

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 85 OF 2021

**LINDA CHRISTOPHER (Suing as an administratrix of
the estates of SPECIOZA PATRICK) PLAINTIFF**

VERSUS

DICKSON MAJALIWA 1ST DEFENDANT

ILALA MUNICIPAL COUNCIL 2ND DEFENDANT

TANZANIA POSTAL BANK PLC

(As a liquidator of Tanzania Women Bank Ltd) 3RD DEFENDANT

MWAFRIKA GROUP LTD 4TH DEFENDANT

PROSPER W. NGUMA 5TH DEFENDANT

HONOURABLE ATTORNEY GENERAL 6TH DEFENDANT

RULING

Date of last Order: 10.02.2022

Date of Ruling: 24.02.2022

A.Z. MGEYEKWA, J

This is a ruling on a trio of preliminary objections taken at the instance of the 3rd Defendant, attacking the competence of the suit which is pending in this Court on 25th June, 2021 against the 6 defendants, claiming

ownership of land from the 5th defendant in respect to Plot No. 205 Block A, located at Buguruni under the Certificate of Title No. 81725 with an estimated value of Tzs 350,000,000/-.

As the practice of the Court. I had to determine the preliminary objections first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which I could not overlook.

The submissions of the preliminary objection were by way of written submission in which the plaintiff was represented by Ms. Jadeness Jasson, learned Advocate whereas the 2nd and 6th defendants enjoyed the service of Rose Kashamba, learned State Attorney and the 3rd defendant had the legal service of Mr. Mbuga Jonathan, learned counsel. The 3rd Defendants raised three Preliminary Objections as follows:-

1. *Time barred*
2. *Res judicata*
3. *Abuse of court process*

Mr. Mbuga started with a brief background of the facts which led to the instant suit which I am not going to reproduce in this application. Submitting on the first limb of the objection, Mr. Mbuga argued that it is not in dispute that the trial court was moved by the plaintiff for recovery of the deceased land which is now in the name of the 5th defendant after

being sold to him since 2012. He cited Item 22 of Part 1 of the Law of Limitation Act, Cap. 89, the law which provides 12 years period to recover land. He stated that the time started to run from the date of death as per section 9 of the Law of Limitation Act, Cap. 89.

Mr. Mbuga also cited section 33 of the Law of Limitation Act provides for exclusion of the time spent in seeking a letter of administration but the same is not addressed in the pleadings. To buttress his contention, he referred this court to the cases which made a judicial interpretation on the cited provisions; **Jaribu Nassoro v Beatus Alois Thomas Kundi**, land Case No.34 of 2013, **Swalehe Bin Nassiri v Salim Bin Swalehe Bin Hussein** (1960) 1 EA 425 and **Yusufu Same & Another v Hadija Yusuf** (1996) TLR 350. He went on to submit that in accordance with annexures EA-4 and EA-5, the deceased passed away on 3rd April 1991, more than 30 years lapsed for the plaintiff to claim the deceased's right as required by the law.

He added that the plaintiff was appointed to administer the estate of the deceased's estate in 2019. It was his view that the 12 years had already been lapsed for the plaintiff to claim recovery of the suit land and there is no order of extension of time as per the requirement of section 44 of the Law of Limitation Act, Cap.89. He ended by stating that the right remedy

for the plaintiff's suit is to be dismissed under section 3 of the Law of Limitation Act, Cap.89.

On the second limb of the objection, the learned counsel for the 3rd defendant contended that the suit is Res judicata to Land Case No. 230 of 2012. It was his submission Res judicata is governed by section 9 of the Civil Procedure Code Cap.33 and the relevance of this section is to bar multiplicity of suits and guarantee finality to litigation and makes conclusive a final judgment between the same parties or their privies on the same issue by the court of competent jurisdiction in the subject matter of the suit. Mr. Mbuga listed all five conditions of Res judicata.. The learned counsel for the 3rd defendant went on to submit that the provision also provides more elaboration on the issue of common interest. To fortify his submission he cited the case of **Lotta v Tanaki and Others** [2003] 2 EA 556.

Mr. Mbuga continued to argue that the main issue is Land Case No.230 of 2012 is the recovery of land from the 5th defendant which is also the subject matter in dispute in this instant suit. He went on to state the issue of the same parties, in Land Case No. 230 of 2012 the issue of common interest comes in whereas the previous case was instituted by beneficiaries of the deceased including the plaintiff, and in the instate suit the plaintiff has opted to institute the case under the umbrella of

administratrix of the deceased. He averred that the plaintiff was a beneficiary in the previous proceedings and thus she was privy to the plaintiff in this case, they had a common interest to make sure that the suit land returned to the beneficiaries not otherwise. It was his view that had it been the decision in the previous suit in favour of them automatically this suit would not even be instituted in either way. He strongly contended that this instant suit is Res judicata to Land Case No. 230 of 2012 within the meaning of section 9 explanation VI of the Civil Procedure Code Cap.33 thus, he urged this court to dismiss the suit with costs.

Regarding the issue of abuse of the court process, Mr. Mbuga was brief and focused. He submitted that the issue is two folded. First, the same order which the plaintiff is now seeking before this court was also asked and denied in the probate court Mirathi No. 297 of 2004. Secondly, is that this court is vested with the mandate in making sure all proceedings present in court for determination are bonafide. He added that in the contrary then the court can terminate the same only to prevent abuse of the process.

On the strength of the above length submission, the learned counsel for the 3rd defendant beckoned upon this court to dismiss the suit with costs as the same is time-barred, if not then the same is Res judicata to the Land Case No. 239 of 2012 and abuse of court process.

Responding, on the first limb of the objection, Mr. Mutakyamirwa argued that the 3rd defendant counsel has missed a point on the objection of time limitation. He stated that in paragraph 17 of the Plaint, the plaintiff stated that she was appointed to administer the deceased's estate on 19th September, 2019 and the time from the death of the deceased to the time of appointment of administratrix of the deceased's estate is excluded. To buttress his contention, he cited section 25 (2) of the Law of Limitation Act, Cap.89.

He continued to argue that the former owner of the disputed land died in 1991 and thus from 1991 to 19th September, 2019 is required to be excluded. Fortifying his submission he cited the case of **The Registered Trustees of Masjud Mwinyi v Daniel Zakaria and 2 others**, Civil Case No. 200 of 1995. Mr. Mutakyamirwa asserted that the plaintiff was busy prosecuting with due diligence another civil proceedings. To support his stand he cited section 21 (1) of the Law of Limitation Act, Cap.89. It was his submission that the plaintiff was within the time limit and thus this objection is demerit.

As to the second limb of objection, Mr. Mutakyamirwa submitted that on the issue of Res judicata, each case must be treated on its own merits. He submitted that the plaintiff was wrong in instituting Civil Case No. 230 of 2012 without revocation of the appointment of the 1st defendant to be

an administrator of the deceased estate. To bolster his submission he cited the case of **The Registered Trustees** (supra). He added that it was wrong to sue the other defendants and forget to sue the 2nd defendant under which the said misdeed got its cause.

It was his submission that the 3rd defendant's advocate could raise his concern that the said prayer has not been prayed for in the Plaint, however, the learned counsel for the plaintiff submitted that this is an early stage of the proceedings and the amendment can be sought any time before the pronouncement of the judgment. To support his contention, he cited the case of **James Kabalo Mapalala v British Broad Casting Corporation** [2004] TLR 143.

He went on to submit that the court when administering justice should not sit as mere observe of justice. To support his submission he referred this court to the case of **Angelina Reuben Samson and another v Aysafi Investment Company**, Civil Appeal No. 4 of 2020. It was his submission that the prayers and parties in the instant suit are different from the former suit and thus, Land Case No.95 of 2021 is not Res judicata with Land Case No. 230 Of 2012. He submitted that Sarkar on Evidence 15th Edition which is in *parimateria* with section 45 of the Evidence Act, Cap.6 has modified the rules as to Res judicata which does not apply in fraud. He went on submitting that in the previous suit the plaintiff's prayer was to the

extent of sale of the suit property and in the instant suit, to the prayers are related to the question of fraudulent acts committed by the 2nd defendant in transferring the title to the 1st defendant.

In conclusion, the learned counsel for the plaintiff insisted that the 3rd defendant's objections are devoid of merits save to the 2nd objection which is subject to amendment under which they lodged their prayer to be allowed to amend their Plaint with a view of embodying the proper party.

In his short rejoinder, Mr. Mbuga reiterated his submission in chief. He added that the time is excluded not from the date of the death of the deceased rather from the time proceedings for probate or letter of administration are initiated to the time the aforesaid letters are granted by the court. To support his submission he cited the cases of **Shakila Shembazi (suing as the administrator of the estate of Shembazi Jabir Bakari) v Commissioner of Prisons & another**, Land Case No. 32 of 2008. Concerning the second limb of the objection, Mr. Mbuga stated that the learned counsel for the plaintiff conceded to the objection that the instant case has no any facts or paragraphs nor reliefs seeking for nullification of Land Case No. 230 of 2012.

It was his further submission that their objection is related to the Plaint and not intended amendment if any, and he cannot seek or rely on the amendment when there is an objection in place. To buttress his

submission, he cited the case of **Pangaa Mineral Ltd v Petrofuel (T) Ltd & 2 Others**, Civil Appeal No. 96 of 2015. It was his further submission that for one to file a case for nullification of the former judgment has to plea for extrinsic fraud and not intrinsic fraud. Supporting his submission he referred this court to the case of **The Government of Libya v Meis Industries Co. Ltd**, Civil Case No. 225 of 2012.

Stressing on the point of common interest, Mr. Mbuga submitted that the intent of the plaintiff is the same and the issue of fraud as stated in paragraph 14 of the Plaintiff was dealt in the Land Case No. 230 of 2012 thus, it was his view that the matter is Res judicata to Land Case No. 230 of 2012.

In conclusion, he reiterated his prayer and urged this court to dismiss the suit with costs.

From these rival contentions, one pertinent question for determination is in relation to *whether the preliminary objections are meritorious*. Disposal of the preliminary objections will follow the sequence in which the same is preferred. With respect to the first limb of objection, the question is *whether this suit is time-barred*. The learned counsel for the 3rd defendant valiantly contended that this suit is time-barred. In his view, the dispute arose after the death of Specioza Patrick on 3rd April, 1991, whereas the plaintiff was appointed to administer the estate of the

deceased's estate in 2019. It was his view that the 12 years had already been lapsed for the plaintiff to claim recovery of the suit land. On his side, the learned counsel for the plaintiff submitted that the plaintiff was appointed to administer the deceased's estate was on 19th September, 2019 and this stems from the facts obtained in the Plaint. However, with due respect, to the learned counsel for the plaintiff, this is not a reliable date to account when the cause of action arose.

Besides, the time when the deceased passed away is not borne in the Plaint, the same are reflected in the annexures accompanying the Plaint. In my view, the plaintiff was required to include relevant facts such as when exactly the cause of action arose. However, there is no starting point to determine whether the suit is time-barred. In such circumstances, this court draws an adverse inference against the plaintiff who failed to show sufficient facts as to when the cause of action started to run from the date when Specioza Patrick passed away. See the case of **Aziz Abdalla v R** (1991) TLR 1.

With respect to the first limb of objection that the suit is *Res judicata*. I harmonize with the 3rd defendant's Advocate who has analyzed the elements of *Res Judicata* from different authorities like the provision under Section 9 of the Civil Procedure Code Cap 33 [R.E. 2019]. The doctrine of *Res judicata* is part of our laws and is embodied in section 9 of the Civil

Procedure Code, Cap. 33 [R.E 2019]. This provision is couched in a mandatory form as follows, and I will quote them verbatim for the sake of a readymade reference:-

“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 to litigate 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.” [Emphasis supplied].

The principle was well articulated by the Court in the case of **Yohana Dismas Nyakibari and Another v Lushoto Tea Company Limited and 2 Others**, Civil Appeal No. 90 of 2008 (unreported), the principle of Res judicata was enunciated that:-

*“There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These are (i) **the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;** (ii) the former suit must have been between the same parties or privies claiming under them; (iii) **the parties must have litigated under the same title in the former suit;** (iv) the court which decided the former suit*

must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.”

Additionally, the doctrine of Res judicata bars a party to come back to this court for the same issue. In the case of **Paniel Lotha v Tanaki & Others** [2003] TLR 312, the court 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.”

In the case at hand and in Land Case No. 230 of 2012, the parties were the same. In Land Case No. 230 of 2012, Linda Christopher was among the Plaintiffs (5th Plaintiff). They instituted the suit as the beneficiary of the deceased claiming on the same property. In the instant case, Linda Christopher has lodged the suit as an administrator of the estate of the late Specioza Patrick litigating on the same property of the late Specioza Patrick. The subject matter in the Land Case No. 230 of 2012 is for recovery of land in respect to Plot No.205, Block 'A' Buguruni at Dar es Salaam with Certificate of Title No. 81725. According to paragraph 6 of the Complaint, the plaintiffs alleged that they and Dickson Majaliwa (the 1st defendant) are owners of the suit premises and alleged that the Dickson

Majaliwa (the 1st defendant) without consent transferred the title of the suit premises into his name and used to take a loan which he defaulted to service, thus, the same was sold in the public auction.

In the instant case, specifically in paragraph 9 of the Plaint, the plaintiff is claiming jointly and severally against the defendants an order that the transfer of Plot No.205, Block 'A' Buguruni at Dar es Salaam under Title No. 81725 from the deceased to Dickson Majaliwa (the 1st defendant) was tainted with fraud and the plaintiff also claimed for an order to declare the purported auction of the disputed land unlawful.

Moreover, Land Case No. 230 of 2012 was determined and finalized on merit. Therefore, all elements of res judicata have been proved, without doubt, this suit is Res judicata to Land Case No. 230 of 2012 which was heard on merit.

It is the plaintiff's counsel's argument that the plaintiff was wrong in instituting Land Case No.230 of 2012 without revocation of the appointment of the 1st Defendant to be administrator of the deceased estate. This ground cannot hold water since Linda Christopher was a party in Land Case No. 230 of 2012. Also, the subject is substantially the same as the previous dispute and the case was determined and finalized by the competent court. Hence, the plaintiff was precluded from instituting a similar suit in any other court of law. Therefore, bringing it back as a Land

Case before this court again infringes the Doctrine of Res judicata and hence it is an abuse of the court process to come. I have also considered the two Latin maxims that litigation must come to an end, this court cannot entertain endless litigation. I find the second limb of objection has met all the essential elements of Res judicata.

Guided by the above findings, it is clear that the law prohibits courts from entertaining any matter which is Res judicata. It follows that the preliminary objections raised by the learned Counsel for the 3rd Defendant have merit. Therefore, the court is enjoined to dismiss Land Case No.85 of 2021 for being Res judicata and abuse of court process. The plaintiff to pay the defendants half of the costs incurred in attending the matter in court.

Order accordingly.

Dated at Dar es Salaam this date 24th February, 2022.


A.Z.MGEYEKWA
JUDGE
24.02.2022

Judgment delivered on 24th February, 2022 in the presence of Ms. Jadness Jason, learned counsel for the plaintiff, Ms. Rose Kashamba and Lina, State Attorneys, Mr. Hans Mlindoko, learned counsel for the 3rd and 5th defendants.



A.Z.MGEYEKWA

JUDGE

24.02.2022

Right of Appeal fully explained.