IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO.7 OF 2009

(From the Decision of the District Land and Housing Tribunal for Lindi at Lindi in Application No.25 of 2008)

FARAJI ALI RUKWANJA.....APPELLANT

VERSUS

LINDI TOWN COUNCIL.....RESPONDENT

JUDGMENT

10 June & 23 July, 2021

DYANSOBERA, J.:

This is an appeal against the ruling of the District Land and Housing Tribunal for Lindi at Lindi delivered on 2nd day of April, 2009 dismissing with costs the appellant's suit for being time barred.

Brief facts of the case for deciding this appeal are the following. The appellant Faraji Ali Rukwanja instituted, before the District Land and

Housing Tribunal for Lindi at Lindi, Land Application No. 25 of 2008 against the respondent, TED Lindi Municipal Council, claiming, *inter alia*, recovery of suit Plot No. 32 Block "A" and issuance of a new building permit.

The suit was not determined on merit as Mr Nakua A. Faraja, learned State Attorney who was representing the respondent raised a preliminary objection of three points. One of the points on which the determination of the appellant's suit was based was that **the application is time barred.**

Submitting in support of the said preliminary point of law, then learned State Attorney for the respondent argued that from the appellant's own allegations, the cause of action arose in 1990 when the applicant was allegedly dispossessed of the suit plot. Mr. Nakua relied on the provisions of item 22 of Part I of the Schedule to the Law of Limitation Act, Cap 89 then R.E.2002 to support his argument. He explained that under that item the period of limitation for the recovery of land is 12 years. He argued that the appellant's right of action expired since 2002, the same having accrued in 1990. According to him, the appellant was late by six (6) years thus rendering his application incompetent and bad in law and therefore, liable to be dismissed.

On his part, the appellant argued that the Law of Limitation was not applicable in the circumstances of the case. He reasoned that the disputed plot had undergone serious struggle since it was offered to him. He was of the view that since he had raised serious allegations as per the application form and its annextures, then the application required to be heard on merit instead of being disposed of by a preliminary objection. It was his further argument that from 1990 to 2005 there had been live communications written and oral between the appellant and respondent. He sought support of this by a letter Ref. No. FAR/Mas/1 addressed to the respondent in 2005 in which he expressed his deep concern on his right over the suit plot stressing that even this communication was ignored by the respondent.

In its ruling, the District Land and Housing Tribunal was satisfied that the application before it was bad in law as it was late by six years; it having been filed in December, 2008 while the cause of action had arisen in 1990.

With respect to the existence of prior struggles between the appellant and respondent to settle the matter, the Hon. Chairman was alive to the decision of this court in the case of **Morandi Rutakyamirwa v. Petro Joseph** [1990] TLR 49 on the authority that where there are

sufficient grounds for delay to institute a case, a court can extend time and that such sufficient ground is the willingness of the respondent to settle the matter amicably but never complies with it.

With regard to this case, the Hon. Chairman was of the view that although the appellant submitted that he made or there existed several fruitless correspondences with the respondent, the appellant never said anywhere in his submissions that at one stage of such struggles the respondent expressed intention to settle the matter amicably.

As said above, the trial Tribunal upheld the above preliminary point of objection and dismissed with costs the appellant's application under section 3 (1) of the Law of Limitation Act.

The appellant was aggrieved. His first appeal to this Court was heard on 24th September, 2009. In deciding this appeal, this court (Hon. Chinguwile, J. as she then was) on 25th day of September, 2009, quashed the decision of the trial Tribunal and set aside all orders made pursuant to such decision. The decision by Hon. Chinguwile, J. was based on the fact that the District Land and Housing Tribunal lacked jurisdiction to try a dispute concerning Plot No. 32 Block A located in Lindi Township Land Office No. 313022 which was a registered land.

The above decision was, however, reversed by the Court of Appeal of Tanzania in Consolidated Civil Revisions No. 2, 3, 4, 5 and 6 of 2010 between **Olam Tanzania Limited and 3 others v. Seleman S.Seleman and 4 others** in which Faraji Rukwanja, the present appellant appeared as the 4th appellant and the Lindi Town Council, the current respondent featured as the 5th respondent.

This appeal was remitted to this High Court so that another judge was appointed to determine it on merit.

Following this order, the record was, after being dispatched to this court, assigned to me on 9th day of October, 2019. The hearing could not take off with immediate dispatch because, despite being served, parties were good defaulters. It was not until on 8th day of June, 2021 when parties appeared through representations. While Mr. Robert Dadaya, learned Advocate represented the appellant, the respondent, on her part, enjoyed the legal services of Mr. Augustino Severin (Principal officer of the respondent.

At first, that is on 1st day of June, 2009, the appellant had filed three grounds of appeal but later on 3rd day of December, 2019, two additional grounds of appeal were filed.

Before me, Mr. Robert Dadaya combined the 2nd and 3rd grounds of appeal in the original petition of appeal with the 1st additional ground of appeal and argued them together. He submitted that the Chairman erred in law and fact by upholding the preliminary objection which, to a large extent, required evidence to prove communication between the parties. Counsel was of the view that there was a gross misapprehension of pleadings on part of the Chairman. He explained that the appellant had pleaded that from 1990 to 2008, he was vigorously pursuing the matter administratively and there were correspondences, both oral and written from 1990 to 2008 which, according to the learned counsel for the appellant, made the preliminary objection lack qualification of being a pure point of law. Mr. Dadaya emphasised that the purported preliminary objection required evidence to prove the existence or otherwise of the correspondences. Counsel for the appellant argued that the preliminary objection was misconceived as it was based on unascertained facts from the appellant's application and submission. Referring this court to the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 696 at p. 701 where it was observed that a preliminary objection raises a pure point of law, cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The

learned Counsel contended that so long as the nature of preliminary objection demanded evidence, the trial Tribunal Chairman ought not to have jumped to the ruling as he did. Counsel was under the impression that by sustaining the preliminary objection and dismissing the suit, the Chairman denied the appellant the right to be heard and this was in contravention of our very basic Constitution and a violation of human rights enshrined under Article 13 (6) (a) of the 1977 Constitution and condemned the appellant unheard. In buttressing this argument, Mr. Robert Dadaya cited the cases of **Mbeya Rukwa Transport Ltd v. Jestina Georgea Mwakyoma** [2003] TLR 264, **Ndesamburo v. Attorney General** [1997] TLR 137 at p. 140. Counsel for the appellant emphasised that there were allegations which required proof by evidence.

An argument was also made that the court had power to extend time if there was an ongoing dialogue for amicable settlement.

In concluding his submission, the learned counsel took the view that the dispute did not arise in 1990 but arose in 2006 when there was a dialogue which aborted.

Responding to the submission by learned counsel for the appellant, Mr. Augustino Severine, the Principal Officer of the respondent joined

hands with the trial Tribunal's holding that the matter was hopelessly time barred. He explained that the evidence as to the live communication and intention to settle the matter amicably did not arise as there was an issue of law and there no alternative than determining the legal issue of time limitation. Mr. Augustino argued that the issue before the Chairman was the appellant's right of recovery of his land on Plot No. 32 Block A, Lindi Municipality which land was revoked in 1990. It was contended for the respondent that the accrual of cause of action started in 1990 but the matter was lodged in 2008 which, according to the Law of Limitation Act, the limitation period for recovery of land was 12 years. Mr. Augustino was emphatic that the Tribunal had inherent powers to first determine the preliminary objection in terms of Order XIV rule 2 of the Civil Procedure Code.

As to the definition of what a preliminary objection is, Mr. Augustino argued that it is a notice brought to the attention of the court by an adverse party on a point of law or fact raised in the pleading by opposite party for which the court is called upon to decide in the first day prior to going to the main issue.

With regard to the argument that the appellant was denied of his right to be heard hence contravening the principle of natural justice, Mr. Augustino argued that there was no such denial as the appellant had waived his own right by failing to accrue his right in time.

Replying on the appellant's argument that there were correspondences to have the matter settled amicably, Mr. Augustino submitted that those correspondences were not in respect of settlement and was between different entities. Mr. Augustino urged the court to dismiss this appeal for lack of merit.

In his brief rejoinder, Mr. Dadaya submitted that the argument by the Chairman that there was no proof of communication disqualified the preliminary objection from being a pure point of law. Counsel for the appellant stressed that the Chairman could not know the ins and outs unless he had heard the evidence and that mere submissions could not form part of evidence. According to learned Counsel, the Chairman was duty bound to avail himself with opportunity to have the communication and correspondences prove and this could only be done during a substantive hearing and not at a preliminary stage as was the case in this

matter. Counsel for the appellant disputed the truth of the definition of preliminary objection given by Mr. Augustino for lacking any backing up.

Having carefully considered the grounds of appeal and the submissions given by the learned counsel for the appellant and the respondent's Principal Officer and having read and understood the record of the lower Tribunal, I have to determine whether the suit by the appellant at the District Land and Housing Tribunal was time barred and whether it was proper for the trial Tribunal to dismiss the suit on that preliminary objection.

As far as the first facet, that is whether the suit by the appellant at the District Land and Housing Tribunal was time barred is concerned, the established principle is that to be sustained by this court as preliminary objection, the point taken must be true and pure point of law predicated on ascertained and undisputed facts. As to what constitutes a true preliminary objection, the case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd and another**, [1969] EA, 696 cited by Mr. Robert Dadaya, learned Counsel for the appellant is the *locus classicus*. At page 700, Law J.A. said of preliminary objections:

> "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection as to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Likewise, Sir Charles Newbold with characteristic forthrightness and force made the following observation at page 701:

> "The second matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objections. 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop".

As can be gleaned from the record and as rightly submitted by the learned Counsel for the appellant, the argument that the appellant's suit was time barred was not a pure point of law on unascertained facts. On

the contrary and in line with the above authority and Mr. Dadaya's argument, I am inclined to hold that the point of objection raised by the respondent is not self-proof. It is subject to proof by some other material facts. I will explain.

The law is clear that a right of action accrues on a date on which a cause of action arose. Under Section 5 of the Law of Limitation Act [Cap. 89 R.E.2019], it is enacted thus:

> "Subject to the provisions of the said Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arose".

According to the above provisions, there is no dispute that a period of limitation begins to count from the date of the accrual of the cause of action. However, the date of accrual of the cause of action is a question of fact which cannot be resolved in an argument on a preliminary objection as was the case in this matter. This court (Hon. Massati, J as he then was) held the same view in the case of **Tanzania Red Cross Society v. Dar es Salaam City Council, Ilala Municipality Council, Kinondoni Municipality Council and Temeke Municipality Council**, Commercial Case No. 53 of 2005 (unreported). Indeed, the aim of the preliminary

objection was succinctly elaborated by the Court of Appeal in the case of **Bank of Tanzania Ltd v. Devram P. Valambia:** Civil Application No. 15 of 2002 (unreported) in the following words:

> "The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily".

The date when the cause of action arose in the present case was not a point of law which could be disposed of summarily. The reason is not far-fetched and is this. Normally, preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of the evidence. As the record depicts, at the trial Tribunal, the respondent through learned State Attorney, in support of the preliminary objection, submitted at paragraph 1.2 as follows:

> "Your Honour, as it appears that the applicant hereto sues for recovery of land, Plot No 32 Block, which he alleges of being disposed by the respondent in 1990 as he articulates in paragraph 12 of the plaint and supported by letter Ref. No. LN/A/32/18 dated 24/12/1990 annexed to the plaint as annexture "F 9".

On his part, the appellant under paragraph 2.7 of his submission, told the Tribunal that from 1990 he did not abandon the said plot nor keep silent to communicate with the respondent. The appellant detailed the communication under sub-paragraphs (a) to (d) of his submission filed on 24th day of February, 2009.

These were, in my view, substantive issues which could only be determined after perusal of evidence.

On whether it was proper for the trial Tribunal to dismiss the suit on that preliminary objection, the record is clear that while the respondent had asserted that the cause of action arose in 1990, the appellant maintained that the cause of action did not arise in 1990 as there were live communication and negotiations to have the matter settled amicably. The Hon. Chairman was aware of the decision of this court in the case of **Morandi Rutakyamirwa v. Petro Joseph** [1990] TLR 49 on the authority that where there are sufficient grounds for delay to institute a case, a court can extend time and that such sufficient ground is the willingness of the respondent to settle the matter amicably but never complies with it.

Whether or not the respondent willed to settle the matter amicably but never complied with it was disputed.

The versions above indicate that both parties were involved in a clash of facts. These clash of facts needed evidence. In other words, the issue when the cause of action arose in this case, was a matter of substantive adjudication of the litigation on merits with evidence adduced, facts sieved and weighed and then finding of fact made by the court.

It was, therefore, wrong on part of the Hon. Chairman to hold, as he did, that the cause of action arose in 1990 and that the suit was time barred.

I think my finding as adumbrated above suffices to dispose of the whole appeal.

In the end result and for the stated reasons, the appeal succeeds and is allowed. The trial court ruling and subsequent order are quashed and set aside. The record should be remitted to the District Land and Housing Tribunal for Lindi at Lindi for hearing of the suit on merit, before another chairman competent to try the same. Costs to be in the cause.

W.P. Dyansobera

Judge

23.7.2021

This judgment is delivered under my hand and the seal of this Court on this 23rd day of July, 2021 in the presence of Mr. Robert Dadaya, learned advocate for the appellant but in the absence of the respondent.

Rights of appeal to the Court of Appeal of Tanzania explained.

W.P. Dyansobera

Judge