THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY OF MBEYA
AT MBEYA
LAND APPEAL NO. 85 OF 2018.

(Originating from Application No. 7 of 2018, in the District Land and Housing Tribunal for Kyela, at Kyela)

BOIDI MWANSEPE.....APPELLANT

VERSUS

AMOSI ANDILILE MWAKYUSA.....RESPONDENT

JUDGMENT

18/02 & 15/04/2021.
UTAMWA, J:

In this first appeal, the appellant **BOIDI MWANSEPE** challenged the judgment dated 22nd October, 2018 (impugned judgment) of the District Land and Housing Tribunal for Kyela, at Kyela (the Kyela DLHT) in Application No. 7 of 2018. The respondent, **AMOSI ANDILILE MWAKYUSA** contested the appeal.

The brief background of this matter goes thus; that, the respondent (Amosi) sued the appellant (Boidi) before the DLHT claiming that he had trespassed his land (the suit land). Before the DLHT the respondent claimed that, he had bought the suit land from one Tamimu Kyeja (now deceased). However, before his death, the said Tamimu (the deceased) was engaged in a dispute with the appellant (Boidi), but the deceased

worn the case. That prior case started in a ward tribunal and ended as Appeal No. 60 of 2014 before the Rungwe District Land and Housing Tribunal (the Rungwe DLHT). He thus, believed that, the deceased was the true owner of the land, hence the appellant was trespasser.

In this ruling I will thus, refer to the matter between the respondent and the deceased which ended in the Rungwe DLHT as the previous or former matter. I will also refer to the matter which staged in the Kyela DLHT and from which the appeal at hand originated (i. e between the appellant and respondent herein) as the subsequent matter or matter under discussion or matter under consideration. This is for purposes of an easy distinction of the two matters.

On his part, the appellant claimed before the Kyela DLHT (in the subsequent matter which led to this appeal) that, he had inherited the land from his father as the clan land. He also disputed the sale of the land between the deceased and the respondent.

Through the impugned judgment, the Kyela DLHT held in the subsequent matter that, the suit was *res judicata*. It however, went further and ordered that, the application was allowed and it declared the respondent the lawful owner of the suit land.

The appellant herein was aggrieved by the said impugned judgment hence this appeal. In his memorandum of appeal before this court, he preferred four grounds of appeal couched in the layman's language, but which had the following meaning:

1. That, the Kyela DLHT erred in law and facts in finding that the matter was *res judicata* since the decisions of the ward tribunal

and the Rungwe DLHT in the previous matter were null and void following lack of pecuniary jurisdiction on the part of the ward tribunal.

2. That, the Kyela DLHT erred in law and facts in believing the sale agreement between the deceased and the respondent though there was no sufficient evidence supporting it.
3. That, the Kyela DLHT erred in law and facts in believing on the will purportedly made by the deceased though the same was not supported by evidence.
4. That, it was legally erroneous for the same chairman to preside over both appeals, before the Rungwe DLHT and before the Kyela DLHT.

Owing to the above listed grounds of appeal, the appellant urged this court to grant him the following reliefs; to declare him the lawful owner of the suit land, to condemn the respondent to pay costs and to grant him any relief this court will deem fit.

As hinted earlier, the respondent contested this appeal. Following the consensus by the parties, this court directed, the appeal to be argued by way of written submissions. It must however, be noted that at the time of hearing, the respondent had died and his administratrix of estate, one Felista Amos Mwakyusa, defended the matter on his behalf. Both sides of the case were not legally represented.

It must further be noted that, though the parties agreed to argue the appeal by written submissions, and though the court directed so, the appellant did not file his submissions. He instead, filed what he called a

"REJOINDER." In that document he essentially reiterated the contents of his memorandum of appeal.

Owing to the course taken by the appellant the respondent's representative filed submissions urging this court to dismiss the appeal. She alternatively argued that, the Kyela DLHT was right in holding that the matter before it was *res judicata* and could not be adjudicated.

In my view, the interests of justice demand that, this appeal should be considered on merits thought the appellant did not file proper written submissions. This view is based on the grounds that, both parties are laymen. Again, the principle of overriding objective compels this court to take that course considering the circumstances of the case itself. This principle was recently underscored in our law through the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). The principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice; see section 6 of Act No. 8 of 2018 that amended the CPC. The amendments added new sections 3A and 3B to the statute. The principle was also underscored by the Court of Appeal of Tanzania (CAT) in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported Judgment dated 10 October, 2018). This precedent construed section 45 of the Land Disputes Courts Act, Cap. 216, R. E. 2019.

I will now test the first ground of appeal. If need will arise, I will also test the rest of the grounds. Regarding the first ground of appeal the issue is *whether or not the Kyela DLHT was justified in deciding the issue of res judicata*. The appellant in his petition of appeal complained that, the Kyela

DLHT was not justified to find the matter *res judicata* because, in the previous case, the ward tribunal lacked pecuniary jurisdiction since the subject matter of the suit is 10 Million Tanzanian shillings (Tshs.). It follows thus, that both the decisions of the ward tribunal and of the Rungwe DLHT in the former matter were null and void. On his part, the respondent advocated for the impugned judgment arguing that, the Kyela DLHT was justified to hold that the matter was *res judicata*.

In my view, the circumstances of the matter at hand does not encourage deciding the issue affirmatively on the following grounds: in the first place, it is clear according to the impugned judgment that the Kyela DLHT found the matter as *res judicata* basing on section 9 of the Civil Procedure Code, Cap. 33 R. E. 2002 (now R. E. 2019), hereinafter called the CPC; see at page 3 of the judgment. These provisions are couched in a mandatory form as follows, and I will quote them verbatim for the sake of a readymade reference:

> "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 subsequent suit or the suit in which such issue has been The Civil Procedure Code [CAP. 33 R.E. 2019] 44 subsequently raised and has been heard and finally decided by such court."

In my concerted view, the provisions of the CPC just quoted above prohibit courts from entertaining any matter which is *res judicata*. It follows thus, that, an issue of *res judicata*, being a legal issue touching jurisdiction of the court, has to be raised by any party or by the court *suo motu*, before the matter is actually entertained by the court. The issue has to be

considered and determined by the court upon the parties addressing it on the issue. It follows that, upon finding that the matter is *res judicata*, the court is enjoined to strike out the matter for incompetence and for want of the requisite jurisdiction to entertain it.

In the present matter however, the record clearly shows that, the Kyela DLHT heard the parties on merits in which both sides gave their respective evidence on oath. It then fixed a date of judgment and pronounced it as shown previously. It is thus, lucid that, the DLHT raised the issue of *res judicata* when it posed for composing the impugned judgment. It raised the issue *suo motu* and determined it without firstly hearing the parties on that said issue. It then went on giving orders in favour of the respondent as demonstrated earlier.

It therefore, goes without saying that, the Kyela DLHT offended the section 9 of the CPC quoted above by entertaining the subsequent matter which it held to be *res judicata*. Again, it is obvious that, the same DLHT violated the principles of natural justice by denying the parties of their right to be heard on the said issue of *res judicata*. There was therefore, no fair trial to the parties, especially the appellant against whom the decision was made. It is our law that, a decision which offends the principles of natural justice cannot stand. Again, a decision reached through a denial of the right to fair trial cannot survive. This is because, the right to fair trial is fundamental and corner stone of adjudication of justices; see a decision by the CAT in the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported).

The law further guides that, where in composing a decision a court discovers an issue which was not addressed by the parties, it is enjoined to re-open the proceedings and invite the parties to address it on the discovered issue before it determines it; see the decisions by the CAT in the cases of **Zaid Sozy Mziba v. Director of Broadcasting, Radio Tanzania Dar es salaam and another, CAT Civil Appeal No. 4 of 2001, at Mwanza** (unreported) and **Pan Construction Company and Another v. Chawe Transport Import and Export Co. Ltd, Civil Reference No. 20 of 2006, CAT at Dar es Salaam** (unreported). This guidance by the CAT was meant to avail the parties with the right to be heard regarding the issue discovered by the court and thus, to promote the parties' rights to fair trial. The Kyela DLHT ought to have thus, complied with this particular guidance of the CAT to avoid violating the above highlighted important principles of adjudication. It is more so because, the decisions by the CAT just cited above constitute the law of this land and are binding to the DLHT and this court as courts which are subordinate to the CAT which is also the highest court in our court system. This is vide the doctrine of *stare decisis*. The position of the law was underscored by the CAT in the case of **Jumuiya ya Wafanyakazi Tanzania Vs. Kiwanda cha Uchapishaji cha Taifa [1988] TLR 146.**

Moreover, I am settled in mind that, even if it is presumed (without) deciding that the Kyela DLHT properly held that the subsequent matter before it was *res judicata*, it could not be justified to grant the application and declare the respondent (who was the plaintiff before it) the lawful owner of the suit land. This is because, once a matter is declared res

judicata, it means the same is incompetent and cannot be re-tried as per section 9 of the CPC quoted above. The only legal remedy for a matter which is *res judicata* is to strike it out as I envisaged previously. In other words, a *res judicata* cannot give any substantive right to any party.

Furthermore, since the respondent was the plaintiff before the Kyela DLHT, and since the said DLHT had found the matter *res judicata*, it could not again decide the matter in favour of the same respondent. It could only strike it out with costs to the appellant since costs follow event, unless there were good reasons for apportioning the costs.

Owing to the reasons shown above, it cannot be argued that, the Kyela DLHT rightly decided the issue of *res judicata* for the reasons shown above though the reasons are slightly different from those adduced by the appellant. The irregularity is so serious and has caused a failure of justice. The impugned judgment cannot thus, be saved by section 45 of Cap. 216 (supra). These provisions essentially guide that, appellate or revisional courts should not reverse decisions of ward tribunals or District Land and Housing Tribunals for errors that do not cause failure of justice. These provisions were underlined by the CAT in the **Yakobo Case** (supra).

Having observed as above, I answer the issue regarding the first ground of appeal negatively that, the *Kyela DLHT was not justified in deciding the issue of res judicata*. I thus, uphold the first ground of appeal. This finding makes it unnecessary to test the rest of the grounds of appeal since it is capable of disposing of the entire appeal. I will not thus, consider the other grounds of appeal.

Due to the reasons shown above, I will not grant the reliefs sought by the appellant despite the fact that I have upheld the first ground of appeal. Instead, I make the following orders: I nullify the proceedings of the Kyela DLHT in the subsequent matter under discussion. I accordingly set aside its impugned judgment. If the respondent's administratrix of estate still wishes, she may re-file the matter before any competent tribunal in defending the estate of the late respondent. In case she does so, and if the issue of *res judicata* will raise, the law highlighted above shall be followed by that trial tribunal. In case the matter is brought before the same Kyela DLHT, the same shall be entertained by a different chairman and different set of assessors so as to test justice from fresh judicial minds. Each party shall bear his/her own costs since the Kyela DLHT was instrumental in committing the blunder that has led to the above decision. It is so ordered.

J.H.K. Utamwa

Judge

15/04/2021.

15/04/2021.
CORAM; JHK. Utamwa, J.
Appellant: present.
For Respondent: present.
BC; Ms. Gaudensia, RMA.

Court: Judgment delivered in the presence of both parties, in court, this 15th April, 2021.

JHK. UTAMWA.
JUDGE.
15/04/2021.