IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 78 OF 2022

(C/F Application No. 134 of 2019 District Land and Housing Tribunal of Arusha at Arusha)

NAFTALI LOGILAKI ..... APPELLANT

VERSUS

ELIBARIKI LOGILAKI ..... 1ST RESPONDENT

SEKUNDI MODEST MINJA ..... 2ND RESPONDENT

JUDGMENT

27th July & 21st September, 2023

TIGANGA, J.

In Application No. 134 of 2019 filed before the District Land and Housing Tribunal of Arusha at Arusha (the trial tribunal), the 2nd respondent herein successfully sued the appellant and the 1st respondent for restraining him to possess and use the piece of land measuring 10 paces length and 10 meters width located at Sanawari ya Juu area, Olturoto Ward within Arumeru District in Arusha Region (the suit land).

According to the evidence before the trial tribunal, the 2nd respondent purchased the suit land from the 1st respondent on 10th September, 2018 for the consideration of Tshs. 3,000,000/=. When he started clearing the suit land with intention of developing the same, the

appellant, who is the 1st respondent's brother, stopped him on the ground that although the suit land was bequeathed to the 1st respondent by their late father, he was not supposed to sell the same. That, the suit land is a family property and the same ought to pass through the 1st respondent's generation hence, he prayed that the sale be declared invalid. The evidence also shows that, after several meetings the Logilaki's family agreed to pay back the 2nd respondent his purchase money Tshs. 3,000,000/= but the latter wanted to be paid Tshs. 4,000,000/= including disturbance allowance. However, the appellant and his family failed to do so hence, the matter was filed at the trial tribunal.

After full trial, the trial tribunal declared the sale valid on the ground that, the 1st respondent sold his own land and ordered the appellant and his family not to disturb the 2nd respondent from enjoying the suit land. It also ordered them to pay the 2nd respondent Tshs. 1,000,000/= as general damages. Alternatively, it ordered them to compensate the purchase money Tshs. 3,000,000/= and Tshs. 2,000,000/= for disturbance. Aggrieved, the appellant preferred this appeal with the following four (4) grounds;

1. That, the trial tribunal erred in law and in fact in declaring the suit land as a property of the respondent.

2. That, the trial tribunal erred in law and in fact in condemning the family to pay damages of Tshs. 1,000,000/= and Tshs. 2,000,000/= as compensation for unlawful agreement entered between respondents which the family were not party of.
3. That, the family had agreed to refund the 2nd respondent Tshs. 3,000,000/= without any cost because he had purchased this disputed land without consent of the family.
4. That, the trial tribunal erred in law and fact in entertaining the matter which was *res judicata*.

During hearing which was by way of written submissions, the 1st respondent appeared himself and unrepresented while the appellant was represented by Mr. Lengai S. Loitha while the 2nd respondent was represented by Ms. Aziza Shakale, both learned Advocates.

Supporting the appeal, Mr. Lengai submitted on the 1st ground of appeal that, the 1st respondent was never the owner of the suit land but rather the caretaker as the same still belonged to their late father. That, following the death of their father, the appellant was appointed to be the administrator of the estate of their late father, and he has never distributed the suit land to the 1st respondent herein, hence the same remains part and parcel of the deceased estate and the latter had no right

to sell it without consent of the whole family. He argued that, although the tribunal chairman ruled out that the sale agreement was signed by family members which symbolizes their acceptance, the same was not true as the 1st respondent did incorporate any family member on the said sale agreement. The learned counsel referred the Court to the case of **Fara Mohamed vs. Fatuma Abdallah** [1992] TLR 205 which observed that, a mere care taker of the deceased estate does not have the legal tittle to transfer ownership to another person.

On the 2nd ground, the learned counsel submitted that, as long as the 1st and 2nd respondents made an agreement without involving any family members, such transaction was null and void. Henceforth, neither the appellant nor other family members cannot be held liable to pay the 2nd respondent compensation of Tshs. 1,000,000/= while they were not part of the said sale agreement. Further to that, since none of the 1st respondent's family members signed the said sale agreement as a witness, the Logilaki's family cannot be held accountable to pay the said fines as intimated by the trial tribunal. Thus, the trial tribunal erred in making such orders of compensation.

On the 3rd ground of appeal, Mr. Lengai submitted that, the Logilaki family was ready to compensate the 2nd respondent Tshs. 3,000,000/= so

that they can redeem the land without any other additional costs because the sale was invalid. He added, the law is clear that, there is window of 12 years in which they can redeem the suit land and that they are within time as held in the case of **Yeromino Athanase vs. Mukamulani Benedicto** [1983] TLR 370.

On the last ground, the learned counsel submitted that, according to section 9 of the **Civil Procedure Code**, Cap 33, R.E. 2019, this dispute had already been litigated to its finality by Oltroto Ward Tribunal hence, the trial tribunal erred in entertaining it. Mr. Lengai averred that, had the 2nd respondent not satisfied with the decision of the ward tribunal, he would have appealed against the same instead of filing a new suit. He further contended that, in the decision of the ward tribunal, the suit land was declared as the property of the late Mzee Logilaki eligible to be inherited through generations. He referred the Court to the case of **Village Chairman K.C.U. Mateka vs. Antony Hyera** [1988] TLR 188 which set out the conditions for a plea of res judicata to apply including the fact that parties have to be the same. He prayed that this Court allow the appeal with cost by quashing and setting aside the trial tribunal's proceedings and judgment.

Opposing the appeal, the 1st respondent submitted on the 1st ground of appeal generally that, the suit land is not part of their late father's estate because the latter bequeathed it to him before his demise. He referred the Court to the decision of the ward tribunal which acknowledges this fact and ordered him to be stripped ownership for the sake of his kids. He argued that, the trial tribunal did not err in holding that the sale agreement was valid because he sold what legally belonged to him.

On the 2nd ground, 1st respondent submitted that, considering the fact that the sale agreement was not illegal, the trial tribunal did not err in ordering him and the appellant to compensate the 2nd respondent Tshs. 1,000,000/= as general damages due to the disturbance the appellant caused. He holds that, the said order was fair because the appellant indeed disturbed the 2nd respondent from developing the suit land and for him and the appellant each to pay Tshs. 500,000/= was fair considering all the disturbance caused to him.

As to the 3rd ground, it was the 1st respondent's submission that, since the Logilaki's family has decided to pay back the purchase money, challenging the compensation of Tshs. 2,000,000/= is premature. On the last ground he argued that, this matter was not *res judicata* because both

the parties as well as the cause of action on the matter at the ward tribunal and the trial tribunal are different. He prayed that, this appeal be dismissed with cost.

Mrs. Shakale for the 2nd respondent submitted on the 1st ground that, the 1st respondent herein was not a care taker of the suit land rather, he legally owned the same. In that regard, he had a good title to pass on to the 2nd respondent by way of sale thus, the trial tribunal did not err in declaring the sale agreement valid. She argued that, the case of Farah Mohamed (supra) as cited by the appellant is distinguishable from the matter at hand hence the same should be disregarded.

On the 2nd ground, Mrs. Shakale submitted that, the order for compensation to the tune of Tshs. 1,000,000/= as general damaged was given to the appellant and the 1st respondent at their personal capacity only and not to the whole Logilaki's family.

As to the 3rd ground, it was the learned counsel's submission that, the appellant's claim to redeem the suit land is newly raised in this appeal hence, the Court should disregard it. On the last ground, she submitted that, this matter is not *res judicata* to the matter entertained by the Olturoto Ward Tribunal as both the parties as well as the cause of action are different. She prayed that this appeal be dismissed with cost.

In his brief rejoinder appellant's learned counsel reiterated his earlier position in the submission in chief and maintained that, since the ward tribunal declared the suit land belonged to the family and not the 1st respondent, the said sale was null and void hence the trial tribunal erred in holding otherwise.

Having gone through the trial court's records as well as both parties submissions, I now proceed to determine grounds of appeal starting with the 1st one in which the appellant challenged the trial tribunal's decision in declaring the ownership of the suit land to the 1st respondent. I should first and foremost state the guiding principle governing land dispute that, in land disputes, just like in normal civil cases, the onus of proving the case lies on the shoulder of the one who alleges anything on his/her favour and the standard of proof is on the balance of probabilities. This principle is enshrined under section 110 of the **Evidence Act** [Cap. 6 R.E R.E 2019] and in a number of decisions of the Court of Appeal such as the decision in the case of **Maria Amandus Kavishe vs. Norah Waziri Mzeru (Administratrix of the Estate of the late Silvanus Mzeru) & Another,** Civil Appeal No. 365 of 2019 CAT at Dsm (unreported) where the Court of Appeal had this to say;

> *"It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in*

his or her favour. This is the essence of the provisions of sections 110 (1), (2) and 111 of the Evidence Act. It is equally elementary that, since in this appeal the dispute between the parties was of civil nature, the standard of proof was on a balance of probabilities, which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. See: ***Anthony Masanga v. Penina Mama Ngesi & Another,*** *Civil Appeal No. 118 of 2014 and* ***Hamza Byarushengo vs Fulgencia Manya & 4 Others,*** *Civil Appeal No. 33 of 2017 (both unreported).* ***It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies, discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case.*** *" (emphasis added)*

Having the above principle in mind and applying it to the appeal at hand, the law puts it clear that, the burden to prove any fact lies on the person who alleges the same. Looking at the evidence tendered at the trial tribunal, it is undisputed fact that the suit land was sold by the 1st respondent to the 2nd respondent herein. Appellant's grievance at the trial tribunal was that, such land was not owned by the 1st respondent hence needed family consent in disposing the same. However in his own words during his testimony, the appellant had this to say regarding the suit land;

"...Maombi haya hayana msingi; lakini sisi kama familia tuko tayari kurudisha fedha zake Shilingi 3,000,000/=, kwani eneo hilo si mali ya mdaiwa wa 2, ni eneo la urithi ***yaani mdaiwa wa 2 aiirithi eneo hilo toka kwa baba yetu.*** *" (emphasis mine)*

During cross examination the appellant further stated that, the suit land was distributed to the 1st respondent, however, according to customs and traditions, him being the last male born, his land inheritance remains at home as a generational property to be inherited by his children. According to the appellant, as a general caretaker and administrator of the estate of the late Mzee Logilaki's family, he is protecting and safe guarding the legal inheritance of the 1st respondent's children.

