IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT ARUSHA

MISC. LAND CASE APPEAL NO. 31 OF 2017

(From the decision of the District Land and Housing Tribunal of Arusha District at Arusha in Land Case Appeal No. 70 of 2015, original Ward Tribunal of Sokoni II Ward in Application No. 5/2015)

1. RAHEL SIMON
2. HELEN SIMON
3. NEMBRIS SIMON
4. DINA SIMON ..... **APPELLANTS**
5. NAISHIYE SIMON
6. NAISILIGAKI SIMON
7. JOYCE SIMON
8. SOPHIA SIMON

VERSUS

SOLOMON SIMON.....RESPONDENT

JUDGMENT

Date of last Order: 01/06/2018

Date of Judgment: 17/08/2018

BEFORE: S.C. MOSHI, J.

The appellants herein instituted land dispute against the respondent before the Sokoni II Ward Tribunal claiming the suit land, that the same was bequeathed to them by their deceased father. The Ward Tribunal entered

judgment in favour of the appellants and the respondent appealed before the District Land and Housing Tribunal which allowed the appeal and set aside the decision of the trial tribunal on ground that the claim which was instituted before the Ward Tribunal was time barred. Dissatisfied with the decision of Arusha District Land and Housing Tribunal appealed before this court basing on the following grounds;

1. That the appellate Tribunal erred in law and in fact in holding that the matter filed at the Ward Tribunal was hopelessly time barred.
2. That the Appellate District Land and Housing Tribunal erred in law and in fact in holding that the time started running from the date of the will without putting into consideration the directives given to the respondent by their deceased father.

Before this court, the appellants were represented by Lawena learned Advocate while the respondent was represented by Osujaki learned Advocate. The hearing of this appeal was disposed of by way of written submissions and both parties filed their submissions accordingly.

Arguing the first ground of appeal, the appellants' counsel submitted that, time limitation cannot start running from the date of the death of Simon Meitinyiku rather the limitation period started from the time when the respondent demolished the buildings that were in the suit land and failed to erect other buildings in the suit land. He further stated that, demolition of the building was in compliance with the wishes of the deceased Simon Meitinyiku. As per the evidence the said buildings which were used as "pombe shop" had to be demolished and the respondent failed to erect

other buildings in the suit land for the appellants; hence the appellants decided to take the matter to the clan elders and the clan elders failed to resolve the dispute hence the appellants decided to refer the matter to the Ward Tribunal. He further stated that, the claim that the matter is time-barred does not hold water because there is no evidence to prove that. He referred this court to page 2 of the proceedings of the trial tribunal where the 1st appellant testified that;

> *"Mdai aliendeleza ushahidi wake kuwa kabla Mwenyezi Mungu hajamwita marehemu Baba yao alikuwa amelazwa katika Hoswpital ya Seliani alimwita Mdaiwa Solomon Simon ambaye ni kaka yao na kaka mwingine aitwaye Lotasamaki Simon ambaye kwa sasa ni Marehem na kuwaagia kuwa Eneo la Ardhi ya iliokuwa kilabu cha pombe ya kienyeji (Mbege) Eneo la Magharibi mwa shamba hilo ni mali ya marehemu Lomnyaki (Joram) Simon na Eneo la shamba hilo upande wa Mashariki lililokuwa na Majengo ya Kilabu litakuwa mali ya mabinti wote wa marehemu baba yao (Simon Meitinyiku). Aliendeleza ushahidi wake kuwa marehemu Baba yao alitoa pia wosia kuwa kaka yao (Mdaiwa Solomon Simon) avunje majengo ya kilabu na kuwajengea Wadai (Mabinti) nyumba ambazo mabinti wote watayamiliki."*

He said that, the appellants having discovered that the respondent was not ready to erect new buildings in the suit land and was using them for his own business he had to take the matter to the Ward Tribunal for action.

Therefore, he stated that the first ground of appeal has merits and prayed the same be allowed.

In regard to the second ground of appeal, he submitted that the respondent was directed to demolish the building in which there was a pombe shop and erect new buildings for the appellants. The respondent complied with the first part of the will but failed to complete the second part which required him to erect new buildings for the Appellant. Having failed to accomplish the second part of the will the appellants were forced to take the matter to the clan elders and later to the Ward Tribunal. He said, the respondent's failure to erect the building and instead started using the suit land for his own benefit turned him to a trespasser. Thus, the time accrued in 2015 when the respondent was ordered to complete the wishes in the will and failed. Therefore, he submitted that the Appellant District Land and Housing Tribunal erred in law and in fact when it allowed the respondent's appeal. Hence he prayed this appeal be allowed by quashing and setting aside the decision of the Appellate District Land and Housing Tribunal. He also prayed for costs.

Responding to the first ground of appeal, the respondent's counsel submitted that the laws regulating period of limitation for recovery of possession of land is very clear that the limitation period is 12 years. He also referred this court to THE CUSTOMARY LAW (LIMITATION OF PROCEEDINGS) RULES GN NO. 311 OF 1964 Rule 2, item 6 which states that;

"Proceedings to recover possession of land or money secured on mortgage of land is 12 years".

He also referred this court to the case **Yusuf Same and Another vs Hadija Yusuf** [1996] TLR 347 where it was stated that;

"The limitation period in respect of lane, irrespective of when letters of administration had been granted, was 12 years and on this basis the respondent's claim was time-barred."

He further submitted that, it is principle of law that, time started to run from the time when the disposition was completed and the disposition was completed even before the death of one SIMON MEITINYIKU (deceased's father) in 1997 when the appellants bequeathed the land as per the 1st Appellant's testimony. He further stated that, although the respondent occupied the disputed land even before the death of the late Simon Meitinyiku along with time to time improvement on the disputed land like constructing a permanent house, toilet and take care of bananas farm; the appellants has never claimed the ownership nor to take some of the farm products. In the year 2015 (18 years from the bequest in 1997) as the record shows the 1st appellant appeared for the first time before the family meeting to claim the ownership of the land on 7/3/2015 and the family meeting was concluded on 25/3/2015 which decided that the appellants have no rights over the disputed land and the land belongs to the respondent. He said, there was no warrant for relaxation in the appellants for 18 years to realize the rights of appellants over the property. He cited

the case of **Dr Ally Shabhay v Tanga Bohora Jamat** 1997 TLR 305 (CA) where the court observes that;

> *"Those who come to courts of law must not show unnecessary delay in doing so; they must show great diligence"*

He also cited the case of **Tanzania Dairies Ltd v Chairman Arusha Conciliation Board and Isaack Kirangi** (1994) TLR 33 (HC) where it was held that;

> *"Once the law puts a time limit to a cause of action, that limit cannot be waived even if the opposite party desists from raising the issue of limitation."*

Responding to the second ground of appeal, he submitted that the period of limitation to any court action runs from the date of which the right of action accrues and referred this court to THE CUSTOMARY LAW (LIMITATION OF PROCEEDINGS) RULES GN NO. 311 OF 1064 Rule 2 which states that;

> *"No proceedings for enforcement of any claim under customary law of a nature shown in the second column of the schedule hereto...., such period being deemed to commence on the day when the right to bring such proceedings first accrue or when a day these rules comes into operation, whichever is later".*

He also referred this court to the case of **CRDB (1996) v. Boniface Chimya** [2003] TLR 143 where it was held that;

> *"It is common knowledge that the period of limitation to any court action runs from the date on which the right of such action accrues and the period is prescribed under the laws of limitation Act 1971".*

He submitted that, the period of time run against the appellants from the date on which the right of action for such proceedings accrues and this is when the disposition was completed as the 1st appellant testified.

He further submitted that, they challenged the will before the 1st appellate tribunal that it does not comply with requirement of the laws which provided for a valid will; THE LOCAL CUSTOMARY LAW (DECLARATION) (NO.4) ORDERED, Order 2, Third Schedule item 5,6,7, and 11 and THE INDIAN SUCCESSION ACT, 1865. He said, items 6 of the third schedule of THE LOCAL CUSTOMARY LAW (DECLARATION) NO. 4) ORDER provides inter alia that;

> *"people who are mentioned as inheritors in a will shall not be witnesses to the will except his wife or wives."*

Further item 11 of the Third Schedule of THE LOCAL CUSTOMARY LAW (DECLARATION) (NO.4) ORDER states that wills must be witnessed by at least four witnesses, two witnesses must be relatives of the testator and two should not be related to testator. Again under item 5, third schedule of THE LOCAL CUSTOMARY LAW (DECLARATION)(NO.4) ORDER state that a wife or wives of the testator must also witness the will. He contended that,

in the case of **Deusdedit Kashanga v. Bi. Baite Rwabigene,** 1968 HCD 165, Mustafa J. emphasized that;

> *"An oral will must be witnessed by at least 4 people, at least 2 of whom must be kinsmen and at least 2 unrelated to the testator. The wife or wives of the testator are additional to the minimum of 4 recognized witnesses."*

He said that, since this requirement was not complied with, the alleged oral will has not been proven.

