

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

CONSOLIDATED LAND APPEAL NO. 283 & 300 OF 2023

*(Arising from Land Application No. 120 of 2022 of the District Land and Housing
Tribunal of Temeke at Temeke)*

INNOCENT R. MROSO APPELLANT

VERSUS

ATUPELE MWAIJIBERESPONDENT

17/10/2023 & 31/10/2023

JUDGMENT

A. MSAFIRI, J.

This is a judgment on the two consolidated appeals involving the two parties namely Innocent Mrosso who is an appellant in the Appeal No. 283 of 2023 against Atupele Mwaijibe who is the respondent. Also there is an Appeal No. 300 of 2023 where the appellant is Atupele Mwaijibe against Innocent Mrosso, the respondent. The two parties appealed against each other over the same decision in Land Application No. 120 of 2022 in the District Land and Housing Tribunal for Temeke at Temeke(herein the trial Tribunal) which was delivered on 08.06.2023 before Hon. L.H. Rugarabamu, Chairperson.

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The brief background of this consolidated appeal is that Innocent R. Mrosso, who is the appellant in Land Appeal No.283 of 2023, initially instituted an Application before the District Land and Housing Tribunal of Temeke at Temeke in Application No. 120 of 2022, against Atupele Mwaijibe, the respondent who is also the appellant in Land Appeal No. 300 of 2023 before this Court.

Innocent Mrosso, then an applicant claimed that he has leased to the respondent two business rooms (frames) which the respondent was using for his Laboratory business. That the parties have entered lease agreement where the respondent has leased the said two business rooms for monthly rent of Tshs. 70,000/=per room from 05/9/2020 to 05/3/2021. That the respondent paid for the whole six months' rent of Tshs. 840,000/=.

That, following the end of the first six months, the parties entered a new agreement. At that time the applicant received a notice from Health Inspector that in order to conduct a Laboratory business on the area, he must build a toilet for his tenant. The applicant claimed that he complied and built a toilet in order for his tenant, the respondent to conduct his business. That the applicant built the said toilets on his own costs, and *Atupele*.

informed the respondent that the rent has increased and the new rent shall be Tshs. 100,000/= per one room.

The appellant claims that the respondent have refused to pay the new rent and was not willing to make payments despite several demands from the applicant. He claimed before the trial Tribunal that an order be issued to compel the respondent to pay monthly rent of Tshs. 100,000/= per each room up to the day of the vacant possession and the payment of Tshs. 6,000,000/= as general damages.

After hearing of both parties, the trial Tribunal granted the Application. However it found that the agreed rent as per the lease agreement was Tshs 70,000/= per each room and not Tshs. 100,000,000/= per room as the applicant claimed. The trial Tribunal ordered the respondent to pay the rent arrears on Tshs 70,000/= per month from the date of the commencement of the new agreement after the expiry of the old one until the date the respondent will give vacant possession. The trial Tribunal also ordered the respondent to give vacant possession of the suit premises.

It appears that both parties were not happy with the decision of the trial Tribunal for different reasons hence each party lodged an appeal to this Court. The applicant lodged Appeal No. 283 of 2023, while the *Accl.*

respondent lodged an appeal No. 300 of 2023 both challenging the decision of the trial Tribunal in Application No.120 of 2022. As observed earlier, this Court have consolidated the hearing of the two appeals and the parties were informed accordingly.

The disposal of the appeals was by way of written submissions, whereas, in the Land Appeal No. 283 of 2023 the appellant was represented by Ms. Mary Nyasebwa, learned Advocate while the respondent was represented by Mr. Danstan Goshoko Nyakamo learned Advocate. More so, on Land Appeal No. 300 of 2023, the appellant therein was represented by Mr. Danstan Goshoko Nyakamo learned Advocate while the respondent was represented by Ms. Mary Nyasebwa learned Advocate.

Both parties had their grounds of appeal but each of the party had included preliminary objection against the other with or without notice.

