

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)**

AT MTWARA

LAND APPEAL NO. 07 OF 2021

*(Arising from Land Application No. 47 of 2020 In the District Land and Housing Tribunal
for Mtwara at Mtwara per Hon. H. I. Lukeha, Chairman)*

FRANK EDWARD(administrator of the Estates

of the Late Asha Swalehe).....APPELLANT

VERSUS

HAWA SWALEHE MKAMBA..... RESPONDENT

JUDGMENT

MURUKE, J.

Appellant being an administrator of the estate of the late Asha Swalehe filed land dispute at the District Land and Housing Tribunal claiming that the land in dispute forms part of the estate of the late Asha Swalehe, thus asked tribunal to hold so. In her written statement of defence, respondent raised preliminary objection that the dispute was time bared. Trial tribunal sustained preliminary objection thus dismissed the dispute.

Dissatisfied, appellant preferred an appeal raising five grounds. For reason to be adduced late, I will deal with first ground of appeal only, namely: that, the Trial Chairman grossly erred both in law and fact by ruling that, the Land Application No. 47 of 2020 was time barred:- Appellant maintained in



Land Application No. 47 of 2020 was time barred:- Appellant maintained in his submission that the dispute was not time barred on the following reasons:-

One, the suit land was not the property of the respondent prior the demise of the late Asha Swalehe, that is why the Respondent requested the land for her to cultivate which request was granted.

Two, the permission to occupy and use had no time limit but was subject to one major condition, that is to hand over the suit land to the lawful heirs when they so demand.

Three, Respondent has all along occupied and used the suit land at the expense of the lawful beneficiaries of the late Asha Swalehe, the appellant inclusive.

It is clear that Respondent was authorized to enter, occupied and used the land. Thus trial tribunal erred to rule that, time starts to run against the appellant, Asha Swalehe. Time limitation does not work on the circumstances of host - invitee relationship, as was held in the case of Laurent Barnaba Mbuki Vs Evelin Gideon John, Land Appeal No. 18 of 2020 (unreported) Gwae J, Arusha registry (unreported) insisted appellant counsel.

Respondent on the other hand, submitted that, it is clear from the pleadings that, the appellant claims the land to be of none other than Asha Swalehe, who according to paragraph 6 (a) (iii) of the application at trial tribunal, passed away on 2005, while possessed of the dispute land at the time of her death. The application at trial tribunal subject of this appeal, was filed on 2020 being more than 14 years from the date, Asha Swalehe passed

 2

away. The Law under item 22 to the schedule of the Law of Limitation [Cap 89 R.E 2019] provides for 12 years recovery of land from the date the cause of action arose.

The cause of action in cases of this nature where the deceased dead, while possessed of the land in dispute is reckoned, pursuant to section 9 (1) of the law of limitation, on the date of his death. It was further insisted by respondent counsel that, section 9 (1) of the Law of limitation has been subject of consideration by the Court of Appeal in the case of Yusuph Same and Another Vs. Hadija Yusuph 1996 TLR 347, also in the case of Lucy Range V. Samwel Meshack Mollel and anothers, Land case No. 323 of 2016 (unreported) where Makuru J, held at page 6 that the cause of action arose on 1997 when deceased Meisha Mumbasi passed way. Thus, since Asha Swalehe passed away on 2005, then from 2005 when she passed away it is more than 14 years.

Having heard both counsels submission on the first ground, it is worth noting that, submission by both counsel contains issues of Law and facts to be determined. At paragraph 6 (a) (v) of the application at trial tribunal it was pleaded that,

“After the burial of the late Asha Swalehe, the Respondent requested for the disputed land in order to cultivate seasonal food crops as she had no land to farm which request was granted on condition that she be prepared to handle over the same to the lawful heirs when so demand it.”

From the pleadings above, there are issues to be ascertained, namely

One, whether respondent was an invitee,



Two, whether respondent was sued by beneficiaries of estate of Asha Swalehe, before present ruling subject of this appeal.

Three, At what time in point, time will start to run against the appellant to institute the dispute against respondent.

Four, whether principle of adverse possessor apply to an invitee.

All the four issues involve around as to when cause of action arose. It is an issue that need evidence for the date to be ascertained. This cannot be resolved at the preliminary stage of point of Law. Evidence is needed to have answers. These are serious issues that need evidence to get an answer. In the case of **Mwananchi Insurance Company LTD Vs. The Commissioner for Insurance, Misc. Commercial Cause No. 2 of 2016 HC (unreported)** Mwambegele J, at P.4 referring the case of **Soitsambu Village Council Vs. Tanzania Breweries Limited and another, Civil Appeal No. 105 of 2011 (CAT) (unreported)** cited with approval it was held that:-

“Where a court is to investigate facts, such an issue cannot be raised as a preliminary objection on a point of Law.... It will treat as a preliminary objections only those point that are pure law, unstained by facts or evidence”

The Judge went at P.5 held that:

“It is not a preliminary objection if there is need for evidence to ascertain a fact”



This court in the case of **Tandahimba Newala Cooperative Union (TANECU) LTD Vs. Chikundi Holding (T) LTD, Civ. Case No. 8 of 2019** at P.7 the learned Judge Dyansobera fully subscribed the above legal exposition that, if the court is to investigate facts, such an issue cannot be raised as preliminary objection on a point of Law.

Thus, it was wrong for trial tribunal Chairman to hold at the stage of preliminary objection that, dispute is time barred in presence of averment of paragraph 6(a) (v) of the application.

Trial Tribunal dismissal of the application at that stage is denial of a appellant right to be heard. Right to be heard is one of principle of natural justice. Failure to observe the same vitiates proceedings. Thus proceedings culminating to Ruling sought to be challenged are quashed and ruling is set aside. Parties to proceed where case ended before hearing of the preliminary objection. Case to proceed on merits ground of time limitation to be one of issues to be determined by the tribunal.

Trial tribunal records to be remitted within 30 days from the date of this judgment. Appeal allowed.



Z. G. Muruke

Judge

22/10/2021

Judgment delivered in the presence of Steven Lekey, Advocate, for the respondent and also holding brief of Robert Dadaya, Advocate, for the appellant.



A handwritten signature in blue ink, appearing to read "Z. G. Muruke".

Z. G. Muruke

Judge

22/10/2021