IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 27354 OF 2023

(Originating from Application No. 148 of 2022, Ilala District Land and Housing Tribunal)

BILUNGU MRISHO KALENZI.....APPELLANT

VERSUS

PRISCUS MARANDU.....1ST RESPONDENT

SALUM ZUBERI SELEMANI (Administrator of the

Estate of the Late Zainabu Salehe Gubwe).....**2ND RESPONDENT**

JUDGMENT

18th to 21st March, 2024

E.B. LUVANDA, J

The Appellant named above is unhappy with the decision of the Tribunal which dismissed his claim for ownership of a landed property comprising 1500 square meters located at Msingwa Street, within Ilala District, on account of being *res judicata*.

In the petition of appeal the Appellant raised three grounds of appeal, namely: One, the Honorable Chairperson erred in law and fact for erroneously arriving into the findings that the dismissal of the Appellant's claim of ownership of the suit property in the Application No. 229 of 2009 by virtue of the provisions of

section 9 of the Civil Procedure Code, Cap 33 R.E. 2019 bars the Tribunal from entertaining the new cause of action (claims of ownership of the same suit property) in the Application No. 148 of 2022 between Bilungu Mrisho Kalenzi and Priscus Marandu arose upon the purchase of the suit premises by the Appellant after the dismissal of the Application No. 229 of 2009; Two, the Honorable Chairperson erred in law and fact for erroneously arriving into the findings that the Application No. 148 of 2022 between Bilungu Mrisho Kalenzi and Priscus Marandu had already been conclusively determined by the same Tribunal in the Land Application No. 229 of 2009; Three, the Honorable Chairperson erred in law and fact for failure to properly apply the principle of the law enunciated in the case of **East African Development Bank vs Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009 CAT DSM, to all the circumstances of the facts constituting cause of action in the Application No. 148 of 2022 between Bilungu Mrisho Kalenzi and (sic), consequently erroneously arriving into the findings that the dismissal of the Application No. 229 of 2009 bars the filing of the Application No. 148 of 2022 and its determination by the Tribunal.

This appeal proceeded in the absence of the Third and Fourth Respondent who defaulted to appear.

Mr. Mashaka Ngole learned Counsel for Appellant submitted that the provision of section 9 Cap 33 (supra) was wrongly applied by the trial Chairperson to the extent of reaching a finding that the Appellant property in the Application No. 229 of 2009 by virtue of section 9 bars the Tribunal from entertaining the new cause of action (claims of ownership of the same suit property) in the Application No. 148 of 2022. He submitted that Application No. 229 of 2009 never determined the question of ownership between parties but rather it reached a finding that the person who had sold the suit land had no valid title to pass to the Appellant, for reason that the Second Respondent therein one Said Mohamed Kibasame had neither power of attorney nor letter of administration to pass title of the land in dispute to the Appellant, arguing that is why in Land Application No. 148 of 2022 the Second Respondent is the administrator of the estate of the late Zainabu Salehe Gubwe, the original owner. He submitted that the decision of the Tribunal in Land Application No. 229 of 2009 is that the suit land was still the property of the late Zainabu Salehe Gubwe and the dismissal order of the application was relating to the transaction alleged to have been made by the person who had no capacity to sale one Said Mohamed Kibasame, and for the claim of ownership which originated from the transaction alleged to have been made in 1989. He cited the case of **Felician**

Credo Simwela vs Quam Ara Massod Battezy, DC Civil Appeal No. 10 of 2020.

Ground number two, the learned Counsel submitted that in spite a fact that the land in dispute in Land Application No. 148 of 2022 is partly the same with that of Application No. 229 of 2009, argued that the cause of action are different and claims of ownership by the Applicant in Application No. 229 of 2009 are against a party that has capacity to sale the land in dispute to the Appellant and who is different person who had sold the suit land to the Appellant at the time of Land Application No. 229 of 2002 (sic). He submitted that land Application No. 148 of 2022 would have been conclusively determined as found by the Chairperson if the cause of action claimed by the Appellant over the suit land was the same as one in Application No. 229 of 2002 (sic). He submitted that the holding by the Tribunal in Application No. 229 of 2009 never barred the Appellant from procuring a purchase of the suit land from the person with capacity to sale the same which created a lawful cause of action in Land Application No. 148 of 2022.

Ground number three, the learned Counsel submitted that the trial Chairperson wrongly applied the principle enshrined in the case of **East Africa Development Bank** (supra) which according to him the discussion and analysis made by the Court, its applicability does not suit the circumstances in

Land Application No. 148 of 2022 for reason that: One, the cause of action in Land Application No. 229 of 2009 and No. 148 of 2022 are different; Two, the second cause of action arose after the findings of the Tribunal that the Appellant purchased the suit land from the person who had no capacity to sale; Three, the dismissal of the cause of action in Land Application No. 229 of 2002 (sic) was based on the capacity of vendor to the sale of the suit land, while in Land Application No. 148 of 2023 (sic) the cause of action has been and was preferred against the trespasser and the administrator.

Mr. Ngassa Ganja Mboje learned Counsel for First Respondent, in reply, submitted that the question of ownership was the key issue before the Tribunal in Land Application No. 229 of 2009, argued the Tribunal rejected the reliefs for ownership pleaded by the Appellant and dismissed the suit after determination of the evidence presented by the Appellant. He submitted that the question of ownership was determined, argued the proper remedy was for the Appellant to challenge it. He cited the case of **Swahili Travel Services Limited @ Swahili Travellers Services Limited & Three Others vs Peter Thomas Assenga**, Civil Appeal No. 126 of 2023 HC DSM. He submitted that the cause of action in the former suit was trespass by the First Respondent on the suit property and relief sought therein are the same as those contained herein, being a declaration that the Appellant is the lawful owner. He cited the case of **Felician Credo**

Simwela vs Quamara Massod Battezy & Another, DC Civil Appeal no. 10 of 2020 HC Sumbawanga; **Jansa Mwakipesile vs Benedictor Mwambwila**, Land Appeal No. 52 of 2021, HC Mbeya. He submitted that by concluding the sale agreement between the Appellant and the Second Respondent who was privy to the former suit, is merely searching new evidence for the former cause of action, arguing is prohibited by the doctrine of *res judicata*.

Ground number two, the learned Counsel submitted that the Appellants suit was dismissed on merit for failure to prove his case and ownership. He submitted that the dismissal of the suit after full trial prevent the Appellant from instituting a suit to claim ownership from the trespass alleged to have been done by the First Respondent in 2009, arguing Application No. 148 of 2022 between the same parties has already been conclusively determined by the same Tribunal in the Application No. 229 of 2009.

Ground number three, the learned Counsel submitted that the Tribunal correctly applied the principle. He submitted that parties are litigating over the same cause of action with respect of the suit property since 2009 vide Land Application No. 229 of 2009 which was heard and determined on merits, where the Appellant failed to prove his case where it was dismissed for lack of merit and the Appellant decided to search for new evidence on the same cause of

action. He submitted that the doctrine of *res judicata* was applied correctly by the trial Chairperson.

The Second Respondent supported the appeal.

Strictly speaking this appeal is without base. In the former suit to wit Land Application No. 229 of 2009, the matter was heard and determined conclusively on merit after both parties had adduced and tendered their evidence. At the end of a trial, the Tribunal ruled that the Appellant herein failed to prove his claim of ownership over the suit land, on account that the vendor one Said Mohamed Kibasame @ Mohamed Nassoro Kibasame by the time of sale on 31/12/1989 had no capacity thus no title could pass to the Appellant, for reason that the latter was not authorized by his wife one Zainabu Salehe Gubwe to dispose it on her stead.

It would appear the Appellant embarked on to clear the air by attempting a second purchase from the Second Respondent the purported administrator of the estate of the late Zainabu Salehe Gubwe, for what was pleaded as to legalize the sale of the suit land where they executed a sale agreement dated 24/02/2022.

The Appellant pleaded that eight months after delivery of judgment in Land Application No. 229 of 2009, the First Respondent trespassed the suit land again.

It is to be noted that judgment in Land Application No. 229 of 2009 was pronounced on 22/01/2020. Meaning that the purported trespass by the First Respondent (if at all was there) can be reckoned to have occurred sometimes in August 2020. This signifies that at the time of executing sale agreement on 24/02/2022, the First Respondent was on the suit premises.

Again, the so called administrator of the late Zainabu Salehe Gubwe was appointed on 1/09/2021 as per letters of administration annexure MK-1 to the Second Respondent's written statement of defence filed at the Tribunal. One could wonder why immediately and upon grant the so called administrator did not form an opinion to sue the purported trespasser alleged occurred around August 2020, instead rushed to concluded the alleged legalization of the a sale of the suit land. My undertaking in recapping these sequence of events are predicated on the fact that in the written statement of defence filed at the Tribunal by the Second Respondent herein he pleaded to have lawfully purchased and to been in actual possession of the suit land since 2003. The Appellant did not file a reply to the written statement of defence by the Second Respondent to rebut this factual position. This is drawn in line with a fact that there was a point of time limit which was not determined by the Tribunal.

Be a s it may, to my respective view, the so called legalization of the purchase between the Appellant and Second Respondent over the same suit executed on

24/02/2022, cannot be said to have the effects of altering and changing a cause of action determined in Land Application No. 229 of 2009, into a new one. This is because in Land Application No. 229 of 2009 the matter of ownership in respect of the Appellant over the suit property was conclusively and finally determined on its merit, where his claim was dismissed. To my view the dismissal order had the effect of barring the Appellant from coming back to the same Tribunal, over the same subject matter, the same cause of action, the same reliefs, and substantially the same parties in additional to the so called administrator who was unwilling to clear his title as against the alleged trespasser prior embarking into the purported legalized sale agreement.

In the case of **East Africa Development Bank** (supra) also cited by the Tribunal, the apex Court said it all regarding re-suing after dismissal,

> *'...In our considered opinion then, the dismissal amounted to conclusive determination of the suit by the high court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated'*

The Appellant did not see any need to challenge the verdict in Land Application No. 229 of 2009, rather choose an alternative route or second path on the so called legalizing the sale albeit declared to be void ab initio by the Tribunal. Meaning there was nothing to legalize on the first place. For another, the

Tribunal in Land Application No. 229 of 2009 had actually gone a further step ahead, disowning the suit land against everybody and whoever was impleaded therein.

This can be vindicated by the following passages of finding by the Tribunal in Land Application No. 229 of 2009, at page 12 second paragraph, I bold protion of interest to me,

> *'In addition, even if the court presumed that the second Respondent was selling the area on behalf of his wife;* ***in order that sale to be valid the evidence of Zainabu Salehe Gubwe owning that area was necessary to prove her title over the same premises but that evidence was not adduced'***

To my view based on the finding above, the question of ownership by the alleged late Zainabu Salehe Gubwe was also at stake. Therefore, the Appellant was re-purchasing from someone who did not vindicate his title, for reason that Zainabu Salehe Gubwe was disowned as well.

At page 15 last paragraph continue on page 16, the Tribunal ruled in Land Application No. 229 of 2009,

> *'This is similarly to the Respondents who through the testimony adduced by DW1, DW2, DW3 and DW4 supported by exhibit D1 which is a sale agreement between the first Respondent and Mohamed Nassoro Kibasame executed on 15/10/2002 all the witnesses did not prove Mohamed Nassoro Kibasame who the*

evidence also show that is called Said Mohamed Kibasame the area he sold on 15/10/2002 belong to him.

That evidence was necessary to prove if the area which he sold belonged to him.

All the witnesses from the Respondents side did not prove how Mohamed Nassoro Kibasame became the owner of the suit premises which on 15/10/2002 they witnessed it being executed'

By this finding the title of the First Respondent herein equally was rendered naked and at stake.

In fact, the Tribunal verdict had the effects of disowning all parties therein regarding ownership of the suit land. I wonder why the Appellant along the First Respondent herein who was the First Respondent therein, did not take necessary steps to challenge it.

That said all, I am unable to ascribe to the proposition by the learned Counsel for the Appellant. To my view, the question of *res judicata* was well founded and grounded. There is no way the verdict of the Tribunal can be varied by this Court. I accordingly affirm the same.

The appeal is dismissed with costs.

THE HIGH COURT OF TANZANIA * LAND DIVISION *

E. B. LUVANDA
JUDGE
21/03/2024

Judgment delivered in the presence of the First Respondent, Ms. Jackline Mruma learned Advocate for the Appellant and Mr. Ngassa Ganja Mboje learned Counsel for First Respondent and in the absence of the Second Respondent.

E. B. LUVANDA
JUDGE
21/03/2024