In the Land Appeal No.283 of 2023, the respondent Atupele Mwaijibe, while he was filing his reply to the memorandum of appeal, he also filed a notice of preliminary objection to the effect that;

1. *That the Honourable Court has no jurisdiction to entertain this Appeal as the land suit in Application No. 120 of 2022 is res judicata to Land Suit No. 135 of 2021 of Makangarawe Ward*

Alls

*Tribunal and its Appeal No. 46 of 2021 of the Temeke District
Land and Housing Tribunal for Temeke at Temeke.*

While the appellant in Land Appeal No. 283 of 2023 was submitting in support of his appeal, he also raised a preliminary objection in the written submission to the effect that the Land Appeal No. 300 of 2023 was out of time. He argued that although the objection was not raised as the point of preliminary objection, it touches the competency of the Appeal No. 300 of 2023, and the remedy is for the said appeal to be struck out.

Having gone through the whole of the submissions by the parties, this Court has decided to disregard both preliminary objections by the contending parties for the reasons that, the first objection which was raised by Atupele Mwaijibe on the issue that the Appeal No. 283 was *res judicata* was also raised by the said Mwaijibe in Appeal No. 300 of 2023 as his first ground of appeal among five grounds of appeal which were supporting the said appeal. Hence this Court is of the view that the issue which was raised as a ground of appeal cannot again be raised as a preliminary objection.

In the preliminary objection on the time limitation of the Appeal No. 300 of 2023 which was raised by Innocent Mroso, the Court finds that this

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cannot stand. The objection was raised in the submissions and this is a bad and unacceptable practice. A preliminary objection cannot be raised in the course of submissions without at least seeking the leave of the Court. This is amount to taking the other opponent by surprise which can lead to occasioning failure of justice. Therefore, the Court disregarded the objections as said earlier and went on to determine the appeals on merit.

For the reason I will reveal later, I have opted to start with determination of the grounds of appeal in Appeal No. 300 of 2023 particularly the first ground which the appellant stated that the learned trial Chairman erred in law and in fact by not finding that the land suit in Application No. 120 of 2022 is *res judicata* to Land Suit No. 135 of 2021 of Makangarawe Ward Tribunal and its Appeal No. 46 of 2021 of the Temeke District Land and Housing Tribunal at Temeke.

Mr Nyakamo, counsel for the appellant in Appeal No. 300 of 2023 submitted that, the trial Tribunal erred in law and fact by not finding that Land Application No. 120 of 2022 was *res judicata* to the land suit No. 135 of Makangarawe Ward Tribunal and its Appeal No. 46 of 2021 of the District Tribunal. That, the matter was previously determined by a competent Tribunal and hence the appellant could not in law commence fresh proceedings on the same subject matter as this is prohibited under *Adle*.

Section 9 of the Civil Procedure Code, Cap 33, R.E 2019 (herein the CPC). That, the ingredients which are required for the principle of *res judicata* to apply has all been met in this matter. He prayed for this Court to quash and set aside the decision and orders of the trial Tribunal in Application No. 120 of 2022.

In reply, Ms Nyasebwa, counsel for the respondent in Appeal No.300 of 2023 contended that, the Application No. 120 of 2022 was a different suit from Land Suit No. 135 of 2021 at Makangarawe Ward Tribunal. That at the Ward Tribunal, the suit was about the claim of being unlawfully evicted from the suit premises, while in Application No 120 of 2022 the claim was payment of rental arrears and general damages. The counsel for the respondent argued that the subject matter in the two suits were not the same hence the matter should not be regarded as *res judicata*.

In rejoinder, the counsel for the appellant mostly reiterated his submissions in chief and maintained that all ingredients of *res judicata* has been met in the said matters.

Before determining this ground of appeal, the Court have observed that the ground of *res judicata* was not raised in the trial Tribunal during the hearing of the Land Application No. 120 of 2022. However, the ground of *res judicata* is on point of law that stems on matters of jurisdiction and *Alles.*

since it is on point of law, it can be raised at any time even in appeal stage, and this Court is bound to determine it. (see the case of the Court of Appeal in **Tanzania Revenue Authority vs. Cotra Company Limited**, Civil Appeal No. 12 of 2009 CAT at Mwanza(Unreported)].

Having considered the submissions by parties, I also read the attached judgement of Land Appeal No. 46 of 2021 which was before the District Land and Housing Tribunal at Temeke (herein as the appellate Tribunal). According to the said judgment, it was the appeal arising from the decision of Makangarawe Ward Tribunal in Civil Case No. 135 of 2021. The parties were Atupele Mwaijibe (then appellant) against Innocent Mrosso (then respondent). The facts were that the appellant has sued the respondent before the Ward Tribunal claiming that the same has increased rent after the first lease agreement has expired. The Ward Tribunal dismissed the appellant claims hence being aggrieved he filed the appeal before the appellate Tribunal challenging the decision of Makangarawe Ward Tribunal. The Appellate Tribunal dismissed the appeal and upheld the decision of the Ward Tribunal.

It seems that instead of the respondent Innocent Mrosso executing the decision and award of the Ward Tribunal, or if he was unsatisfied with the decision of the Ward Tribunal, he could have lodged an appeal, he *Atu*.

instituted a new case before the trial Tribunal which is Application No. 120 of 2022.

Having gone through the Applications which were filed before the Tribunals, It is my finding that Application No. 120 of 2022 is *res judicata* to the Civil Case No. 135 of 2021 before Makangarawe Ward Tribunal. This is for the reason that all the ingredients of *res judicata* under Section 9 of the CPC have been met.

The doctrine of *res judicata* is embedded in Section 9 of the CPC 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, litigating under the same the 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 case of **Registered Trustees of CCM vs. Mohamed Ibrahim Versi & Sons**, Civil Appeal No. 16 of 2008, CAT at Zanzibar (unreported), the Court of Appeal made analysis on the provisions of *Ally*.

Section 9 of the CPC and stated the conditions which must be fulfilled for the principle of *res judicata* to apply. The Court of Appeal set the conditions necessary for the plea of *res judicata* to successfully operate, as follows;

- 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.*

In the instant matter, all the ingredients as per the above set principle have been met. It is clear that the parties are the same between the former suit that is Civil Case No. 135 of 2021 and the following Appeal No. 46 of 2021, and the subsequent suit which was Application No. 120 of 2022. *Alls.*

The subject matter which was directly and substantially in issue was the same in those suits which is the rent payments on the two business rooms owned by Innocent Mrosso and rented/leased by Atupele Mwaijibe.

The matter was heard to the finality by a competent jurisdiction which is the Ward Tribunal of Makangarawe. The decision of the Ward Tribunal was final to the extent that Atupele Mwaijibe appealed to the Appellate Tribunal, where the appeal was dismissed.

To be precise the Application No 120 Of 2022 which this appeal stems from, has already been determined by the competent Ward Tribunal in Civil Case No. 135 of 2021 and the Appellate Tribunal in Land Appeal No. 46 of 2021, hence as said earlier, the remedy was to go for execution or come to this Court for the second appeal and not filing a new case.

From the foregoing reasons, I find that the first ground of appeal in the Appeal No. 300 of 2023 has merit and it is allowed.

Having allowed the first ground of appeal in Land Appeal No.300 of 2023, I hereby quash and set aside the proceedings, findings, judgment and decree of the District Land Tribunal of Temeke District in Application No. 120 of 2022 on ground that it was *res judicata* to former suit i.e. Land Suit No. 135 of 2021 of Makangarawe Ward Tribunal which was heard to


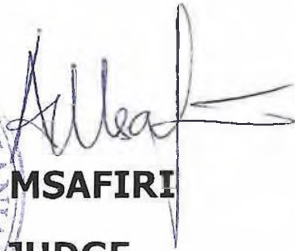
Atts.

its finality on the same subject matter and there was an Appeal No. 46 of 2021 at the District Land and Housing Tribunal of Temeke challenging the said decision, the appeal which was heard and dismissed.

Having found that Application No. 120 of 2022 was *res judicata*, naturally the Appeal No. 283 of 2023 cannot stand and it collapses. It is for this reason that I will not determine the other grounds of appeal in both appeals as this one ground suffices to dispose of both matters.

In upshot, the Appeal No. 300 of 2023 is allowed on the ground of *res judicata* and the Appeal No. 283 of 2023 collapses. Due to the nature of the appeals, each party shall bear their own costs to each appeal.

Order accordingly. Right of further appeal explained.

A circular seal of the High Court of Tanzania, Land Division. The outer ring contains the text "THE HIGH COURT OF TANZANIA" at the top and "LAND DIVISION" at the bottom, separated by two stars. The inner circle features a central emblem of a traditional building or structure.
A handwritten signature in blue ink, appearing to read "A. Msafiri".
A. MSAFIRI
JUDGE
31/10/2023