

IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CIVIL APPEAL NO.33 OF 2016

FROM CIVIL CASE NO.60 OF 2015 OF THE LAND TRIBUNAL

1. SADA RAMADHAN MOHAMMED)
2. HAMOUD RAMADHAN MOHAMMED) APPELLANTS

VERSUS

SIWEMA OTHMAN MWINYI) RESPONDENT

JUDGEMENT

BEFORE: HON. ABDUL-HAKIM A. ISSA, J

This appeal arises from the decision of the learned Magistrate of the Land Tribunal, Hussein Makame (RM) in Civil Case No. 60/2015 at Vuga, Zanzibar. This case has a long history and in order to appreciate the present appeal we have to look at this history. The dispute in this matter is a plot of land situated at Tunguu, in the Southern Region of Unguja. In 1993 Othman Mwinyikondo Mwarabu filed a Civil Suit in the Primary Court against five Defendants: (1) Iddi Ramadhan Chum, (2) Idrissa Chum Pandu, (3) Shaaban Iddi, (4) Ahmed Abdalla Abeid, and (5) Ramadhan Moh'd. The Plaintiff was claiming that his plot of land was trespassed by the above five defendants, but during the site visit the 2nd and 4th Defendants were withdrawn as they have been wrongly sued. Hence, the judgment was delivered by the Primary Court Magistrate in favour of the three Defendants. The decision was that the three Defendants also own plots of land which are different from that of the Plaintiff. The Plaintiff, Othman Mwinyikondo aggrieved by that decision appealed to the District Court where he lost. He appealed again to the Regional Court in Civil Appeal No. 42 of 1995 where he also lost, and finally appealed to the High Court in Civil Appeal No. 31 of 1996, where he also lost.

In 2013, the children of Othman Mwinyikondo namely, Mwinyikondo Othman Mwinyikondo and Siwema Othman Mwinyikondo instituted Civil Case no. 137 of 2013 against Ramadhan Moh'd Said and Khamis Khatib Bhai at the Land Tribunal. This case has not been heard yet, but the Plaintiffs are claiming that after the death of Othman Mwinyikondo, Ramadhan Moh'd Said, who was one of the three defendants in the earlier case which was finally decided by the High Court, is alleged to have been illegally possessing the same plot of land and later sold the same to Khamis Khatib Bhai.

In 2015 Sada Ramadhan Mohamed and Hamoud Ramadhan Mohamed (the Children and Administrator of estate of Ramadhan Mohamed) instituted Civil Suit No. 60 of 2015 against Siwema Othman Kondo. The Plaintiffs are claiming that the Defendant has trespassed in their plot of land and uprooted various trees and build a foundation in their plot of land. Following the filing of this Civil Suit No. 60 of 2015 the Defendant filed her Written Statement of Defence and raised five preliminary objections on the points of law, which can be summarised as follows:

- a) The suit is res-judicata (following the decision of the Court in Civil Case no. 53 of 1986 and the following appeals).
- b) The case is res subjudice (following the institution of Civil Case No. 137 of 2013)
- c) The Plaintiffs lacks locus standi after selling their plot to Khamis Khatib Bhai
- d) The Court lacks jurisdiction to entertain the matter, and
- e) The Suit lacks cause of action.

The above preliminary objections were heard by the learned magistrate of the Land Tribunal and delivered his ruling on 12.2.2016. In his ruling he upheld the preliminary objections and dismissed the suit. The Plaintiffs were aggrieved and hence, they

appeal to this Court. In this Appeal the Plaintiffs/ Appellants filed a memorandum of appeal which contains the following five grounds of appeal:

- 1) The Trial Magistrate of Land Tribunal erred in law and fact in holding the suit is res-judicata.
- 2) The Trial Magistrate of Land Tribunal erred in law and fact in holding the suit is res-subjudice.
- 3) The Trial Magistrate of Land Tribunal erred in law and fact in holding that the Appellants'/ Plaintiffs have no locus standi.
- 4) The Trial Magistrate of Land Tribunal erred in law and fact in holding the land tribunal has no original jurisdiction to hear and determine this suit.
- 5) The Trial Magistrate of Land Tribunal erred in law and fact in holding that the Appellants'/ Plaintiffs have no cause of action.

In the hearing of this appeal the Appellants were represented by learned advocate Mr. Othman Ali Hamad, the Respondent was represented by learned advocate Ms. Moza Moh'd Khamis.

With respect to the first ground of appeal, the learned advocate for Appellants Mr. Othman submitted that the case was not res-judicata. The learned RM did not investigate the issue of res-judicata which should follow section 6 of CPD. He cited the Civil Procedure – Student Manual which was written by B.D. Chipeta, which explains what is res-judicata. In that book it was explained that the case should include same parties, same subject matter and same title and the decision should be final. He added that in page 4 of the ruling the RM said the case was res-judicata, but the said case was not attached to WSD. He submitted that the issue of res-judicata was not complied with.

Ms Moza on the other hand agreed with the decision of the learned RM and opposed these grounds of appeal. With respect to the first ground of appeal she submitted that section 6 of CPD was complied with; the parties were the same in the two cases. The first case was filed by Othman Mwinyikondo Mwarabu against five

defendants whom one of them was the father of the Appellants. On page 9 of the proceedings, it is shown that the case ended and the father of Appellants won the case.

With respect to the second ground of appeal, Mr. Othman submitted that the issue of res-subjudice arise when there are two cases proceeding and one is stayed. In this case that was not a situation as there was no other case pending. He added that the case mentioned has no connection with this as the parties were different. In that case the plaintiffs are Mwinyikondo Othman Mwinyikondo and Siwema Othman Mwinyikondo while in this case the plaintiffs are Sada Ramadhan and Hamoud Ramadhan. Ms. Moza on the other hand submitted that they showed before Land Tribunal that there was a case going on – Civil Case no. 137 of 2013, Siwema Othman Mwinyikondo V. Ramadhan Mohammed and Khamis Khatib Bhai.

With respect to the third ground of appeal, Mr. Othman submitted that locus standi cannot stand as P.O. the Court needs to hear the parties and then determine the matter. He cited the case of **Petromark Africa Ltd & 5 Others V. Kenya Commercial Bank Ltd** [2011] Civil Appeal No. 134 of 2011 (Unrep.) The Court held that P.O cannot be raised in three circumstances: (1) where there is a dispute of facts which needs to be decided by the Court, (2) in a situation where the Court is required to exercise judicial discretion, and (3) where there is no pure point of law, which, if argued may dispose of the suit. He submitted that this issue is not a pure point of law.

Ms. Moza submitted that in order to be able to file a suit the Appellant must had ownership of the land. In this case the land has been sold to Khamis Khatib Bhai by the father of the Appellants; hence, they do not have a locus standi.

With respect to the fourth ground of appeal Mr. Othman submitted section 13 of the Land Tribunal Act talks about jurisdiction of the Court which is to entertain land disputes. He submitted that the learned RM was wrong in upholding this P.O. With respect to this issue, Ms. Moza conceded that section 13 empowers the Land Tribunal to hear various land issues. But due to the amendment made in 2008 some matters have been removed. In this case the issue is inheritance of Ramadhan

Mohammed and the proper Court is Kadhi's Court. She added that the Wakf Commission is the one empowered to look after the property of the deceased, but it has delegated that power to the Appellants which is ultra-vires. She cited the case of **RAJU RARIOTOPHAN V. AC** (1970) Appeal Case 972 which talks about ultra-vires.

With respect to the last ground of appeal, Mr. Othman submitted that it was not proper to uphold that P.O. the CPD said if the plaint does not disclose cause of action, it should be rejected and not dismissed. He cited the case of **John M. Byombalirwa V. Agency Maritime International Tanzania Ltd.** [1983] TLR 2 where the Court directed that when a case has no cause of action, it should be rejected and not dismissed. He prayed to the Court to set aside that decision and ordered the case to be heard on merit.

With respect to this ground of appeal, Ms. Moza submitted that it is true that the suit has no cause of action. The Appellants cannot claim ownership of the land which has been sold by their father to another person long time ago. Further, they do not have a document showing their title of land. She prayed that the appeal should be dismissed with cost.

Mr Othman responded on the issue of jurisdiction and submitted that the case involves land dispute and not inheritance. He added that the Wakf Commission can delegate its power to another person in accordance with section 34 of the Wakf Commission Act.

We are now turning to the grounds of appeal and the first ground of appeal is that dealing with the issue of res-judicata. In fact, our jurisdiction is teeming with authorities regarding res-judicata. The following are examples of these authorities:

- a) **STEPHEN MASATO WASIRA V. JOSEPH SINDE WARIOBA AND THE AG** [1999] TLR 334,
- b) **PENIEL LOTTA V. GABRIEL TANAKI AND OTHERS** [2003] TLR 312
- c) **UMOJA GARAGE V. NBC HOLDING CORPORATION** [2003] TLR 339.

To begin with section 6 of the Civil Procedure Decree lays down the rule about res-judicata. It provides:

"6. (1) 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 to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by court.

(2) For the purpose of this section –

(a) "former suit" denotes a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto;

(b) The competence of a court shall be determined irrespective of any provision as to a right of appeal from the decision of such court;

(c) The matter referred to in this section must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by the other;

(d) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in suit;

(e) Any relief claimed in the plaint, which is not expressly granted by the Decree, shall for

the purposes of this section, be deemed to have been refused;

(f) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating".

This provision contemplates five conditions, which when co-existent, will bar a subsequent suit. The conditions are:

- (i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in the former suit;
- (ii) The former suit must have been between the same parties or privies claiming under them;
- (iii) The parties must have litigated under the same title in the former suit; (iv) the Court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.

To start with the first condition, the matter in issue in the case before Primary Court is that the Plaintiff, Othman Mwinyikondo Mwarabu was claiming to be the owner of the plot of land situated at Tunguu, which he purchased from Keserran Gopal Samji in 1965. In 1991 he started to make a follow up of that plot of land and instituted a suit in 1993 claiming that there are five Defendants who have trespassed in his land. Among the defendants is Ramadhan Mohammed (5th Defendant). The issue in the Land Tribunal (the present case) which gave rise to this appeal is that the children of the 5th Defendant are litigating that the children of the Plaintiff have trespassed in the same plot of land. It is clear that these issues are one and the same; in the

former suit the plaintiff is claiming to be the owner of that plot, which has been encroached by the Defendant. In the present case the children of the 5th Defendant are claiming the children of the Plaintiff have trespassed in the same plot of land. This means they are claiming they are the owner of that plot of land. Hence the issue in both cases is one which is the ownership of the plot of land.

The second condition is that the former suit must have been between the same parties or privies claiming under them. This is very clear, in the former suit the parties were fathers, in the present suit the parties are children of those fathers. In addition in the former suit there were four more parties, two were withdrawn as they have been erroneously joined in the suit. Hence, the decision was in favour of the three defendants; that they all have their own plots of land. In the present case the children of the 5th Defendant are the one claiming encroachment on that plot of land which has been done by the child of the Plaintiff. Hence, this condition also has been complied. The matter falls under the above explanation (vi) of section 6; they are all deemed to claim under the persons so litigating. In the case of *Peniel Lotta V. Gabriel Tanaki and Other* [2003] TLR 312 in the similar circumstances the Court of Appeal held that the Appellant is deemed to claim under his mother in that suit and further held that the explanation (vi) to section 9 (similar to above explanation (vi) of section 6) is not confined to representative suits.

The third condition is that the parties must have litigated under the same title in the former suit. This has been covered in the first condition; the former suit and the present suit are all based on the plot of land situated at Tunguu and the claim is the ownership of that plot. In the former the parents were litigating, and in the subsequent case the children are litigating. Hence, this condition is complied.

The fourth condition is that the Court which decided the former suit must have been competent to try the subsequent suit. The former suit was tried by the Primary Court in 1993, the present suit was tried by the Land Tribunal in 2015. Although the Courts are different but the Primary Court still would have been competent to try the suit if it was not for the establishment of the Land Tribunal in 1994, which took the jurisdiction of all land disputes. Hence, the Primary Court would have been

competent to try the suit. Sarkar on Code of Civil Procedure, 9th edn on page 99 comments on the similar provisions as follows:

“Competent to try such subsequent suit” refers to the jurisdiction of the court at the time when the former suit was brought and not to its jurisdiction at the date of the subsequent suit. If at that time the former court would have jurisdiction to try the suit if it were instituted, the decision of that court would be res judicata, although when the subsequent suit is brought it is beyond the jurisdiction of the former court on account of rise in the value of property, over-valuation or any other cause”.

The last condition is that the matter in issue must have been heard and finally decided in the former suit. As we have seen above the issue regarding ownership of the plot of land has been heard and finally decided. The High Court in its decision dismissing the appeal, Kannonyele, J. held:

“ All in all we say appellant had the duty to prove not only his alleged title over the property but a better title over and above that of his opponents. With his uncertainty as to identify an exact location of the property, and with his complacency in laying his claim over the shambas in accordance with the law, appellant cannot be said to have discharged his duty of establishing both the title and a better title too even on the balance of probabilities as is required in civil proceedings. It follows therefore, that this being a third appeal, I see no reason to warrant an interference of the three concurrent

***judgments and decree of the courts below....
this appeal is therefore dismissed with costs in
this court and in the courts below".***

This condition has also been complied with. It is submitted that before holding that the suit is res-judicata the five conditions must be co-existent. In the ruling in question the learned RM declared the suit as res-judicata, but in his analysis erred by not discussing all five conditions applicable for a case to be declared res-judicata. But since the analysis made by this Court found that the above five conditions have been complied with I find no reason to interfere with the decision of the learned RM dismissing that suit. Hence, I won't labour further with the grounds of appeal raised and argued in this appeal. The issue of res- judicata is sufficient to dispose the matter. Hence, the suit before Land Tribunal is res-judicata and this appeal, therefore is dismissed with cost.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
5/9/2016

COURT

This judgment was delivered in chambers on this 5th day of September, 2016 in the presence of advocate for Appellants Mr. Salum Khamis Bakar and in the presence of Respondent and her advocate, Ms. Moza Moh'd Khamis.

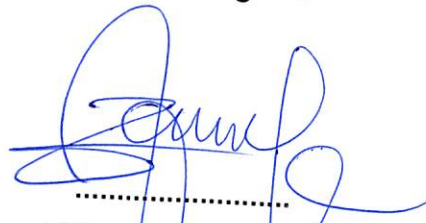
(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
5/9/2016

COURT

The right of appeal is explained.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
5/9/2016

I certify that this is a true copy from the original.



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YESAYA KAYANGE
DEPUTY REGISTRAR
HIGH COURT ZANZIBAR

/HALLY/