

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR
(CORAM: WAMBALI, J.A, SEHEL, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 25 OF 2020

YUSSUF KHAMIS HAMZA..... APPELLANT

VERSUS

JUMA ALI ABDALLA..... RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Zanzibar
at Vuga)**

(Abdalla, J.)

**dated the 7th day of June, 2018
in**

Civil Appeal No. 02 of 2018

JUDGMENT OF THE COURT

26th November, & 3^d December, 2021

SEHEL, J.A.:

This is an appeal against the judgment and decree of the High Court of Zanzibar (the High Court) that upheld the decision of the Land Tribunal of Zanzibar at Vuga Majestic, Zanzibar (the Tribunal) and accordingly dismissed the appellant's appeal with costs.

The facts leading to the present appeal are such that; the respondent filed a suit against the appellant in the Tribunal claiming for a declaratory order that he was a lawful owner of a three acres land situated at Kama

village in Zanzibar (the disputed property), an eviction order to be issued against the appellant, an order for payment of compensation to the tune of TZS. 1,000,000.00 and costs of the suit.

To prove his case, the respondent (PW1) told the Tribunal that in 1995 he was allocated three acres of land. However, in 2000, it was acquired by the Government for the purpose of constructing a public school. That, after acquisition, Juma Fom Juma (PW5), the Sheha of Kama Shehia gave him a letter to take it to the Office of the District Commissioner of the West District of Unguja. That, letter was requesting for alternative acres to be allocated to him as compensation for the one acquired by the Government. That, upon receipt of such a letter, the District Commissioner forwarded it to the Ministry of Water, Construction, Energy and Lands (the Ministry). The two letters were tendered and admitted in evidence as exhibit A4. That, on 2nd April, 2013, the Ministry issued him with a temporary title over the disputed property vide Ref. No. AU/AMMN/A.40/3V/7 (exhibit A3).

Omar Said Abdalla (PW2), his neighbour testified before the Tribunal that after the respondent was allocated the disputed property, he became

his neighbour on the northern side. That, he helped him to look after it as the respondent was residing in town centre. That, while there, he saw the appellant trespassing into the disputed property. He thus promptly notified the respondent. Thereafter, a dispute arose between the two parties. That, the Sheha, police officers at Mfenesini police station, himself and the Ministry tried to resolve it amicably, but it was a futile exercise. Hence, the respondent decided to take the appellant before the Tribunal.

Another witness for the respondent was his neighbour from Kama Shehia, one Omar Hassan Khamis (PW3). This witness confirmed to the Tribunal that the respondent's property was acquired by the Government in order to construct a public school as there was none in that area.

An officer from the Ministry, one Omar Salum Mbarak (PW4) told the Tribunal that he received the respondent's application, exhibit A3 and worked on it. Upon being satisfied that the disputed property was free from any incumbrances, he authorised for it to be allocated to the respondent and after all fees being duly paid, exhibit A4 was issued to the respondent.

On the other hand, the defence for the appellant (DW1) was that in 1997, he bought the disputed property for his son, one Moh'd Yussuf

Khamis from PW5 at a price of TZS. 500,000.00. The sale agreement was tendered and admitted in evidence as exhibit A1. He said that after he had bought it, he planted permanent trees like coconut and mango trees. However, in 2013 the respondent invaded his property and destroyed all trees by cutting them down.

Saleh Ramadhan (DW2) supported the evidence of DW1 that the disputed property was purchased at a price of TZS. 500,000.00. Another witness for the appellant was Omar Othman (DW3) who told the Tribunal that he helped the appellant to clear and plant clove trees in the disputed property.

As earlier stated, the Tribunal found in favour of the respondent. It was convinced that the respondent had good title over the disputed property because he tendered the documents proving ownership, namely: - a temporary permit dated 2nd April, 2004, a receipt showing that fees for allocation was duly paid by the respondent and a letter from the District Commissioner (exhibits A4 and A3, respectively). Consequently, it disregarded the sale agreement (exhibit A1) tendered by the appellant because it did not bear the name of the appellant.

Dissatisfied, he unsuccessfully appealed to the High Court. In upholding the Tribunal's findings, the High Court found that the respondent sufficiently established ownership of the disputed property through exhibits A3 and A4. It also found credence on the evidence of PW4 who authorized the allocation of the disputed property to the respondent. It noted, just like the Tribunal did, that exhibit A1 bore the name of Moh'd Yussuf Khamis who was not the appellant.

Still aggrieved, the appellant lodged the present second appeal trying to challenge the concurrent findings on two grounds of appeal which are: -

- "1. That, the learned first appellate Judge erred in law to uphold the decision of the Land Tribunal without considering that the Land Tribunal proceeded with the hearing of the case and pronounced the judgment without understanding the land in dispute between the parties in the case.*
- 2. That, the learned first appellate Judge erred in law to uphold the decision of the Land Tribunal without considering the fact that, the appellant was occupying and cultivating on the shamba alleged to be in dispute for over a period of the time allowed by the law."*

At the hearing of the appeal, both the appellant and the respondent appeared in person. They had no legal counsel to represent them.

Having being given a chance to submit on his grounds of appeal, the appellant first adopted the written submissions filed in terms of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). It was submitted on the first ground of appeal that there was variance between the plaint, written statement of defence and the evidence concerning the boundary of the disputed property. He contended that since parties described different boundaries over the disputed property, the Tribunal ought to have framed an issue that geared at identifying the disputed property as required by Order XVI rule 1 (5) of the the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar. In his submission, the appellant reproduced the evidence of PW4 when he was answering a questioned put to him by assessor number one that he did not visit the disputed property. With that evidence on record, the appellant contended that, the Tribunal determined the dispute without knowing the property which the parties were at logger heads.

For the second ground of appeal, the appellant argued that he had been occupying the disputed property peacefully from 1997 and in 2013 the respondent invaded him and cut down trees. He argued that item 131 of Part VI of the schedule of the Law of Limitation Decree Cap. 12 of the Laws of Zanzibar, requires a suit based on land to be instituted within a period of 12 years but since the respondent's suit was filed after the lapse of 12 years, it ought to have been dismissed in terms of section 3 of that Act. At the end, he urged us to find that the decisions of the Tribunal and that of the High Court were unjustifiably determined hence the appeal be allowed.

In reply, the respondent briefly narrated as to how he came to possess the disputed property. That, it was allocated to him by the Government as compensation to his acquired land. That, after acquisition, he was issued with a letter by PW5 to take it to the District Commissioner and that he followed all procedures required for land allocation. At the end, he urged us not to disturb the concurrent findings of the Tribunal and the High Court that ruled in his favour. He prayed to the Court to dismiss the appellant's appeal.

In rejoinder, the appellant contended that his case before the Tribunal was supported by his two witnesses but the Tribunal did not consider their evidence and that during the trial, he requested the respondent to bring proof of ownership of his initial allocation that was acquired by the Government but he could not bring it. He thus reiterated his earlier submission that his appeal be allowed.

Having heard the rival submissions advanced by the parties and closely examined the record of appeal, the grounds of appeal and the written submission filed by the appellant, we find that there are two issues for our determination. First, whether the Tribunal understood the land, subject matter of the dispute. And secondly, whether the claim by the respondent was barred by time limitation.

We shall start with the first ground of appeal that the Tribunal did not know the land on which parties had competing interests. The appellant's argument was based on the way the parties described the boundaries of the disputed property in their pleadings. At this juncture, we think it is pertinent to reproduce the parties' relevant pleadings. Since the pleadings were in Kiswahili language, we shall rephrase them in English

language. The respondent who was by then the plaintiff alleged in paragraph 3 of the plaint that: -

"The plaintiff was the lawful owner of the disputed property situated at Kama area in the West Region of Unguja. That, he lawfully possessed it after being allocated by the Director for Lands and Registration following the acquisition of his property that was needed for constructing a public school in Kama area. That, the plaintiff followed all procedures for allocation of the new acres. That, the plaintiff filed a request through the office of Sheha of Kama Shehia, then it was forwarded to the Office of the District Commissioner and later to the Office of the Director for Lands and Registration and finally in 2012 he got temporary title and in 2013 he completed the registration of the acres described as follows: -

South: Road

North: Mganga Mashinde

East: Safia Khamis

West: Hindi Jecha".

On the other hand, the appellant replied to the claim in his paragraph 2 of the written statement of defence as follows: -

"That, the contents of paragraphs 2 and 3 of the plaint are disputed. The defendant averres that he is the lawful owner of the disputed property with the boundaries described herein below which was bought by the appellant for his son, one Moh'd Yussuf Khamis from Sheha of Kama Shehia since 1997. That, the defendant further averres that initially the acres were a sand pit but later on it was developed by the defendant by planting permanent trees and that the defendant had been utilizing the acres since 1997 without any disturbances and there had never been any dispute over its ownership. The sale agreement is attached in the written statement of defence as annexure A1 to form part of the exhibit.

South: Road

North: Valley

East: Pitch-hole

West: Pitch-hole".

From the above pleadings it is evident that the boundaries described by the respondent are different from the ones described by the appellant. Nonetheless, we are settled in our minds that the parties were disputing over the same three acres of land situated at Kama area in West Region of Unguja. This is because of the clear evidence on record. For a start, the allegation of ownership of the disputed property as described by the respondent in his plaint was vehemently disputed by the appellant in his written statement of defence. Hence, the appellant knew that the respondent was referring to the disputed property which he, the appellant, claimed to have obtained by way of purchase from PW5.

There is also evidence of PW3 which established that the dispute between the parties over the disputed property started way back before it was taken to the Tribunal by the respondent.

It is also in evidence that after hearing the parties' evidence, the Tribunal rightly determined the dispute in favour of the respondent which decision was fittingly affirmed by the High Court. Given the clear evidence on record, we find that the disputed property was well known to the parties. It be noted that the appellant did not raise this issue before the

Tribunal. It was also not one of the three grounds advanced in the High Court. In that respect, we find that the first ground is an afterthought.

Besides, we are increasingly persuaded by the respondent's case that the disputed property was allocated to him by the Government as compensation for his acquired property. We failed to go along with the argument of the appellant that he bought the disputed property in 1997 because as rightly observed by the Tribunal and the High Court, annexure A1, which the appellant heavily relied upon to establish ownership, bears the name of Moh'd Yussuf Khamis. It does not have his name. Moreover, PW5 denied to know Moh'd Yussuf Khamis. In that regard, we do not find merit in the first ground of appeal. We accordingly dismiss it.

We now turn to the second ground of appeal that raises the issue of time bar of the respondent's suit. It be noted that this ground is raised for the first time at this second stage of appeal. It was not raised in the Tribunal. Neither was it raised in the High Court. In the case of **Mohamed Mohamed and Another v. Omar Khatib**, Civil Appeal No. 68 of 2011 (unreported) the Court declined to entertain the ground of time bar

because it was not raised in the courts below and in the parties' pleadings.

It said: -

*"It is elementary that in our civil justice system parties are bound by their pleadings. **In this case, the issue of time bar was not raised by the parties in their pleadings. In this sense, it was quite in order and absolutely perfect for the courts below not to deal with a matter which was not canvassed in the pleadings,** notwithstanding the Order given by Dahoma, J., which we may respectfully say that it was given in the form of an advice, so to speak. In saying so, we do not mean to downplay the importance of the mandate given to courts for dealing with a jurisdictional issue even where it was not raised by the parties in their pleadings. **We are aware that the question of jurisdiction is fundamental and can be raised at any stage of the proceedings.** However, in the justice of this case, we do not see how the point could be dealt with adequately without engaging ourselves in an exercise of ascertaining the facts in the case. We say so because it is from the facts and the evidence thereto that we can meaningfully be in a position to*

make a decision on whether or not the suit was time barred. Certainly, our preoccupation at this stage should be to deal with matters of law only. We are not expected to deal with a point whose proof might entail revisiting the factual evidence in the case.” (Emphasis is added)

Similarly, as we have stated herein, in the present appeal, the appellant raised the issue of time limitation for the first time at this second stage of appeal. Since it was not pleaded and there were no material facts placed before the Tribunal, the Tribunal could not have dismissed the respondent's suit. We find that it acted within the purview of the law when it proceeded to hear and determine the dispute on merits. Of course, we are alive with the settled position of the law that time limitation goes to the jurisdictional issue of the court and that it can be raised at any time, even at the appellate stage by the court, but in order for it to be noted and raised it would require material evidence to be placed before the Court. In the present appeal, there is none. The only evidence we managed to get from the pleadings and witnesses is that, the dispute between the parties started in 2013. Furthermore, we have stated herein that the allegation by the appellant that he obtained the disputed property in 1997 is not

supported by any evidence. That being the case, we failed to get any other material evidence to suggest that the suit was time barred. Consequently, we do not find merit in the second ground of appeal and we proceed to dismiss it.

For the foregoing reasons, we do hereby dismiss the appeal with costs.

DATED at ZANZIBAR this 3rd day of December, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This Judgment delivered on 3rd day of December, 2021 in the presence of the appellant and respondent both present in person, is hereby certified as a true copy of the original.


G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL