

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 57 OF 2023

RUTH JACKSON MPUNDA PLAINTIFF

VERSUS

YUSUPH MZEE NGORORO1ST DEFENDANT

HAMIDA ABDALLAH NGORORO 2ND DEFENDANT

COMMISSIONER FOR LANDS MINISTRY OF LANDS,

HOUSING AND HUMAN SETTLEMENT DEVELOPMENT....3RD DEFENDANT

KIGAMBONI MUNICIPAL COUNCIL.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Date of the last Order: 27.04.2023

Date of Ruling: 03.05.2023

A.Z. MGEYEKWA, J.

At the outset, on 10th March 2023 the Plaintiff herein instituted the present suit against the Defendants. She claims against them jointly and severally for a declaratory order that, she is a lawful owner of the disputed land

described as Plot No. 618, Block "G", located at Magogoni Area, within Kigamboni Municipality, in the city of Dar es Salaam; a declaratory order that the purported allocation and grant of a right of occupancy to the 2nd defendant by the 4th defendant is unlawful and ineffectual hence, null and void; a perpetual injunctive order restraining the defendants or their agents or assignees from entering in her suit plots in any way; general damage as may be assessed by the Honourable Court and to be paid by the 1st and 2nd defendants jointly and severally; costs of the suit to be paid by the defendants jointly and severally; and any other reliefs as the Honourable Court deems fit to grant.

The 1st and 2nd Defendants disputed the claims of the Plaintiff's by filing the Written Statement of Defence dated 31st March 2023 enshrined with the preliminary objection on points of law. Again, the same was disputed by the 3rd, 4th, and 5th Defendants *vide* their joint Written Statement of Defense filed on 11th April, 2023. During the course of hearing, Mr. Mbuga, counsel for the 1st and 2nd defendants prayed to register the preliminary objection on points of law to *wit*: -

1. *The suit is res judicata against the Plaintiff;*
2. *The suit is time-barred; and*
3. *The suit abuses the Court process.*

As per the good practice of the Court, it is the requisite of law and procedure that, having been seized with the preliminary objections, it is prudent to deal with them primarily before embarking on the determination of the main suit.

Submitting in support of the objections, Mr. Mbuga Jonathan, learned Advocate for the 1st and 2nd Defendants hereof commenced with the 1st limb of objection to the effect that, the suit is *res judicata* by virtue of section 9 of the Civil Procedure Code Cap.33 [R.E 2019]. He specified that David Robinson in the Ward Tribunal for Mjimwema, Kigamboni was litigating under the common interest of the Plaintiff. To fortify his submissions, he cited the cases of **Maimuna Alfani Salehe v Chilwa Lubawa Kiliaki**, Land Case No. 235 of 2021 at page 14; **Sabuni Detergents Ltd v Haroon Daud Abdulla**, Commercial Case No. 46 of 2006 at page 8 and 9 and that of **Paniel Lotta v Gabriel Tanaki & Others** [2003] TLR 315.

Regarding the 2nd limb of objection, he maintained that it is folded under Items 22 and 24 of Part 1 to the 1st Schedule of the Law of Limitation Act, Cap.89 [R.E 2019]. He stated that in counting when the cause of action arose, the time starts to run from the date on which the Plaintiff became aware of her right was taken or interfered with. He qualified that, if you go through the annexures, it is clearly indicated that the dispute arose in 2008

and the Plaintiff lodged the instant suit before this Court in 2023 which arithmetically there is a lapse of 15 years beyond the prescribed time of limitation. He added that the relief of declaratory order for being the lawful owner of the land in dispute is within 6 years. To buttress his proposition, he referred this Court to the decision of **CRDB (1996) Ltd v Boniphace China**, [2003] TLR 416 and that one of **Benedict G. Mukasa v Mbarouk Suleiman & 3 Others**, Land Case No. 4 of 2021.

As to the 3rd limb of the objection, he asserted that, in the case at hand, although it does not state specifically it aims to pre-empt the decision of the Ward Tribunal which declared the 1st and 2nd Defendants the lawful owners of the suit property or it aimed to create conflicting decisions on the same property from different Courts. He averred that they understand as a matter of law this Court can set aside the said decision through a fresh case if there is fraud committed by the party at the Ward Tribunal.

Resisting the objections, Mr. Sinare Ramadhani contended that the points of objection raised are not pure points of law as they require an analysis of arguments. The learned Advocate for the Plaintiff contended that in the case of **Shose Sinare v Stanbic Bank Tanzania Ltd & Another**, Civil Appeal No. 89 of 2020 for a preliminary objection to be successful it does not need to be supported by evidence as the counsel for the 1st and 2nd

Defendant referred this Court to annexures RJM7, RJM8 and RJM21 to the Plaintiff.

He asseverated that, for the suit to be *res judicata*, all the conditions must co-exist and one should not pick the condition and conclude that the suit is *res judicata* as failure to establish all the conditions thereof it stands to fail and the same is overruled on that basis. He urged the Court to disregard the objections.

On the 2nd limb of the objection, it was Mr. Sinare's contention that this ground is misplaced and misconceived as the suit emanates from Order XXI, Rule 52 of the Civil Procedure Code Cap.33 [R.E 2019]. He went on to submit that, section 3 and Item 22 of Part 1 to the 1st Schedule of the Law of Limitation Act, [Cap 89 R.E 2019] is irrelevant and hence inapplicable in the matter at hand.

Concerning the 3rd limb of the objection, he uttered that, the Plaintiff filed a suit at the District Land and Housing Tribunal for Kigamboni at Kigamboni and the same was dismissed, being aggrieved by the dismissal order the remedy was to institute a fresh case and hence, she is not abusing the Court process but she is exercising her statutory rights. To bolster his proposition, he cited the case of **Elimelec Francis Mchallo (as an administrator of the estate of the late Janeth Francis Mchallo)**

v Lawrance Simon Machallo, Land Case No. 10 of 2023, (unreported) on pages 11, 12, 13 and 16.

In rejoinder, Mr. Mbuga briefly stated that from submissions made by Mr. Sinare he is not disputing that there was a decision of the Ward Tribunal, the 1st Defendant was declared a lawful owner and the said decision is still intact as they did not move the Court to depart from it. He cemented that, the issue of pecuniary jurisdiction of the subject matter to be more than TZS 300,000,000/= (Three Hundred Million Shillings Only) was raised in Land Appeal No. 181 of 2022 and not in the Ward Tribunal.

On the issue of time-barred, he submitted that the Plaintiff does not dispute the cause of action to have accrued in 2008 rather his advocate is disputing that this Court cannot refer to the annexures without the support of any law. He pondered that filing an objection proceeding before the trial Tribunal does not mean that the said proceeding validated the time when the cause of action arose.

Lastly, as to the issue of *res judicata*, he reiterated his submissions in chief and stated that all the conditions were met and the plaintiff is related to David Robison. he added that the counsel for the Plaintiff has not disputed whether the litigation at the Ward Tribunal the plaintiff had no interest thereat.

I have carefully considered the arguments advanced by the counsel for the 1st and 2nd defendants and the rebuttal from the Plaintiff's advocate in order to determine the merit or demerit of the preliminary objections raised.

The law governing *res judicata* is envisaged under section 9 of the Civil Procedure Code, [Cap 33 R.E 2019] which provides thus: -

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.

In the light of the above provision of law, it is with no flicker of doubt that, the decisions of the Mjimwema Ward Tribunal in Application No. 6 of 2013, Misc. Application No. 5 of 2022 and Misc. Land Application No. 147 of 2022 altogether before the District Land and Housing Tribunal for Kigamboni at Kigamboni was delivered by the Court of competent jurisdiction in respect of the same subject matter.

More so, in the matter at hand, the subject matter is Plot No. 618, Block "G", located in Magogoni area, within Kigamboni Municipality, in the city of Dar es Salaam as per paragraph 4.1 of the Complaint filed on 10th March 2023 which is similar to that in Application No. 6 of 2013 before Mjimwema Ward Tribunal and Misc. Application No. 5 of 2022 and Misc. Land Application No. 147 of 2022 both before the District Land and Housing Tribunal for Kigamboni at Kigamboni.

Further, the decision of Mjimwema Ward Tribunal in Application No. 6 of 2013 was determined to its finality. On 10th February 2022, the 1st Defendant filed an Application for Execution *vide* Misc. Application No. 5/2022 which was confronted by the objection proceedings in Misc. Land Application No. 147 of 2022 and thus dismissed for being devoid of merit the same was concerning the same suit premises. See the cases of **The Registered Trustees of Chama Cha Mapinduzi v Mohamed Ibrahim Versi & Sons and Another**, Civil Appeal No. 16 of 2008; **Peniel Lotta vs. Gabriel Tanaki and Others**, Civil Appeal No. 61 of 1999 (2003) TLR Page No. 314 and **George Shambwe v Tanzania Italian Petroleum Company Ltd** [1995] TLR 21 to that effect.

To end, the parties herein are litigating under the same title, leave apart in Application No. 6 of 2013 at Mjimwema Ward Tribunal the parties were David Robinson v Yusuf Mzee Ngororo, yet in Misc. Application No. 5/

2022 parties were Yusuf Mzee Ngororo v David Robinson also in Misc. Land Application No. 147 of 2022 rival parties were Ruth Jackson Mpunda v Yusuf Mzee Ngororo & David Robinson and in the instant case parties are Ruth Jackson Mpunda v Yusuph Mzee Ngororo, Hamida Abdallah Ngororo, Commissioner for Lands Ministry of Lands, Housing and Human Settlements Development, Kigamboni Municipal Council and the Attorney General, constructively, they are litigating under the same title which has been aforementioned above.

In the case of **Witness Rhobi Elia v Khamis Abdallah Mduma & 2 Others**, Land Case No. 300 of 2022, (unreported) on page 7 of the Ruling, this Court stated that: -

“In other words, the suit is constructive res judicata, a suit that sets to bar any claims being raised in a later proceeding if the claim (sic) on the same subject matter ought to have been raised and decided earlier.”

[Emphasis added].

It should be noted that the plaintiff does not dispute that David Robinson is her husband, so, he was litigating under the same title which, and therefore the Judgment concerning the disputed land is that of *rem* and not *persona*, hence, constructively *res judicata* under the circumstances.

In the case of **Moto Matiko Mabanga v Ophir Energy Plc & 6 Others**, Civil Appeal No. 119 of 2021, CAT at Dodoma (unreported) on page 14 of the Judgment of the Court it was observed and held that: -

“At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence”.

Applying the above holding of the Court of Appeal of Tanzania it is clear that there was no any harm for the 1st and 2nd Defendants' counsel to refer to the annexures of the plaint. The counsel referred to annexures.... without referring to the examination of any evidence.

It is a trite law under Order XXI, Rule 62 of the Civil Procedure Code, Cap.33 [R.E 2019], the remedy for the Plaintiff herein was to file a suit to establish her rights. Her claims concerning the suit property were determined to its finality in Application No. 6 of 2013 before Mjimwema Ward Tribunal and Misc. Land Application No. 147 of 2022 before the trial Tribunal and, consequently, the instant matter is *res judicata* and not otherwise.

Having said so, I proceed to hold that this suit is constructive *res judicata* and this Court is barred to determine it as it abuses the Court process. This 1st limb of objection having disposed of the matter, there is no need in dwelling to the 2nd and 3rd limb of the preliminary objections since the 1st objection has merit, the same suffice to dispose of the application.

That said and done, I sustain the 1st limb of the preliminary objection. As a result, the suit is dismissed accordingly without costs.

It is so ordered.

DATED at Dar es Salaam this day of 3rd May, 2023.




A.Z. MGEYEKWA

JUDGE

03.05.2023

COURT: Ruling is delivered this 3rd May, 2023 in the presence of Mr. Mwandambo, counsel for the Plaintiff, and Mr. Mrindoko, counsel for the 1st and 2nd Defendants.




A.Z. MGEYEKWA

JUDGE

03.05.2023