

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA
AT MUSOMA

LAND APPEAL NO. 36 OF 2021

ALBETUS SAMWEL APPELLANT
VERSUS

MOURICE LANYA OKOTH
(Administrator of the estate of
the late Gaspa Aliwa Orwa) RESPONDENT

***(Appeal from the judgment of the District Land and Housing
Tribunal for Tarime at Tarime in Application No. 9 of 2018)***

JUDGMENT

9th September and 7th December, 2021

KISANYA, J.:

The appellant, Albetus Samwel was the respondent at the District Land and Housing Tribunal at Tarime (trial Tribunal) in Application No. 9 of 2018. He was sued by the respondent, Mourice Lanya Okoth who introduced himself as an administrator of the estate of the late Gaspa Aliwa Orwa. The dispute was over ownership of the piece of land located at Radienya hamlet, Rabuor Village within Rorya District.

It was the respondent's case that the late Gaspa Aliwa Orwa was declared the lawful owner of the disputed land by the Nyaburongo Primary Court vide the judgment dated 16th November, 1990 in Civil Case No. 206 of 1990. However, it was on 9th February, 2018 when the respondent filed a suit against the appellant. He prayed, *inter alia*, for a declaration that he was the lawful owner of the disputed land according to the judgment of 1990.

The appellant denied the respondent's claim. He also raised a preliminary objection on points of law to the effect that the respondent had no *locus standi* and that the suit was time barred, *res judicata* and *sub-judice*. In its ruling on the objection, the trial Tribunal overruled all points of preliminary objection. It proceeded to hear the suit on merit. At the end of the day, the application was granted whereby, the late Gaspa Aliwa Orwa was declared the lawful owner of the disputed land. Further to that, the appellant was ordered to vacate the disputed land with immediate effect.

Dissatisfied, the appellant has appealed to this Court raising a total of eight grounds of appeal as follows:-

1. *That, the trial chairman erred both in law and in fact to entertain the suit which was totally time barred.*
2. *That, the trial Chairman erred in law and in fact by entertaining the respondent's claim while in real sense there was no proof of letters of administration thus he lacked locus standi on the matter.*
3. *That, the trial Chairman erred in law and in fact by allowing the relief which has never been prayed for by the respondent herein and which has never been made an issue at the commencement of the hearing.*
4. *That, the trial chairman erred in law and on fact by violating the procedure of dealing with a matter in which one of the party is being represented under power of attorney.*
5. *That, the trial chairman erred in law and in fact when he failed to hold that the judgment dated 16th November, 1990 of Nyaburongo Primary Court if at all existed had no connection with the present suit as it totally lacked any description in terms of size and boundaries.*
6. *That, the trial chairman erred in law and in fact for failure to*

appreciate that the appellant's evidences were heavier than the respondent's evidences which was also contradictory.

7. That the trial Chairman erred in law and in fact by leaving out undetermined issues.

8. That, the trial chairman erred in law and in fact to proceeding dealing with a matter without disclosing reasons as formerly the matter was before another chairman.

At the hearing of this appeal, Mr. Egbert Mjunga, learned advocate, appeared for the appellant while, the respondent was represented by Mr. Onyango Otieno, learned advocate. Both counsel for the parties made their respective submissions on all grounds of appeal. However, for the reasons to be noted herein, I will not dwell on the submissions on each of the ground. It is my considered opinion that determination of the first and second grounds of appeal suffices to dispose of this appeal.

I prefer to start with the second ground on whether the respondent had *locus standi* to prosecute a suit he filed before the trial tribunal. It was Mr. Mjunga's submission that the respondent did not tender in evidence the letters of administration that appointed him to administer the estate of the late Gaspa Aliwa Orwa. Therefore, referring the Court to the case of **Lujuna Shubi Balonzi Senior vs the Registered Trustees of Charman cha Mapinduzi** (1990) TLR 203, he argued that the respondent had no *locus standi*. In reply, Mr. Otieno submitted that the respondent was administrator of the estate of the late Gaspa Aliwa Orwa. Although the learned counsel conceded that the

letters of administration was not tendered in evidence, he was of the view it was part of the record of the trial Tribunal because it was attached to the application.

