

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 87 OF 2020

**HAMISI MOHAMED (As the Administrator
of the Estate of the late RISASI NGAWÉ)APPELLANT**

VERSUS

**MTUMWA MOSHI (As the Administratrix
of the Estate of the late MOSHI ABDALLAH)RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Mgetta, J.)

dated the 24th day of November, 2016

in

Land Case No. 301 of 2009

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JUDGMENT OF THE COURT

17th & 29th March, 2023

KWARIKO, J.A.:

The appellant herein unsuccessfully sued the respondent in the High Court of Tanzania, Land Division at Dar es Salaam (the trial court), seeking among other things, a declaration that Plot No. 60 Block 'J' Kibambawe Road, Kariakoo Dar es Salaam (the suit property) is the property of the late Risasi Ngawe. He prayed that the respondent be ordered to give vacant possession of the suit property.

It was the appellant's case that, on 30th May, 2006 he was appointed administrator of the estate of the late Risasi Ngawe, his maternal grandfather who died in 1957. Subsequently, when he was in the process of transferring the suit property into his name, he discovered that there was a caveat issued in respect of that property by the respondent, claiming that it was the property of the late Moshi Abdallah pursuant to the decision of the Buguruni Primary Court in Probate and Administration Cause No. 340 of 2003 (Probate Cause No. 340 of 2003). He consequently applied for revision of that decision before the District Court of Ilala vide Civil Revision No. 4 of 2008. However, that application was dismissed on 24th February, 2009.

Undaunted, the appellant preferred an appeal against that dismissal in the High Court of Tanzania, Dar es Salaam District Registry in (PC) Civil Appeal No. 36 of 2009. That appeal was also dismissed. Since both the District Court and the High Court had advised the appellant to claim the suit property through a civil suit, he heeded to that advice and lodged a land case before the trial court.

On her part, the respondent disputed the appellant's claim contending that the appointment of the appellant as the administrator of the estate of the late Risasi Ngawe was procured by fraud and false

suggestions as he is not a descendant of the late Risasi Ngawe. It was claimed further that, the Primary Court decision has not been altered or reversed by any higher court and thus it still remains that the suit property belongs to the late Moshi Abdallah. The respondent also counter-claimed for a declaration that she was entitled to ownership of the suit property as it is part of the estate of the deceased Moshi Abdallah who was the husband of the appellant's late mother. That the appellant was begotten by a different man after divorce of his mother by the late Moshi Abdallah and since then the late Moshi and his family lived in the suit property undisturbed for many years until the appellant emerged to claim it.

At the end of the case from both sides, the trial court found that, since the Primary Court decided in favour of the respondent and the same has not been reversed or altered, it had no jurisdiction to decide a fresh suit in respect of the same subject matter. On that note, the trial court dismissed the suit.

Aggrieved, the appellant is before this Court on the following two grounds of appeal:

- 1. That, the learned trial Judge erred in law and fact by holding that the court had no jurisdiction to*

decide on the ownership of the suit property as the decision of the Primary Court in Mirathi No. 38 of 2009 had already declared that, Plot No. 60 Block 'J' Kibambawe Kariakoo, Ilala Dar es Salaam forms part of the estate of the late Moshi Abdallah and as such decision has not been reversed or set aside by a higher court.

2. That, the learned trial Judge erred in law and fact by dismissing the appellant's claims in relation to the ownership of Plot No. 60 Block 'J' Kibambawe, Kariakoo, Ilala Dar es Salaam despite the evidence adduced before the court proving that the suit property belongs to the late Risasi Ngawe.

Both parties lodged their respective written submissions in terms of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 which were adopted during the hearing.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented while Messrs. Yahya Njama and Leonard Manyama, learned advocates represented the respondent.

We have considered the parties submissions and we are ready to tackle the grounds of appeal. However, before we do that, we shall first determine a point of preliminary objection which we had allowed the respondent to raise. It goes thus:

"The suit before the High Court was time barred".

It was submitted in respect of this point that there is ample evidence establishing that the late Moshi Abdallah and his heirs lived in the suit property for more than fifty years thus when the appellant filed a suit to claim it, he was out of time of twelve years within which a claim for recovery of possession of a landed property may be filed in court. The learned counsel relied on the provisions of section 52 (2) of the Land Disputes Courts Act [CAP 216 R.E. 2019] (the Land Disputes Courts Act) and Part 1 of the Schedule to the Law of Limitation Act [CAP 89 R.E. 2019] (the Law of Limitation Act). In his further submission in support of this objection, Mr. Njama referred the Court to the decision in the case of **Abel Rwegoshora v. Raphael Mukaja** [1970] H.C.D n. 100 where it was stated that *'a claim for possession of land is barred if brought after twelve years from the date the claim arose'*. For this reason, the learned counsel argued that, the suit was time barred and thus the trial court had no jurisdiction to entertain it.

In response to the foregoing, the appellant contented that the suit was within time. He added that even if the family of the late Moshi lived in the suit property for many years, the same belonged to the late Risasi Ngawe.

The issue for our determination is whether the suit before the trial court was time barred. The respondent has given a sweeping statement that the late Moshi Abdallah and family lived in the suit property for more than fifty years undisturbed before a claim over that land was filed. No specific time of accrual has been given. Section 24 (1) of the Law of Limitation Act provides for the time when the right of action accrues in respect of the claim by legal representative of the deceased person's property; it states thus:

"Where a person who would, if he were living, have a right of action in respect of any proceeding, dies before the right of action accrues, the period of limitation shall be computed from the first anniversary of the date of the death of the deceased or from the date when the right to sue accrues to the estate of the deceased, whichever is the later date."

According to this provision, in order to establish the accrual of the right of action, the date of the death of the late Risasi Ngawe should have been established. What is in record is that he died in 1957 without further explanation. It follows therefore, that evidence would be needed to establish the date of accrual of the right of action on the deceased's estate. The East African Court of Appeal in the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd v. West End**

Distributors Ltd [1969] EA 696 defined what a preliminary objection should be. It was stated thus:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the 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."

On the strength of the cited decision, since evidence is needed to establish the date of accrual of the right of action, the point raised is not a pure point of law fit to be raised as a preliminary objection. For this reason, we find the objection unmerited and we hereby overrule it.

Back to the merit of the appeal, the appellant submitted in respect of the first ground that the trial court erred to refer to Probate Cause No. 38 of 2009 as the one in which the Primary Court of Buguruni declared the suit property as part of the estate of the late Moshi Abdallah. He argued that in fact that pronouncement of the Primary Court was made in Probate Cause No. 340 of 2003. That notwithstanding, the appellant argued that, following the decision of the Primary Court, he applied for revision before the District Court of Ilala and further appeal to the High Court of Tanzania, Dar es Salaam District

Registry where in both instances he was advised to file a civil suit to claim the suit property and that is what he did. He thus contended that the trial court had jurisdiction to decide the suit as per section 3 of the Land Disputes Courts Act, more so as the Primary Court had no jurisdiction to determine ownership of land or any property when dealing with a matter of appointment of administrator of deceased's estate.

Responding to the foregoing submission, Mr. Manyama argued that the trial court only slipped when it referred to Probate Cause No. 38 of 2009 but it meant Probate Cause No. 340 of 2003 where it was decided that the suit property belonged to the late Moshi Abdallah. He contended that since that decision has not been reversed or altered by a higher court, it remains intact. In support of this assertion, the learned counsel referred us to the decisions of **Serikali ya Mapinduzi ya Zanzibar v. Farid Abdallah** [1998] T.L.R. 355 and **Goyal v. Goyaj & Others** [2009] 2 EA 143. He added that, since the decision of the Primary Court still stands, the High Court had no jurisdiction to determine the issue of ownership afresh, instead any aggrieved party ought to have assailed that decision before the higher court.

We have considered the submissions of the parties in relation to this ground. At the outset, we are in agreement with Mr. Manyama that the trial court might have inadvertently referred to Probate Cause No. 38 of 2009 of the Primary Court where it was decided that the suit property belonged to the late Moshi Abdallah. This is because at pages 178 to 182 of the record of appeal, the trial court discussed the decision of the Primary Court of Buguruni in Probate Cause No. 340 of 2009 and stated that it had no jurisdiction to determine the suit since the Primary Court had decided that the suit property belonged to the late Moshi Abdallah. As to the bone of contention in this ground of appeal, it is not disputed that when the respondent applied for letters of administration in respect of the estate of the late Moshi Abdallah, the Primary Court decided that the suit property belonged to the late Moshi Abdallah. In a bid to assail this decision, the appellant unsuccessfully applied for revision before the District Court. His appeal against the decision of the District Court to the High Court was dismissed. As correctly found out by the High Court, the application for revision was filed out of time of twelve months on 24th February, 2009 from 29th January, 2007 when the decision of the Primary Court was handed down. This was contrary to section 22 (4) of the Magistrates' Courts Act [CAP 11 R.E. 2019]. We are of the firm view that, although the District Court and the High Court advised the

appellant to file a civil suit to claim the suit property, the decision of the Primary Court was still intact having not been reversed by any higher court.

For the foregoing analysis, we are of the decided view that, the trial court did not err to decide that it had no jurisdiction to determine the suit relating to ownership of the suit property while that matter had already been decided by the Primary Court in the decision which is still intact. The appellant is at liberty to challenge that decision before the District Court. On the basis of the above stated reasons, this ground of appeal fails.

Since the appellant was not a party to the proceedings of the Primary Court, he may challenge the said decision before the District Court by obtaining extension of time to do so.

Having decided the first ground in the negative, the second ground dies naturally as it relates to the issue of ownership of the suit property which, as we have indicated above, was found to be the property of the late Moshi Abdallah, which decision has not been overturned.

For what we have discussed above therefore, we find that the appeal is without merit and we hereby dismiss it. In the circumstances of the case, each party shall bear its own costs.

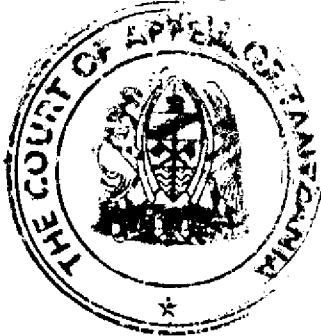
DATED at DAR ES SALAAM this 28th day of March, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2023 in the presence of the Appellant and the Respondent in person, and in the presence of Mr. Yahaya Njama Counsel for the respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J.E. FOVO", written over a horizontal line.

J.E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL