

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPEAL NO. 225 OF 2021

(Originating from the District Land and Housing Tribunal for Kibaha in Land Application No. 125 of 2018 Originating from the Ward Tribunal for Kiwanga, in Case No.7 of 2018)

MIJA MAGANGA APPELLANT

VERSUS

MOHAMED MRISHO MLANGA RESPONDENT

JUDGMENT

Date of Last Order: 17.02.2022

Date of Judgment: 28.02.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Kiwanga in Land Case No.7 of 2018 and arising from the District Land and Housing Tribunal for Kibaha in Land Appeal No.125 of 2018 in which Mohamed Mrisho Mlanga, the respondent was the applicant and Mija Maganga was the respondent.

The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellant instituted a case at the Ward Tribunal claiming that the respondent invaded and trespassed their family land located at Kidomole in Bago village. The respondent denied the appellant's claims. The trial tribunal decided the matter in favour of the appellant.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kibaha vide Land Appeal No.125 of 2018 complaining among others that the trial tribunal had no jurisdiction to determine the case, the evidence was not well analysed and the dispute at the trial tribunal was res judicata to Land Application No.97 of 2016. The appellate tribunal decided the matter in favour of the respondent and declared that the matter was res judicata.

Undeterred, the appellant has come to this Court seeking to assail the decision of the District Land and Housing Tribunal for Kibaha on three grounds of grievance; namely:

- 1. That, the Chairperson erred in law and fact by holding that the land complaint No.07 of 2018 was Res judicata.*

- 2. That the Chairperson erred in law and fact by holding that the land application No.92 of 2016 and land complaint case No.07 of 2019 was the same case.*
- 3. That the Chairperson erred in law and facts by holding that Nassoro Rashid was properly sued on land application No.97 of 2016 by the respondent.*

When the matter was called for hearing before this court on 15th December, 2021, the appellant requested to argue the appeal by way of written submission. The appellant did not comply with the court order. She requested for extension of time to file her written submission in chief. Her request was granted. By the court consent, the appellant filed his submission in chief on 02nd February, 2022 and the respondent Advocate filed his reply on 14th February, 2022, and the appellant filed a rejoinder on 17th February, 2022.

The appellant began by tracing the genesis of the matter which I am not going to reproduce in this appeal. The appellant's argument in respect of the first ground of appeal is essential that the Chairperson erred in law and fact to hold that Complaint No.07 of 2018 was Res judicata. The appellant submitted that parties in the Case No.07 of 2018 were Mija Maganga v

Mohamed Mrisho Mlangi. She claimed that there was no proof that the appellant was a party to any land dispute with the respondent in respect of the land in dispute the appellant went on to submit that she was claiming the land as a personal legal representative of Mwanadeka. She added that for Res judicata to stand, one should have been shown that a court of competent jurisdiction had finally determined a land dispute between the respondent and the late Nassoro Mwanadeka or his personal legal representative. She forcefully contended that there was no proof that the appellant or the late Nassoro Mwanadeka were parties to any dispute with the respondent.

Reacting in respect of the second ground, the appellant argued that the Chairman erred in law and fact to hold that Application No.97 of 2016 and Application No.07 of 2018 were the same. She valiantly contended that these two applications were not the same as parties were different. She lamented that in the tribunal's judgment, the Chairman stated that the respondent submitted that in Application No.97 of 2016 the parties were the respondent and Nassoro Rashid Nassoro.

The appellant continued to argue that she was not a party in Application No.97 of 201. She went on to state that throughout the judgment, it was not

controverted that the land in dispute belonged to the late Nassoro Mwandeka. She argued that is Nassoro Rashid Nassoro purported to sue to recover the deceased's property without a letter of administration that does not bar the appellant as a rightful legal representative of the late Nassoro Mwandeka. Stressing on the point, she claimed that it was wrong for the Chairperson to hold that in Application No.97 of 2016 the parties were the same.

As to the last ground, the appellant was brief and focused. She asserted that Nassoro Rashid Nassoro could not sue or be sued in respect of the deceased's property because he was not the personal legal representative of the deceased Nassoro Mwandeka. She referred this court to page 10 of the typed judgment last paragraph, the assessors stated that the decision of the Ward Tribunal should not be disturbed.

On the strength of the above submission, the appellant beckoned upon this court to allow the appeal with costs.

The respondents' denial was spirited. The learned counsel for the respondent came out forcefully and defended the District Land and Housing decision as sound and reasoned. The learned counsel for the respondent

started with a brief background of the matter at hand which I am not going to reproduce in this appeal.

With respect to the first ground of appeal, the learned counsel for the respondent contended that the appeal before this court is misconceived entirely on circumstances surrounding the doctrine of res judicata. He submitted that the Chairperson in his holding referred to section 9 of the Civil Procedure Code Cap.33 [R.E 2019]. He went on to state there is no dispute that Nassoro Rashid Nassoro who litigated in Land Application No.97 of 2017 is the brother of the appellant. He went on to submit that the subject matter for litigation in Land Application No. 97 of 2016 between Nassoro Rashid Nassoro and Mohamed Mrisho Mlangi, the respondent herein is the same subject matter at hand.

The respondent's father went on to submit that in Land Application No. 125 of 2017, Nassoro Rashid Nassoro in his affidavit claimed that the disputed land belongs to him he added that Nassoro and the appellant were claiming for a piece of land which was a family property and their claims squarely fall under section 9 of the Civil Procedure Code Cap.33 [R.E 2019]. Mr. David Ntonge insisted that the Chairman was correct to hold that the

matter before her was Res judicata. He urged this court to dismiss the appeal.

Submitting on the second ground, the respondent's counsel was brief and straight to the point. He supported the decision of the District land and Housing Tribunal. He submitted reiterated his submission on ground one of the appeal, that the litigants were the same litigated under the same subject matter and the outcomes of the matter were the same. Thus, he urged this court to dismiss this ground of appeal.

Elaborating on the third ground, the learned counsel for the respondent contended that Naasor Rashid Nassoro was the right person to be sued by the respondent because he was the one who trespassed into the disputed land and claimed to be the owner of the suit land. The learned counsel for the respondent asserted that the tribunal on page 8 of its judgment observed that the appellant did not object to the fact that in Land Application No.97 of 2016 her relative Nassoro Rashid Nassoro was wrongly being sued by the respondent.

He valiantly argued that this ground is an afterthought. He continued to submit that at the time when the respondent lodged a suit against Nassoro

Rashid Nassoro, there was no legal representative of the deceased estate of Nassoro Mwanadeka as the appellant wants to mislead this court. The issue of assessors, Mr. David Ntonge stated that the Chairman is not bound by the opinion of assessors. He added that the issue of res judicata was a point of law thus it was difficult for the assessors to understand.

On the strength of the above submission, Mr. David Ntonge beckoned upon this court to uphold the trial tribunal decision and dismiss the appeal for lack of merits.

In her short rejoinder, the appellant reiterated her submission in chief. She submitted that the respondent has not shown how the principle of Res judicata operates as against the appellant. She stated that Nassoro Rashid Nassoro was not the administrator of the estate of Nassoro Mwanadeka. She referred this court to the affidavit sworn by Nassoro Rashid Nassoro was acting as the administrator of the estate of Nassoro Mwanadeka. She added that in Land Application No. 125 of 2018, Nassoro Rashid Nassoro was suing in his own capacity and claimed that he was the owner of the suit land. Insisting, the appellant claimed that the appellant and respondent have never been in any proceedings as the same parties. In conclusion, the appellant urged this court to allow the appeal with costs.

Having heard the submissions of both parties simultaneous with carrying a thorough review of the original records, I wish to state from the outset that I will combine and argue the first and second grounds together because they are intertwined and the third ground will be argued separately.

With respect to the first and second ground, the appellant is complaining that the Chairperson misdirected himself to hold that matter is res judicata. The issue for determination is whether the suit before the trial tribunal was barred by the doctrine of res judicata. In determining the issue of res judicata automatically the second ground, whether the Land Application No.97 of 2016 and Land Complaint No.07 of 2019 are the same or not will be addressed. The principle of res judicata is embodied in section 9 of the CPC which stipulates:-

"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 law is settled and clear on the applicability of the principle of Res judicata whereas for the doctrine to apply the following conditions must be proved, these are; (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 substantially 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. Its applicability makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit.

The rationale behind the Doctrine of Res judicata is to ensure certainty in the administration of justice - see: **East Africa Development Bank v Blueline Enterprises limited**, Civil Appeal No. 110 of 2009 (unreported). Additional, the police of Doctrine of Res judicata is to guarantee the finality of litigation and therefore to protect an individual from a multiplicity of litigation. Insistently, the applicability of the doctrine is for the sake of

promoting the fair administration of justice and honesty and to prevent the law from abuse. In the case of **Paniel Lotha v Tanaki And Others** [2003] TLR 312 was held that:-

"... the object of the Doctrine of res judicata is to bar the multiplicity of suits and guarantee finality to litigation. It makes a conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."

The same holding was held in the case of the **Registered Trustees of Chama cha Mapinduzi v Mohamed Ibrahim Versi and Sons and Another**, Civil Appeal No. 16 of 2008, Court of Appeal of Tanzania at Zanzibar (unreported).

Similarly, the Court of Appeal of Tanzania in the case of **the Attorney General v Paulo Sanga**, Civil Appeal No. 175 of 2020 cited the book of Professor M.P JAIN titled Indian Constitutional Law, 5th Edition Reprint, 2004 at page 1314. Professor M.P JAIN articulated on the rationale of the rule of res judicata as follows:

"...The rule of res judicata is based on considerations of public policy as it is in the larger interests of the society that a finality should attach to

binding decisions of courts of competent jurisdiction, and that individuals should not be made to face the same kind of litigation twice..."

Guided by the above cited law and authorities, I will examine the records of both tribunals and determine the above issue whether Land Complaint No.7 of 2018 before the Ward Tribunal for Kiwangwa was *res judicata*. Reading the handwritten proceeding of District Land and Housing Tribunal for Kibaha in Land Application No. 97 of 2016, the parties were Mohamed Mrisho Mlangi and Nassoro Rashid Nassor. In 2016, Mohamed lodged a case against Nassoro Rashid Nassoro, the brother of Mija Maganga. The matter proceeded *ex parte* against Nassoro Rashid Nassor. The subject matter was concerning a piece of land located at Molwe with Bagamoyo District. The cause of action was trespass and ownership of land. In 2018, Mija Maganga lodged a case at the Ward Tribunal for Kiwangwa in Case No.40 of 2018 the parties were Mija Maganga against Mohamed Mrisho Mlangi, the subject matter was regarding a piece of land located at Molwe with Bagamoyo District cause of action was trespass and ownership of land.

Dissatisfied by the decision of the Ward Tribunal for Kiwangwa, the respondent filed an appeal at Kibaha District Land and Housing Tribunal, claiming that the matter at the Ward Tribunal for Kiwangwa was *Res judicata*

in Land Application No. 97 of 2016. It is worth noting that the subject matter and cause of action at the District Land and Housing Tribunal for Kibaha in Land Application No. 97 of 2016 and the matter at the Ward Tribunal of Kiwangwa were the same. In other words, the matter at District Land and Housing Tribunal for Kibaha and Ward Tribunal involved the same property and one of the parties was a party in the previous case.

The main complaint by Mija Maganga is that she was not a party and is not privy to the proceedings in Land Application No. 97 of 2016. It is my view that even though Mija Maganga was not a party in Land Application No. 97 of 2016, the doctrine of res judicata is still intact since the subject matter and cause of action were the same and the matter was determined to its finality. Consequently, the Land Application No.97 of 2016 and Land Complaint No.07 of 2019 are the same to the extent explained above that the subject matter and cause of action are the same and the matter was determined conclusively by the District Land and Housing Tribunal. Therefore, in my respectful view, the Land Case No. 7 of 2018 at Ward Tribunal for Kiwangwa was Res judicata.

On the third ground, the fact that Nassoro Rashid Nassoro in his affidavit did not state that he is the administrator of the estate of Nassoro Mwandeka

the same cannot be a good ground for disputing the suit land which was determined and an order in respect to the subject matter was issued. The said suit was a bar to the appellant to lodge a fresh case. Therefore, I fully subscribe to Mr. David submission that the appellant could not institute a fresh suit. It is worth noting that after realizing that there was a judgment in regard to their family plot, the appellant was in position to file exhaust other legal remedies such as filing application for revision because they were not part in the previous case and urged the court to give her the right to be heard.

In the upshot, I find nowhere to fault the findings and decision of the District Land and Housing for Kibaha in Land Appeal No.125 of 2018. Thus, I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 28th February, 2022.




A.Z.MGEYEKWA
JUDGE
28.02.2022

Judgment delivered on 28th February, 2022 in the presence of the appellant and Mr. Masinde Chimo, learned counsel for the respondent.




A.Z.MGEYEKWA
JUDGE
28.02.2022

Right of Appeal fully explained.