

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

LAND APPEAL NO. 166 OF 2022

*(Appeal from the Judgment and Decree in Land Application Case
No.40/2021 of Kilombero District Land and Housing Tribunal)*

FELIX MAGHEMBE APPELLANT

_____ VERSUS _____

RICHARD MICHAEL MWIGONJA.....1ST RESPONDENT

BETSEBA MATIMBWI@ BETSEBA MWIGONJA....2ND RESPONDENT

JUDGMENT

Date of last Order: 25/11/2022

Date of Judgment: 11/1/2023

MALATA, J.

This appeal originates from the Judgment and Decree of Kilombero District Land and Housing Tribunal ("the DLHT") for Ifakara in Land Application Case No. 40/2021 delivered on 19th August, 2022 by Hon. Mmbando-Chairperson. Successfully, the applicants (respondents herein) jointly sued the respondent (appellant herein) for trespass over 20 acres of land located at Namawala village. Consequently, the trial tribunal declared the appellant

a trespasser and condemned him to pay the respondents Tshs. 5,000,000/=as general damages. Aggrieved thereof, the appellant preferred an appeal to this Court, the subject to this judgment.

The background of this case is that, in a year 2014 the appellant herein lodged at Idete Ward Tribunal, a **Land Dispute Case No. 15 of 2014** against one Peter Matimbwi for trespass over 30 acres of land located at Namawala Village. The records show that, on 26th June, 2014 the said Peter Matimbwi (who was the respondent) in the said land Complaint appeared before Idete Ward Tribunal and denied involvement in encroaching the appellant's 30-acres and claimed no ownership of the same. Peter Matimbwi testified that;

"sina eneo lolote lile la familia ya Maghembe, Mimi ni Mwalimu mstaafu sina habari zozote za kilimo. Hayo ndiyo maelezo yangu."

After testified that he was cross examined by one of the members of the trial ward Tribunal and the said question and reply thereto is recorded as follows;

"Swali: *Endapo itabainika wewe unamiliki shamba hilo?*

"Peter Matimbwi; Mimi sitambui lolote."

Despite, Peter Matimbwi denying to have interest over said land, the ward tribunal proceeded to hear the case by the appellant and his witnesses as if, there was a defendant/respondent claiming interest against the

appellant herein over the same land. The tribunal continued and decided the case in favour of the appellant, though there was no defendant in the case after Peter Matimbwi denying to have trespassed and or declared to have neither trespassed nor interest on it. After such victory against nobody, the appellant proceeded to execute the ward tribunal's decision against Peter Matimbwi in Kilombero DLHT where he instituted **Misc. Application No. 183 of 2020**. The eviction order was granted on 11th February, 2021 and effected on 13 March, 2021 by the tribunal's Court Brokers namely Property Master's as the Court Brokers in the said case.

On 5th April, 2021 the appellant instituted at Mngeta Primary Court a **Criminal Case No. 67 of 2021** against the respondents accusing them for trespassing over his decreed 30 acres in **Land Dispute Case No. 15 of 2014**. Relying on **Land Dispute Case No. 15 of 2014** between **Felix Maghembe Vs. Peter Matimbwi** of Idete Ward Tribunal and DLHT, the Mngeta Primary Court found the Respondents guilty and consequently convicted them and sentenced each to pay a fine of Tshs.50, 000/= and in default thereto, serve a custodian sentence of one month in jail. Further the Primary Court ordered that:

*I quote; "**Adhabu:** Washtakiwa kwa kuwa ni watenda kosa kwa mara ya kwanza, Mahakama inawaamuru watoe faini ya Tshs 50,000/= kila mmoja wakashindwa kulipa watumikie kifungo cha mwezi mmoja ili iwe fundisho kwa wengine*

V.John
Hakimu Mkaazi II
05/05/2021

Amri: *Washtakiwa baada ya adhabu hiyo hapo wavune mpunga wao na wakabidhi shamba hilo kwa SM1, kama wana madai yao waende Baraza la Ardhi kwa utatuzi wa nani ni mmiliki halali wa shamba hilo". (Emphasize added)*

V.John
Hakimu Mkaazi II
05/05/2021

The respondents being aware of the proper forum to claim for their rights on land in compliance with the Mngeta Primary Court's orders hereinabove instituted **Land Application No. 40 of 2021** before the Kilombero DLHT claiming for a total of twenty (20) acres of land against the appellant who also claimed to own the same it. The respondent herein did not appeal against decision in **Criminal Case No. 67 of 2021** of Mngeta Primary Court on criminal trespass which did not establish ownership of land between the parties.

