

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 228 OF 2023

(Originating from the decision of Temeke District Land and Housing Tribunal in Land Application No. 110 of 2023)

GODLOVE HOSEA NOMBO----- APPELLANT

VERSUS

**SALOME OMARY KITALA (As a Personal Representative
of the Late) Omary Fatiha Kitala-----1st RESPONDENT**

MOHAMED BAKARI MOHAMED-----2nd RESPONDENT

SALUM MUSTAPHA KANYINYI-----3rd RESPONDENT

RULING

11th October & 5th December 2023

MHINA, J.

This is a ruling in respect of the preliminary objection raised. Briefly, the appellant appealed before this court against the decision of Temeke DLHT, which was delivered in favour of the respondents. In his memorandum of appeal, he preferred seven grounds for appeal thus: -

- 1. THAT, the trial chairperson erred in law and facts in dismissing the applicant's application.*

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2. *THAT, the trial tribunal erred in law and facts by failing to apprehend and address the key issues which were framed.*
3. *THAT, the trial tribunal erred in law and facts in ordering the area measuring 2.7 is owned by the late Omary Fatiha Kitala and be handled to the first meters is Respondent in the absence of counterclaim.*
4. *THAT the trial chairperson erred in law and facts in holding that the disputed plot was No. 105 Block Q was surveyed without involving the Respondent and neighbors.*
5. *THAT, the trial tribunal erred in law and facts by failure to evaluate the evidence tendered before the tribunal and consequently reached a wrong decision.*
6. *THAT, the trial chairperson erred in law and in facts for considering proceedings which had no reasons for reassignment.*
7. *THAT the proceedings and the conduct of the matter were tainted with procedural irregularities, which renders the proceedings a nullity and causes a miscarriage of justice.*

On top of the grounds of appeal, the appellant prays for the following reliefs that: -

- a) *This court to allow the appeal and quash the decision of the Temeke District Land and Housing Tribunal and nullify the entire proceedings and judgment of the trial tribunal*

and declare the Appellant as a lawful owner of Plot No. 105 Block Q Temeke Area in Temeke municipality, and

b) Costs of this appeal be borne by, the Respondents.

When the applicants were served with the pleadings, they jointly filed a notice of Preliminary objection, raising three points of preliminary objections as follows: -

- i. That this Honorable Court has no jurisdiction to entertain the matter.*
- ii. The Court is already functus officio.*
- iii. This appeal is res subjudice ab initial.*

At the hearing of the Preliminary Objection, which was by way of written submissions, Mr. Peter Makundi learned counsel appeared for the respondents, and the appellant afforded the service of Mr. Cleophas Manyangu learned counsel.

On the 1st point of preliminary objection, Mr Makundi asserted that the first case was instituted in 2006 and decided by the Ward Tribunal and then by Temeke District Land and Housing Tribunal in favour of the 1st Respondent's father. Aggrieved, the Appellant appealed to this Court, of which the Respondents won the case.

Later, the Appellant instituted a land case in Temeke District Land and Housing Tribunal claiming ownership of the same property between the same parties in the same court.

He insisted that the law is clear that for a person aggrieved by the decision of the High Court, the avenue is to Appeal to the Court of Appeal of Tanzania and not to re-institute the same claim in the lower court or Tribunal.

Citing sections 9, 10 and Order II Rule 1 of the Civil Procedure Code Cap 33 R.E 2019, Makundi argued that DLHT had no power to overrule or reverse the decision of the High Court of Tanzania.

Therefore, he submitted that this appeal is res-judicata to the decision of this Court in Misc. Land Appeal No. 152 of 2009, by MZIRAY, J (as he then was). He said the records in Appeal No. 64 of 2006 before Temeke District Land and Housing Tribunal reveal the same parties and subject matter.

Mr Makundi insisted that, before the DLHT, the applicant re-instituted Land Application No. 10 of 2018, and also, the reliefs sought were the replica of what was sought in Land Appeal No. 152 of 2019 thus, it was wrong for the appellant to re-institute a case based on the same cause of action, same subject matter and same parties claiming under the same title before the DLHT which amounts to abuse of court process.

Supporting his argument that the appellant's action was an abuse of the court process, and he cited the cases of **Sh. Ranbir Singk and**

Another vs. Sh. Naresh Kumar and Others (2019): High Court of Himachal Pradesh. (India), and **Saraki Vs. Kotoye** (1992) 9 NWLR156 at 188.

He insisted that an objection on the point of law challenging the jurisdiction of the court can be raised at any stage. Once raised, it must be determined before proceeding to determine a substantive matter. He referred to the case of this court in **Tumaini J. Kuboja vs. Amina Mbikilwa** Misc Land appeal No.29 2021 Itemba, J., which referred to the case of **Shahida Abdul Hassanal Kassam vs. Mahedi Mohamed Gulamali Kanji** Civil Application No. 42 of 1999. He maintained that this court lacks jurisdiction to entertain this matter on the ground that this case was already decided on merit in Misc. Land Appeal No. 152 of 2009, delivered by Mziray, J. (as he then was) and Temeke District Land and Housing Tribunal, lack jurisdiction to determine the matter afresh as it did. He also calls upon this court to invoke its powers vested under section 42 of the Land Dispute Courts Act, Cap 216 RE: 2019, to nullify the proceedings of the DLHT of Temeke for want of jurisdiction.

He, therefore prays for the preliminary objection raised be sustained and the appeal be dismissed with costs.

Responding, Mr. Manyangu claims that the preliminary objections raised are devoid of merit, the same should be overruled with costs, and the appeal lodged by the appellant should be heard on merit.

On the first and second points of preliminary objections, he submitted that the grounds were raised before the District Land and Housing Tribunal in Land Application No. 110 of 2018 but were not determined for the reasons that the respondents failed to prosecute their claims.

He maintains that, as long as the two preliminary objections were dismissed for want of prosecution on 21.11.2018, it bars the respondents from raising again in the same suit or an appeal originating from the same suit. He insisted that the respondents are estopped from raising the same objections in the same suit (Land Application No. 110 of 2018) or in the instant appeal, which originated from the same suit (Land Appeal No. 228 of 2023).

He further submitted that the first preliminary objection that this court lacks jurisdiction to entertain this appeal is misplaced. He insisted that section 41 (1) of the Land Disputes Court Act 2002, Cap 216 RE 2019, gives a right of appeal to a person aggrieved by the decision of the District Land and Housing Tribunal to appeal to the High Court of Tanzania.

Therefore, since Land Appeal No. 228 of 2023 originates from the decision of the Temeke District Land and Housing Tribunal in Land Application No. 110 of 2018, this court has jurisdiction.

Regarding the cited case of **Shyam Thanki and Others** (supra), Mr. Manyangu stated the case is distinguishable from the circumstances of this appeal.

On the second preliminary objection that the appeal is res judicata, Mr. Manyangu submitted that the cited section 9 of the CPC deals with suits and not appeals.

He insisted that the instant appeal is not a suit by the meaning ascribed under section 9 of the Civil Procedure Code Cap 33 RE 2019. This is an appeal whereby the appellant challenges the lower tribunal's decision in Land Application No. 110 of 2018.

He further submitted that neither the relief sought nor the parties to the suit appeared before the District Land and Housing Tribunal. The parties have never been in the purported Land Case No. 33 of 2006 before the Ward Tribunal of Mtoni or Land Appeal No. 64 of 2006 at the District Land and Housing Tribunal or Miscellaneous Land Appeal No. 152 of 2009.

He insisted that the res judicata principle applies only to suits and not appeals, as provided under section 9 of CPC 1966 RE 2019.

After the submissions from both parties, I am now tasked to determine whether the raised points of preliminary objection have merits to be sustained or else wanting to be overruled.

As it appears, both the points of the preliminary objection raised are rooted in the issue of jurisdiction. That is to say, this court lacks jurisdiction to entertain the appeal before it.

The law is settled that an objection on a point of law challenging the jurisdiction of the court can be raised at any stage, and for that being a point of law, it has to be determined before proceeding to determine the substantive matter. - See – **Shah I Da Abdul Hassanal Kassam vs Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (CAT-unreported).

On the first point of preliminary objection, it is argued that the appeal No. 228 before this court is res judicata to the High Court Land Appeal No. 152 Of 2009.

Before I go to the records, I should state clearly that the law governing the principle of res-judicata is Section 9 of the Civil Procedure Code, Cap, 33. R.E 2019 which also provides: -

"9. 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**".[emphasis is mine]*

By looking at the cited provision of law, it is quite clear that the objective of the principle of res-judicata is to bar multiplicity of suits and make a conclusive final judgment between the same parties on the same issue by the court of competent jurisdiction in the subject matter of the suit.

The Court of Appeal of Tanzania in **Peniel Lotta Vs. Gabriel Tanali and others** [2003] TLR explained the applicability of Section 9 of the CPC; it pointed to five conditions, which, when co-exist, will bar a subsequent suit. The conditions 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 issues must have been heard and finally decided in the former suit*

In this appeal, Mr. Makundi raised a preliminary objection that this court has no jurisdiction as the appeal is bad in law for being res judicata to Misc. Land Appeal No. 152 of 2009, which this Court determined on 30 June 2017.

On the part of Mr. Manyangu, he denied the assertions for the reasons that the preliminary objection is misplaced for being raised before the Trial tribunal and dismissed for want of prosecution and that the principle of res-judicature applies to suits and for the reasons that before me is an appeal, the same does not apply.

In the determination of whether this appeal is res-judicata to Misc. Land appeal No. 152 of 2009, I will start with Mr. Manyangu's claims. First, the claim that the respondent is estopped from raising the preliminary objection for the reason that it was raised before the trial tribunal and dismissed for want of prosecution takes me back to the principle guiding the point of preliminary objection. Once the legal issue arises, it has to be dealt with and fully resolved before determining the

merit of the matter. The law is clear that, once the issue of jurisdiction when spotted, whether by parties to the case or by the court *suo motu*, there will not be room to avoid its disposal.

In this instant appeal, the point raised is on jurisdiction, which, as I hinted earlier, the law is settled that it can be raised at any point, even at the appellate stage. On this, the Court of Appeal in **Yusuf Khamis Hamza vs. Juma Ali Abdalla, Civil Appeal No. 25 of 2020** (Tanzlii), held that:-

"Of course, we are alive with the settled position of the law that time limitation goes to the jurisdictional issue of the court and that it can be raised at any time, even at the appellate stage by the court, but for it to be noted and raised it would require material evidence to be placed before the Court".

Therefore, since the issue of res-judicata goes to the jurisdiction of the court, then it is a pure point of law and can be raised at any stage.

In line with that, it is my findings that the respondents were not estopped from raising the issue of jurisdiction before this court for the reasons that before the trial tribunal, the issue was dismissed for want of prosecution and was not determined on merit.

There is a danger of having conflicting decisions on the same subject matter and parties if the issue of res-judicata is ignored.

Secondly, Mr. Manyangu's argument that the principle of res judicata applies only to suits and not to appeals. This should not detain me long, and I have the following;

One, neither the Appellate Jurisdiction Act nor the Civil Procedure Code has defined what a suit however, in the **Attorney General v. Reverend Christopher Mtikila**, Civil Appeal No. 20 of 2007 (Tanzlii), the Court of Appeal, on pages 9 and 10, defined a 'suit' to mean:

"Proceedings of a civil nature in a court of law involving two or more parties on a dispute or claim which needs to be adjudicated upon, to determine or declare the rights of the disputing parties."

Further, this Court (Mlyambina. J) in **Burafex Ltd (Formerly known as AMETAA Ltd) vs. Registrar of Titles**, Civil Appeal No. 235 of 2019, (HC-DSM Unreported) defined the term suit as;

"a proceeding of civil nature in various forms such as petition, application, appeal, review, revision or as referred in the Civil Procedure Code (supra) filed in a Court of Law between two or more parties for the determination of rights and duties of such persons."

From the above-cited cases, I subscribe to the view that an appeal falls within the ambit of the word suit as it affects the finality on determining the parties' rights.

Second, as I alluded to earlier, as per the cited case **Yusuf Khamis Hamza (Supra)**, a point of law that touches on jurisdictional issues can be raised even at the appellate stage.

Based on the above analysis, I proceed to hold that raising the point of preliminary objection on the issue of res-judicata was contained by the respondent as the appeal before me is a suit as provided for under section 9 of the Civil procedure Code Cap 33 RE: 2019

Having resolved the above issue, I now determine whether this matter is res judicata as claimed.

It is on the record that this Court Mziray J (as he then was) determined Misc. land Appeal No. 152 of 2009 originated from the decision of the District Land and Housing Tribunal for Temeke in Land Appeal No. 64 of 2006 where the parties were Goodlove Hosea Nombo and Omary Fatiha Kitale respectively. The dispute was over a piece of land measuring 2.7 metres. The appeal was dismissed on 13. September 2011.

Undaunted, the appellant (Goodlove Hosea Nombo) filed several applications at the High Court such as 105 of 2012, 141E of 2014, 623 of 2015 and the last was an application for leave to appeal to the Court of Appeal vide Misc. Land Application No. 310 of 2016. On 30 June 2017, this Court (Mzuna. J) refused that application for leave to appeal.

On 20.04.2018, the appellant re-file the matter before DLHT for Temeke, suing Omary Fatiha Kitale through legal representative Salehe Omary Kitale and two others, one Mohamed Makarani Mohamed as 2nd Respondent and Salum Mustapha Kanyinyi as 3rd respondent. The cause of action was the dispute over the piece of Land measured 2.7 metres, the land first litigated and determined in Misc. Land appeal No. 152 of 2009. This is evident on page 3 of the DLHT judgment in Misc. Land application No. 110 of 2018 where it reads as I quote: -

*Mdai alinunua eneo bishaniwa kwa Abbasi Hassan Pwilikiti Mwaka 1999 kupitia kwa mdogo wake Oscar Hosea Nombo. Mwaka 2006 ulibuka mgogoro kwa mara ya kwanza kati ya Marehemu Omary Fatiha Kitale na Mdai Godlove Hosea Nombo ambapo Marehemu alidai eneo lake la Mita 2.7 kutoka kwa Mdai ambalo lilionekana kumegwa wakati wa upimaji uliofanyika 1967. **Mgogoro huu ulisiklizwa mpaka Mahakama Kuu, ambapo uamuzi uliotoka haikumfurahisha au kumridhisha Mdai. Lakini kilichomfanya asiombe kibali cha kwenda Mahakama ya rufaa (Mahakama ya upeo) ni pale alipogundua kwamba, Mdaiwa wa 1 ameuzua eneo au kiwanja chote namba 105 Kitale Q Temeke kwa Wadaiwa wa 2 na 3.***

That being the situation, it is clear that the elements of the principle of res-judicata, as stated in the case of **Paniel Lotta** (supra), are met.

Therefore, the appeal before me is res-judicata to the Misc. Land Appeal No. 152 of 2009. The appellant ought to appeal to the court of appeal in Misc. Land Appeal No. 152 of 2009 and not to re-institute the fresh suit litigating over the same subject matter.

There is a maxim that there must be an end to litigations, and litigations do not continue to eternity. This maxim fits the circumstances of this matter. After the dismissal of his appeal by this Court, the appellant was not supposed to go back to the DLHT for Temeke to re-institute his claims.

Flowing from above, I sustain the 1st point of preliminary objection that this Court lacks jurisdiction to determine the matter for it being res-judicata. Equally, the same applies to the trial tribunal in Land Application No. 110 of 2018; it had no jurisdiction to determine the matter before it because the dispute was already determined to its finality by this Court in Misc. Land Appeal No. 152 of 2009. That decision is a nullity.


In such a circumstance, I invoke the provision of section 43 (1) (b) of the Land Dispute Act, Cap 2016, which vests revisional powers to this court, and proceed to revise the proceedings of the District Land and Housing Tribunal for Temeke by quashing the proceedings and set aside the judgment and decree in Application No. 110 of 2018 dated 2 May 2023.

Since the first limb of the preliminary objection disposes of the appeal, I don't see a reason to determine the remaining limbs, as they will not change the outcome.

Consequently, I dismiss the appeal with costs.

It is so ordered.




K.D. MHINA
JUDGE
5/12/2023