

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 261 OF 2020

ALI SHABANI AND 48 OTHERS APPELLANT

VERSUS

1. TANZANIA NATIONAL ROADS AGENCY (TANROADS) ...1ST RESPONDENT

2. THE ATTORNEY GENERAL 2ND RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Tanga)**

(Mruma, J.)

dated the 26th day of November, 2019

in

Land Case No. 02 of 2019

.....

JUDGMENT OF THE COURT

01st & 10th June, 2021

KOROSSO, J.A.:

This appeal arises from the ruling of the High Court of Tanzania at Tanga in Land Case No. 02 of 2012 dated 26/11/2019 that sustained the respondent's preliminary objection that the applicant's suit was time barred. In the said suit, the appellants prayed for an order to compel the 1st respondent, Tanzania National Road Agency (TANROADS) to pay a range of amount as compensation for the destruction of their residential houses along Tanga-Horohoro road, within Mkinga District, Tanga Region and other reliefs.

At the backdrop, what led to the institution of the suit can be briefly stated as follows: In the year 2003, the 1st respondent approached land owners along Tanga- Horohoro road, the appellants included, of its upcoming plan for construction and enlargement of the roach which would affect residential and business areas in Mkinga District. Areas to be affected were Magaoni, Bawa, Dada, Kwa Chombo, Kiru, Mpirani, Vuo, Petukiza, Mbuluni, Mbuyuni, Maforani, Makobenji, Mwagula, Kwa Rashidi, Custoum, Sitaki Shari, Mbujuni, Kwa Songoro, Gezani, Sitakidawa, Bwagamacho, Kigirini, Loko and Mansabay.

Subsequently, around 2009 the 1st respondent gave the appellants notice with an order to demolish the houses on their own and allegedly also promised to compensate them against the destruction. In 2009, the 1st respondent, initiated construction and enlargement works around Tanga-Horororo Road. In 2013, a few of those affected were compensated, leaving others who were dissatisfied with the said status and proceeded to file the suit before the High Court in 2019.

In their defence, the respondents raised a preliminary objection on a point of law contending that the suit was time barred. That was without prejudice to their main contention that the appellants were not entitled to

any compensation since the demolished houses encroached the road reserve in contravention of the law regulating road reserves in Tanzania.

The High Court sustained the preliminary objection holding that the suit founded on compensation was time barred as it was instituted beyond twelve (12) months contrary to item I in the first schedule to the Law of Limitation Act [Cap 89 R.E 2002] (the LLA).

Dissatisfied, the appellants filed their appeal to this Court predicated on two (2) grounds as follows:

- 1. That, the trial Judge erred both in law and facts for upholding the preliminary objection mixed up with facts to be ascertained by evidence at the hearing.*
- 2. That, the trial Judge erred both in law and in fact for dismissing the appellant's suit based on time limitation while disregarding the grounds for exemptions claimed by the appellants from the law of limitation.*

When the appeal came for hearing the appellants were represented by Mr. Henry Njowoka, learned Advocate. The respondents were represented by Ms. Jenipher Kaaya, learned Senior State Attorney, Mr. Rashid Mohamed and Mr. Luka Shishira both learned State Attorneys.

Addressing the grounds of appeal, Mr. Njowoka, argued both written and oral submissions that the preliminary objection sustained by

the High Court was not a pure point of law since its determination was dependent on considering both facts and law. The learned counsel contended that such a preliminary objection did not deserve consideration having regard to the settled position of law that an objection cannot qualify to be a pure point of law where facts have to be ascertained to determine it. To reinforce his stance, he cited the cases of **Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd** [1969] E.A. 696 and **Karata Ernest and Others vs Attorney General**, Civil Revision No. 10 of 2010 (unreported).

The learned counsel impressed upon us that in the case subject of the instant appeal, the question whether the suit was time barred or not should not have been dealt with at the preliminary stage because it had a mixture of facts and law. Elaborating further, the learned advocate contended that examination of evidence on record to determine the years the parties were in negotiations to settle the matter amicably was required. He submitted further that though the notice to demolish and compensate those affected was issued in 2003 and 2004 none of victims were compensated until 2013, 2014 and 2016 and some in 2018. The appellants were not compensated hence filing of the suit.

