

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

LAND APPEAL NO. 22 OF 2020

*(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in land application No.
151/2014)*

ALOYSIUS BENEDICTO RUTAIHWA.....APPELLANT

VERSUS

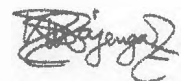
STANSLAUS MUTAHYABARWA.....	1ST RESPONDENT
JOSEPH J. RUTAIHWA.....	2ND RESPONDENT
JOSEPHAT B. RUTAIHWA.....	3RD RESPONDENT
ANTHONY S. RUTAIHYWA.....	4TH RESPONDENT
SILAS B. RUTAIHWA.....	5TH RESPONDENT
WINFRIDA ANDREA.....	6TH RESPONDENT
LETICIA GREGORY.....	7TH RESPONDENT
THOMAIDES J. ZACHWA.....	8TH RESPONDENT

JUDGMENT

14th July & 27th August 2021

Kilekamajenga, J.

In this case, appellant was appointed the executor of the will of his father the late Benedicto Joseph Rutaihwa who died in 1978. The appellant was appointed the administrator in 2014 and immediately sued the respondents at the District Land and Housing Tribunal at Bukoba seeking an order to declare them as trespassers. It is further alleged that the 2nd, 3rd, 4th and 5th respondents were close relatives of the appellant (brothers) who, after the death of their father, continued to use their father's land as part of their inheritance. The appellant



accused his own brothers for illegally selling portions of the deceased land at different times, while they were not executors of their father's will.

Finally, the trial tribunal declared the respondents as trespassers. The tribunal further ordered the appellant to compensate the respondents before eviction. Being disgruntled with the decision of the trial tribunal, the appellant preferred this appeal while armed with four grounds of appeal thus:

- 1. That the Hon. Chairman grossly erred in law and fact for ordering compensation of the respondents for their buildings after a valuation from a qualified valuer while the respondents have been declared as mere trespassers into the suit land;*
- 2. That, the Hon. Chairman grossly erred in law and fact for the failure to order demolition and removal at their own costs and expenses of the houses illegally built by the respondents on the suit land being mere trespassers;*
- 3. That, the Hon. Chairman grossly erred in law and fact for declaring that the respondents as mere trespassers without considering the appellant's prayer for payment of mesne profits which would have accrued to the applicant from the use of the suit land but for the illegal occupation of the same; and*
- 4. That, the Hon. Chairman grossly erred in law and facts for allowing the respondents to harvest their plants and their fully grown trees without specifying a time limit within which to do so.*

The appellant appeared in person to defend the appeal while enjoying the legal services of the learned advocate, Mr. Bernard Mbakileki. On the other hand, the 1st respondent was represented by two learned advocates, Messrs. Alli Chamani and Abel Rugambwa. The 4th, 6th and 7th respondents were represented by the learned advocate, Mr. Abel Rugambwa. The 8th respondent was present in person and without representation.

On the first ground, the counsel for the appellant objected the order of paying compensation to the respondents. He argued that the 2nd, 3rd, 4th and 5th respondent had no right to sell the land because they were not administrators of estate. Therefore, the respondents were mere trespassers. He supported his argument with the case of **Avit Thadeus v. Isdory Asenga, Civil Appeal No. 06 of 2017**, CAT at Arusha (unreported); **Ramadhani Kambi Mkinga v. Ramadhani Saidi [1985] TLR 140**; **Jenerali Ulimwengu and two others v. Robert Elisante Ngowo, Land Case No. 250 of 2016**.

On the second ground, Mr. Mbakileki impugned the decision of the trial tribunal for failing to order the 1st respondent demolish his house as he was declared a trespasser. On the 3rd ground, he argued that the trial tribunal erred in not ordering mesne profit to the appellant. He supported the argument with the case of **Eligius Kazimbaya v. Pilli Prisca Mutani and another, Civil Appeal No.**



163 of 2019, CAT at Dar es salaam (unreported). He invited the Court to read **section 3 of the Civil Procedure Code** that defines the term mesne profit. He urged the Court to order payment of mesne profit to the appellant.

