THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL No. 23 OF 2018
(Arising from the Decision of the District and Housing Tribunal for Maswa in Land Application Case No. 9/2012)

DEMA MAKALO & 8 OTHERS .... APPELLANTS

VERSUS

SULLA TIMLA MAKALO.....RESPONDENT

JUDGMENT

Date of the last Order: - 11th June, 2020
Date of the Judgment: -10th July, 2020

MKWIZU, J.:

In Maswa District Land and Housing tribunal, SULLA TIMILA MAKALO who is administrator of his grandfathers' estate, the late Makalo Sitta, filed an application for declaration ***inter alia*** that the disputed piece of land is the property of the late Makalo Sitta's family and that it was illegally sold to the respondents . It was the respondent (original complainant) that the land belonged to his late grandfather who used the suit land peacefully until his death in the year 1960.In the year 2007, Dema Makalo and her late husband, Maduhu Limbu without a consent from the late Makalo's family sold a total

of 77 acres out of 130 to Machambi Kitapanda (14 acres), Sagayika Gumada (2 acres), Masunga Magigisi (2 ½ acres) ,Wanga Magudi (21 Accres), Masuke Mwilu (11 acres), Nyanda Masaga (6 ½), Kwandu Sagaika (14 acres) and Nila Dilu (3 ½ accres).

The respondent alleged further that having sold the 77 acres, Demo Makalo and her husband shifted to Lamadi Centre in Magu district. The respondent's requests for vacant possession by the above mentioned buyers prove futile hence the application in the District land and housing tribunal.

On their part, appellants claimed to be bonafide purchaser of the suit land and that thy are lawful owners through the *Hati za kimila* issued to them by the Village authorities. The application at the trial tribunal ended in favour of the respondent, that the land belonged to Makalo Sitta's family. Appellants were permanently restrained from trespassing on the suit land. The premises which were built on the said land were ordered to be demolished at the appellants costs and 1st appellant was ordered to refund the purchase price paid to her. Aggrieved by this decision, the appellants, **DEMA MAKALO** and

8 others are now appealing to this Court. They initially filed three grounds of appeal:

1. *That the Honorable Trial Chairman erred in law and in facts in deciding that the suit land belongs to the late Makalo Sitta instead of the Appellant herein above.*

2. *That the Honorable trial Chairman erred in Law and in facts when he ignored the opinion of the assessors and decided the case based on the existence of tombs in the suit land and awarding the suit land to the respondent herein.*

3. *That the trial Chairman of the Tribunal erred in law and in facts by ignoring the evidence of the appellants herein above that they own the land in accordance with customary right of occupancy which was granted to them by the village council.*

Later on 7/2/2019 they filed two additional grounds of appeal to wit:

1. *That the learned Chairman erred in law and in facts entertained the land dispute which was time barred*

2. *That, the learned Chairman erred in law and facts when he intentionally omitted to record the evidence of the witness for the respondents namely; Limbu Masigere,Masunga Buzibila ,Hakiyamungu @ Haki Nkhabhi, Sylevester Shikolo and Ndete Maduhu.*

By the order of the court dated 11th June, 2020 the parties filed written submissions for and against the appeal, the appellants enjoyed the service of Frank Samuel (Advocate) whereas the respondent appeared in person, with no legal representation.

In his first additional ground of appeal, Mr. Frank raised two procedural issues, first that, respondent had no *locus stand* to file the application at the trial tribunal. He said, Makalo Sitta passed away in the year 1960. The letter of Administration was granted to the respondent by the Nkolo Primary Court on the 25th October, 2010, meaning that respondent was appointed Administrator of the estate of the late Makalo Sitta after 50 years after the his death .Mr. Frank acknowledged that the law regulating administration of estate does not prescribe the time limit, he however of the view that such limitation is provided for under Item 24 of Part 1 of the schedules to the

Law of limitation Act Cap 89 R:E 2019 which is six years. His assertion was that the appointment of the Respondent as an administrator of the estate of the late Makalo Sitta done after 50 years was time barred since no extension of time was sought under **section 44 of the Law of the Limitation Act**. He concluded that the tribunal erred therefore to entertain the matter as respondent had no *locus stand*.

Secondly, Mr. Frank submitted that the claim was instituted before the tribunal after expiration of the 12 years' time limit for claim in respect of land. He said, the claim was lodge 52 years after the death of the owner contrary to the Law of Limitation Act. He referred the court to Item No. 21 of Part 1 of the Schedule read together with **section 9 (1) of the Law of Limitation Act**. He pressed that the suit at hand was instituted out of the time limit and hence untenable.

