IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 49 OF 2021

JALIBU MRISHO MWENE MILAO

(Administrator of the estate late Mrisho Jalibu) ..... **PLAINTIFF**

VERSUS

HON. ATTORNEY GENERAL & OTHERS ..... DEFENDANT

RULING

Date of last Order 17.09.2021

Date of Ruling 22.09.2021

A.Z.MGEYEKWA, J

The Plaintiff JALIBU MRISHO MWENE MILAO (The Administrator of the estate of late Mrisho Jalibu), brought this action against the Defendants' Hon. Attorney General & 7others on the ground that the 8th defendant

unlawfully obtained Certificate of customary Right of Occupancy **No.24BGM801** from **"Halmashauri ya Kijiji cha Kiwangwa BAGAMOYO, dated 11/08/2014"** covering a portion of the yet to be divided Estate of the late Mrisho Jalibu (hereinafter called "the suit property" (4.5) acres estimated at the tune of 45,000,000.00.

When the matter came for hearing on 30/08/2021 the 8th respondent among other things on his pleadings raised 4 preliminary objections towards the applicant's pleadings as follows: -

1. *That the suit is bad in law for being sued a wrong person*
2. *The suit if filed time burred(sic)*
3. *The suit res-judicata (sic)*
4. *The suit offends the mandatory requirements of section 6 (3) and 4 of Cap 5, The Government (Urban Authorities) Act amended by the Written laws (Miscellaneous Amendments) No. 1 of 2020.*

All of the pleadings were by way of written submissions in which the applicant was represented by Benard Mbakileki, learned Advocate, whereas the 1st,2nd, 3rd,4th, 5th, 6th, and 7th defendants, despite the fact that were all served with summons but did not enter an appearance, while the 8th defendant appeared in person. Therefore, the matter proceeded *exparte* against them.

The respondent contended that the Applicant wrongly sued the Executive Director of Bagamoyo and Chalinze District Council instead of suing the District Council (registered authority) and that the office of Solicitor General cannot be sued on its own, since it is a unit of the Attorney General. He also complained that the application is time-barred since the applicant indicated that the dispute arose in 1997 when the 8th respondent purchased the disputed land from one Rajab Rashid Lungole. The respondent continued to complain that from 1997 to 2021 when this application was brought before this court, it is over 12 years contrary to the statutory requirement in lodging a land suit. It was his view that this application is brought contrary to section 22 Part I of the Schedule of the Law of Limitation Cap.89 [R.E. 2019] to which states that 22 "suit to recover land is 12 years".

On the 3rd ground, the respondent argued that this Land Application is res-judicata on the ground that the Plaintiff had sued the 8th defendant to recover the same suit property in 2013, the case that was decided by the competent court being Land Application No.111 of 2013 at the District Land Housing tribunal for Kibaha at Kibaha and the Plaintiff appealed to this court before Hon. Mwangesi being Land Appeal No. 126 of 2016.

More so, the respondent proceeded to cement on his argument that the rationale of res judicata are found in two latin Maxim;-

i. ***Interest rei publcase ut sit finis lium***" which means the interest of the general public requires that there must be an end to litigant and

ii. "***Nemo debet bis vecali, si constant curiae quad sit pro una et eadem causa"*** which means no man should be twice sued or twice prosecuted upon one of the same set of facts if there has been a final decision of competent court see Earl Jowit's Dictionary of English law, 1959 Edition)

He referred this court to section 9 of the Civil Procedure Code Cap.33 [R.E. 2019] which reveals the following essential elements of the Doctrine of Res judicata;

1. *That the judicial decision was pronounced by the court of competent jurisdiction.*
2. *That the subject matter and the issue decided are the same substantially the same as the issue in the subsequent suit*
3. *That the judicial decision was final and,*
4. *That it was in respect of the same- parties litigant under the same title.*

He stressed that the case at hand has offended the above elements of res judicata. The respondent opted not to submit on the 4th limb of his preliminary objections.

In response, the Plaintiff's Advocate contested each and every preliminary raised by the 8th defendant. The learned counsel for the Plaintiff on the 1st ground of preliminary objection argued that all 8 defendants, in this case, were properly sued as per section 30 (3) of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 and that equally to section 31 (1), (a) of the same Act, the office of the Hon. Solicitor General was properly joined in this suit because they were directly involved in the unlawful issuance of the Customary Right of Occupancy No. 24 BGM/801 dated 11th August, 2014.

The learned counsel for the Plaintiff was of the view that the remedy available if the other defendants were wrongly sued is to strike out the names of the unnecessary parties but not to dismiss the suit as erroneously prayed by the 8th Defendant. To fortify his position he referred this court to Order I Rule 10 (2) of the Civil Procedure Cap.33 [R.E. 2019].

