

TANZANIA / JUDGMENT

DANIEL NADA GOBRE EDITEDD 22222

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SUB-REGISTRY OF MANYARA
AT BABATI LAND APPEAL NO. 13497 OF 2024 (Originating from Mise. Land Application No. 1361
of 2024 in this Court, original Land Application No. 54 of 2018 before the District Land Housing
and Tribunal for Babati at Babati) DANIEL NADA GOBRE..... 1st APPELLANT
SAMWEL NADA GOBRE..... 2nd APPELLANT VERSUS PIUS BARNABAS
ETLAWE.....RESPONDENT

JUDGMENT

19th August & 17th September, 2024 Kahyoza, J.: Pius Barnabas sued Daniel Nada, Samwel Nada and Hhayaa Nada Gitenay seeking a declaration that he was rightful owner of Plot No. 47 Block "A" located in Bashnet village (the suit of land). He won the suit. Dissatisfied, Daniel Nada and Samwel Nada appealed to this Court contending that the suit was res judicata, the tribunal erred to entertain the suit for mis-joinder of parties and that it failed to properly consider the appellants' evidence. The background is that; the land in dispute, which is Plot No. 47 Block 'A' Bashnet is in Bashnet Village within Babati district. Pius Barnabas claims to be the lawful owner as he bought the disputed land from Hhayaa Nada i Gitenay on 27th May, 2025. Pius Barnabas alleged that on 8th February, 2016 Daniel Nada and Samwel Nada invaded the disputed land with no any colour of right. Daniel Nada and Samwel Nada claimed that the disputed land belongs to their father, Nada Gobre and that the tribunal declared him a lawful owner of the suit land vide Land Application No. 45 of 2015. Pius Barnabas tendered number of exhibits including a sale agreement, a title deed and land rent receipt to mention the few, in proving his ownership. On the appellants' side, they testified that the disputed land belonged to their father, Nada Gobre. The Bashnet village council once acquired the said land and allocated it to the citizens one of them being Hhayaa Nada Gitenay (the 3rd respondent) but the government did not compensate Nada Gobre, the owner of the said land. Nada Gobre instituted a suit vide Land Application No. 45 of 2017, against the village Council a to remit the acquired land for failure to compensate him. The Court issued a decree in favor of Nada Gobre and the persons who were allocated were ordered to vacate. Pius Barnabas refused to vacate. He instituted the current suit and the tribunal declared him a lawful owner. Daniel Nada Gobre and Samwel! Nada Gobre, appealed raising three grounds of appeal as follows- 2

1. that, the trial tribunal erred in law by entraining the land dispute, which had already been entertained, hence it was res-judicata;
2. that, the trial tribunal erred in law and fact by entertaining for suit for mis-joinder of parties; and
3. that, the trial tribunal erred in law and fact for failure to consider the evidence tendered by the appellants. The Court heard the appeal orally. The issues for consideration are whether the suit before the trial court was res judicata, whether suit was bad in law for mis-joinder of parties and whether the trial tribunal did not consider the appellants' evidence. Was the suit res judicata? I resolved to start with the issue whether the suit before the trial court was barred by the doctrine of res judicata. Given the background of this matter the record depicts that, the parties to Application No. 45 of 2017 were Nada Gobre v. H/Kijiji-Bashnet. Nada Gobre, the plaintiff, was declared a lawful owner of the land consisting 1.5 acres at Bashnet village. Bashnet Village Council had acquired 1.5 acres of land from Nada Gobre without paying him compensation. There is evidence from Daniel Nada Gobre, Abrahamu Mlundi (Dw2) and Labu Muhake (Dw3) who deposed that Plot 3 No. 47 Block 'A' Bashnet was part of the suit land in Application No. 45 of 2017 which was declared to belong to Nada Gobre. Abrahamu Mlundi (Dw2), who alleged that he was the Bashnet village executive officer in 1997 when Nada Gobre's land was surveyed, deposed that Plot No. 47 Block 'A' Bashnet was part of the land litigated upon in Application No. 45 of 2017. Abrahamu Mlundi (Dw2) was a witness in both Application No. 45 of 2017 and Land Application No. 54 of 2018. He was a witness of truth. Not only that but also, apart from Pius Barnabas testifying that he bought the suit land from Hhayaa Nada Gitenay, there is no evidence on how Hhayaa Nada Gitenay acquired Plot No. 47 Block 'A' Bashnet, the disputed land. Hhayaa Nada Gitenay did not testify. Thus, there is no evidence to prove that Hhayaa Nada Gitenay had title let alone good title to pass to Pius Barnabas. I am of the firm view that though on the face of it the lands which are the subject matter in Application No. 45 of 2017 and Application No. 54/2018 look different, they are the basically the same. The land which is subject matter in Land Application No. 54/2018 is a subset of the land which was a subject matter in Application No. 45 of 2017. The parties in the Land Application No. 54 of 2018 seem to be different from the parties in the Application No. 45 of 2017. The parties in Application 4 No. 45 of 2017 were Nada Gobre against Bashnest village council whereas the parties in Land Application No. 54 of 2018 are Pius Barnabas against Daniel Nada, Samwel Nada and Hhayaa Nada Gitenay. The record has it that Daniel Nada and Samwel Nada are Nada Gobre's children. They denied to own the disputed and land claiming that it belonged to Nada Gobre. They are thus, privy to Nada Gobre. Hhayaa Nada Gitenay was a necessary party as he is a person who sold the disputed land to Pius Barnabas. Pius Barnabas is privy to Hhayaa Nada Gitenay. The story does not end there, it is on record that Bashnet village council, which was a party to Application No. 45 of 2017 after it acquired land from Nada Gobre, it surveyed it and allocated it to several persons including Hhayaa Nada Gitenay, the person from whom Pius Barnabas traces his title. It is unfortunate that Hhayaa Nada Gitenay did not testify to explain how he acquired the suit land. There is no dispute that, Pius Barnabas traces his title

from Bashnet village council which was a party to Land Application No. 54 of 2018. Thus, although the parties in Application No. 45 of 2017 were different from Land Application No. 54 of 2018, they are privy, that is they are claiming under the same title. The doctrine of res-judicata applies to such circumstance. It was held in the case of Felician Credo Simwela v. Quamara Mssodo Battez and Abdillah Ahamed Yusuph, Civil Appeal No. 10 of 2020, that- "The law is very settled and dear on the applicability of the principle of res judicata. For the doctrine to apply the following conditions must be proved, these are; i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim; ii) the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit either actually or constructively; iii) the party in the subsequent suit must have litigated under the same title in the former suit; iv) the matter must have been heard and finally decided; v) that, the former suit must have been decided by a court of competent jurisdiction. Its applicability makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The object and public policy behind the doctrine of res judicata is to guarantee finality of litigation and therefore to protect an individual from a multiplicity of litigation. Insistently, the applicability of the doctrine is for the sake of promoting the fair administration of justice and honesty and to prevent the law from abuse. In many jurisdictions, the principle applies, not only to the specific claims made in the first case but also to claims that could have been made during the same case".⁶ There is no dispute that the tribunal was competent to try Application No. 45 of 2017 and it conclusively determined the application. There is no dispute that the persons to whom Bashnet Village Council, including Hhayaa Nada Gitenay had allocated the land were not involved in Application No. 45 of 2017. That does not entitle them the right to sue. They ought to have applied for revision seeking to be heard before they were declared trespassers. I, therefore, uphold the contention that Land Application No. 54 of 2018 was res judicata to Application No. 45 of 2017. The tribunal misdirected itself to hold otherwise. After upholding the first ground of appeal, I find no pressing need to consider the remaining grounds of appeal. However, for the sake of completeness, I consider them. Was the suit bad in law for mis-joinder of parties? The appellants complained that the tribunal erred in law and fact for entertaining the matter while there was a mis-joinder of parties as Bashnet Village Council, a necessary party was not joined. The issue is whether Bashnet Village Council was a necessary party.⁷ The law is very clear under Order I, rule 9 of the Civil Procedure Code, [Cap 33 R.E. 2019] (the CPC) that a suit shall not be defeated because of misjoinder of parties. It states- "A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it." In the record depicts that the tribunal held that Bashnet Village Council, which was the fourth respondent, was mis-joined because there were no allegations against her by Pius Barnabas. It concluded that Bashnet Village Council had nothing to defend. The tribunal made that finding after, Bashnet Village Council, which was the fourth respondent had raised a preliminary objection that Pius Barnabas had sued it

wrongly without issuing a notice to sue as per the law. The tribunal ordered Pius Barnabas to relinquish his claims if any, against Bashnet Village Council. Pius Barnabas amended the application to remove Bashnet Village Council. The appellants are complaining that Bashnet Village Council was a necessary party, thus, it was wrong for Pius Barnabas not to make her a party. The term necessary party is defined in the Black's law Dictionary, 8th Edition to mean as "a party who, being closely connected to a lawsuit 8 should be included in the case if feasible, but whose absence will not require dismissal of the proceedings "The court of appeal in the case of Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others, Civil Application No. 68 of 2011 made a distinction between necessary and non- necessary party when considering circumstances upon which a necessary party ought to be added in a suit, and stated that - "...an intervener, otherwise commonly referred to as NECESSARY PARTY, would be added in a suit under this rule ...even though there is no distinct cause of action against him where: -

- (a) NA
- (b) his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit." Again, in the case of Abdullatif Mohammed Hamis v. Mehboob Yusuf Osman and Another, (Civil Revision No. 6 of 2017) [2018] TZCA25 when the court was faced with an akin situation, stated that- "The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors 9 for such determination include the particulars of the non-joinder party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed." Being guided by the above authorities and having reflected on the matter at hand, it is my settled view that, Bashnet Village Council was a necessary party who ought to have been joined in the proceedings. This is because Bashnet village Council was required to answer the question how she obtained the land in dispute and whether the disputed land was the same land in Land Application No. 45/2017. Bashnet village Council was required to establish its title to the disputed land and the tribunal would determined the rights of Hhayaa Nada Gitenay against Bashnet village Council. It would also have determined rights of Pius Barnabas against Hhayaa Nada Gitenay. Thus, if Bashnet village Council, Hhayaa Nada Gitenay and Pius Barnabas were parties. Thus, the tribunal would have had a better chance to determine who was the rightful owner and the rights of each person. I uphold the second ground of appeal, that the suit was bad in law for misjoinder. The remedy for misjoinder is not to defeat the suit but to order the party who was not joined to be joined as party. See Farida Mbaraka 10 and Farid Ahmed Mbaraka v. Domina Kagaruki, Civil Appeal No. 136 2006 where after detecting that the necessary party was not joined in to the suit, remitted the matter to the trial court with directions that hearing should proceed after joining a necessary party. Given the fact that I have upheld that first ground of appeal that the suit was bad in law for being res-judicata, I will abstain from ordering the non-joined party to be joined. Did the tribunal fail to evaluate the appellant's evidence? Lastly, the appellants complained that the tribunal did not consider

their evidence. The respondent opposed this complaint. I will not dwell on this complaint. I totally agree that the tribunal did not consider or evaluate the appellant's evidence. The tribunal put much emphasis on the contention that Pius Barnabas bought the disputed land and he had evidence to that effect. It did not consider the appellants' evidence that the seller had disputed title. The seller did not testify to establish his title to the land he sold to Pius Barnabas. If the seller's title was not proved the buyer could have obtained good title. The tribunal did not consider the maximum that "Nemo dat quod non habet" that is a person cannot pass a better title than what he has. 11 The fact that the trial tribunal did not consider the appellants evidence is no fact as the first appellant court has a duty to re-consider the evidence on record and if necessary to reach a conclusion different from the trial court. I have re-considered the evidence on record to the extent shown above. Thus, the appellants' complaint has been addressed. The appellants' evidence was heavier than that of the respondent. The respondent did not prove his title to the disputed land. In the upshot, I allow the appeal, since I have upheld ground of appeal that the suit or the application is res-judicata, the remedy available is as I hereby do quash proceedings, set aside the judgment and its subsequent orders. Since the application was wrongly filed, I dismiss the application or the suit in its entirety. The appellants are awarded costs. I order accordingly. Judge 12 Court: Judgment delivered in the presence the first appellant and the respondent and in the absence of the second appellant. B/C. Ms. Fatma (RMA) present. John R. Kahyoza Judge

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