

TANZANIA / JUDGMENT

JUDGMENT OF CATHERINE KIJINGO VS MSAFIRI MLOWEZI FINAL

COURT
TANZLIIDECIDED
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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA LAND APPEAL NO. 82 OF 2023 CASE REFERENCE NO.
20230821000521505 (Originating from Land Application No. 227 of 2019 District Land and Housing
Tribunal for Mbeya) CATHERINE AYUBU KIJINGO (Suing as administratrix of estates of late
CHARLES WAYA) APPELLANT VERSUS MSAFIRI
MLOWESI 1ST RESPONDENT EZEKIEL
MGOGO 2ND RESPONDENT SHESCO
SHOGA 3RD RESPONDENT DOTO MAJI YA
PWANI 4TH RESPONDENT

JUDGMENT

Date of hearing: 2/7/2024 Date of judgment: 20/8/2024 NONGWA, J. In the District Land and Housing Tribunal for Mbeya at Mbeya, Charles Waya now deceased instituted a suit against the respondents for possession of the land situated at Itamboleo ward within the district of Mbarali in Mbeya region. The application did not go for full trial after the 1 respondent had successfully raised preliminary objection that the matter was res judicata. This appeal has been filed by the Catherine Ayubu Kijingo in her capacity as the administratrix of the late Charles Waya. Disgruntled with dismissal of the application the appellant has filed memorandum of appeal on four grounds; one, that the trial chairman erred in law and fact to enter judgment in favor of the respondents under the doctrine of res judicata without considering the fact that the suit was new and different from the previous one; two, that the trial chairman erred in law and fact to dismiss the suit for being res judicata against all the respondents while the same was not established by the first respondent; three, that the trial chairman erred in law and fact to dismiss the suit for being res judicata in terms of subject matter while the land in dispute was different from that litigated in the ward tribunal; and four, that the trial chairman erred in law and fact to dismiss the suit for being res judicata by confirming the ward tribunal judgments which was tainted with illegalities in the eye of the law. When the appeal came on for hearing the appellant was represented by Mr. Emily Mwamboneke, learned counsel whereas the respondents appeared in persons. The appeal was disposed through written submission. The respondents filed joint written submission. 2 In his submission Mr. Mwamboneke consolidated all grounds of appeal

and argues as one, he submitted that the case before the tribunal was not *res judicata* because parties and subject matter were not the same. He referred to section 9 of the Civil Procedure Code, Cap 33 “the CPC” which provides conditions for the doctrine of *res judicata* to apply and the cases of Simon Mugenjwa and Another vs Ibrahim Magembe, Civil Appeal No. 123 of 2020 [2023] TZCA 17440 (20 July 2023; TanzLII) and Athnasia T Massinde t/a Abeti Primary School vs National Bank of Commerce, Commercial Case No. 34 of 2016

[2016] TZHCComD (30 June 2016; TanzLII). Elaborating, counsel submitted that the subject matter before the ward tribunal was on land located at Kapunga village but in the district tribunal the land located at Ukwavila village, that parties in the ward tribunal were Doto Daniel, Cheso Chogga, Doto Maji Ya Pwani, Ezekiel Mgogo against Catherine Mgulwa and Christina Mgulwa in the district tribunal parties are different and the matter was filed by Charles Waya who was never involved in way on cases before the ward tribunal. Further submission was that subject matter was different and size is 28 acres owned by appellant, boundaries of the subject matter as per map as pleaded was different from boundaries stated in the ward tribunal 3 judgments. According to the counsel all these was proof that the matter was not *res judicata*. Other argument was that the chairman decided the application to be *res judicata* by confirming the ward tribunal judgments which was tainted with illegalities in the eyes of the law, that is quorum of members at a time of hearing the case was not indicated in the proceedings, the appellant was deprived right to be heard as was never a party to cases filed by the respondents in the ward tribunal. From the above submission counsel prayed the appeal to be allowed with costs. In reply submission, respondents submitted that they have appealed against the ruling of hon. Ngunyale, J. which extended time to the appellant to file this appeal and it is registered as Civil Appeal No. 659 of

2023. It was submitted that this court has power under section 95 of the CPC to stay proceedings pending the determination of the appeal. they argued that the law does not provide procedure in circumstance of this case but common sense, justice, equity and good conscience requires these proceedings to be stayed. The court was referred to the case of Yahya Khamis vs Hamida Haji Idd & Others, Civil Appeal No. 225 of 4 2018 [2019] TZCA 116 (16 May 2019; TanzLII) in support of the argument. On whether the matter was *res judicata* it was submitted that the matter was adjudicated in Land Cases No. 5 of 2017 between Dotto Daniel vs Catherine Ngulwa, Land Case No.6 of 2017 between Chesco Choga vs Catherine Ngulwa and Land Case No. 7 both of 2017 between Ezekiel Mwalindu vs Catherine Ngulwa all before the ward tribunal of Itamboleo. Elaborating the respondents said that the matter in the tribunal in Application No. 227 of 2019 was between Charles Waya vs Msafiri Mlowesi, Ezekiel Mgogo, Chesco Choga and Doto Maji ya Mwani as respondents. According to the respondents Catherine Ngulwa, the respondent in cases before the Itamboleo ward tribunal is the wife of Charles Waya. That the second respondent in the ward tribunal featured as Ezekiel Mgogo and fourth respondent as Dotto Daniel. They added that the subject matter in Application No. 227 of 2017 is the same which was in dispute in the ward tribunal in disputes referred earlier. It was further submission from the respondents that

as the decision of the ward tribunal has never been reversed by the upper court or tribunal, Application No. 227 of 2029 was res judicata, thus prayed the appeal to be dismissed with costs. 5 On rejoinder, counsel for the appellant complained on the act of the respondent's counsel to bring the issue of stay of proceedings in reply submission. Counsel stated that the issue was raised earlier and through the order 13/03/2024, the court resolved it after the respondent has failed to prove existence of appeal. It was argued that as the ruling which granted extension of time is intact and the court ordered hearing to proceed, the appeal should proceed to stage scheduled. On the merits of the appeal, it was submitted that parties are different and therefore the matter not res judicata. On subject matter being the same counsel argued that it was different in terms of location, size and boundaries. Further submission was that decisions of the Itamboleo ward tribunal were reversed in Appeal No. 136 of 2021 by the District Land and Housing Tribunal for Mbarali delivered on 25/10/2023. Having considered pleadings and the rival submissions of the parties, the only issue for determination is whether the matter in the tribunal was res judicata. However, before I venture on that issue, I will deal first with the point of stay of proceedings raised by the respondents in their reply submission. According to the respondents, they have a pending appeal at the Court of Appeal which challenge the ruling in Misc. Land Application No. 6 65 of 2022, thus implored the court to invoke section 95 of the CPC and stay this appeal awaiting the outcome in that appeal. Adversely the appellant's counsel was unamused by the tendency of raising new points during submission. He added that the court on 13/3/2024 ordered to proceed with hearing appeal after the respondents had failed to provide proof of the pending appeal, according to the counsel the court is functus officio on that matter. I have followed the arguments and agree that this court has powers to stay proceedings where the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed. It is noteworthy that the term suit entails the appeal. I have perused the record and agree with counsel for the appellant that on 13/3/2024 the respondents raised a concern that they had appealed against the ruling in Misc. Land Application No. 65 of 2022, but it was not considered for lack of proof. Yet again in their written submission they have raised the same issue arguing that their appeal at the Court of Appeal is Civil Appeal No. 659 of 2023 but they did not provide any proof thereof like, notice of appeal or memorandum of appeal. It 7 would seem the respondent just raised the point, argued it in the vacuum but left for the court to search for proof of the said pending appeal forgetting that it is the duty of parties to mould their cases from which the court will base its decision. In absence of proof that there is a pending appeal in the Court of Appeal of which its decision has direct impact in this appeal, the court can do nothing but reject the invitation. The above paves way for the determination of the issue of res judicata, the starting point is section 9 of the CPC which provides; 'No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same 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 issue has been subsequently raised and has been heard and finally decided by such court.' Under the above provision to make the suit *res judicata*, the following conditions must be established;

- (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. 8 (iii) The parties have litigated under the same title in the former suit (iv) The court which decided the former suit been competent to try the subsequent suit.
- (v) The matter in issue must have been heard and finally decided in the former suit." The above condition applies cumulatively and not in isolation unless the party is litigating under the same title. The fourth and fifth condition poses no difficult as in 2017 the ward tribunal was the competent tribunal over land disputes and Land Case Nos. 5, 6 and 7 of 2017 were heard to its finality. However, the decisions in the above-mentioned disputes were quashed and nullified vide Land Appeal No. 136 of 2021 of the District Land and Housing Tribunal for Mbarali. The second and third conditions whether parties are the same, in Application No. 227 of 2029 in the district tribunal parties are Charles Waya as applicant against Msafiri Mowesi, Ezekiel Mgogo, Chesco Shoga and Doto Maji ya Pwani. It is agreed by parties that in the ward tribunal parties were Ezekiel Mwalindu, Chesco Shoga and Doto Daniel against Catherine Ngulwa, it is noteworthy that each party had filed separate case. 9 From the above it needs no microscope to know that parties in Land Case Nos. 5, 6 and 7 of 2017 in the ward tribunal and Application No. 227 of 2019 of the DLHT are different. In the ward tribunal the applicants were Ezekiel Mwalindu, Chesco Shoga and Doto Daniel as applicants against Catherine Ngulwa as respondent, in the district tribunal the applicant is Charles Waya being the applicant against Msafiri Mowesi, Ezekiel Mgogo, Chesco Shoga and Doto Maji ya Pwani as respondents. It is wonder that the respondent's counsel submitted that Ezekiel Mgogo and Doto Maji ya Pwani is the same as Ezekiel Mwalindu and Doto Daniel who featured in the ward tribunal in Land Case Nos. 5 and 7 of 2017 without any proof on differences on names. There is argument that Catherine Ngulwa is the wife of Charle Waya to which there was no dispute from the appellant but for the purpose of the doctrine of *res judicata* there is no proof that Charles Waya was privy to cases in the ward tribunal of Itamboleo or litigating under the title of Catherine Ngulwa. Coming to the first condition the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. According to the appellant's counsel the subject 10 matter differs in terms of size and location, the respondent's counsel had opposite view. On my part the fact that the later Charles Waya was not a party to cases filed by the respondents against Catherine Ngulwa, and there being no claim that he was litigating under her title, the principle of *res judicata* cannot operate against him. The chairman relied on the subject matter decision to find that the suit was *res judicata* by relying on the case of Jesca Deus vs Fatma Mapinduzi & Others, Land Case No. 197 of 2014 High Court Land Divion. The ruling and argument the counsel for the respondent adopted. I have had no advantage of reading the case Jesca Deus vs Fatma Mapinduzi & Others (*supra*) as it was not attached to

submission of the respondents and my search through the TanzLII website did not come across it, maybe it was not uploaded to the platform. That apart is the decision of this court not binding on me. To my understanding there is only two kinds of judgment that is judgment in personam and judgment in rem. Judgment in personam operates only against the parties to the suit whereas judgment in rem is pronounced on the status of some particular subject or property or thing. This kind of judgment operates against the whole world. 11 In this jurisdiction and elsewhere in the world claims before the courts generally involve the rights and obligations of those and only those, privy to the proceedings that is to say decision pronounced by courts or tribunal are judgment in personam. This sound good as it would be contrary to the interests of justice to determine rights and obligations of those who are not parties, and who may not have been given any notice or opportunity to make submissions on the issues. Courts have always been courts of conscience, operating in personam and not in rem. In *Mariam Ndunguru vs Kamoga Bukoli & Others* [2002] TLR 417 the court stated; 'So in this sense the judgment of the court was a judgment in personam, against the defendants only, and not in rem The common law, to my understanding, recognises both judgments in rem and judgments in personam. It all depends on the nature of proceeding in which the particular type of judgment is sought Thus a judgment in an ordinary action of contract or tort will be a judgment in personam or, more accurately, a judgment inter- partes, a judgment declaratory of status would be a judgment in rem. As seen above the reliefs in the present case indicate that the suit was founded on trespass which is tort. It was sought in it that the defendants be declared to have been trespassers on the suit land and therefore they should be evicted from there and be made to pay compensation for the trespass. The 12 judgment in the suit was a judgment in personam, and not a judgment in rem...." [See also; *Masumbuko Kwolesya Mtabazi vs Dotto Salum Chande Mbega*, Civil Appeal No. 44 of 2013 [2020] TZCA 1939 (26 March 2020; TanzLII) and *Jacqueline Jonathan Mkonyi & Another vs Gausal Properties Limited*, Civil Appeal No. 311 of 2020 [2023] TZCA 17326 (12 June 2023; TanzLII)] A more precious decision on nature of judgment for declaration of land right to which I subscribe was given in the case of *Issack Nguvumali v. Petro Bikufake* (substituted by *Mtalikwa Bikulake*)

- (1972) H.C.D No. 139 the High Court held that; 'In land cases judgment in favour of a party is not always judgment against the whole world so it does not bind those who were not parties, and res judicata cannot apply.' Given the above, even if the subject matter was the same, but in this case, there is dispute over it, the principle of res judicata would not apply to the appellant because was not party to the former suit in the ward tribunal and the judgment given in favour of the respondents was judgment in personam with effect that it binds only those who were parties to it or their privies and those litigating under that title. 13 Even assuming that the application was res judicata, from the pleadings and arguments of the parties I doubts if the same could successfully be argued as pure point of law. This is so because parties in the former suit, location and size of the suit land was in dispute through the pleadings and in disposing it required to peruse documents accompanying the pleadings to support the objection such as exhibits which were yet to form part of record

of the tribunal. Faced with akin situation in the case of Soitsambu Village Council vs Tanzania Breweries Limited & Another, Civil Appeal No. 105 of 2011 [2012] TZCA 255 (17 May 2012; TanzLII) the court held that; 'Now issues of ownership of the disputed land cannot be resolved in the pleadings. There must a fully-blown trial to that effect. The learned judge appeared to rely on paragraph 6 of the plaint to resolve this seemingly complex issue. It is clear to us that the relevant facts in the pleading in dispute were not agreed upon. On the pleadings as they are it was not possible for the trial court to adjudicate upon whether the plea of res judicata could stand. It was incapable of disposing of the suit. It should have been dealt with at the end, and not at the beginning of the trial. An objection whose disposal requires proving or disproving of facts or evidence ceases to be a preliminary point of law.' In the final analysis, I find that the chairman slipped into error when he viewed the principle of res judicata on the subject matter decision by 14 the ward tribunal without considering other conditions. Further he did not consider that the parties, size and location of the suit land was in dispute between the parties. At the end, the appeal has merits, I hereby quash and set aside the ruling of the chairman in Application No. 227 of 2019 and remit back the file to the tribunal before another chairman to continue with hearing of the suit. The appellant will have his costs. V.M. NONGWA JUDGE 20/8/2024 Dated and Delivered at Mbeya this 20/8/2024 in presence of the 1st Respondent and Ms. Epifania Msuya advocate for the Appellant. V.M. NONGWA JUDGE 15

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