He added that section 97 of the Civil Procedure Code Cap.33 [R.E. 2019] gives power to the court at any time to amend any defect or error in any proceeding in a suit in determining any issue.

On the second limb of the preliminary objection, the learned counsel for the Plaintiff argued that the suit is not time-barred since the letters of Administration were obtained on 13/10/2011 and the Plaintiff started claiming the 8th defendant trespassed his land. He further contended that one Rashid Simu who sold the suit land to the 8th defendant had no better title to pass to the 8th defendant whatsoever. Supporting his position, he cited the case of **Menard Theobard Bijuka & two others v Didas J.Tumaini,** Civil Appeal No. 49 of 2019 where the Court of Appeal of Tanzania at Bukoba (unreported) had this to say;-

> "*...we find the transaction between the respondent and the clan members of the deceased, if any, to have been invalid and therefore of no legal effect. It must be noted at once that until then, there was no administrator of the deceased's estate who could have transacted on her behalf. In such situation, the nemo dat quido non habet rule comes into play and if is anything to go by, it follows in our judgment that the respondent could not have purchased a piece of land from someone who had no legal mandate to deal with it...*"

The learned counsel for the Plaintiff added that the suit property was in issue far from 2005 when the Plaintiff was yet to be appointed as administrator of the Estate of the late Mrisho Jaribu.

He continued to argue that the learned counsel for that the upon obtaining the letters of Administration of late Mrisho Jalibu, he instituted Land Application No.111 of 2013 at the District Land and Housing Tribunal for Coastal Region at Kibaha against the 8th defendant for the unlawful occupation of the disputed land. He valiantly argued that the 8th defendant's erroneous claims the 12-year bar defense counted when determining the question of time limitation. Fortifying his position, he cited the cases of **Bhoke Kitang'ita v Makuru Mahemba**, Civil Appeal No. 222 of 2017, **Trustees of Holy Spirit Sisters Tanzania v January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016, CAT **(unreported)**, CAT quoted with approval the case of **Mbira v Gachuhi** [2002] E.A. 137 (HCK) in which again, reliance was made in the case of **Moses v Lovegrove** [1952] 2 QB 533 and **Hughes v Griffin** [1969] 1 All ER 460 which state 8 elements for one to claim adverse possession.

The learned counsel for the Plaintiff further submitted that these preliminary objections raised by the 8th defendant are total misconceived

as it is based on facts which are not ascertained and need to be proved by evidence from both parties which is contrary to the landmark decision in the case of **Mukisa Biscuits Manufacturing V West End Distributors Ltd** (1969) EA at pg 4 where the defunct Hon Court of Appeal had this to say:-

> *"a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"*

He added that in the light of the above-cited authorities, he urged this court to overrule the points of the preliminary and determine the case on merits.

On the 3rd limb of preliminary objection, the learned counsel for the Plaintiff submitted that the Land Application No. 49 of 2021 before this court is distinguishable from cited cases, considering the conditions by which the doctrine of res judicata applies. He argued that the Land Application No. 111 of 2013 and Land Appeal No. 126 of 2016 were filed in respect of recovering the suit land following 8th defendant's trespassed

into a piece of land of Mrisho Jalibu and not against the unlawful issuance of Customary Right of Occupancy No. 24 BGM/801 dated 11th August 2014 to the 8th Defendant which is a subject matter of this case.

The learned counsel for the Plaintiff did not end there, he argued that the second and third elements of *res judicata* fail because in Land Application No. 49 of 2021 parties are different from Land Application No.111 of 2013 and Land Appeal No. 126 of 2016. Regarding the 4th element of *res judicata*, the learned counsel for the Plaintiff submitted that the previous suits were instituted, decided, finalized in the competent courts on their own merits. Therefore that in regard to the Plaintiff's submissions the preliminary objections raised by the 8th defendant should not be upheld at all and this court be pleased to hear the case on merit.

In his rejoinder, the 8th defendant maintained that this Land Application is time-barred for more than 47 years from 1997 to 2021 without instituting the same against the 8th defendant. He further submitted that Land Application No. 111 of 2013 and Land Appeal No. 126 of 2016 were the same as the instant Land Application No.49 of 2021. He added that the Plaintiff did not raise the issue of Certificate of Customary Right of Occupancy but remained silent and that bringing the same as a

fresh case in this court is an abuse of the law and court procedure, and therefore that this suit is *res judicata.*

Having gone through the submissions from both parties and before I go very far in analyzing each and every point of the preliminary objection raised, I would like to start with the 3rd preliminary objection, which is, that the suit is *res judicata.*