On 20th June, 2022 *suo motu*, this court through Land Revision No. 5 of 2022, called for DLHT record and revised and set aside the order for temporary injunction issued by the trial tribunal and further ordered the said case to be heard under a certificate of urgency by different chairperson.

After hearing the case, the DLHT for Kilombero decided **Land Application No. 40 of 2021** in favour of the respondents herein and declared them to be lawful owners of the land in dispute. Dissatisfied thereof, appellant petitioned to this court raising six grounds of appeal, **THAT;**

- 1. the trial tribunal erred in law and facts by holding that the respondents are lawful owner of the suit land whereby the same tribunal ordered the same land belongs to the Appellant in Misc. Application for Execution No. 183 of 2020.*
- 2. the trial tribunal erred in law and facts by holding that the respondents are lawful owner of the suit land whereby there was a Criminal Judgment No. 67 of 2021 before the Mngeta Primary Court between the same parties, in the same area which termed the respondents as trespasser.*
- 3. the trial tribunal erred in law and facts for entertaining the matter which was res judicata.*
- 4. the trial tribunal erred in law and facts for determined a matter without joinder of necessary party.*
- 5. the trial tribunal erred in law by entertaining the matter without jurisdiction.*
- 6. the trial tribunal erred in law and facts for failure to assess,*

evaluate and analyze the evidences hence came up with the wrong and unfair decision.

Hearing of the appeal proceeded orally on 25th November, 2022. The appellant appeared through Mr. Amin Mshana learned counsel while respondents were represented by Mr. Bageni Elijah, learned advocate.

Before submitting on the grounds of appeal, Mr. Mshana learned counsel put forward to the court and prayed, as such; **one**, to commence with, ground 3 which touches issue of "*res-judicata*" **two**, conjoining grounds 1 and 2, **three**, abandoning ground 4 of the appeal and finally stated that ground 5 and 6 will be argued separately. The Prayers were accordingly honoured.

Submitting **on ground three on res judicata**, Mr. Mshana stated that, the land subject of this appeal had already been determined and decreed in favour of the appellant by Idete Ward Tribunal in **Land Dispute Case No. 15 of 2014 and Application for Execution No. 183 of 2020**. Mr. Mshana submitted that, since the Idete tribunal declared the appellant a lawful owner, it was wrong for the DLHT to register land dispute through **Land Application No.40/2021** and determine it while the same had already been determined and the appellant was declared a lawful owner. Mr. Mshana argued further that, though the litigants at Idete Ward Tribunal and in subsequent Land Application No.40/2021 in DLHT were

different, but what was litigated and decreed was the same land subject to this appeal.

Mr. Mshana submitted, that at Idete Ward Tribunal, the appellant sued one Peter Matimbwi and thereafter obtained a decree against him and executed at Kilombero DLHT as mentioned earlier. He associated the current respondents with Peter Matimbwi on the relationship that the 2nd respondent is a wife of Peter Matimbwi, meanwhile the two (respondents) are blood brother and sister. He submitted further that, since the 2nd respondent was a wife of Peter Matimbwi, she is privies to **Land Dispute Case No. 15 of 2014 and Application for Execution No. 183 of 2020.**

Mr. Mshana added that the appellant sued the respondents for criminal trespass on the appellant's decreed land at Mngeta Primary Court in Criminal Case No. 67 of 2021. They were all convicted as charged and sentenced accordingly. The respondents did not appeal against that decision. In that circumstances, Mr. Mshana submitted that the respondents had knowledge of the decision of Idete Ward Tribunal in **Land Dispute Case No. 15 of 2014; Land Execution Case No. 183 of 2020 of Kilombero DLHT, and Criminal Case No. 67 of 2021 of Mngeta Primary Court.** He submitted that, despite the respondents being aware of the said decisions, they opted not to challenge, hence agreeing on what

were decided and decreed. Concluding ground 3 of appeal, Mr. Mshana submitted that, the respondents had available remedy of appealing against the Primary Court decision and applying for revision against the decision of the Idete Ward Tribunal. He thus asked the court to declare **Land Application No.40/2021 res judicata.**

Submitting **on ground five**, Mr. Mshana stated that, since there was a decision of the DLHT on execution of the same matter, then DLHT had no jurisdiction to entertain the matter which had already been decided before it. He argued that, by doing so led to chaos on the same tribunal for having two decisions over the same subject matter. Mr. Mshana referred this court to the decision in the case of ***Tabitha Mgabe Nshoya Nyamhanga Magoti Vs. Leonia Sengo and 4 Others Land Case No. 337 of 215, High Court of Tanzania at Dar es Salaam [Unreported]*** whereby in this court held that, if there is judgment by the same court on the same matter then the court is barred from entertaining the subsequent case. He thus prayed the court to declared that, since DLHT dealt with execution proceedings in Land Execution Case No. 183 of 2020 of Kilombero DLHT arising from Land Dispute No. 15 of 2014 then DLHT was therefore barred from entertaining Land Application No.40/2021.

On ground six, Mr. Mshana submitted that, DLHT failed to evaluated the evidence. He argued that ownership of land is achieved by

clearing the bush, by allocation, inheritance, gift, purchase and adverse possession. He submitted that the respondents tendered the receipt showing that they acquired land in 2000 while they claimed to have obtained in 1996. Finally, he prayed to the court to allow the appeal with costs and declare the appellant a lawful owner of the disputed land.

In reply thereto, Mr. Bageni Elijah, learned counsel commenced his submission with **ground three**. He submitted that, the matter was not a res judicata because the land in Land Dispute No. 15 of 2014 at Idete Ward Tribunal was; **one**, it involved about 30 acres while in Land Application Case No. 40 of 2021 subject to this appeal only involves 20 acres at the ratio 10 acres to each of the respondent, **two**, parties in Land Dispute No. 15 of 2014 were **Felix Maghembe** against **Peter Matimbwi** while in Land Application No. 40 of 2021, the parties were the Respondents herein against Felix Maghembe, **three**, the respondents were neither part nor witness in Land Dispute No. 15 of 2014 at Idete ward tribunal.

Moreover, Mr. Bageni referred this court to **paragraph 11** of the respondent's (appellant) written statement of defence in Land Application Case No. 40 of 2021 filed on 4th June, 2021 before Kilombero DLHT where he stated that;

"...the suit land belongs to him since he was allocated in 1996 by the Namawala village council, thereafter the applicants came

and asked the respondent to cultivate in for short time but amazingly they have turned evil and confiscated it."

It was his submission that since the appellant admits that the said land was given to the respondents by himself, he had no cause of action against Peter Matimbwi in **Land Dispute Case No. 15 of 2014** of Idete Ward Tribunal.

Mr. Bageni also submitted that, the decision of Idete Ward Tribunal and its subsequent execution application cannot bind the DLHT since the cases were different. He argued that the principles of privity are not automatically and does not arise by mere facts that the 2nd respondent is married to Peter Matimbwi. He stated that, since the appellant's advocate has heavily relied on the decision of Idete Ward Tribunal, he also prayed to refer this Court to the proceedings of the same Idete Ward Tribunal where Peter Matimbwi testified to have no interest on the land in dispute.

Further, Mr. Bageni referred this court to evidences by DW2, Emmaculata Francis Mfanando who was among the assessors in Land Dispute No.15 of 2014 at Idete Ward Tribunal confirmed that, Peter Matimbwi denied ownership of the disputed land. Finally, Mr. Bageni submitted that, even the decision in Criminal Case No. 67 of 2021 on criminal trespass cannot bind the respondents in land disputes. He thus rested his submission on the ground.

As to **ground 5** of appeal, which was based on the issue of jurisdiction, Mr. Bageni insisted that since the matter was not a res-judicata, the DLHT had jurisdiction to hear the parties in Land Application No. 40/2021 on merit and decide as it did. He submitted that the trial tribunal was correct to hear the said case because there was no judgment which binds the DLHT involving the parties on the same subject matter.

In reply to **ground six**, Mr. Bageni submitted that the evidence adduced before the DLHT was enough to warrant and the trial tribunal to entered correct decision based on the evidence before it. He submitted that the available evidences on record speaks loudly by itself that, the respondents were lawful owners of the disputed land. Mr. Bageni submitted further that the receipt tendered in the trial tribunal by the appellant had no evidential values as it was issued on 1996 but seems the same receipt to have remained valid up to 2000. Mr. Bageni submitted that even this court could infer that the said receipts was valid, yet they could have nothing to prove ownership of the disputed land, because the evidence on record clearly tells that the respondent have been in possession of the disputed land undisturbed since 1996 up 2021 which is more than 15 years. He concluded by praying this Court to upheld the decision of the trial tribunal and dismiss this appeal with costs.

By way of **rejoinder**, Mr. Mshana reiterated what had submitted in his substantive submission. He insisted and prayed to the court to allow the

appeal with costs.

I have carefully snoopied the oral submissions advanced by both learned counsels. I also managed to read the judgment, proceedings and the entire records of ***Land Dispute Case No. 15 of 2014; Land Execution Case No. 183 of 2020 of Kilombero DLHT; Criminal Case No. 67 of 2021 of Mngeta Primary Court and Land Application Case No. 40 of 2021.***

Based on the grounds of appeal and submission from both sides, this court has gathered three issues for determination, these are; _____

1. whether Land Application No.40 of 2021 of DLHT was res judicata against Land Dispute Case No. 15 of 2014 of Idete Ward Tribunal and its Land Execution Case No. 183 of 2020 of Kilombero DLHT;
2. Whether in entertaining Land Execution Case No. 183 of 2020, the DLHT for Kilombero made Judgment became *functus officio* to hear Land Application No.40 of 2021 for lack of jurisdiction;
3. Whether the respondents were legally barred from instituting Land Application No.40 of 2021 following existence of Land Dispute Case No. 15 of 2014 of Idete Ward Tribunal and its Land Execution Case No. 183 of 2020 of Kilombero DLHT;

4. Whether the evidence adduced before DLHT in land Application No.40 of 2021 proved ownership of land to either party;
5. What is the fate of this appeal.

To start with issue No.1 on res judicata, this court find indebted to detail some governing principles on ***Res Judicata***.

In Tanzania issues of res judicata is regulated by section 9 of the **Civil Procedure Code [Cap. 33 R.E 2019]** which provides that;

"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".

In the case of **Onesmo Olengurumwa Vs. Attorney General, Misc. Civil Cause No. 36 of 2029; High Court of Tanzania-Main Registry [unreported]** my learned brother *Hon.Mlyambina, J* on 21stOctober, 2020 interpreted the above law and held at page 9 that:

"It is undisputable valid that the doctrine of res judicata entails the identity of parties (or their proxies); subject matter;

*and **cause of action between two cases**, one of which has been conclusively and finally determined prior to the suit in question, before a Court of competent jurisdiction".*

[Emphasize is added]

In other words, Section 9 of the Civil Procedure Code, provides for similar factors of invocation of res judicata. These are; **one**, the matter must be directly and substantially the same like in the former suit, **two**, the issues are between the same parties or between parties under whom or any of them is litigating, **three**, the parties have litigated under the same title, **four**, the former suit was determined by the court with competent jurisdiction, **five**, the issue has been determined conclusively.

In case of **Lotta v. Tanaki and Others** [2003] 2 EA 556 at page 557, the Court of Appeal in illustrating the test of *res judicata* in connection to Section 9 of Civil Procedure Code stated that:

"The object of the principle of res judicata is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final Judgement between the same parties or their privies on the same issue by the Court of competent jurisdiction in the subject matter of the suit".