Again item 7, of the third schedule of THE LOCAL CUSTOMARY LAW (DECLARATION)(NO.4) ORDER provides that;

> *"a will is invalidated if a testator is of unsound mind because of insanity, illness and drunkenness or sudden anger."*

He also cited section 54 of the INDIAN SUCCESSON ACT, 1865 which provides that, the bequest or appointment shall be void if supported by the testimony of persons who are beneficially interested in its contents. He thus stated that, given the situation that the so called will does not meet the requirement of the above mentioned laws; hence the will was invalid.

He maintained that, the appellants took 18 years without disturbing or requesting the respondent regarding ownership of the disputed land from 1997 as the appellants testified that the disposition took place until 2015 when the 1st appellant took the matter to the family meeting and he later approached the Ward tribunal to claim the ownership of the land. For all that time before 2015 the respondent made some improvement including

construction of a permanent house, toilet and continuing with "kilimo cha migomba. If it is true that the disputed property belonged to the appellants, the appellant could not have stayed that long without claiming their rights. He therefore prayed the second ground of appeal be dismissed for lack of merits and the entire appeal be dismissed with costs and the decision of the Appellate tribunal be upheld.

In rejoinder the appellant's counsel stated that Rule 2, item 6 of the Customary Law (Limitation of Proceedings) Rules (supra) as cited by the respondent's counsel does not apply in this matter as the suit land was not secured on mortgage. He maintained that the whole matter is based on a will that was given by the parties' father one Simon Meitinyuki.

I have considered the submissions of both parties and gone through the records of the lower tribunals. This appeal originates from the Ward Tribunal, hence the law applicable in regard to this matter is The Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules, G.N No. 311 of 1971. The proceedings instituted by the appellants before the Ward Tribunal were for the recovery of land from the respondent which they claimed that their deceased father bequeathed to them. Rule 2 of The Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules (supra) provides that;

> *"No Proceedings for the enforcement of a claim under customary law of a nature shown in the second column of the schedule hereto shall be instituted after the expiration of the corresponding period shown in the third column of that schedule,* ***such period being deemed***

to have commenced on the day when the right to bring such proceedings first accrued *or on the day when these rules came into operation, whichever is the later". (emphasis is mine).*

According to the rule cited above, the limitation period for institution of proceedings for the enforcement of a claim under customary law shall commenced on the day when the right to bring such proceedings first accrued.

The 1st appellant before the trial tribunal claimed that the disputed land was bequeathed to the appellants through oral will when their father was sick in the hospital. The records further show that the deceased died in 1997; hence according to the rule cited above the appellant's right to claim the disputed land accrued in 1997 when their father died as rightly held by the 1st appellate Chairman and not in 2015 as suggested by the appellant's counsel. Item 6 of the Schedule to The Magistrates' Courts (Limitation of Proceedings Under Customary Law) Rules (supra) provides that;

*"**Proceedings to recover possession of land** or money secured on mortgage of land, **is 12 years**". (emphasis supplied)*

Calculating from the period when the appellants father departed (1997) to 2015 when the appellants started to challenge the respondent's possession over the disputed land through Clan meeting and later brought a claim before the trial tribunal is 18 years hence it is obvious that the claim instituted before the trial tribunal was time barred. It was held in the case of **Yusuf Same and Another vs. Hadija Yusuf** [1996] TLR 347 that a

case instituted out of limitation period has to be dismissed immaterial whether limitation has been raised as a defence or not; hence the first appellate court rightly held that the case was time barred. This ground of appeal disposes of also the second ground of appeal.

I therefore basing on the above finding find that this appeal is devoid of merits and it is accordingly dismissed. Since parties to this appeal are relatives, so as to preserve peace and harmony within the family I order no costs.

Order accordingly.

S. C. MOSHI

JUDGE

17/08/2018