With the brief analysis above, it is clear that, the piece of land sold was indeed 1st respondent's but his family specifically the 1st respondent does not approve its disposition on the ground of protecting 1st respondent's children. As much as I sympathise and see logic in with the appellant's concern, but the suit land being part of the inheritance of the 1st respondent, he had the right to sell it to whomever he wished. The fact that, he did not involve family members on its disposition, that alone does not invalidate the sale transaction conducted. In the circumstances, the trial tribunal did not err in holding that, the suit land initially belonged to the 1st respondent and declaring the sale agreement valid because the 1st respondent had a valid title to pass. This ground fails.

On the 2nd ground, the appellant challenges the trial tribunal's decision for ordering the Logilaki family to pay the 2nd respondent general

damages to the tune of Tshs. 1,000,000/= and compensation of Tshs. 2,000,000/= while the said family was not part of the sale agreement. For clarity, in ordering the damage and compensation to the 2nd respondent, the trial tribunal had this to say;

> *"Vilevile, wajibu maombi wanaamriwa kulipa fidia ya jumla (general damages), kiasi cha Shillingi 1,000,000/= kutokana na usumbufu waliomsababishia mleta maombi. Kama familia ya wajibu maombi inataka kubaki na eneo lenye mgogoro, basi wamrudishie mleta maombi hela zake alizonunulia eneo lenye mgogoro kiasi cha Shilingi 3,000,000/= Pamoja na fidia ya Shillingi 2,000,000/= kwa ajili ya usumbufu."*

Reading this excerpt between the lines, the general damages was ordered to be paid by the appellant and the 1st respondent alone in exclusion of the family members. Regarding the compensation, it is my considered opinion that, the trial tribunal gave the appellant the ultimatum in case his family wants to redeem the suit land, to pay back the 2nd respondent his purchase price Tshs. 3,000,000/= with extra Tshs. 2,000,000/= as compensation for the disturbance caused. I find this as a reasonable alternative verdict taking into consideration the fact that, the appellant and the 1st respondent have their own family feud and the 2nd respondent being a *bona fide* purchaser was unnecessarily entangled in

such feud leading to his failure to enjoy the suit land legally sold to him. In the circumstances, this ground also fails.

As to the 3rd ground, it has already been answered on the 2nd ground, if the appellant is interested in the suit land he should do so by redeeming the same in the manner prescribed above which I find plausible. This ground fails.

Lastly, the appellant challenges this matter as *res judicata* contrary to section 9 of the CPC which reads;

> *"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 subsequently raised and has been heard and finally decided by such court"*

The section bars Courts from entertaining any suit or issue which involved the same parties on the same subject matter and has been determined to its finality by a court of competent jurisdiction. For it to apply the following elements as enunciated in the case of **Emmanuel Simforian Massawe vs. The Attorney General**, Civil Appeal No. 216 of 2019 CAT at Dsm that;

> *1. The matter which is directly and substantially in issue in the*

present case must also have been directly and substantially in issue in a former suit.

2. The previous suit must have been finally and conclusively determined.

3. Parties claiming in the present suit and the former suit must be the same or parties claiming under the same title.

Applying these qualities in the matter at hand, as rightly argued by the respondents, the principle of *res judicata* cannot apply. I hold so because, **one**, Kesi No. 18 ya 2018 determined by the Olturoto Ward Tribunal involved the appellant and the 1st respondent alone in exclusion of the 2nd respondent who was party to Application No. 134 of 2019 hence the parties are not the same. **Two**, the cause of action in the ward tribunal dispute was in respect of stripping off inheritance bestowed to the 1st respondent by his father including the suit land to his children in which was granted by the said ward tribunal. In Application No. 134 of 2019 however, the cause of action was for the trial tribunal to declare the sale agreement valid and allow the 2nd respondent to enjoy the suit land without disturbances.

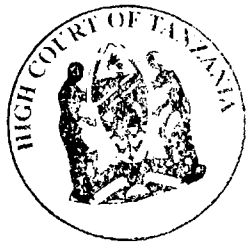
Three, the rationale behind the doctrine of *res judicata* as observed in the decision of the case of **Umoja Garage vs. National Bank of Commerce Holding Corporation** [2003] TLR 339 is to ensure finality in litigation and protect an individual from endless litigations. In the matter

at hand, since before the ward tribunal, the 2nd respondent herein was never a party and he was the one who filed the application subject to this appeal, I can clearly and without hesitation find that, this matter was never decided by any court of competent jurisdiction to its finality hence the principle of *res judicata* does not apply. This ground also fails.

In light of the above, this appeal lacks merit and the same is dismissed with costs, consequent of which, the trial tribunal's decision is hereby upheld.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 21st day of September, 2023.



J.C. TIGANGA

JUDGE