With regard to ground 2, the learned counsel made reference to Order VII Rule 6 of the Civil Procedure Code [Cap 33 R.E 2002] (CPC) which requires the plaintiff to state specifically in the pleadings the grounds for exemption claimed from the LLA. He argued that there are sufficient grounds entitling the appellants to exemption. He contended that although the exemption was not specifically pleaded in the plaint, it can be imputed from reading paragraphs 6 and 7 and its annexures, as they reflect that the appellants continued communication with the respondents on compensation promised by the 1st respondent, with some appellants already compensated. Mr. Njowoka argued further that even if it should be taken that the grounds of exemption were not pleaded specifically, the remedy was not to dismiss the suit since the rules require the plaintiff to only show the grounds of exemption from such laws.

Ms. Kaaya responded by first adopting the written submission filed by the respondents and cited authorities opposing the appeal. On ground 1, to contextualize the issue, she made reference to the holding in **Mukisa Biscuit Manufacturing Company limited** (supra) on what constitutes a preliminary objection on a pure point of law. She argued that what was raised in the High Court was a preliminary objection related to limitation of time and its determination did not require examination of evidence.

Ms. Kaaya argued further that the cause of action and claims were pleaded at paragraph 6 and 7 of the plaint. The cause of action arose in 2009 after demolition of the appellants houses and places of business. She insisted that in determining the cause of action the plaint and its annexures are relevant and in the present case there were no issues or facts to ascertain in determining whether or not the suit was time barred.

With regard to time limitation to file the suit for compensation, the learned Senior State Attorney contended that this is prescribed under item 1 of the schedule to the LLA. She thus cited the case of **Peter Nadhan Mroki vs AG and 2 Others**, Land Case No. 2013 (unreported) to reinforce the position advanced.

Next, the learned Senior State Attorney confronted the argument by the counsel for the appellant that the point of law raised required determination of other facts including the negotiations which took place between the appellants and the respondents on compensation issues. The learned State Attorney argued this to be misconceived because it is settled law that where preliminary objection is on limitation of time it is a pure point of law and thus no facts need to be considered.

With regard to the ground on exemption based on negotiation, she argued that even if such negotiations took place, that did not stop time

to run against prescribed time limitation. She sought reliance from the cases of; **Makamba Kigome and Gregory Matheyo vs Ubungo Farm Implements Limited and PSRC**, HCT Civil Case No. 109 of 2005 (unreported). She also took cognizance of the fact that this ground was argued in the alternative and thus contended that this should be inferred as a concession on the part of the appellants that the suit was time barred. She reasoned that her observation is further underscored by the fact that there was nothing pleaded in the Plaint that can be taken as meant to plead exemption or exclusion of limitation period as claimed by the counsel for the appellants in terms of Order VII rule 6 of the CPC.

In rejoinder, the counsel for the appellants reiterated what was submitted earlier on. Besides, apart from conceding that specific exemptions were not pleaded in the plaint, he invited the Court to infer such pleadings in paragraphs 6, 7 and 8 of the Plaint.

We have considered the submissions by the learned counsel on the grounds of appeal. With regard to ground 1, we have no doubt that the answer to it lies in the issue whether or not the preliminary objection was on pure point of law as stated in **Mukisa Biscuits case** (supra) and other cases which relied on that decision. In **Karata Ernest and Others** (supra) the Court held as follows:

*"At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the courts of deciding it. It only "consists of a point of law which has been pleaded, or which arise by clear implication out of the pleadings". Obvious examples include, objection to the jurisdiction of the court; **a plea of limitation**; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law;..." [emphasis added]*

It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstracts without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence. Under the circumstances, we are satisfied that the learned trial judge rightly held that the preliminary objection was based on a pure point of law and dismissed the suit for being time barred.