Borrowing experience from the Indian Supreme Court, res judicata was discussed in the case of **Smt v. Rajeshwari v. T.C. Saravanabava**, Civil

Appeal No. 7653 of 1997 and Civil Appeal No. 7654 of 1997, under section 11 of **the Indian Code of Civil Procedure, [Act No. 5 of 1908]** which is *in pari materia* with section 9 of our **Civil Procedure Code [Cap 33 R.E.2019]** where it held that:

"The appeal of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial would not be permitted to be raised for the first time at the stage of appeal".

The supreme Court of India went on to state further that:

Not only the pleadings have to be taken, it has to be substantiated by producing the copies of the pleadings, issues and Judgement in the previous case. May be in a given case only copy of Judgement in previous suit is filed in proof of pleadings of res judicata and the Judgement contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof.

In yet another case of **Vaish Aggarwal Panchayat v. Inder Kumar and Others**, *Civil Appeal No. 2089 of 2015*, the Supreme Court of India summed up the position by referring to the case above and came to the

conclusion as held in the case of **Syed Mohd. Salie Iabbai v. Mohd.**

Hanifs, 1976 AIR 1569 that:

The basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the Judgement which operates as res judicata".

Res Judicata, therefore, is a phrase which has been evolved from a Latin maxim, which stand for 'the thing has been judged, meaning there by that the issue before the court has already been decided by another court, between the same parties. Therefore, the court will dismiss the case before it as being useless. Res Judicata as a concept is applicable both in case of Civil as well as Criminal legal system. In criminal legal system, we use the word *autrefois convict* and *autrefois acquit*. Further it operates as an estoppel in criminal and civil litigation. If a party pleads and successful prove it, then the court will be estopped from entertaining the subsequent criminal or civil case

The term is also used to mean as to 'bar re-litigation' of such cases between the same parties. Once a final judgment has been announced in a lawsuit, the subsequent judges who are confronted with a suit that is identical to or substantially the same as the earlier one, they would apply the Res

Judicata doctrine 'to preserve the effect of the first judgment. This is to prevent injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources and time of the Judicial System.

And, therefore, the same case cannot be taken up again either in the same or in the different Court of Tanzania or elsewhere. This is just to prevent them from multiplying judgments, so a prevailing plaintiff may not recover damages from the defendant twice for the same injury. In that regard, making res judicata efficacious, the court has to look and consider; **first**, identity in the thing at a suit, **second**, identity of the cause at suit, **third**, identity of the parties to the action, **fourth**, identity of the issues which are the similar, **fifth**, identity in the designation of the parties involved, **sixth**, whether the judgment was final and **seventh**, whether the parties were given full and fair opportunity to be heard on the issue.

Conclusively, the court therefore must satisfy itself that; **one**, there is a final judgment, **two**, the judgment must be on the merits, **three**, the claims must be the same in the first and second suits, **four**, the parties in the second action must be the same as those in the first, or have been represented by a party to the prior action, **five**, parties were given full and fair opportunity to be heard on the issue.

The rationale behind doctrine of res judicata is gathered from three Roman maxims, that; **first**, *Nemo debet lis vexari pro eadem causa* which means that no man should be vexed (annoyed) twice for the same cause, **second**, Interest *republicae ut sit finis litium* meaning thereby that it is in the interest of the state that there should be an end to a litigation and **third**, *re judicata pro veritate occipitur* which bears the meaning as a judicial decision must be accepted as correct.

Having gone through the above principles of the law, I now turn to the facts at hand.