On the 4th ground, Mr. Mbakileki argued that the tribunal erred in dismissing the appellant's claim because the respondents failed to prove their case as per section 110 of the Evidence Act. On the issue of time limit, the counsel argued that the time limit of 12 years does not apply in cases of probate and administration as this. Furthermore, the issue of time limit arose during the trial and was determined in favour of the appellant. He referred the Court to the case of **Rhodha Sobe v. James Fredy Sagaria, Land Appeal No. 69 of 2019 (unreported)**. He urged the Court to allow the appeal and grant the appellant's prayers.

Mr. Chamani for the 1st respondent invited the Court to determine the issue of time limit though it was not one of the grounds of appeal. He referred the Court to the case of **B.9532 CPL Edward Malima v. R, Criminal Appeal No. 15 of 1989**, CAT at Mwanza (unreported). He further invited the Court to consider the cases of **Yusuf Same and Another v. Hadija Yusuf [1996] TLR 347** which referred to **section 9 of the Law of Limitation Act, Cap. 89 RE 2019** and **Haji Shomari v. Zainabu Rajabu, Civil Appeal No. 91 of 2001**. He

dismissed the argument that time begins to run after the grant of letters of administration. In his view, the case was time-barred because the deceased died in 1978 and the case was filed in 2014.

On the other hand, Mr. Rugambwa for the 1st, 4th, 5th and 7th respondents averred that the appellant was not entitled to payment of mesne profit because it was not proved. He insisted that the appellant's claim had no merit and urged the Court to dismiss the appeal. On his part, the 8th respondent informed the Court that he has stayed in the land for more than 14 years. He claimed to have bought the land from the appellant's neighbour. He denied the allegation that the land belongs to the appellant's clan.

When rejoining, Mr. Mbakileki argued that the counsels for the respondents failed to address the contents of **section 35 of the Law of Limitation Act**. He further insisted that the 1st respondent was a trespasser and should pay mesne profit to the appellant.

When composing the judgment, I noted an irregularity on the absence of assessors' opinions in the proceedings of the trial tribunal. I therefore invited the parties to address me on this anomaly. Mr. Mbakileki for the appellant told the Court that the tenure of assessors had expired and the chairman therefore

proceeded without assessors. Mr. JS Rweyemamu argued that on 19th September 2019, the record shows that the matter was scheduled for assessor's opinions and the chairman did not state whether their tenure expired. Generally, the reasons for absence of assessors are missing. Such reasons only feature in the judgment something which is a fatal procedural irregularity. When rejoining, Mr. Mbakileki argued that the matter of assessors is not in issue and it was too *ad hoc* to decide whether the irregularity was fatal or not. So far the law allows the chairman to proceed in absence of assessors when their term expires.

I should also state that this is one of the cases filed by the appellant that have similar grounds of appeal to other appeal. In disposing the appeal, the reasoning and conclusion may not be different from the other cases concerning this dispute. In this case, having considered the grounds of appeal and submission from the counsels, there are two pertinent issues worthy of determination in this appeal. **First**, whether or not the suit was time barred. On this point, Mr. Mbakileki for the appellant vehemently argued that under **section 35 of the Law of Limitation Act, Cap. 89 RE 2019**, the issue of time limitation does not apply in matters of probate and administration when a person claims for recovery of the deceased's land. Though, the appellant's father died in 1978, and the Court granted letters of administration to the appellant in 2014, vide probate and administration cause No. 1 of 2013, the suit was not time barred.

On the other hand, Mr. Chamani and Rugambwa for the respondents were of the view that time begins to run from the date of the death of the deceased. Therefore, the suit was already time barred in 2014.