Accordingly, we agree with the learned Senior State Attorney and find nothing to fault the learned High Court Judge in his finding that the preliminary objection raised was a point of law. We thus find no merit in ground one and dismiss it.

Regarding ground 2, in essence, the learned High Court Judge is faulted for dismissing the appeal for being time barred whilst disregarding the grounds for exemption pleaded in the plaint. The appellants complaint is that the plea for exemption in paragraphs 6 and 7 of the plaint read with the annexures disclosing the communication which took place between the rival parties on the issue of compensation was disregarded. The relevant provision that guides on pleading exemptions is Order VII Rule 6 of the CPC which states:

"Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed".

The contest lies in whether the appellant pleaded the grounds for exemption in the plaint as required by the law and if so whether such grounds were capable of checking the law of limitation. The appellants are relying on paragraphs 7 and 8 on the plaint which state that:

"6 - That, sometimes in 2003, 1st Defendant in the course of planning reconstruction, enlargement and entire rehabilitation of Tanga to Horohoro road, the first Defendant approached the Plaintiffs and informed them that their residential and business areas at ... within Mkinga District in Tanga City, in Tanga Region will be affected by the road construction and enlargement project, gave them

notices with an order to demolish their houses on their own and consequently promised to compensate their residential and business houses. The Plaintiffs complied with the order of the Government via notice given by the 1st defendant by demolishing their residential and business houses.

However, the Defendants compensated only few victims of the road enlargement project while discriminating and disregarding the Plaintiffs herein. The Defendants discriminatorily refused to honour their promises as a result, the Plaintiffs lost all their residential houses, and all their belongings. Annexed hereto and marked "A-1" collectively are copies of notices given to the Plaintiffs by the 1st Defendant, of which the Plaintiffs crave leave of the Honourable court that they form part of this plaint.

7. That, in 2009 the 1st Defendant conducted construction and enlargement of Tanga-Horohoro road in which affected the Plaintiffs' properties. And for the whole period since 2009 before completion of constructions, Plaintiffs started to claim their entitlements from the 1st Defendant and Ministry responsible whereby Plaintiffs were given mere several promises until last year that they will be compensated but in 2013 only few people were paid compensation. Annexed hereto and marked "A-2" collectively are copies of correspondences with Ministry responsible and copy of the cheques and other payment receipts and some few compensation report of which the Plaintiffs crave leave of the Honourable court that they form part of this plaint."

Having gone through paragraph 6 and 7 of the plaint and the relevant annexures we find nothing pleaded therein to find that the appellant did plead exemption from the limitation period. The context of the said grounds is to show what the appellants were doing from the time they were notified by the defendants of the planned reconstruction of the Tanga-Horohoro road and preparedness of the necessity to demolition houses and businesses, that is, from 2003.

Due consideration has been given to the true import of Order VII Rule 6 of the CPC, we are satisfied that paragraphs 6 and 7 of the plaint did not plead facts sufficient to show exemption from limitation on which the trial court could have held otherwise. At any rate, guided by the LLA and decisions of this Court, we agree with Ms. Kaaya that the grounds of exemption in paragraphs 6 and 7 were incapable of checking time limitation in favour of the appellants.

In the case of **Consolidated Holding Corporation vs Rajani Industries and Another**, Civil Appeal No. 2 of 2003, whilst discussing the LLA we stated:

“It is apparent that under these provisions, the time taken in negotiating for settlement is not one of the categories of instances in which time is excluded in computing the period of limitation...”

In the light of the clear statement of the law, we are unable to disagree with the learned trial Judge. She rightly held that the appellants suit was time barred it being instituted beyond 12 months from the date on which the time accrued. As the suit was time barred, the only order was to dismiss it under section 3(1) of the LLA. Accordingly, we find no merit in ground 2 and dismiss it.

In the end, for the foregoing reasons we dismiss the appeal with costs.

DATED at **TANGA** this 10th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of June, 2021 in the presence of Miss. Elisie Paul, learned counsel for the Appellant and Miss. Luciana Kikala, learned counsel for the Respondents, is hereby certified as true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL