

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 15 OF 2020

(Arising from Land Application No. 74 of 2019 in District Land and Housing Tribunal
for Mtwara at Mtwara)

ABDALLAH NAMBEDA.....1ST APPELLANT

ZAIDATU SWALEHE.....2ND APPELLANT

MAHAMOUD SWALEHE.....3RD APPELLANT

HAWA SWALEHE.....4TH APPELLANT

VERSUS

ZAINABU BAKARI NAMMADILA.....RESPONDENT

JUDGMENT

22 Sept. & 26 Nov. 2020

DYANSOBERA, J.:

This is appeal assails the ruling and drawn order of the District Land and Housing Tribunal for Mtwara in Land Application No. 74 of 2018 delivered on 15th November, 2019 on a point of law raised point of law

raised *suo motu* whereby the appellants' appeal was, on 15th November, 2019, struck out for being *res judicata*. The appeal is premised on the four grounds. In the 1st and 2nd grounds of appeal the appellants are faulting the District Land and Housing Tribunal for deciding that the suit was *res judicata* in that the previous suit was not heard on merit but the matter was nullified and ordered to be heard afresh after it was found that Chikongola Ward Tribunal was not properly constituted. The complaint in the 3rd ground of appeal is that the Tribunal erred in declaring the suit to belong to the respondent while the respondent had already been given her portion by her late husband who is the appellants' father.

A brief background of the matter is as follows. In 2016, Zainab Bakari Nammadila, the present respondent sued Zaidatu Swalehe, the present 2nd appellant in Land Case No. 52 of 2016 at Chikongola Ward Tribunal disputing ownership of the farm at Lilandi Nyakayaka village. The Ward Tribunal found in favour of the respondent by declaring her the rightful owner of the suit land. Dissatisfied, the 2nd respondent appealed to the District Land and Housing Tribunal vide Land Appeal No. 100 of 2017. On 26th January, 2018 the Tribunal nullified and quashed the proceedings and decision of Chikongola Ward Tribunal on the ground that it was not properly/legally constituted.

The respondent obliged and went back to Chikongola Ward Tribunal and filed the suit (Land Case No. 86 of 2018) again against the 2nd respondent. The 2nd respondent refused to be heard by the Tribunal on the ground that she had engaged an advocate and therefore, did not enter appearance. Matter was heard ex parte and on 30th April, 2018 the respondent carried the day. On 28th August, 2018 the appellants knocked at the door of the District Land and Housing Tribunal but the District Land and Housing Tribunal noted that the suit was *res judicata* and struck it.

Before this court, parties appeared in person and were unrepresented. The appellants argued in support of the appeal and the respondent argued in opposition.

I have considered the rival arguments and the record of finding of the lower Tribunal.

the issue is whether the suit before the District Land and Housing Tribunal was *res judicata*.

In **Black's Law Dictionary** (Ninth) Edition *res judicata* is defined as follows:

"An affirmative defence barring the same parties from litigating a second law suit in the same claim, or any other claim arising from the same transaction or series of transactions and that could have been raised but was not raised in the first suit."

The doctrine of res judicata was rightly invoked in the suit, the subject of the present appeal. As rightly pointed out by the learned Chairman, section 9 of the Civil Procedure Code [Cap. 33 R.E.2002] was undoubtedly applicable in the situation before the Tribunal. It is provided under that section thus:

“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 of competent jurisdiction to try such subsequent suit or the suit in which such issue has been subsequently raised and suit has been heard and finally decided by such court.”

There are five essential requirements that have to be proved in order to establish the doctrine of re-judicata. These requirements are summarized in **Mulla The Code of Civil Procedure 16th Edition Vol. 1** at page 173 as follows:-

- 1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue (actually or constructively) in the former suit*
- 2. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.*
- 3. The parties aforesaid must have litigated under the same title in the former suit.*
- 4. The court which decided the former suit must have been a court competent to try it*
- 5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.*

These principles were reiterated by this court in the case of **Unyangala Enterprises Ltd versus Tanzania Breweries Ltd and National Bank of Commerce (1997) Ltd**: Civil Case No. 306 of 2000 and confirmed by the Court of Appeal in Civil Appeal No. 91 of 2014 between **Ester Ignas Luambano versus Adriano Gedam Kipalile**. In that case, the Court of Appeal was interpreting the provisions of section 6 (1) of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar which is in pari materia with section 9 of the Civil Procedure Code [Cap.33 R.E. 2002].

The Court of Appeal the case of **Kamunye and others v The Pioneer General Assurance Society Limited** (1971) EA 263 enunciated the principle of res judicata where it stated thus:- "*The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time – Greenhalgh Mallard, (1947) 2 ALL ER 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply-Jadva Karsan Harnam Singh Bhogal (1953), 20 EACA 74.*

The same position had been adopted in the case of **Mandavia versus Singh** [1965] EA 118 at 121 where it was stated:

"In determining whether or not the case is barred by "res-judicata", the test is whether the plaintiff in the second suit is trying to bring in another way, in the form of new cause of action a transaction which has already been

presented before a court of competent jurisdiction in an earlier proceedings which have been adjudicated upon”.

This is exactly what the appellants were trying to bring in another way the matter which had already been determined. This is so because what he had raised had already been determined by the Tribunals of competent jurisdiction that is the Ward Tribunal. The appellants’ argument that the Ward Tribunal had no jurisdiction has no basis because that decision is still valid and has not been varied. The Court of Appeal sitting at Mwanza in the case of **General Manager K.C.U. (1990) Ltd v. Mbatama Rural Primary Cooperative Society**, (Bkb) Civil Application No. 1 of 1999 had occasion to comment on the enforceability of the court’s decision even where its correctness is questionable and held:

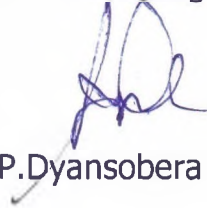
*a court decision though its correctness may be questionable remains an enforceable court’s order unless and until, through appropriate steps, has been set it aside, if in fact it is defective. This is the position of the court according to its decision in the case of **General Manager K.C.U. (1990) Ltd v. Mbatama Rural Primary Cooperative Society**, CAT, (Bkb); Civil Application No. 1 of 1999 at Mwanza (unreported).*,

As rightly held by the Honourable Chairman, if the 2nd respondent felt that the Ward Tribunal had no jurisdiction, she duty bound to go back to the said Tribunal and apply to have it set aside. She did not do that.

Besides, as correctly observed by the Chairman at page 5 of the typed judgment of the Tribunal, parties at Chikongola Ward Tribunal were Zainabu Bakari Nammadila and Zaidatu Swalehe. The dispute was on ownership of cashewnut farm located at Nakayaka village. Before the said Tribunal the respondent was the same though the appellants were the 2nd respondent and others but the subject matter was the same cashew nut

farm located at Nakayaka whose ownership had been determined by Chikongola Ward Tribunal. The matter before the District Land and Housing Tribunal in the impugned matter was, therefore, res judicata.

Having considered all this I am satisfied that the first appellate District Land and Housing Tribunal rightly decided the matter according to the law and I find nothing to fault its finding. The appeal fails and is dismissed costs.



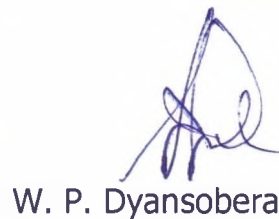
W.P.Dyansobera

Judge

26.12.2020

This judgment is delivered under my hand and the seal of this Court on this 26th day of December, 2020 in the presence of appellants and the respondent

Rights of appeal to the Court of Appeal explained.



W. P. Dyansobera

Judge