

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL APPEAL NO 38 OF 2000

(FROM Arusha District Court Civil Case No 33 of 1999)

ALBERT R. MOSHI .....APPELLANT

VERSUS

ENGAREOLMOTONY COOPERATIVE]

SOCIETY LIMITED ] .....RESPONDENT

**JUDGEMENT**

**R. SHEIKH, J**

This is an appeal against the decision of the Arusha District Court in Civil Case No 38 of 1999.

In the aforesaid Civil Case No 38 of 1999 which was commenced on 12/08/99 the appellant ALBERT R. MOSHI (the plaintiff) had sued the ENGAREOLMOTONY RURAL COOPERATIVE SOCIETY LTD (the respondent herein and the defendant then) for a declaration that he, the plaintiff is the lawful owner of a piece of land measuring approximately one acre situated at Ngaramtoni shopping

centre, Arumeru District, bordering the defendant's property to the south. When the case came up for hearing counsel for the defendant raised an objection on the ground that the suit was barred by res-judicata. The Arusha District Court upheld the objection holding that both the parties as well as the subject matter of the suit, that is the land in dispute, are the same as those in a previous suit filed by the plaintiff, Arusha District Court Civil Case No 22 of 1998 which was dismissed on 14/10/1998. Upon upholding the objection the District Court dismissed Civil Case No.38 of 1999. Hence, this appeal.

The appellant raised the following two grounds of appeal:-

1. The magistrate erred in holding that the matters directly and substantially in issue in Civil Case No 38 of 1999 had been directly and substantially in issue in Arusha R.M.s' Court Civil Case No. 22 of 1998.
2. –The Magistrate did not advert his mind to the fact that the cause of action in Arusha District Court Civil Case No. 38 of 1999 was different from the one in Arusha R.M.s' Court Civil Case No 22 of 1998. In support of the appeal Mr. Kinabo learned counsel for the appellant has submitted that the cause

of action in Arusha District Court Civil Case No. 38 of 1999 is different from the one in Arusha R.M.S' Court Civil Case No.22 of 1998 and that Arusha District Court Civil Case No. 38 of 1999 is an action for trespass to land, which is a continuing wrong. Citing Section 7 of the Law of Limitation Act learned counsel argued that the latter suit having been instituted on 12/08/1999 approximately one year after the dismissal of the former action Arusha District Court Civil Case No 22 of 1998 is not res judicata. He asserted that the plaintiff was in law entitled to file a fresh suit in the circumstances.

Apparently conceding to this submission, Mr. Oola learned advocate for the respondent has not countered the written submission filed on behalf of the appellant. Section 7 of the Law of Limitation Act 1971 relied on by Mr. Kinabo reads:-

"7. Where there is a continuing breach of contract or continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or wrong, as the case may be, continues."

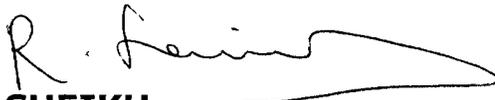
Without further ado I must say that as the cause of action in both cases is trespass which is clearly a continuing wrong, a fresh period of limitation begins to run every moment the wrong continues, and therefore the matter cannot be time-barred so long as the alleged wrong, in the instant case, the trespass continues. However the Section aforesaid is clearly intended to apply to issues of limitation, not res judicata.

I have pondered on whether this can also mean that a fresh suit cannot be barred by res judicata where there is a continuing wrong as is alleged in the instance case, relating to the same parties and the same subject matter. As the claim arises from a wrong-an act of trespass allegedly done on 11/08/99, subsequent to the dismissal of the former suit, the cause of action is not the same and the matter directly and substantially in issue in the instant suit is not the same as that in the previous suit, even if the subject matter is the same.

Accordingly I have to agree with Mr. Kinabo's view that though the parties and the subject – matter of the two cases may be the same the latter suit cannot be barred as res judicata. (See Mulla on

Code of Civil Procedure Vol. I 15<sup>th</sup> Edition, pages 112 and 113). The earlier suit did not operate as res judicata in my view.

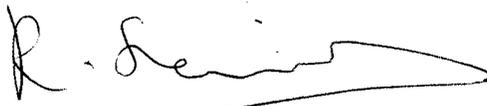
In the premises the appeal succeeds and is accordingly allowed with costs.

  
**R. SHEIKH**

**JUDGE**

**25/02/2008**

Judgment delivered this 28/02/2008 in the presence of Mr. Kinabo advocate for the appellant and Mr. Oola advocate for the respondent, and Mariam B/C.

  
**R.SHEIKH**

**JUDGE**

**28/02/2008**