For the purposes of this discussion, I wish to reproduce the two sections thus:

Section 9 of the Law of Limitation Act, Cap. 89 RE 2019 provides that:

*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.***

*(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.***

(3) Where a person institutes a suit to recover land, being an estate or interest in possession and assured otherwise than by will, to him, or to some person from whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

There are two points gleaned from the above provisions of the law. **First**, if the deceased possessed the land before his death, in calculating the time for

recovery of that land, time accrues from the death of the deceased. Therefore, in terms of the instant case, and in-line with the above provisions of the law, time accrued from 1978 when the deceased died. By the time when the appellant applied for the administration of estate in 2013, by virtue of the above provision, he was already time barred.

Second, according to the above provision of the law, where a person is disposed from the use of the land, time accrues from the date when such dispossession started. **Section 33(1) of the Law of Limitation Act**, clarifies further the implication of the above provisions of the law thus:

33.-(1) A right of action to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as "adverse possession") and, where on the date on which the right of action to recover any land accrues and no person is in adverse possession of the land, a right of action shall not accrue unless and until some person takes adverse possession of the land.

By applying this principle in the instant case, when the respondents occupied the suit land, time accrued from the date of occupation.

However, the counsel for the appellant argued that **section 35 of the Law of Limitation Act** provides something different from **section 9 of the same Act**.

I wish to reproduce the section for the purpose of quick reference thus:

35. For the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator of the estate of a deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration or, as the case may be, of the probate.

The section allows an administrator who wants to claim land to do so as if there was no interval between the death of the deceased and grant of the letters of administration. The two sections within the same Act prompted my search for the proper interpretation of the law. For instance, Hon. Judge Levira (as she then was) when dealing with a similar situation in the case of **Helena Mwaipasi v. Philip Mwambungu and two others, Land Case No. 10 of 2012**, HC at Mbeya (unreported), she had the following to say:

'The plaintiff is unfortunately caught in the web of limitation. It is uncontroverted fact that by the time the plaintiff was granted the letters of administration in 2012, she was already time barred. I am bold and hold therefore that, the suit at had wad filed while time barred as per section 35 of the Law of Limitation Act, Cap. 89 RE 2002.'

Also, in the case of **Mshamu Saidi (Administrator of the estate of Saidi Mbwana v. Kisarawe District Council and four others, Land Appeal No.**

177 of 2019, HC Dar es salaam (unreported), Hon. Judge Maige (as he then was) observed that:

'Armed with the above authorities, I have no hesitation to hold that, in terms of section 35 of LLA reads together with section 9(1) of the same, the period between the death of the deceased and the appointment of an administrator is not excluded in counting the period of limitation.'

In the instant case, the appellant applied for the administration of estate after the expiry of more than 36 years. This long period of time has a lot to suggest. In the words of Mwangesi, J. (as he then was), the appointment of an administrator of estate after the expiry of such a long period of time may be a gate to unfounded claims because a land cannot remain un-possessed for such a long period. The deceased's heirs immediately occupied the land and might have been in continued use for all that time. Precisely, he observed in the case of **Julius Fundi and Modesta Kamakarwe v. Ernest Pancras, Probate and Administration Appeal No. 03 of 2013**, HC at Bukoba (unreported) thus:

'...the Primary Court did misdirect itself to administer the matter at hand and proceed to appoint an administrator, who in the actual sense would have nothing to administer other than creating some unfounded claims in respect of the estate of the deceased, which as already indicated above, already have owners.'

Now, back to the discussion on time limit, the Court of Appeal of Tanzania in the case of **Haji Shomari** (*supra*) further cemented that, in terms of **section 9(1) of the Law of Limitation Act**, time to recover land begins to run after the death of the deceased. Furthermore, the decision of this Court, authored by Hon. Mgeyekwa, J., in the case of **Rodha Sobi** (*supra*) analysed the two sections that:

'Guided by the above provision of the law, a suit to recover landed property must be filed within 12 years. Moreover, in cases related to recovering of land an administrator of the estate can file a claim in court as if no interval of time between the death of the deceased person as stated under section 35 of the Law of Limitation Act Cap. 89 [RE 2019]. According to section 35 of the Law of Limitation Act Cap. 89 [RE 2019], the time taken to apply for the administration of the estate of the late Sobi is excluded. Thus time started to run against the appellant after obtaining letters of administration. Therefore, in computing time, the days started to run from the date when the administrator of the estate was appointed that is 2016, thus, the application falls within time.'

Applying the above principle would mean that, the recovery of the deceased's land will have no actual time limit as time accrues as soon as the administrator receives letters of administration. In other words, persons who have stayed and possessed land for over hundred years will now be liable for eviction after the administrator acquires letters of administration. In my view, this position of law seems to contravene the period allowed for recovery of land according to the

Law of Limitation Act. Also, the doctrine on adverse possession may be redundant when apply the above interpretation.

In analysing this issue, Hon. Judge Maige (as he then was) had the following observation in the case of **Shomari Omari Shomari (as administrator of the late Seleman Ibrahim Maichila) v. Mohamed Kikoko, Land Appeal No. 171 of 2018:**

'...exclusion of time for the purpose of limitation is a question of law. It is specifically provided for in Part IV of the LLA which is entitled 'Computation of period of limitation.' Section 35 is not in it.'

Moreover, Hon. Msumi J, (as he then was), after citing the two provisions of the Law of Limitation Act in the case of **Yusuf Same and another v. Hadija Yusuf [1996] TLR 347** decided that:

'Applying these provisions to the present case respondent's right of action accrued from 14th January 1979 when the deceased died. The computation of this period still begins from that date despite the fact that respondent was granted letters of administration on 25th February 1992, that is about 12 years after the death of the deceased. In fact what actually happened is that by the time when respondent was granted the letters of administration her cause of action had already been time barred. And at the time when she filed the suit on 08th July 1993 respondent was late by over two years. The arguments of Mr. Raithatha on the issue of limitation

are valid hence it is held that the suit against the appellants was incompetent as it was time barred.'

In the instant case, as already stated, the appellant's father died in 1978 but the appellant applied for the letters of administration in 2013. He was granted letters of administration in 2014 and he immediately filed this case. In my view, he possibly applied for administration not for reason of administration of estate but to fight the respondents. By the time when the appellant was granted letters of administration in 2014, he was already time barred because it was after the expiry of 36 years. The suit was time barred regardless whether the letters of administration were granted in 2014. Therefore, in terms of **section 3 (1) of the Law of Limitation Act, Cap. 89, RE 2019**, read together with Part I item 22 of the schedule of the same Act, the case before the trial tribunal was incompetent for the good reason that it was brought after the period of 12 years.

I understand, during the trial, the suit was objected but the trial chairman decided that the time accrued from 04th February 2014. Even if the objection could not be raised during the trial, this is a point of law which may be raised at any stage. In the case of **B.9532 CPL Edward Malima v. the Republic, Criminal Appeal No. 15 of 1989**, CAT at Mwanza (unreported), the Court of Appeal decided that:



'...we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of parties.'

Furthermore, under the doctrine of adverse possession, the appellant have no right to recover the land that the respondents have occupied without interruptions for over 36 years. This principle of the law was stated in the case of **Bhoke Kitang'ita v. Makuru Mahemba, Civil Appeal No. 222 of 2017 CAT at Mwanza (unreported)**, where the Court of Appeal of Tanzania stated that:

"It is a settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise hi right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession."