It is on record and undisputed fact that; **one**, the parties to Land Application No.40 of 2021 are different from Land Dispute No.15 of 2014, **two**, the respondent (Peter Matimbwi) in land Dispute No. 15 of 2014 declared to have no interest on the land thus there was no case but the appellant herein raised a claim against nobody who claimed interest thence there was no judgment in law, **three**, the DLHT did not render any judgment and pronounce that the appellant herein is a lawful owner of the land in dispute but it merely acted as executing tribunal of the non-existing judgment in land Dispute No. 15 of 2014 which was against nobody, **four**, the appellant herein did not plead res judicata but raised it at this appellate stage contrary to above governing principles of law in the case of **Syed Mohd. Salie Iabbai V. Mohd. Hanifs and the case of Smt v. Rajeshwari v. T.C. Saravanabava**, **five**, criminal Case No. 67 of 2021

of the Mngeta Primary Court on trespass did not determine ownership of land between the Appellant and Respondents, **six**, there is only one case, Land Application No.40 of 2021 which finally and conclusively determined rights of the parties (Appellant and Respondents herein) and no subsequent suit ever been instituted and litigated by the same parties, on the same subject matter with the similar title and issues and **seven**, the appellant pleaded in paragraph 11 of his written statement of defence that,

*"Furthermore, the respondent avers that the suit land belongs to him since he was allocated in 1996 by the Namawala Village council; **thereafter the applicants came and asked the respondent to cultivate in it for short time but amazingly they have turned evil and confiscated it**".*
[Ephasize added]

The above quoted paragraph from appellant's defence confirms nothing but that, the appellant is aware as to whom he had cause of action with. He confirmed that, to have no cause of action against one Peter Matimbwi who also testified to have no interest on the said land. Further, the mere fact that, the 2nd Respondent is a wife of Peter Matimbwi is not a proof of the alleged collusion bearing in mind that, the appellant, through his own admission, claimed to have engagement with the Respondents herein and not Peter Matimbwi. However, the appellant decided to sue Peter Matimbwi for no apparent reasons.

As such, this court is of the firm view that, there was no decision ever been made save for in Land Application No.40 of 2021 in the case between the respondent and appellant herein, thus, the raised res judicata is non-starter as it do not exist. Further, even if it existed, which is not, was the same is a mere afterthought as it had never been raised in the pleadings but introduced at the first time at this appellate level, therefore untenable in law. Apart from the principles in the cases of **Syed Mohd. Salie labbai V. Mohd. Hanifs** and the case of **Smt v. Rajeshwari v. T.C. Saravanabava**, this Court is also guided by the principles in the case of **Juma v Manager PBZ Ltd and others [2004] I EA 62**, where Court of Appeal Tanzania at Zanzibar held that: -

"...the first appellate Judge, therefore, erred in deliberating and deciding upon an issue which was not pleaded in the first place". [Emphasize added]

This court just out of curiosity went on gathering facts if there was res judicata, affirmatively, it gathered is no facts proving what the appellant strongly believes and pursue as res judicata. This court, therefore, holds that, the appellant's plea of res judicata is untenable in law on the reason given herein above. This ground therefore lacks merits and it is accordingly dismissed.

In response to **issues No.2 and 5**, this court finds that, this issue shares

similar position with 1st issue. It is clear that the DLHT did not determine Land Execution Case No. 183 of 2020 but it acted as executing Tribunal for the decision rendered by Idete Ward Tribunal which was between Felix Maghembe and Peter Matimbwi in Land Dispute No 15 of 2014. There was no land dispute determined by the DLHT for Kilombero save for Land Application No.40 of 2021 between the parties herein. In the absence of another judgment involving same parties, issues and subject matter, then DLHT correctly entertained Land Application No. 40 of 2021.

Similarly, since Mr. Peter Matimbwi claimed no interest in Land Dispute No.15 of 2014, then there was no case capable of resulting into judgment and Land Execution Case No. 183 of 2020. The Trial tribunal to hold that there was no case before it for want of defendant claiming interest on the same, otherwise it was case by and against the Plaintiff himself (Felix Maghembe) the appellant herein.

In the circumstances, the DLHT was not functus officio in entertaining execution process in land execution No.183 of 2020, thus had jurisdiction to try it.

