industrials Limited, Civil Application No. 84 of 1999. These cases were cited in the case of **Edwin Paul Mhede vs. Shose K. Ngowo, Land Revision No. 17 of 2013.**

He said though the relief for an application in objection proceedings is to institute a fresh case, but it was proper for the Tribunal to dismiss the application filed by the applicant for being *res judicata*. He said should the court grant the prayer in the Memorandum of Appeal these would be two judgments, the one of the High Court in PC Civil Appeal No. 39 of 2011 and the one which will be a result of the new suit. He prayed for the appeal to be dismissed with costs.

The 2nd respondent said he did not have any objection to the appeal because the subject matter at hand was given to the 1st respondent in the decision of Madai ya Ndoa No. 28 of 2010 without considering the fact that the property belonged to the appellant. He said the 1st respondent concealed the fact that he was married to the appellant and he could not raise it because he was blackmailed by the 1st respondent. He said he is praying for the property to be returned to the appellant who is the rightful owner of the property.

It is without dispute that there was a matrimonial dispute between the two respondents at the Primary Court (Madai ya Ndoa 28 of 2010) and an appeal at the High Court (PC Civil Appeal No. 39 of 2011) (the **matrimonial proceedings**). The decision in these proceedings were for grant of divorce, maintenance of the child and distribution of matrimonial assets including the house which is also subject of the matter at the Tribunal resulting to this appeal. It is also not disputed that in the matrimonial proceedings the appellant was not a party, and further it is not in dispute that the appellant herein filed Land Application No. 296 of 2016 which was struck out and thereafter Land Application No. 275 of 2018 which is the subject of this appeal. The issue is whether the matrimonial proceedings are *res judicata* to Land Application No. 275 of 2018 which is the subject of this appeal?

In answering this question, I will be addressing the grounds of appeal generally. Section 9 of the CPC under which the principle of *res judicata* arises 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 on which such issue has been subsequently raised and has been heard and finally decided by such court."

It is well settled law and leading authorities are at one, 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 either actually or constructively;*
- (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) *that the former suit must have been decided by a court of competent jurisdiction.*

The rationale behind the doctrine of *res judicata* is to ensure finality in litigation – **Umoja Garage v. National Bank of Commerce Holding Corporation, Civil Appeal No. 3 of 2001 (CA)** (unreported). It is also meant to protect an individual from multiplicity of litigation. I also subscribe to the case of **Gerard Chuchuba** (supra) cited by the appellant's Counsel, Mr. Roman Lamwai.

Mr. Kinawari has argued that the subject matter in the matrimonial proceedings is the same as that in Land Application No. 275 of 2018 and that the proceedings came to a finality that is why the Chairperson found it prudent to dismiss the application on grounds of *res judicata*. I agree the house which is in issue in this appeal was also a subject matter in the matrimonial proceedings. However, it is apparent that the parties in the matrimonial proceedings, are not the same as those in Land Application No. 275 of 2018 as the record is clear that the appellant was not a party in the said matrimonial proceedings. In that regard the appellant did not have any opportunity to be heard in these cases in respect of the property subject of this appeal. In respect therefore hence *res judicata* cannot stand on account of the difference of the parties in the matrimonial proceedings and in Land Application No. 275 of 2018. Further and as correctly said by Mr. Roman Lamwai, Land Application No. 296 of 2016 cannot be *res judicata* of Land Application No. 275 of 2018 because it was struck out and so it was not finally determined.

Mr. Kinawari said Explanation VI of section 9 of the CPC covers the appellant's interest. Explanation VI states:

"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

In my considered view, Explanation VI above covers those who litigate bonafide either in a public or private right. But considering the circumstances of the matrimonial proceedings, the foundation was not bonafide because in the proceedings, there were issues related to cheating, irresponsibility, concealment of facts and the like. It was therefore not expected that the respondents specifically the 2nd respondent would bonafide cover the interest of the appellant. The circumstances in the matrimonial proceedings would thus not fit in the context of Explanation VI. In that respect therefore, the matter before the Tribunal was not *res judicata* and I hold as such.

As regards the applicability of Order XXI Rule 62 of the CPC which was raised by Mr. Roman Lamwai, I think both Counsel for the applicant and respondents have the same understanding that this is the best alternative although Mr. Kinawari pointed out another remedy which in my view would be best addressed when the substantive application is heard.

In the result and for the reasons I have endeavored to explain, the appeal has merit, and it is allowed with costs. The decision of the Tribunal is hereby quashed and set aside. The matter is to be returned to the Tribunal for hearing on merit of Land Application No. 275 of 2018.

It is so ordered.

V.L. Makani
V.L. MAKANI
JUDGE
09/05/2022