In the above case, the Court of Appeal adopted the approach and stance of law developed in a number of cases including the cases of **Moses v. Lovegrove [1952] 2 QB 533** and **Hughes v. Griffin [1969] 1 All E R 460**, where it was stated that:

"[ON] the whole, a person seeking to acquire title to the land by adverse possession had to cumulatively prove the following:

- a) That there had been absence of possession by the true owner through abandonment*
- b) That the adverse possessor had been in actual possession of the piece of land;*
- c) That the adverse possessor had no colour of right to be there other than his entry and occupation*
- d) That the adverse possessor openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
- e) That there was a sufficient animus to dispossess and an animus possidendi*
- f) That the statutory period, in this case **twelve (12) years, had elapsed;***
- g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*
- h) That the nature of the property was such that in the light of the foregoing/adverse possession would result.*

Now, based on the above position of the law, even if the respondents were mere adverse possessors, the appellant have lost right of claim over the land as the respondents have occupied and possessed the land for more than 12 years without interruption.

Second, on the issue of assessors and giving their opinion, I wish to revisit the mandatory provisions of the law which the trial tribunal ought to adhere.

Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019 provide thus:

"23 (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors; and

(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment".

The emphasis is also provided under **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** that:

"19 (1) The tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;

(2) Notwithstanding sub – regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give opinion in Kiswahili".

The presence of assessor is not a ceremonial procedure but their participation must be reflected at all levels of the trial which include giving opinion before delivering the judgment. Also, the chairman is duty bound to take into account the assessors' opinion in the judgment. Where the chairman finds good reasons to depart from the assessors' opinions, he/she may do so by giving reasons. On this point, **section 24 of the Land Disputes Courts** clearly provides that:

"24. In reaching decisions, the chairman shall take into account the opinion of assessors but shall not to be bond by it, except that the chairman shall in the judgment give reasons for differing with such opinion".

As a matter of procedure, it is not sufficient for the assessors' opinions to appear in the judgment without being reflected in the proceedings. Such opinion must be read in the presence of the parties and the chairman must record such opinion in the proceedings. Failure to do so renders the whole proceedings a nullity because, if the record does not show the assessors' opinions, it is as good as the case was heard without assessors. The Court of Appeal of Tanzania was confronted with a similar irregularity in the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported)** where Hon. Kerefu, JA. observed *inter alia* that:

"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed".

Furthermore, a similar situation occurred in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** and the Court of Appeal of Tanzania had the following to say:

"Therefore, in our own considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."

Similarly, in the land mark case of **Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported)**. The Court of Appeal of Tanzania reiterated the above stance of the law. In that case Hon. Mugasha, JA further insisted that:

"...Such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict."

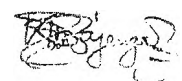
The Court of Appeal further stated that:

"...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving

*their opinions before the determination of the dispute. As such, **their opinion must be on record.***"(emphasis added).

See also, the cases of **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil appeal No. 286 of 2017**, CAT at Mbeya (unreported); **General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa, Civil Appeal No. 13 of 2012**; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali, Civil Appeal No. 70 of 2017**.

In the instant case, the proceedings of the trial tribunal shows that the assessors opinions were read on 29th October 2019. However, this date does not feature in the proceedings and there is no evidence to suggest that such opinions were read in the presence of the parties. Surprisingly enough, the judgment shows that the tenure of assessors expired and the chairman decided to proceed in their absence. It is not clear whether the assessors' tenure expired or their opinions were actually read. In conclusion, apart from the fact that the assessors were not invited to give their opinion according to the law something that renders the proceedings of the trial tribunal a nullity. Also, as stated above, the suit was time barred. I hereby quash the proceedings and set aside the decision of the trial tribunal. I have no reason to order retrial of the case because the suit was time barred. It is so ordered.



DATED at **BUKOB**A this 27th day of August, 2021.



Ntemi N. Kilekamajenga.

JUDGE

27/08/2021

Court:

Judgment delivered this 27th August 2021 in the presence of the appellant and his counsel, Mr. Bernard Mbakileki, Mr. JS Rweyemamu for the 1st, 4th, 6th and 7th respondents. The 8th respondent was present in person and without representation. Right of appeal explained.



Ntemi N. Kilekamajenga.

JUDGE

27/08/2021