Regarding **issue No.3** on the available remedy to respondents following the decision in Land dispute No. 15 of 2014, this court decide that, the respondents had these avenues, had there be any judgment affecting the respondents' rights, they had two options applying for revision against the

decision in land dispute No.15 of 2014 or institute suit for claim of ownership of part of the decreed land. The rationale behind is that, they were not privy to and afforded right to be heard in Land dispute No.15 of 2014. The dispute before Idete Ward Tribunal was between Mr. Felix Maghembe (appellant herein) and one Peter Matimbwi. Mr. Peter Matimbwi claimed to have no interest whatsoever on the said land thus no judgment as judgment cannot be issued against none. As there was no decision, then the only remedy by the respondents herein was to institute a suit for claim of ownership of land in question against the appellant herein. This circumstance do not fall within the ambit where revision can be invoked. The respondents, therefore, correctly instituted a suit. The appellant's position that, the respondent ought to have applied for revision do not hold water and it is accordingly dismissed.

As to **issue No.4** herein above, this court assembled evidence proving that; **one**, the respondents were in occupation of land in question since 1996 and that, upon allocation of by Namawala village, they continued to occupy they continued to plant seasonal and permanent plants, **two**, in 2014 the appellant claimed ownership of land against Peter Matimbwi who testified to have no interest whatsoever, **three**, in 2014 through **Criminal Case No. 67 of 2021 of Mngeta Primary Court**, the respondent was for the first time accused for trespassing over the land in dispute whom

the respondents have been in ownership since 1996, **four**, respondents were convicted for trespassing the appellant's land, **five**, the respondents did not appeal but opted to institute land application No.40 of 2021 claiming for ownership from 1996 to 2021 when appellant instigate ownership dispute, **six**, the **Criminal Case No. 67 of 2021 of Mngeta Primary Court** did not determine ownership though convicted the respondents in the absence of judgement declaring appellant the owner against the respondents, **seven**, the appellant pleaded in paragraph 11 of his written statement of defence that,

*"Furthermore, the respondent avers that the suit **land belongs to him since he was allocated in 1996 by the Namawala Village council; thereafter the applicants came and asked the respondent to cultivate in it for short time but amazingly they have turned evil and confiscated it**". [Emphasize added]*

Eight, that the appellant was throughout not in occupation and use of land in dispute since 1996, **nine**, appellant did tender any documentary evidence nor otherwise proving that he gave such land to respondents in 1996, **ten**, both parties did not provide documentary evidence of allocation of the land in dispute, **eleven**, SM4 one Seleman Wala was the acting Kitongoji chairperson and that, he participated in allocating the said land to respondents in 1996 together with SM3 and SM5.

Having evaluated the evidence on record, this at means satisfied that, the land belongs to the respondents as the appellant has failed to prove ownership by production of any slight evidence including; allocating document from Namawala village, no occupation since 1996, no document nor oral evidence that he gave the land to respondents in 1996 as per paragraph, 11 of the written Statement of Defence quoted herein above, no other evidence proving ownership on the appellant's side.

As such, this court is satisfied that the appellant did not prove his case as required by section 110, 112, and 115 of the Evidence Act, Cap.6 R.E.2019.

On the basis of the evidence on record, this court hold that, DLHT properly assessed the evidence adduced before it and it is accordingly confirmed.

The respondents are declared the legal owners of the land in dispute.

All said and done, I find this appeal lacks merits and consequently dismiss it with costs.

It is so ordered.

DATED at MOROGORO this 11th January, 2023.



G.P. MALATA

Judge

11/1/2023

Court:

Judgement delivered in Chambers this 11th January, 2023 in the presence of the appellant in person and Mr. Fred Sanga holding for Mr Bageni advocate for the Respondents.

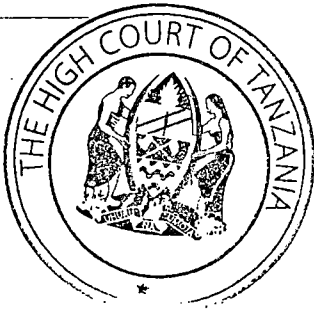


G.P. MALATA

Judge

11/1/2023

Rights to appeal fully explained parties.



G.P. MALATA

Judge

11/1/2023