

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 314 OF 2020

IBRAHIM ABDALLAH

(the Administrator of the Estate

of the late Hamisi Mwalimu APPELLANT

VERSUS

SELEMANI HAMISI

The Administrator of the Estate of

the late Hamisi Abdallah.....RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania
(at Arusha)**

(Moshi, J.)

dated the 11th day of March, 2016

in

Civil Case No. 17 of 2014

JUDGMENT OF THE COURT

16th & 21st February, 2022

MUGASHA, J.A.:

This is an appeal arising from the decision of the High Court at Arusha in Civil Case No. 17 of 2014 in which the appellant sued the respondent claiming that the House at Plot No. 54 Block 'G' Area F located at Bondeni area within the City of Arusha was unlawfully occupied by the late Hamisi Abdallah who had refused the house to be administered as a lawful estate of the late Abdallah Mwalimu. As gathered from the pleadings, it was alleged

that, the said house was among the properties which the late Abdallah Mwalimu during his life time, managed to own. He was also blessed with seven children among whom, was the late Hamisi Abdallah. Following his death in the year 1969, family members agreed that the house in dispute be occupied by the late Hamisi Abdallah, the elder brother as other siblings were still young. Having resided in the house for quite a long time, it was alleged that he asserted ownership of the house and thus a misunderstanding cropped up between the family members. As reconciliation efforts which at some point involved the religious leaders proved futile, the appellant opted to embark on an official search at the Land Registry at the Arusha City Council. At the land Registry, he gathered that the title deed of land in which the disputed house is located was transferred from one Amon Benjamin to the late Hamisi Abdallah. This forced the appellant to commence the suit against the late Hamisi Abdallah seeking among others, the following reliefs: **one**, a declaration that the house belongs to estate of the late Abdallah Mwalimu; and **two**, that the house in dispute does not lawfully belong to the late Hamisi Abdallah because the transfer between Amon Benjamin and the late Hamisi Abdallah is unlawful.

The aforesaid claims were opposed by the late Hamis Abdallah who in the written statement of defence averred to have lawfully acquired the house

in question through the distribution of estate of the late Abdallah Mwalimu. Moreover, the respondent raised preliminary points of objection on the following points:

"(i) the defendant being a holder of a certificate of the Right of occupancy on plot No. 54 Block "E", Area "F", Arusha Municipal now City Council, since 28th day of June, 1982, and the same was renewed on the 6th day of March, 2013 for a fixed term of 99 years, the Plaintiff has no locus standi to institute the present suit.

(ii) As corollary to the above, the claim by the Plaintiff, on the pleadings available is statute barred under the law of Limitation Act, Cap 89 RE 2002."

The respondent contended the matter was time barred having been instituted after expiry of three decades because: **One**, the late Abdallah Mwalimu died in 1969 following which the late Hamis Abdallah was appointed as administrator of estate; and **two**, the late Hamisi Abdallah was on 5/10/1976 appointed as heir by Arusha Urban Primary Court. On the other hand, the preliminary objection was opposed on ground that it relates to ownership, a matter requiring proof by evidence and which can properly be canvassed at the trial. As is the practice of the courts, the High Court had to determine the preliminary objection first before embarking on the trial. After

the hearing which was conducted by way of written submissions, luck was not on the appellant's side as the suit was dismissed after the learned High Court Judge sustained the second preliminary point of objection on time bar.

Undaunted the appellant has preferred an appeal to the Court. In the Memorandum of Appeal, he has fronted two grounds:

1. That, the trial Judge erred in law and fact when [he] decided to dismiss the suit for reason that, the suit is time barred.
2. That, the trial Judge erred in law and fact when [he] ruled that, the late Hamisi Abdallah was allocated the suit house in 1976 and he obtained a Certificate of Right of Occupancy on 28/6/1986 while the allocation and certificate of Right of Occupancy was [fraudulently] obtained.

Parties filed written submissions containing arguments for and against the appeal which were adopted by the respective learned counsel at the hearing of the appeal.

At the hearing, the appellant who was present in Court had the services of Mr. Hamisi Mkindi, learned counsel whereas the respondent was represented by Mr. Eric Kanga learned counsel. Following a brief dialogue with the Court on the context of the second ground of appeal and considering

that a full trial was not conducted, Mr. Mkindi abandoned the second ground of appeal and we marked it so.

In addressing the sole remaining ground of appeal, in his focused submissions, Mr. Mkindi faulted the learned trial Judge in dismissing the suit for being time barred having sustained the preliminary objection which was based on mixed issues of law and law fact which required proof. On this, he argued that, the question of limitation could not be determined by the trial court on face value of the plaint without proof by the evidence. Moreover, he contended that, the trial Judge's decision to dismiss the appeal was based on the respondent's written submissions which was not proper. In this regard, he argued that, the learned trial Judge wrongly dismissed the appellant's case because as the preliminary objection was on mixed point of law and facts, a point of law could not sail through at that stage in the wake of facts requiring to be ascertained by proof. To support his propositions, he cited to us the cases of **OLAIS LOTH (Suing as administrator of the estate of the late LOTH KALAMA VS MOSHONO VILLAGE COUNCIL**, Civil Appeal No. 95 of 2012 and **MS. SAFIA AHMED OKASH (As administrator of the Estate of the late AHMED OKASH VS MS SIKUDHANI AMIRI AND 82 OTHERS**, Civil Appeal No. 138 of 2016 (both unreported).

On the other hand, in opposition of the appeal, Mr. Eric submitted that, the learned trial Judge was justified to dismiss the suit on account of being time barred which was in accordance with the dictates of the law of Limitation Act whose object is to do away with stale claims. He was also of the view that, there can never be a mixed point of law and facts as contended by the appellant's counsel. In this regard, he contended that, the preliminary objection raised before the trial court was purely on a point of law and the suit deserved dismissal. On this, he relied on 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).

Having heard the submission of the respective learned counsel and the record before us, basically the appellant is faulting the High Court Ruling which dismissed his suit upon sustaining the respondent's preliminary objection that the suit was time barred. Thus, the main issue for consideration is whether relying on bare pleadings it can safely be vouched that the appellant's suit was time barred before the High Court. At this juncture, it is crucial to revisit the appellant's claim before the High Court which was based on what was pleaded in the Plaint as follows:

paragraph 4. *That, the plaintiff is a lawful administrator of the estates of the late Abdallah Mwalimu who died on 16th May, 1969 in Arusha. After the death of the deceased one Ibrahim Mwalimu the plaintiff herein during the meeting of the family was appointed to be the Administrator of the estates of the late Abdallah Mwalimu and later on approved by the Court. The copy of the said letter of administration is herewith attached and marked as "A" and leave of this honourable court is craved to form part of this plaint.*

paragraph 5. *That, during his lifetime the late Abdallah Mwalimu managed to own some properties which are located within Arusha Region. One among these properties is the House Plot No. 54, Block G Area F which is located at Bondeni area (City Centre) within the city. Further, the late Abdallah Mwalimu left Seven children who are Hamisi Abdallah, Yusuph Abdallah, Ibrahim Abdallah, Amani Abdallah, Issah Abdallah, Ramadhani Abdallah and Fadila Abdallah. The copy of the Right of Occupancy is herewith attached and marked as "B" and the leave of this honourable court is craved for it to form part of this plaint.*

paragraph 6. *That, after all activities of the funeral of the late Abdallah Mwalimu the disputed house described in paragraph 4 above was left to the Defendant as the elder brother. This was an agreement of all members of the family due to the fact that the Defendant had already married and*

owned the family while other members of the family were still very young at that time. furthermore, the Defendant was given the disputed house just to stay with his family not to own or to transfer it.

paragraph 7. *That, surprisingly, after staying for long time since the death of the late Abdallah Mwalimu the Defendant unlawful started to claim the house belongs to him. He restricted other members of the family to enter in the disputed house.*

paragraph 10. *That, the plaintiff herein as a lawful administrator of the late Abdallah Mwalimu made official search to the Land Registry at the office of Arusha City Council and found that the right occupancy of the disputed land had been unlawful transferred from one Amon Benjamin to Hamisi Abdallah (Defendant). It is clear and known to the Defendant that the lawful owner of the disputed land was the late Abdallah Mwalimu. The copy of the transfer of right of occupancy is herewith annexed and marked as "F" the leave of this honourable court is craved for it to form part of this plaint."*

As earlier stated, although the respondent opposed the claim, he as well, raised in the written statement of defence a preliminary point of objection which was sustained and the appeal dismissed.

It is settled law that a pure point of law does not arise if there are contentions on facts yet to be ascertained by evidence. See – **HEZRON M. NYACHIYA VS TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS AND ANOTHER**, Civil Appeal No. 79 of 2001 (unreported), **OLAIS LOTH** (supra). **MS. SAFIA AHMED OKASH** (supra) and **SHARIFA TWAHIB MASSALA VS THOMAS MOLLEL AND 4 OTHERS**, Civil Appeal No. 67 of 2011 and **KARATA ERNEST AND OTHERS VS ATTORNEY GENERAL** (supra). In the latter case, the Court subscribed to what was held in the case of **MUKISA BISCUIT** (supra) where Sir Charles Newbold, P. Apart from frowning on the increasing practice of preliminary points of objections on matters which should be heard in the normal way, defined what constitutes a preliminary objection on a point of law having said among other things, the following:

*"the first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quiet improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. **It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of*

*judicial discretion. **The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuses issues.** This improper practice should stop. "*

[Emphasis supplied]

In the light of the bolded expression, the emphasis is that a preliminary objection may only be raised on a pure question of law which can be discerned if the court is satisfied that the pleaded facts are not contentious or if any of the facts has to be ascertained in a proper trial.

In the case which is a subject of the appeal, the High Court sustained the preliminary point on the basis of what is reflected at page 63 of the record of appeal in the following terms:

"It is obvious that the defendant, the late Hamis Abdallah was allocated the house in 1976 and he obtained a certificate of Right of Occupancy on 28/6/1982. There is no point in time when the plaintiff claimed ownership of the suit premises. This suit was filed in 2014. It is therefore apparent that the suit is hopelessly out of time by virtue of item number 22 of part 1 of the Schedule to the Law of Limitation Act 1971 [Cap 89 R.E 2002] which

provides that limitation to institute a land suit is twelve years.

Time limitation is not a legal technicality as submitted by the plaintiff. It is a legal requirement which affects the root of the case and interests of the parties.”

A careful scrutiny of the above excerpt shows that, in dismissing the suit for being time barred, the trial Judge relied on what was pleaded by the respondent in the written statement of defence and his written submissions in favour of the preliminary objection raised. As correctly submitted by Mr. Mkindi, this was irregular because pleadings and the written submission do not constitute evidence. See – **SABRY HAFIDHI KHALFAN VS ZANZIBAR TELECOM**, Civil Appeal No. 47 of 2009; and **GODBLESS JONATHAN LEMA VS MUSSA HAMISI MKANGA**, Civil Appeal No. 4 of 2012 (both unreported).

On this account, although we agree that a time barred matter deserves to be dismissed in terms of section 3 of the limitation Act, this is subject to ascertaining proof by evidence be it oral or affidavital. In the premises, in the wake of contentious facts on the point of preliminary objection, the High Court could not conclusively determine the point of objection at that stage.

In addressing the concerns raised by the respondent's counsel, one, we do not agree with his view that there cannot be a preliminary objection on mixed fact and point of law and that proof by parading evidence was not necessary because, the High Court dealt on a purely point of law in dismissing the suit. We found this wanting because it is settled law that, where a preliminary objection raised contains more than a point of law, say law and facts it must fail because factual issues will require proof, be it by affidavit or oral evidence. **See – MOHAMED ENTERPRISE (T) LIMITED VS MASOUD MOHAMED NASSER**, Civil Application No. 33 of 2012 **and OTTU AND ANOTHER VS IDDI SIMBA, MINISTER FOR INDUSTRIES AND TRADE AND OTHERS** [2000] TLR 88.

In view of what we have endeavoured to discuss, the question of when the twelve-year limitation period began to run against the appellant on a claim over the disputed house, still requires proof as it cannot be determined at the stage of deciding a preliminary objection as a pure point of law. On the way forward, we quash and set aside the impugned decision and the subsequent orders of the High Court and remit the case file to the High to proceed with the trial on merits before another Judge. Costs shall abide by

the outcome of that suit. As the appeal is merited we proceed to allow it. It is so ordered.

DATED at **ARUSHA** this 20th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 21st day of February, 2022 in the presence of Mr. Hamisi Mkindi, learn counsel for the Appellant and Mr. Erick Kanga, learned counsel for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL