IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 235 OF 2021

MAIMUNA ALFAN SALEHE ..... 1ST PLAINTIFF

APROUD ALOIS TUNGARAZA ..... 2ND PLAINTIFF

ARCAD PROCHES KIMARO ..... 3RD PLAINTIFF

AKIDA RASHID AJUAE ..... 4TH PLAINTIFF

VERSUS

CHILWA LUBAWA KILIAKI ..... DEFENDANT

RULING

Date of last Order 10.02.2022

Date of Ruling 16.02.2022

A.Z.MGEYEKWA, J

The Plaintiff MAIMUNA ALFAN SALEHE and three others brought this suit action against the Defendant, Chilwa Lubawa Kiliaki. The Plaintiff jointly and severally claims against the Defendant for a declaration that the Plaintiffs are the rightful and lawful owners of unsurveyed pieces of

land measuring 40 acres situated at Kerege Village within Bagamoyo District.

When the matter came for necessary orders on 27th January, 2022 the Defendant among other things on his pleadings raised three preliminary objections towards the Plaintiff's pleadings as follows: -

1. *That the suit is Res Judicata against the Plaintiffs*
2. *The suit is time-barred since the land in dispute was surveyed as Plot No. 2888 and afterward registered under Granted Right of Occupancy with Title No. 58832 far back in 2005.*
3. *That the suit is bad in law for failure to join the Registrar of Titles, a necessary party who decided to register the land contrary to the interests claimed by the Plaintiffs.*

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

The hearing of the preliminary objection was by way of written submissions in which the Plaintiffs had the legal service of Joseph Mandela Mapunda, learned Advocate, whereas the Defendant enjoyed the legal service of Benito Mtulo, learned counsel.

Concerning the first objection that the suit is Res Judicata, Mr. Mtulo contended that there was a similar case; Case No. 5 of 2021 before the Kerege Ward Tribunal at Bagamoyo District which has been heard and finally determined on 25th November, 2021. He argued that the said case involved the same parties and the subject matter was directly and substantially the same as the dispute before this court. Mr. Mtulo stated that pursuant to section 9 of the Civil Procedure Code, Cap.33 [R.E 2019] the Plaintiffs are barred from instituting another suit involving the same parties and cause of action. To buttress he cited the case of **Athnasia T. Massinde & Another v National Bank of Commence**, Commercial Case No. 34 of 2016, this court quoted with approval what was stated in the case of **North West Water Ltd v Bennier Partner** ALL ER [1990] Vol 3 this court held that:-

> *" It is clear that an attempt to re-litigate in another cause of action which has been fully investigated and decided in former action may constitute an abuse of the process."*

The learned counsel for the Defendant continued to argue that it is settled law that where a party is precluded from instituting a further suit in respect of any particular cause of action, he added that such party cannot institute a similar suit in any court to which the law applies. It was his

prayer that Land Case No. 235 of 2021 be dismissed with costs for being Res judicata.

Arguing on the second ground, the learned for the respondents contended that this suit is time-barred since the land in dispute was surveyed as Plot No. 2888 and afterward registered under Granted Rights of Occupancy with Title No. 58832 far back in 2005. He contended that the Plaintiffs are claiming for ownership of land over a piece of land located at Kerege within Bagamoyo District. He added that they contend that the land was allocated to them by Kerege Village Authority in 1999. It was his submission that the land in dispute was registered under the provisions of the Land Registration Act, Cap.334 [R.E 2019] under a Granted Right of Occupancy with Title No. 58832.

He further claimed that the Defendant was in legal occupancy of the land when the Plaintiffs came in 1999 thus their rights over the land were extinguished upon the land being surveyed as Plot No. 2888 and subsequently, ownership was granted to Richard Justo Malisa. He added that the Defendant derives ownership over the land from Richard Justo Malisa by virtue of sale.

The learned counsel for the respondents contended that from December, 2005 when the land in dispute was registered to December,

2021 when this suit was filed in this court as Land Case No. 235/2021 a period of more than 15 years lapsed. It was his submission that the suit land was under adverse possession since 2005. To support his position he referred this court to the cases of **Bhoke Kitang'ita v Makuru Mahemba**, Civil Appeal No. 222 of 2017 CAT at Mwanza, **Moses v Lovegrove** [1952] 2 QB 533, **Hughes v Griffin** [1969] 1 ALL ER 460, and **TANESCO v Hellen Byera Nestroy**, Land Case Appeal No,133 of 2020.

Stressing on that point, the learned counsel for the respondents contended that the period of limitation to recover land is 12 years as per section 3 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019] which reads together with Part I Item 22 of the Schedule of the Act. It was his submission that this suit be dismissed with costs for being time-barred.

Submitting on the third limb of the objection, the learned counsel for the respondent contended that the Registrar of Titles is a necessary party to join the suit. He claimed that the Registrar of Titles made a decision to register a Right of Occupancy over the land pursuant to the provision of section 18 (1) of the Land Registration Act, Cap. 334 [R.E 2019]. Thus, it was his view that for that reason the Registrar of Titles is a necessary party whose joinder in the proceedings is of imperative need. He went on to submit that in case this court will declare the Plaintiffs owners of the suit

land, the court will be required to issue an order which will compel the Registrar of Titles to rectify the register to erase Richard Justo Malisa.