On the 2nd additional ground of appeal Mr. Frank submitted that, the Chairman erred in law and in facts when he intentionally omitted to record the evidence of the respondents' witnesses namely; Limbu Masigere, Masunga Buzigila, Hakiyamungu @ Haki Nkhabhi, Seni Kinele, Sylivester

Shokolo and Ndete Maduhu. The defence witness were to be called and heard during the visit to the *locus in quo*, but there is no record of what transpired at the said visit. He submitted that, the exclusion of the above evidence was done intentionally to weaken the evidence of the appellants.

On the 1st initial ground of appeal, Mr. Frank submitted that the Honorable Trial Chairman erred in law and facts in deciding that the suit land belongs to the late Makalo Sitta instead of the appellant. He said, according to the evidence on record even if it is assumed that the said suit was filed in time, the appellant proved that they had been in possession of the said land for more than 12 years.

Mr. Frank faulted the tribunal for ignoring the opinion of the Assessors without explanation.

On the last ground, it was Mr. Frank's submission that, trial Chairman erred in law and fact by ignoring the evidence of the appellants that they had in possession customary right of occupancy granted to them by the Village Council. He insisted that the appellants testified that they possessed the HATI MILIKI ZA KIMILA which couldn't be issued to them if they were not

the real owner recognized by the village council. He requested the court to quash and set aside the tribunals decision and declare the appellants lawful owners of the suit land.

In reply the respondent strongly disputed the appellant's submission in support of the of appeal. On the issue of time limitation, he argued that the cause of action arises when one comes into knowledge of the trespass. He filed application at Maswa District Land and Housing Tribunal upon finding that appellants have trespassed on the suit land and because he was yet to be appointed administrator of the deceased estate, he had first to apply for the appointment before the institution of the matter. He refuted the contention that appellants have been in occupation of the suit land for 12 years.

With regard to the second additional ground of appeal, the respondent said, Limbu Masigere, Masunga Buzigila, Hakiyamungu @ Haki Nkhabhi, Seni Kinele, Sylivester Shokolo and Ndete Maduhu were not called as witnesses by the Appellants, he said, there is no evidence tendered proving that the

said witnesses were called at the locus in quo and their evidence was not recorded. He urged this court to find this ground of appeal without merit.

He went further explaining that appellants did not prove that they have been in occupation of the suit land for more than 12 years. The alleged evidence tendered by the DW2 that he purchased the suit land from the 1st respondent's husband is not proved by any documentary evidence. After all, insisted respondent, the said husband had no title to pass to DW2 as the land was not his property.

He conceded to the suggestion by the appellant's counsel that the Chairman was required to give reasons why he differed with the assessor's opinion. He cited the provision of the section 24 of the Land Disputes Courts Act Cap 216 but quickly added that the Chairman gave his reasons for departure.

On the ground that appellants were already in possession of the Customary Rights of occupancy, he said, the same are not deemed Right of Occupancy within the eyes of the law but mere papers as they were not issued by a proper authority. Respondent was of the view that deemed Right of

Occupancy is being issued by the Minister for Lands, Housing and Human Settlements. He urged that the appeal has no merit, it should be dismissed with costs.

In rejoinder, the counsel for the appellants reiterated his earlier submission with some correction of typing errors in Case Number.

After carefully reviewing the evidence on record and the submissions made by both parties, I am inclined to agree with the position maintained by the appellants counsel particularly on the first ground in the additional petition of appeal where as stated earlier two issues were raised relating to the respondent's *locus standi* and that the application at the tribunal was time barred.

Going by the records, the respondent filed land application No 9 of 2012 before the trial tribunal after he had obtained a Latter of Administration of Estate of his Late grandfather Makalo Sitta vide an order of the Nkololo Primary Court dated 20/10/2010 in Probate Cause No. 2 of 2010.This administration later was sought and granted almost 50 years after the death of the alleged owner of the disputed land.

