

**THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO.486 OF 2022**

(Arising from the Judgment of the High Court of Tanzania Land Division in  
Misc. Land Appeal No. 189 of 2019 Originating from the District Land and  
Housing Tribunal for Kilombero, Ifakara, and Mang'ula Ward Tribunal in Case  
No. 43 of 2019 )

**KASIMU KINYAKALI** (Legal representative of

the Estate of the late RAMADHANI KINYAKALI) ..... **APPLICANT**

**VERSUS**

**MOHAMED NAPECHE** ..... **RESPONDENT**

**RULING**

*Date of last Order: 27.01.2023*

*Date of Ruling: 31.01.2023*

**A.Z.MGEYEKWA, J**

Before me is an omnibus application preferred under section 14 (1) of the  
Law of Limitation Act, Cap. 89 [R.E 2019] and Order IX Rule 3 of Civil  
Procedure Code Cap.33 [R.E 2002]. The applicant is praying for the  
following prayers:-

- 1. That this Honourable Court be pleased to grant extension and enlargement of time for the applicant to file a Notice of Appeal against the decision of this Court by Hon. Maghimbi, J in Land Appeal No. 189 of 2019.*
- 2. That this Honourable Court be pleased to grant the applicant an extension and enlargement of time to file a certificate of point of law against the decision of this Court by Hon. Maghimbi, J in Land Appeal No. 189 of 2019.*

The application is supported by an affidavit deposed by Kasimu Kinyakali, Legal representative of the estate of the late Ramadhani Kinyakali). The application has encountered formidable opposition from the respondent and has demonstrated his resistance by filing a counter affidavit affirmed by Mohamed Napeche, the respondent and his counsel lodged the following preliminary objection:-

- 1. That application is incompetent before this Hon. Court for being replicate of Misc. Land Application No. 685 of 2021, hence this Application at hand is res judicata.*

When the matter was called for hearing the applicant enjoyed the legal service of Mr. Goodluck Mushi, learned counsel and the respondent had the legal service of Mr. Jumanne Fokasi Sengomba, learned counsel. By the Court consent, the preliminary objection was argued by way of written

submission, whereas both parties complied with the Court order save for the respondent's counsel who waived his right to file a rejoinder.

In his submission, the applicant's counsel contended that the applicant being the administrator of the estate of the late Ramadhani Kinyakali filed a Misc. Civil Application seeking leave of this Court to extend time to file a Notice of Appeal against the decision of this Court by Hon. Maghimbi, J in Land Appeal No. 189 of 2019. Mr. Semgomba argued that the instant application is *res judicata* for being a replicate of Misc. Land Application No. 685 of 2021. He claimed that the applicant has also cited a wrong provision of the law since section 11 (1) of the Appellate Jurisdiction Act Cap. 141 [R.E 2019] and section 95 of the Civil Procedure Code Cap.33 of 1966 seeking leave of this Court to grant him an extension of time to file a Notice of Appeal against the decision of the High Court – Land Division by Hon. Maghimbi, J in Land Appeal No. 189 of 2019. In his view, the proper provision was section 47 (1) of the Land Disputes Court Act, Cap. 216 [R.E 2019] and the Law of Limitation Act Cap. 89 [R.E 2019].

The learned counsel for the respondent continued to submit that the instant application is offending section 9 of the Civil Procedure Code Cap. 33 [R.E 2019] for being *res judicata*. Mr. Semgomba contended that the previous matter with respect to Misc. Land Application No. 685 of 2021 by Hon. Mwenehgotha, J the applicant in Misc. Land Application No. 685 of

2021 moved this Court under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] to grant an extension of time to file a Notice of Appeal against the decision of Hon. Maghimbi, J in Land Appeal No. 189 of 2019]. He added that this Court determined the matter to its finality and delivered a Ruling on 23<sup>rd</sup> May, 2022 whereas this Court dismissed the application for failure to adduce sufficient reasons.

The learned counsel for the respondent continued to argue that the subject matter of previous Application No. 685 of 2021 is substantially the same issue as the matter at hand in Misc. Civil Application No. 486 of 2020. Therefore, in his view, the application is incompetent before this Court and the instant application is misconceived and unmaintainable in law since the same is *res judicata*. He stated that this position is steady with the Court of Appeal of Tanzania holding in the case of **Gerad Chuchuba v Rector, Itaga Seminary** [2002] TLR 213

The learned counsel for the respondent continued to argue that the matter at hand is the issue in the subsequent suit at hand and adjudicating in the same issue in subsequent in the previous application whereas both parties were present. Therefore, in his view, the applicant is barred from filing the same application with the same parties on the same subject matter. To bolster his submission, he cited the cases of **Karshe v Uganda Transport Company** [1967] EA 774, **Jadra Karsan v Harman Singh**

**Ghogal (2)**, Court of Appeal for Eastern Africa pg 77. Mr. Semgomba went on to argue that the matter was determined by a competent Court and finally concluded the matter. Thus, in his opinion the matter cannot be determined once again. The learned counsel for the respondent stressed that the application is unmaintainable before this Court.

In conclusion, Mr. Semgomba beckoned upon this Court to dismiss the application with costs.

Opposing the preliminary objection, the learned counsel for the applicant submitted in length. Mr. Erick valiantly argued that the application is brought under a proper provision of law. He stated that the applicant has correctly and properly cited the provisions of section 11 (1) and section 95 of the Civil Procedure Code Cap.33 [R.E 2019] on inherent powers of the High Court. Mr. Erick continued to argue that it is settled law that citation of wrong enabling provisions of the law is not fatal, but courts should go ahead and grant reliefs prayed provided that they have such power and jurisdiction to do so. To buttress his contention, he cited the case of **Arusha Blooms Limited and Felix v Tib Development Bank Limited & 2 Others**, Misc. Civil Application No. 809 of 2018, High Court at Dar es Salaam (Unreported).

Regarding the issue of *res judicata*, the learned counsel contended that it is the settled law that the doctrine of *res judicata* as expressly provided under section 9 of Cap. 33 bars and abhors repetition of similar suits which have

been finally and conclusively settled between the same parties litigating under the same titles. He submitted that the prayers and reliefs which the applicant seeks in this instant application are quite different and opposed to those being sought in Misc. Land Application No. 685 of 2021. He added that in the instant Application, there is an addition prayer and different relief to the previous application, Misc. Land Application No. 685 of 2021. He stressed that in the instant Application, the applicant is seeking an extension of time so that he may file an application for a certificate of point of law.

The learned counsel for the applicant stressed that there are some differences and variations in prayers and reliefs which were previously sought in Misc. Land Application No. 685 of 2021, and in the instant Application No. 486 of 2022 between the same parties. He submitted that the prayer and relief for certification on a point of law were not decided or adjudicated by this Court in its Ruling dated 23<sup>rd</sup> May, 2022. To support his submission he cited the case of **Felecian Credo Simwela v Quamara Massod Battezy and Onother, HC at Sumbawanga**, Civil Appeal No.10 of 2020. Thus, in his view the Doctrine of *res judicata* does not apply in the matter at hand.

The learned counsel for the applicant insisted that the above mentioned reason is a point of departure between the two applications and therefore the doctrine of *re judicata* is not sufficiently established in our scenario at hand. He emphasized this by citing the case of **Felecian Credo** (supra).

In conclusion, he urged this Court to dismiss the preliminary objection with costs.

Before I proceed to determine the objection on merit, I want to make it clear that the applicant's counsel last submission regarding the *ex parte* ruling against the respondent is unfounded. On 12<sup>th</sup> December, 2022 when the matter was called for hearing, Ms. Leah Mwaibabe was holding brief for Mr. Erick Mkandala and Mr. Jumanne Semgomba, counsel appeared for the respondent. This Court noted that the respondent filed a counter affidavit as per the Court scheduling order. Therefore, this Court vacated its *ex parte* order against the respondent, and ordered both parties to argue the preliminary objection by way of written submission. Therefore it is unethical behavior for the learned counsel for the applicant to raise the same in his reply while they were well informed that this Court had already vacated its previous order.

Back to the preliminary objection raised by the respondent's counsel. I have summarized the submissions of both learned counsels for and against the preliminary objection, I should now be in a position to determine the point of preliminary objection on which the parties bandying words. The issue for determination is *whether the Misc. Land Application No. 486 of 2022 is res judicata*.

The Doctrine of *res judicata* is provided in section 9 of the Civil Procedure

Code Cap.33 [R.E 2002]. For ease of reference, I reproduce the same hereunder:-

*" 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 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".*

The object of *res judicata* makes a conclusive final judgment between the same parties on the same issue by a Court of competent jurisdiction in the subject matter of the suit. In the case of **Peniel Lotta v Gabriel Tanaki & Another**, Civil Appeal No. 61 of 1999 the Court of Appeal set out five conditions of *res judicata* arising from the scheme of section 9 which when coexistent, bars 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 previous suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally settled; in the former suit.



Applying the above principles of *res judicata* in the matter at hand, starting with the first principle, *whether the matter is directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit*. The record reveals that the subject matter in all proceedings is the same. In Misc. Land Application No. 685 of 2021, the applicant prays for leave to the Court of Appeal of Tanzania out of time against the Judgment and Decree of this Court in Land Appeal No. 189 of 2019 delivered by Hon. Maghimbi, J on 18<sup>th</sup> August, 2021. The applicant moved this Court under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019].

In the instant application, Misc. Civil Application No. 486 of 2022, the applicant has brought the same prayers and has brought the application under the same provision of the law, the subject matter is the same. Therefore, the same subject matter is the same in both applications.

In respect to the 2<sup>nd</sup> principle, whether they were the same parties. I have perused the Ruling in respect to Misc. Land Application No. 685 of 2021 arising from the decision of this Court in Land Appeal No. 189 of 2019 and noted that the parties in the Misc. Land Application No. 685 of 2021 are Kasimu Kinyakali, the applicant, and Mohamed Napeche, and the instant application Misc. Civil Application No. 486 of 2022 the parties are the

same. In my considered view, the parties who were involved in all cases are the same.

As to the third principle, the records shows that parties litigated on the same issue; application for extension of time to lodge a Notice of Appeal. In the Misc. Land Application No. 685 of 2021, the applicant's prayer was dismissed for failure to adduce sufficient reasons for extension of time.

On the fourth principle, whether the Court which decided the previous suit must have been competent to try the subsequent suit; the records show clearly that this Court was competent in trying the Misc. Land Application No. 685 of 2021.

With respect to the fifth principle, the matter in issue must have been heard and finally settled. The record reveals that the matter in Misc. Land Application No. 685 of 2021 was finally determined whereas this court found that the applicant has not provided sufficient reasons for his application, hence this Court dismissed the application without costs.

Having said so, I fully subscribe to the learned counsel for the respondent's submission that this application is *res judicata*.

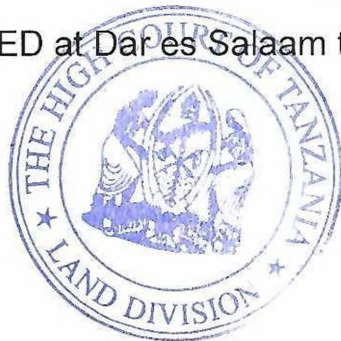
The learned counsel for the applicant in his reply tried to convince this Court that the prayers and reliefs in the two applications varies. It is worth noting that this is an omnibus application, the two prayers are not diametrically opposed to each other, but one easily follows the other. In

my considered view, I find that Mr. Erick's argument is fallacious since the first prayer for extension of time to file a Notice of Appeal is *res judicata* to the previous application; Misc. Land Application No. 685 of 2021, hence the same cannot be determined. Consequently, the second prayer for extension of time to file an application for certification on point of law cannot stand alone and be determined in exclusion of the first prayer.

In the upshot, I sustain the respondent's counsel's preliminary objection, and proceed to dismiss the instant application with costs.

Order accordingly.

DATED at Dar es Salaam this 31<sup>st</sup> January, 2023.



  
A.Z.MGEYEKWA  
**JUDGE**  
31.01.2023

Ruling delivered on 31<sup>st</sup> January, 2023 in the presence of both learned counsels.



  
A.Z.MGEYEKWA  
**JUDGE**  
31.01.2023