It was his view that this is an order whose effectiveness can only be realized by having the Registrar of Titles, the implanting agency taken on board and be allowed to put up his case. Supporting his stand he cited the case of Leonard **Peter v Joseph Mabao & Others**, Land Case No. 4 of 2020. He further submitted that given the nature of the reliefs sought by the Plaintiff, need arises for impleading the Registrar of Titles. It was his conclusion, that non-inclusion of the Registrar of Titles as a necessary party renders the suit unmaintainable.

In response, the Plaintiff's Advocate contested each and every preliminary raised by the Defendant' Advocate. The learned counsel for the Plaintiff on the 1st limb of preliminary objection argued that there was no any suit before any court or tribunal therefore the instant suit cannot be res judicata. He claimed that the Defendant's submission does not hold water since the judgment of the said Ward Tribunal does not describe the subject matter of which it becomes vague as to satisfy this court if it was the same suit referred to or not. Supporting his submission he referred this court to section 9 of the Civil Procedure Code, Cap. 33 [R.E 2019].

It was his view that this objection be dismissed for lack of description of the subject matter in the judgment of the Ward Tribunal and the parties are not the same since the fourth Plaintiff in this suit was not a party in the attached judgment hence thus further disqualifies to be called res judicata.

On the second limb of objection, the learned counsel for the Plaintiff argued that the matter is not time barred since the defendant illegally trespassed to the plaintiffs' land in 2021. It was his view that the cause of action arose in 2021, thus, they have raised their claims within reasonable time since the defendants trespassing into the suit land in 2021. To buttress his submission, the learned counsel for the Plaintiff referred this court to section 5 of the Law of Limitation Act, Cap 89 [R.E. 2019] which states that;

> *"Subject to the provision of this Act the right of action in respect of any proceedings, shall accrue on the date in which the cause of action arises."*

It was his further submission that the time limitation to bring a cause of action arising in land matter is 12 years hence the above plaintiffs are within the reasonable time. He added that this objection is not purely a preliminary objection rather the matter of facts since the defendant has referred matters related to facts which requires to be proved upon by evidence. To buttress his contention, he cited the cases of **Sugar Board**

of Tanzania v 21st Century Food and Packaging and two others, Civil Application No. 20 of 2007 (unreported), **Masangang'wanda v. Chief Japhet Wanzagi and others** (2006) TLR 351, the court with approval cited the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors** (1969) E.A. 696 of which it was stated that:

> *"A preliminary objection has to be on point of law and not on unascertained facts"*

In respect of the third objection on failure to join the registrar of titles as a necessary party. The Plaintiff's Advocate submitted that the registrar is totally not the necessary party to this case since the suit land is neither surveyed nor registered and further the plaintiffs submit that it is not the registrar who trespassed to the suit landed property but the defendant did so.

On the strength of the above, the learned counsel for the Plaintiffs beckoned upon this court to entirely overrule the objections for lacking merits with costs.

The respondent's Advocate rejoinder was a reiteration of what was submitted in chief. With respect to time bar the counsel submitted that the Case No.05 of 2021 was properly instituted at Kerege Ward Tribunal and the plaintiff were duly been summoned. The learned counsel for the Defendant insisted that the Registrar of Title was a necessary party to the

case since the suit land is was surveyed and registered.in conclusion, the learned counsel for the Defendant urged this court to sustain the preliminary objections with costs.

Having gone through the submissions from both parties and before I go very far in analyzing the every point of the preliminary objection raised, I have opted to address the third limb of objection, the respondent's counsel contended that the suit is bad in law for failure to join the Registrar of Titles, a necessary party.

Gathering from the counsel's submission, the rumpus revolves around the involvement of the Registrar of Titles in the pending proceedings. The issue for determination is whether the Registrar of Title is a necessary party in the instant suit. This brings out a critical question that serves as a prelude to the real contention by the parties. The Court of Appeal of Tanzania in the case of **Abduiiatif Mohamed Hamis v Mehboob Yusuf Osman & Another** CAT-Civil Revision No. 6 of 2017 (unreported) established who is a necessary party. The apex Bench borrowed the explanation laid down in the Indian case of **Baranes Bank Ltd v Bhagwandas,** A.I.R. (1947) All 18, wherein it was guided as follows:-

> *"...the full bench of the High Court of Allahabad laid down two tests for determining the questions whether a particular party is necessary party to the proceedings.* ***First****, there has to be a right*

of relief against such a party in respect of the matters involved in the suit, and ***second****, the court must not be in a position to pass an effective decree in the absence of such a party. The foregoing benchmarks were described as true tests by the Supreme Court of India in the case of Deputy Comr., Hardoi v. Rama Krishna, A.I.R. (1953) S.C. 521."*

The superior Court at page 6 of its judgment, held that:-

"We, in turn, fully adopt the two tests and, thus, on a parity of reasoning, ***a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed****. [Emphasis added].*

Thus, the determination as to who is a necessary party to a suit would vary from case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joinder party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.

Applying the tests accentuated in the cited decisions, the question is whether in the circumstances of this case the Registrar or Title is a necessary party whose joinder in the proceedings is an imperative need.

While the Defendant's Advocate believes that, by virtue of their being necessary parties, the duo's involvement is necessary and indispensable. The learned counsel for the Defendant insisted that the Registrar of Title is a necessary party for the reason that no effective decree can be passed by this court without involving the Registrar of Title, the implementing agency to put up his case.

On the other hand, the learned counsel for the Plaintiffs claims that the Registrar of Title is not a necessary party to this suit since the disputed land is unsurveyed and unregistered land. I have perused the pleadings and noted that the Plaintiffs in their Plaint specifically on paragraph 3 stated that the Plaintiffs are jointly and severally claim against the Defendant for a declaration that they are rightful and lawful owners of unsurveyed pieces of land. In that regard, I fully subscribe to the submission of the learned counsel for the Plaintiff, and I hold the view that this objection is not based on pure points of law. As it was held in the case of **Mukisa Biscuit Manufacturers Ltd. v West End Distributors Ltd** [1969] E.A. 696 which has often been cited with approval by the Court, the nature of a preliminary objection was stated as follows:-

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.* ***It***

cannot be raised if any fact has to be ascertained *or if what is sought is the exercise of judicial discretion." [Emphasis added].*

In the present case, the issue of survey and registered land is not stated in the Plaint. Therefore, determination of this issue requires evidence, in my view, it is prematurely to decide that the suit land was surveyed and hence the need to join the Registrar of Title. Therefore in my view, this objection does not confer for being a pure point of law Therefore, the same is disregarded.

With respect to the first limb of objection that the suit is *res judicata*. I harmonize with both parties who have 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* was defined in the **Black's Law Dictionary**, **8th Edition** to mean among other things;-

1. *"An issue that has been definitively settled by judicial decision. An affirmative defense barring the same parties from litigating a second lawsuit* ***on the same claim,*** *or any other claim arising from the same transaction or series of transactions and that* ***could have been -but was not -raised*** *in the first suit"*

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]. For ease of reference, I find it apt to reproduce the section hereunder. It reads:-

> *"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."

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 relation to the case at hand, in Case, No. 05 of 2021 before Kerege Ward Tribunal in Bagamoyo District the parties were the same, it was the Defendant who lodged the case at the trial tribunal and the 1st, 2nd and 3rd Plaintiffs were party to the case save for the 4th Plaintiff. The learned counsel for the Plaintiff complained that the matter at the trial tribunal lacked description of the subject matter.

Reading the Ward Tribunal judgment, the subject matter is in regard to ownership of land situated at Kerege Village within Bagamoyo District. Before this court the parties are Maimuna Alfan Salehe, Aproud Alois Tungaraza, Arcad Proches Kimaro and Akida Rashid Ajuae v Chilwa

Lubawa Kiliaki and the subject matter was ownership of piece of land situated Kerege Village within Bagamoyo. Therefore, in my view the issue of description cannot arise as long at the place where the suit land is located is the same; Kerege village within Bagamoyo. Consequently, I fully subscribe to the learned counsel for the Defendant that in this instant case involves the same parties and the subject is substantially the same as the previous dispute before the Ward Tribunal.

Moreover, since the Case No. 05 of 2021 involved the same parties and the subject matter was directly and substantially the same with the matter at hand, the same was determined and finalized by competent tribunal, therefore, bringing it back as a Land Case before this court again infringes the Doctrine of Res judicata. In the above quotation of foreclosing re-litigating of matters that are already determined by the Judicial decisions. I subscribe to the position pointed out by the Defendant's Advocate that this suit is Res judicata regardless of the 4th Plaintiff who was not a party in the matter at the Ward Tribunal. Therefore the Plaintiffs are precluded from instituting a similar suit in any other court of law.

I have also considered the two Latin maxims that litigation must come to an end, this court cannot entertain endless litigation. The issue of exact description such as size of a plot are not necessary as long as the location

is the same at Kerege within Bagamoyo. I find this first objection has met all the essential elements of Res judicata. Therefore the same is sustained.

With the above findings, I refrain from deciding the remaining points of objections as, I think, any result out of it will have no useful effect on this suit. It will be but an academic endeavor.

In the upshot, I am of the settled view that the first preliminary objection raised by the learned counsel for the Defendant is laudable. Therefore, I proceed to dismiss the suit without costs.

Order accordingly.

Dated at Dar es Salaam this date 16TH February, 2022.

A.Z.MGEYEKWA
JUDGE
16.02.2022

Ruling delivered on 16TH February, 2022 in the presence of Mr. Joseph Mandela, learned counsel for the Plaintiffs and Mr. Benitho Mtulo for the Defendant.

A.Z.MGEYEKWA
JUDGE
16.02.2022

Right of Appeal fully explained.