Nothing was said much on this point by the respondent, his only argument was that he filed the application after learning of the trespass by the appellants and that because he had no letters of administration, he had first to apply for one. Indeed, the respondent, was appointed administrator of the estate of the late Makalo Sitta almost 50 years after the deceased's death. Trial tribunal, being a land court, was limited to deciding the land issues. That being the position therefore, I find myself restricted on what was decided by the tribunal and for which the tribunal had jurisdiction and nothing else. However, it should be sufficient to say here that, if there is anything parties find irregular on the respondent's appointment as an administrator of the Sitta's estate, the complaint should be lodged before the proper court for determination. Land court lacks jurisdiction to decide on issues pertaining to the legality or otherwise of an administrator of estate. This is a purview of the Probate and Administration Court. In **Mr. Anjum Vicar Saleem Abdi Vs. Mrs Naseen Akhtar Saleem Zangie,** Civil Appeal No. 73 of 2003 (unreported) at page 17 the court said:

> *"The revocation and/or validity of the grant of probate to the appellant and his brother could only be legally made and/or challenged under the provisions of the Probate and Administrations of Estates Act, Cap.*

352 and the Rules made there under; Similarly the validity of the probate proceedings would only be competently challenged in an appeal to the High Court from the decision of the subordinate court granting probate and/or in Revision and proceedings in the High Court either on its own motion or on application by an interested party".

On the second point, that the suit was filed outside the prescribed 12 years limit, appellants relied on the provisions of Item No. 22 of the Part 1 of the Schedule read together with section 9 (1) of the Law of Limitation that reads as follows:

"s: *9 (1). Where a person institutes* ***a suit to recover land of a deceased person,*** *whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action shall be deemed to have accrued on the date of death." (Emphasis added).*

Contrarywise, respondent suggested that the cause of action arose from when he learnt about the said trespass. It was his view that, the cause of action accrued in 2015 when appellant together with her husband, illegally sold the land in dispute to the respondents.

It is a settled principle of law that, the question of Limitation is a fundamental one and not merely a technicality since it goes to the root of the case. It can be raised at any stage of the case and once raised, the court is obliged to peruse the pleadings filed by parties and make a finding whether or not the suit is time barred before proceeding with the case on merits. This is because parties are in law bound by a lifespan of any legal remedy for the redress of the legal injury alleged to have been suffered.

Reading the provisions of section 9 (1) of the Law of Limitation Act above, it is clear that the accrual of the cause of action commences after the demise of the deceased if at his death, he was the last person entitled to the suit land.

It is not disputed that the deceased, Makalo sitta died in the year 1960. Thus, guided by section 9 (1) above, the cause of action in our case arose in the same year 1960.This is the position in the case of Yusuf **Same & Another v. Hadija Yusuf** (1996) TLR 347 where it was held;

> "The limitation period in respect of land, irrespective of when letters of administration had been granted is 12 years as from the date of the death of the deceased"

However, as it is for other matters, subsection 2 of section 9 provides specifically that the right of action starts to accrue on the date of dispossession of the property.

The relevant section 9 (2) states: -

> *"9 (2)- Where the person who institutes a suit to recover land or some person through whom he claims has been in possession of and has while entitled to the land, been dispossessed or has discontinued his possession* ***the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.*** "(emphasis is mine).

Again, sections 24 and 25 of the law of limitation act provides for exclusion of time in matters relating to administration of estate. 24(1) reads:

> *"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."*

Section 25(1) provides:

> *"Where a person dies after a right of action in respect of any proceeding accrues to him, the time during which an application for letters of administration or for probate have been prosecuted shall be excluded in computing the period of limitation for such proceeding."*

The two sections above accommodate two dissimilar situations. Section 24(1) deals with a situation where a right of action accrues after the death of the deceased person. In such a state, the period of the first anniversary, that is, a period of one year from the date of death of the deceased or the period before the accrual of right of action, whichever is a later period, is to

be excluded in computing the time limitation. On the other hand, Section 25 (1) addresses a situation where the accrual of the right of action arises before the death of the deceased person. In such a circumstance, it is only the period wherein the plaintiff was prosecuting an application for letters of administration or probate which shall be excluded. This is the position in the case of **Shomari Omari Shomari (administrator of the estate of Selemani Ibrahim Maichila v. Esha Selemani Ibrahim and Another**, Land Appeal No. 171 of 2018, HC Land Division (Unreported) where the court observed that:

> "***Admittedly, (the) time limit for pursuing an action for and against an estate of the deceased is not without exclusion***. *The exclusion is dealt with under sections 24 and 25 of the LLA. Section 24(1) deals with a situation wherein the deceased person dies before the accrual of a right of action. In such a scenario, the period of the first anniversary from the date of death of the deceased or the period before the accrual of right of action, whichever is a later period, shall be excluded..."*

In the present case the cause of action arose after the death of Makalo Sitta. The exclusion therefore applicable under such a circumstance is that

explained under section 24 (1) above. Anyone claiming title under Makalo Sitta could have instituted a suit, under the circumstances of this case after the accrual of the right of action. Inquisitively, one would ask as to when did the right of action arose in this matter. It is not indicated in the record that there was any dispute in relation to the ownership of that suit land until when the appellants were alleged to have encroached onto the suit land. The right of action is thus, deemed to have accrued on the date of the dispossession of the land in question. The respondent's right of action accrued and the twelve-year limitation period commenced to run against him in 2010, when he found the respondents on the suit land and therefore, the respondent's suit instituted in 2012 was within the time of twelve years. The appellant's contention that the suit was time barred has no merit.

I now move to the second ground of appeal in the addition petition of appeal. On this ground it is complained that the trial chairman intentionally omitted to record the evidence of the appellants witnesses namely, Limbu Masigere, Masunga Buzigila, Hakiyamungu @ Haki Nkhabhi, Seni Kinele, Sylivester Shokolo and Ndete Maduhu. These witnesses were to be called and heard

during the visit at the *locus in quo*. Page 32 starting with Paragraph 5 to 7 which read: -

> *"Respondents:- Your Honour, we will call two witnesses to corroborate our testimony we pray for defence hearing date where the Tribunal my (sic) also visit the locus in quo.*
>
> *Mr. Some Advocate:- I have no objection.*
>
> *Order:- (1) defence hearing and visiting of locus in quo to be on 03/12/2016*
>
> *(2) Parties dully informed*
>
> *(3) Defence witnesses to be summoned*
>
> ***E.F.Sululu***
> ***Chairman***
> ***4/11/2016***

However, the typed proceedings is silent on what transpired on the *locus in quo*. After the Tribunal's orders of summoning the defence witnesses who were to appear on 3/12/2016, the record tells nothing on whether the targeted witnesses were summoned or not. My perusal of the original records revealed that the tribunal did actually visit the locus in quo in 9/12/2016. The scheduled date for this visit was 3/12/2016.There is no explanation as to why the date changed. Again, there is nothing indicating whether parties

were aware of this change of the date of the visit to the *locus in quo* and whether the defence witnesses were actually involved.

A further review of the records which was not made part of the typed proceedings revealed that one person called Masunga Busibila testified as DW8 while Seni Kinele testified at the locus in quo as DW9. After a visit, the tribunal did not reconvene and the records are silent on what happened on the defence evidence as it was not indicated whether they closed their case or not. It follows therefore that the appellant's counsel complaint is merited. The procedure taken by the tribunal from 4/11/2016 onwards was illegal and unfair to the appellant as they were not given an opportunity to present their case to the fullest.

As indicated above, the defence's prayer to call witnesses was granted and though no indication that the said witnesses were really called, the tribunals judgment was to the effect that defence failed to call witnesses to support their position. The judgement reads:

"1st Respondent (DW1) called no witness to support her allegation on the land being the property of her husband who inherited the same from her father in law."

This was prejudicial to the appellant who had expressed their willingness to call witness but unfortunately, they were not accorded that right. This is as good as condemning them unheard contrary to the basic and fundamental principles under **article 13 (6) (a) of the Constitution of the United Republic of Tanzania**. In the case of **Abbas Sheally And Another Vs Abdul Fazalboy,** Civil Application No. 33 of 2002 the court stated that,

> "***The right of a party to be heard before adverse action or decision is taken against such party*** *has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.***" *(Emphasis added).*

From the above therefore, I am inclined to find that trial tribunal committed a grave procedural irregularity that vitiate the proceedings. The appellants

were denied the right to be heard, thus contravening one of the basic principles of natural justice. Consequently, on that ground alone, and without going further to consider other grounds raised, I allow this appeal, quash the decision of the lower tribunal with an order that the case be remitted back to the trial tribunal for retrial, before another chairperson and another set of assessors.

Taking into account the nature of the proceedings and parties involved,

I make no order as to cots.

Order accordingly.

Date at **Shinyanga** this 10th day of **July**, 2020

E.Y. MKWIZU
JUDGE
10/7/2020

Court: Right of appeal explained to the parties.

THE HIGH COURT OF TANZANIA

E.Y. MKWIZU
JUDGE
10/7/2020