

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**MISC. LAND APPEAL NO. 3 OF 2019**

(From the Decision of the District Land and Housing Tribunal of Mtwara at  
Mtwara in Land Case Appeal No. 231 of 2018 and Original Ward Tribunal of  
Chaume Ward in Application No. 21 of 2018)

**ATHUMANI MUSSA NAMBOLE.....APPELLANT**

**VERSUS**

**MSHAMU SAID LIUYE.....RESPONDENT**

**JUDGMENT**

10 & 18 March, 2021

**DYANSOBERA, J.:**

The appellant herein is, before this court, challenging the decision of the District Land and Housing Tribunal which reversed the decision of the Ward Tribunal at Chiume.

To appreciate the merit or otherwise of this appeal, a factual background will be necessary. The appellant sued the respondent at the trial Ward Tribunal claiming back the suit land he had pledged to the respondent for securing a sum of Tshs. 100, 000/= and his efforts to redeem it by repayment of the money had proved futile. The respondent, on his part, claimed the suit land to be his lawful property. The Ward Tribunal, in its judgment delivered on 8<sup>th</sup> October, 2018, was satisfied that the appellant had proved his case as the respondent had failed to prove, by documentary evidence, that he had bought the suit land from the appellant.

Aggrieved, the respondent successfully appealed to the District Land and Housing Tribunal which overturned the decision of the Ward Tribunal. In overruling the decision of the Ward Tribunal and finding for the respondent, the Hon. Chairman of the District Land and Housing Tribunal was satisfied that the appellant's suit having been filed beyond the prescribed period of twelve years was time barred and subject to be dismissed under the Law of Limitation Act.

The appellant thought that the decision of the first appellate Tribunal robbed him of justice hence this appeal. According to the appellant's

petition of appeal, nine (9) grounds have been preferred. However, a critical analysis of the said grounds reveal that only two grounds of appeal are of paramount importance in disposing of this appeal. These are grounds Nos. 4 and 6 as set out hereunder:-

4. That the trial learned Chairman grossly erred in law and in fact by accepting and giving weight to the contradictory evidence tendered by the respondent if he purchased the suit land in consideration of Tshs. 350,000/= and on the other side he testified that the suit land had been mortgaged since 1997 by the appellant.
6. That, the learned trial chairman grossly erred in law and fact when he ignored the correct testimony of the appellant that he started to make follow up about the suit land since 2005 in different land machinery, like village land authority and other elders but the respondent refused to vacate the suit land to the appellant although was refunded of the stated amount.

This appeal was heard by way of written submissions. Parties duly complied with the time frame duly set out by this court.

Submitting in support of said two grounds of appeal, the appellant stated that the District Land and Housing Tribunal misdirected itself for failure to consider that the respondent failed to justify his ownership in the suit premises for the reason that that the respondent's claim to have purchased the said suit premises for the amount of Tshs.350, 000/= was unjustifiable and that no any sale agreement was tendered as exhibit to justify his allegation of owning the suit land.

It was the appellant's further submission that the trial tribunal grossly erred in law for holding the view that the dispute was filed by the appellant out of time, without considering the fact that the appellant was within the required prescribed time for one to claim for his right in land matters. The appellant asserts further that he started to search for his rights in the suit land since 2005 where he at first lodged his claims before the Mkwedu Village Land Council which is within Chaume Ward and that the same Mkwedu Village Council held the view that the appellant was the rightful owner of the suit land.

Replying to the appellant's submission, the respondent contended that he occupied the land for a long time and the appellant failed to prove the claims and only laid his claims on the suit land after the passage of

many years. He stressed that his evidence was strong enough to prove ownership. He further maintained that the appellant's suit was time barred when he instituted it at the Ward Tribunal. The respondent supported his argument by citing the case of **Abdallah Mtandi v. Ramadhani Ikungu and Seif Muhoni**, Land Appeal No. 7 of 2009 (unreported) on the authority of adverse possession. He, in the end, invited this court to dismiss the appeal with costs.

I have gone through the lower Tribunals' records and considered the petition of appeal. I have also taken into account the parties' submissions in support and in opposition of the appeal.

As far as the 4<sup>th</sup> ground is concerned, the record of the trial Ward Tribunal reveals that the appellant's claim against the respondent was on trespass of his land he had pledged or rather mortgaged to the respondent for a sum of Tshs. 100,000/= and the land was to be redeemed upon the payment of the said money back to the respondent. The appellant argued that he sought to redeem the land by paying the money but the respondent refused to release the suit property.

In his defence, the respondent told the Ward Tribunal that in 1997 the appellant wanted to pledge his farm but he, the respondent advised

him to sell it to him. The appellant refused and they executed a mortgage but the appellant failed to redeem it. The respondent insisted that he could not surrender it to the appellant unless he gets his entitlement. In his words, the respondent is recorded to have testified at p. 4 of the typed judgment of the Ward Tribunal as follows:-

'ninachofahamu 1997 alikuja Athumani Mussa kuwekeza shamba lakini nikamshauri aniuze lakini hakutaka. Tukawekezana tu lakini cha ajabu hajagomboa shamba. Anataka nimpe tu kwa kuwa nimekaa nalo siku nyingi. Sasa jee, kwani ndo taratibu zinavyo kuwa nimpe tu bila kupewa changu na lile shamba nimefanyia huduma nitapewa nini?

A critical analysis of the parties' evidence clearly shows that parties were at one that the appellant did not sell the farm to the respondent but mortgaged it. As to why the farm was still in the respondent's hands, the appellant said that the respondent had refused to receive back the money after he gave it to him while the respondent maintained that the appellant had failed to pay back. As rightly found by the Ward Tribunal, the respondent did not assert to have bought the suit farm from the appellant and this explains why no sale agreement was forthcoming from either the respondent or his three witnesses he called. As found by the lower Tribunals, there was no evidence that the appellant ever sold the suit land to the respondent. He only mortgaged it. In asserting before the District

Land and Housing Tribunal in the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal that he had bought the suit land from the appellant in 1997 at Tshs. 350,000/=, the appellant was blatantly lying.

The next issue is whether the appellant's suit at the Ward Tribunal was time barred as argued by the District Land and Housing Tribunal. The evidence of the appellant was clear when he mortgaged the suit land to the respondent. Though the respondent argued that it was in 1997, as correctly found by the Ward Tribunal, he failed to prove the assertion by documentary evidence. The appellant maintained that he started claiming back the land from 2005 when he lodged his claims before the Mkwedu Village Land Council which is within Chaume Ward and that the same Mkwedu Village Council held the view that the appellant was the rightful owner of the suit land. If the appellant is believed, and I don't see why he should not, then time started to run in 2005. As correctly admitted by the Hon. Chairman at p.6 of the typed judgment, para 6 of the Customary Law (Limitation of Proceedings) Rules, GN No. 311 of 1964 which applies at the Ward Tribunal under section 52 (1) of the Land Disputes Courts Act [Cap. 216 R.E.2002], provides that the limitation period is twelve years. It is stated thereunder as follows:

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

If that is the case, then the appellant's right to bring the proceedings in the enforcement of a claim under customary law of the nature shown under the said item which was first filed in 2005 in Mkwedu Village Land Council which is within Chaume Ward was within time. The appellant was clear that the said Village Land Council found in his favour. The suit was therefore, not time barred as that was a court of competent jurisdiction within the law.

Even if, for the sake of argument, the appellant's suit was time barred, the issue is whether the District Land and Housing Tribunal was legally justified in entertaining the issue of limitation which had been neither pleaded nor argued by the respondent at the Ward Tribunal.

It would seem, the Hon. Chairman based his issue of limitation on the respondent's 3<sup>rd</sup> ground of appeal at the District Land and Housing Tribunal that:-

'3. Kwamba Baraza tukufu katika maamuzi yake halikutenda haki kwa kitendo chake cha kutozingatina kuwa mrufaniwa alishapitwa na muda wa ukomo wa kudai shamba lenye mgogoro dhidi ya mrufani, kwa kuwa mrufani anatumia shamba lenye mgogoro tokea mwaka 1997 zaidi ya miaka ishirini iliyopita.'



With respect, the plea of limitation though a point of law is not a question of jurisdiction and cannot, therefore, be pleaded for the first time at an appeal stage. As Rostomji, *The Law of Limitation and Adverse Possession* Vol. 1 (1938) puts it at page 35:-

" It is clear however that limitation is not a question of jurisdiction and therefore it cannot, for that reason, be pleaded for the first time at a later stage. The general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon questions of fact.

Likewise, on page 36, he further states that:

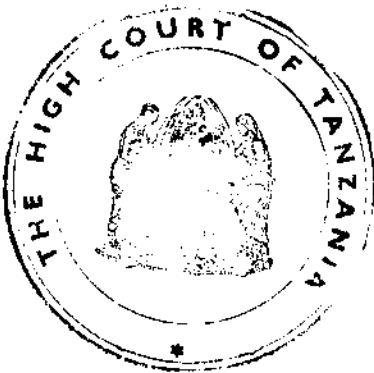
"But in order that the plea of limitation may be given effect to when raised for the first time in appeal, it is necessary that the facts showing that the suit is time barred should be apparent on the record".


The appellant, in his evidence, had told the Ward Tribunal that he had pledged or rather mortgaged the land at Tshs. 100,000/= so that he redeemed it on payment of the said money. Mahmoud A. Mkaunda who testified as PW 2 recalled that the appellant had a cashewnuts farm which he mortgaged it for his personal problems at Tshs. 100,000/=:, that there was no writings and no time limit was set but it was agreed that any time the appellant got money would pay and redeem the farm. In his testimony, the respondent was clear that the appellant had pledged the farm but

failed to redeem it and the respondent could not release it unless he got his entitlement. There was no where the respondent asserted to have bought the farm from the appellant in 1997. The argument by Said M. Mkwaja (DW 2) and Hemed N. Mbeha (DW 3) that they witnessed the sale of the appellant's farm to the respondent and that the sale was reduced in writing was rightly rejected by the Ward Tribunal for lack of proof. Indeed, the respondent was clear that the appellant did not sell him that farm but mortgaged it.

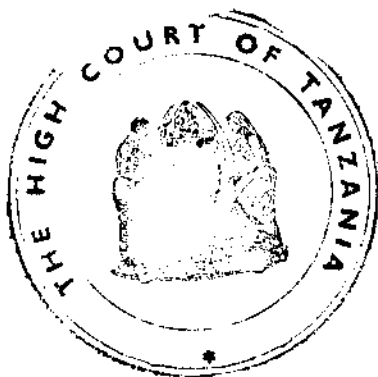
With this evidence, it was improper for the respondent to raise the issue of limitation at an appellate stage and the Honourable Chairman erred in law and in fact in entertaining that plea at that stage. The decision of the Ward Tribunal that the appellant had proved his case was, in circumstances of the case, sound and legally justified. It is trite that the decision of the court properly arrived at should not be lightly disturbed. In this matter, the District Land and Housing Tribunal had no advantage of seeing and hearing witnesses testify. The Ward Tribunal which saw and heard the witnesses testifying believed that the appellant and his witnesses were telling the truth. There was no material, in my view, to fault the sound finding of the Ward Tribunal.


In light of the foregoing reasons, I allow the appeal, quash and set aside the decision of the District Land and Housing Tribunal and uphold the decision of the Ward Tribunal. The appellant is awarded costs in this court and in the Tribunals below.



  
**W.P. Dyansobera**  
**Judge**  
**18.3.2021**

This judgment is delivered under my hand and the seal of this Court on this 18<sup>th</sup> day of March, 2021 in the presence of the appellant and the respondent.



  
**W.P. Dyansobera**  
**Judge**