I harmonize with both parties who we analyzed the elements of *res judicata* from different authorities like the provision under Section 9 of the Civil Procedure Code Cap 33 [R.E. 2019].The doctrine of res judicata was defined in the **Black's Law Dictionary, Eighth Edition**, Edition to mean among other things;-

1. *"An issue that has been definitively settled by judicial decision.*
2. *"An affirmative defense barring the same parties from litigating a second lawsuit* ***on the same claim,*** *or any other claim arising from the same transaction or series of transactions and that* ***could have been -but was not -raised*** *in the first suit"*

The Doctrine of *res judicata* bars the applicant to come back to this court for the same issue. It is settled principle in law especially under the Law of Limitation Act, Cap.89 [R.E 2019] specifically sections 3 (1) and

14 (1) that there must be an end to litigations. The same holding was in the case of **Paniel Lotha v Tanaki And Others** [2003] TLR 312 that, the object of the Doctrine of *res judicata* is to bar the multiplicity of suits and guarantee finality to litigation. It makes a 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.

In relation to the case at hand, it is very clear that there was a first suit Land Application No.111 of 2013 in which the plaintiff was suing the 8th defendant to recover the suit land 5 of 4 acres in Bagamoyo, in the **competent tribunal** in which the applicant admitted at page 12 on paragraph 3 the first suit to have been determined by a competent court. Thus the Judgment was delivered on 18/03/2015 in favor of the defendant.

Aggrieved with the decision of the District Land and Housing Tribunal at Kibaha the Plaintiff appealed to this court in Land Appeal No. 126 of 2016 before Hon. Mwangesi, J (as he then was) whereas the decision of the trial District and Housing Tribunal for Kibaha were upheld. The Judgment was delivered on 29th December, 2019 in favor of the defendant.

In both Land Application No. 111 of 2013 in the District and Housing Tribunal for Kibaha and Land Application No. 49 of 2021 before this court, the Plaintiff issuing the same person (Defendant) claiming to recover the same land suit property which is ready determined by a court of law.

Regarding the 2nd condition on subject matter, the Plaintiff is claiming for unlawful issuance of customary right of occupancy No.24 BGM/801 dated 11th August, 2014. In and in Land Application No.111 of 2013 and Land Appeal No.49 of 2021 the issue in dispute was trespass in respect. It is my respectful view that the subject matter is related to each other both are disputes on ownership. In Land Application No. 11 of 2013, the respondent was declared the lawful owner of the suit property, and this court in Land Appeal No.49 of 2021 which was upheld the tribunal decision rule out that there is no cogent evidence to fault the ownership of the suit land by the respondent.

This time the Plaintiff has come before this court with the same subject matter although he has twisted it to read unlawful issuance of the Customary Right of Occupancy No. 24 BGM/801 which is related to ownership or recovery of the suit property. In the District Land and Housing Tribunal the Chairman declared the 8th Defendant a lawful owner

of the suit land on the size which is cleared stated on his customary right of occupancy. I am in accord with the Defendant's submission that the issue of unlawful issuance of the Customary Right of Occupancy was supposed to be raise in the same suit thus, raising the same in a new suit is an afterthought and the same is disregarded.

In case, the Plaintiff had being aggrieved with the decision of this court in Land Appeal No. 126 of 2021, then the proper remedy for him to adopt was to appeal to the Court of Appeal and not instituting a new suit against the same defendant on the new phrase but the same claim of recovery of the suit property. The argument that the current suit is about unlawful issuance and obtaining of the Customary right of occupancy No 24 BG current suit is about unlawful issuance and obtaining of the customary right of occupancy No. 24 BGM/801 which was not raised in the previous case infringes the first doctrine of res judicata in the above quotation on foreclosing litigation.

Moreover, since the Land Application No. 111 of 2013 was determined, decided, and finalized by competent courts, bringing it back as Land Application No.49 of 2021 before this court again infringes the Doctrine of res judicate in the above quotation of foreclosing relitigating of matters

that are already determined by the Judicial decisions. I subscribe to the position pointed out by the Defendant on the two Latin maxims that litigation must come to an end, we cannot entertain endless litigation. I find this application has met all the essential elements of *res judicata*. The 3rd preliminary is of merit.

With the above findings, I refrain from deciding the remaining points of objections as, I think, any result out of it will have no useful effect on this suit. It will be but an academic endeavor.

In the upshot, this application is incompetent before this court. I strike it out without costs.

Order accordingly.

Dated at Dar es Salaam this date 29th September, 2021.

A.Z.MGEYEKWA
JUDGE
29.09.2021

Ruling delivered on 29th September, 2021 in the presence of Mr. Frank Michael, learned counsel holding brief for Mr. Wilson, learned counsel for the appellant in the absence of the respondents.

A.Z.MGEYEKWA

JUDGE

29.09.2021

Right of Appeal fully explained.