

TANZANIA / JUDGMENT

abel pea vs respicious ishengoma ta bin attorney and 2 others 2021 tzhclandd 6744 28 june 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 76 OF 2019 (From the Decision of the District Land and Housing Tribunal of Kinondoni District at Mwananyamaia, in Land Case No. 242 of 2018, BY R.L. Chenya, dated 17 April, 2019) ABEL PEA APPELLANT VERSUS RESPICUS ISHENGOMA t/a BIN ATTORNEYS
1st RESPONDENT GEORGE NAMWAMBE t/a GENESIS AUCTION MART & DEBT COLLECTORS
2nd RESPONDENT HUSSEIN NDUGUTA KASONGELO S^{3rd} RESPONDENT

JUDGMENT

OPIYO,3: TO ADDRESS COURT. ON WHETHER THE SUIT PROPERTY IS THE SAME This appeal is based only on one ground, that the District Land and Housing Tribunal for Kinondoni, hereinafter referred to as the trial tribunal, erred in both law and facts in its ruling for declaring the dispute to be *Res judicata*, without considering that the cause of action and parties are totally different. In brief, the background of the matter is to the effect that, on the 17th of June 2018, a Land Application No. 242 of 2018 was lodged before the trial tribunal by Mr. Abel Pea, the appellant, against the three respondents above named. The reliefs sought among others were for a permanent injunction restraining the respondents from interfering with the appellant's peaceful occupation of the suit land. The respondents on their part object to the said suit on account that the same is *res judicata*, the same was sustained upon the suit was found to be the same to Land Application No. 143 of 2007, filed in the same tribunal and later an appeal before this court, vide Land Appeal No. 28 of 2009. Further it was found that the suit was *res judicata* to Land Application No. 97 of 2014, lodged before the Wazo Ward Tribunal, followed by its appeal before the District Land Appeal No. 78 of 2018. Being aggrieved by this decision, the appellant lodged the instant appeal, faulting the decision of the trial tribunal for reasons stated hereinafter. The appeal was heard through written submissions, Mr. Thomas Joseph Massawe, learned Advocate appeared for the appellant, while the 3rd respondent enjoyed the legal services of Advocate Rita Odunga. As for the 1st and 2nd respondents, the appeal was heard *ex-parte* against them. Submitting for the appellant, Mr. Massawe relying on section 9 of the Civil Procedure Code, Cap 33 R.E 2019, was of the view that, the suit at the trial tribunal was not *res-judicata* as it involved different parties and

different subject matter, contrary to the previous suits so stated in the impugned ruling of the trial tribunal, vide to Land Application No. 143 of 2007, followed by Land Appeal No.28 of 2009. Also, other cases viewed to be the same as the instant suit Include Land Application No. 97 of 2014, lodged before the Wazo Ward Tribunal, followed Its appeal before the District Land Appeal No. 78 of 2018. In the case which led to this appeal, the appellant was challenging the powers assumed by the 3'^^ respondent on Instructing the and 2''' respondents to evict him (the appellant)from the suit land. These powers were not obtained from any tribunal hence null and void. Also the parties are not the same as the previous cases mentioned here in above. In the previous cases, the parties were the appellant against the 3^^ respondent together with other persons residing on the suit land. As of now It Is strictly between the appellant against the three respondents above, the and Z''' respondents being joined as necessary parties acting under the 3^" respondent's Instructions. Above all the matter was not finally determined, so far, the Issue of ownership of the suit land Is before the Court of Appeal of Tanzania. He Insisted that the case at hand Is a new case, not at all similar to the previous cases. In reply. Advocate Rita for the 3"^ respondent maintained that, the trial tribunal rightly decided the matter as it Is clear that the same Is res judlcata, resembling the previous cases as state at page 3 and 4 of the ruling of the trial tribunal. She Insisted that, the ownership of the suit land, located at Salasala was determined In the previous case. Land Application No. 143 of 2007, In the current case (vide Land Application No. 242 of 2018 the appellant Is challenging his eviction from the suit land. Therefore, the matter has already been determined and cannot be re-entertained as the current matter Is directly and substantially the same as the previous matters. The parties also are the same,the 3''' respondent appeared In Land Application No. 143 of 2007 as the 6!^ respondent. She Insisted that although the names are somehow different but there Is an affidavit on record of change of name of the 3''' respondent from Hussein Bijuguru to Hussein Nduguta Kasongero. The existence of the same parties disputing over the same subject matter in the former cases and the subsequent suit Is sufficient to mark the suit at hand to be res judlcata as stated In the case of Wengert Windrose Safaris(Tanzania) Limited versus Minister for Natural Resources and Tourism & Another, Misc. Commercial Cause No.89 of 2016, High Court of Tanzania, Commercial Division at Dar Es Saiaam, relying on several Indian Cases Including the case of SK Rungta & Co. versus Naval Kishore Deb! Prasad, AIR 1964. Cal 373, where it was observed that, "The mere fact that the first suit is between Zand J as piaintiffand WX and Y as defendants, and the second suit is between W, as piaintiffand Z, J and S(not a party) to the first suit as defendants wiii not take the operation of this section out. If other conditions are satisfied, the expression, the same parties mean the parties between whom the matter substantiaiiy in issues has arisen and afso has been decided. It has been heid thatthe section doesn'tbecome inappiicable byreason ofthere being a party against whom no separate substantiai issue is raised'. She maintained also that, the matter was heard and finally decided In the former suit as stated in Ottoman Bank versus Ghani, Civil Case No. 63 of (1971), H.C.D. 69, where Georges CJ as then was observed, "y4 prerequisite for operation ofthe doctrine ofRes-Judicata is that there shoufd have been a former suit in which the issue aftegedfy Re-Judicata has been decided'. She argued that, the appellant counsel has omitted to state the fact that, the Land Appeal No. 28 of 2009, finalized the matter matters contained In the Land Application No. 143 of 2007, and to date there Is no pending appeal thereof before any

court in respect of the decision if the High Court issued in the Land Appeal No. 28 of 2009. Also, the Land Appeal No. 78 of 2014 at the District Land and Housing Tribunal, resulted from the Land Dispute No. 97/2014 decided by Wazo Ward Tribunal. Therefore, the appellant is just intending to waste the precious time of the court as the instant appeal serves no useful purpose, the same should be dismissed. In his rejoinder, the appellant's counsel reiterated his submissions in chief and maintained that, there is a misdirection from the trial tribunal in its ruling dated 17th April 2019 for declaring the matter to be res-judicata. Having gone through the submissions of both parties and the records of the trial tribunal, the Issue at hand, worth if determination id whether the appeal has merit or not. In order to answer this issue affirmatively, we need to focus on the center of the dispute itself giving rise to the appeal, where the parties are fiercely arguing as to whether the case Land Application No. 242 of 2018, filed by the appellant at the District Land and Housing tribunal was a res-judicata case. The focus being given to the previous cases, vide Land Application No. 143 of 2009 before the same tribunal, followed by the Land Appeal No. 28 of 2009. Later another case before the Wazo Ward Tribunal between the two parties here, the Land Application No. 97 of 2014, followed Its appeal before the District Land Appeal No. 78 of 2018. After perusing the records at hand, it has come to my attention that, the trial tribunal was right to find the Land Application No. 242 of 2018 to be resjudicata, as provided for under section 9 of the Civil Procedure Code Cap 33 R.E 2'19. What makes the said case, (Land Application No. 242 of

2018) to be res judicata is the decision of the same Tribunal entered in respect of the Land Application No. 143 of 2009 and also the appeal that followed from It, Appeal No. 28 of 2009). In that case, the appellant was Involved as an applicant, against nine respondents, the respondent being the 6th on the list. The decision was clear that, none of the parties owns the suit land rather the same placed under the Kinondoni Municipal Council. Both of them were ordered to vacate the area (see the judgement of Hon. Joseph T. Kaare, Chairperson, dated 6th March 2009). However, the twist of events occurred In 2014, five years after the decision In Land Application No. 143 of 2009 has been delivered. As per the records at hand, the appellant and the 3rd respondent again were Involved In another dispute, before the Wazo Ward Tribunal, vide Land case No. 97 of 2014. The case was over the same subject matter and the 3rd respondent was declared the lawful owner of the suit land before the decision was overturned by the District Land and Housing Tribunal for Kinondoni, In Land Appeal No. 78 of 2014 and the appellant became the lawful owner of the suit land. The records are silent as to why the decision of the Land Appeal No. 78 of 2014, contradicted that of the Land Application No. 143 of 2009. It Is not known why both parties turned a blind eye In notifying the court that the ownership of suit area had long been determined by the same tribunal back In 2009, In Land Application No. 143 of 2009. In my settled opinion, based on the records as I have analyzed here In above, the trial District Land and Housing Tribunal was correct In Its finding. The case Is clearly falling within the rules of a res judlcata case, having been long determined and finalized In the judgment of the same tribunal, vide Land Application No. 143 of 2009. The parties are the same, the subject matter Is the same which Is the piece of Land located at Salasala, RTD area In Kinondoni Dar Es Salaam and the reliefs or Issues are the same or substantially the

same see Wengert Windrose Safaris (Tanzania) Limited versus Minister for Natural Resources and Tourism & Another supra. Although the appellant claims that the current in suit, the subject matter is different from the former suit, but it is direct or substantially linked to those already determined In the Land Application No. 143 of 2009. TO make this matter clear, I will reproduce section 9 of the Civil Procedure Code, Cap 33 R.E 2019 as follows;- "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 subsequentsuit or the suitIn which such Issue has been subsequently raised and has been heard andfinally decided bysuch court". Looking at the reliefs sought in the Land Application No. 242 of 2019, where the applicant (now appellatant) prayed among others an order of permanent injunction against the respondents or any other person from interfering with his peaceful occupation of the suit land. When you go back to the judgment of Hon. Kaare, learned Chairperson in Land Application No. 143 of 2009, at page 5, last but one paragraph, the same land was found to belong to none among the two. That is to say it neither the property of the appellant nor the 3rd respondent, rather given to the Kinondoni Municipal Council as the occupier and supervisor of its use. Granting the reliefs sought by the appeallant/ applicant in Land Application No. 242 of 2019, will bring a confusion to what was decided in 2009 over the said land. What I mean to say is, the issues or reliefs sought in Land Application No. 242 of 2019 are the same or substantially the same as those already determined and finalized In the former case, Land Application No. 143 of 2009. In the upshot, I find the appeal to be devoid of merits. The judgment of the trial tribunal Is upheld accordingly, so are the orders that follow/ed the same. In addition to that, the 3rd respondent is ordered not to disturb the appeallant on the suit area as he has no ownership over the area just like the appellant. Both of them are mere Invitees, as the suit land Is under control of KInondonI Municipal Council. Costs to follow the event. Ordered accordingly. M.P. OPIYO, JUDGE 28/6/2021

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