In the light of the above, it is common ground that the respondent instituted a suit to claim the property (disputed land) of the late Gaspa Aliwa Orwa. It is trite law that a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. See the case of **Lujuna Shubi Balonzi Senior** (supra) cited by Mr. Mjunga in which the above position was stated.

Where the matter involves any of the deceased's properties, the power to institute and prosecute a case is vested on the executor or administrator of the estate of the deceased This is pursuant to section 100 of Probate and Administration of Estates Act [Cap. 352, R.E. 2002] which provides that:

"an executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debt due to him at the time of his death, as the deceased had when living"

Now, what proves that a person has mandate of representing the deceased against all persons in possession of the deceased's property is the probate and letters of administration. This is provided for under section 70 (1) of the Probate and Administration Act (supra). It reads:

“Probate and letters of administration shall–

(a) have effect over all the property, movable and immovable, of the deceased throughout Tanzania; and

(b) be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him; and

(c) afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted.”

In the instant case, the respondent deposed in paragraph 6 (a) of the application that he was the administrator of the estate of the late Gaspa Aliwa Orwa who died on 9th February, 1992. As rightly submitted by Mr. Otieno, the respondent appended the letters of administration to support his contention. However, that fact was disputed by appellant who averred as follows in paragraph 3 of the written statement of defence:-

“That the contents of paragraph 6(a) of the application are partly disputed because the applicant is a fake administrator who obtained the letter of administration by fraud.”

Since the respondent alleged that he was administering the estate of the deceased, he was duty to prove that fact and tender in evidence the letter of administration. Despite the appellant disputing that the respondent was administering the estate of the deceased, the latter (respondent) did not tender in evidence the letters of administration. Mr. Otieno urged me to consider that the letters of administration was appended to the application. It

is trite law, and I need not cite any authority that, a document appended to the pleadings is not an exhibit. Likewise, a document not tendered in evidence cannot form a part of the court record. See the case of **Zanzibar Telecommunication Ltd vs Ali Hamad Ali and Others**, Civil Appeal No. 295 of 2019 in which the Court of Appeal with approval cited its decision in **Sabry Hafidh Khalfan vs Zanzibar Telecommunication**, Civil Appeal No. 47 of 2009 (unreported) where it was held that:-

"We wish to point out that annexures attached along with either plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or to the written statement of defence, is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."

Guided by that position, it is clear that the respondent did not prove that he was appointed to administer the estates of the late Gaspa Aliwa Orwa. Therefore, I agree with the learned counsel for the appellant that the respondent had no *locus standi* to institute to case which gave rise to this appeal because the letter of administration was not tendered in evidence.

Even if it is considered that the respondent had *locus standi*, there is yet another issue pertaining to the first ground of appeal. Was the suit time barred? Making reference to paragraph 6(a) and 7(b) of the plaint, Mr. Mjungu argued that the respondent case was premised on the decision of the Nyaburongo

Primary Court in which the late Gaspa Aliwa Orwa was declared the lawful owner of the disputed land. He also made reference to the respondent's testimony that the appellant did not vacate the disputed land from 1990 when the said judgment was given. He was, therefore, of the view that the suit lodged in 2018 was time barred. His argument was based on the provision of item 16, Part I of the Schedule to the Law of Limitation Act [Cap. 89, R.E. 2019] (the LLA) in which a suit founded on judgment is limited to 12 years. He argued further that, even if the suit was for recovery of land, the time of 12 years specified by the LLA had expired.

In response, Mr. Otieno dismissed the argument by the counsel for the appellant. He argued that the 1990's case was between the appellant and the late Gaspa Aliwa Orwa in which the appellant was ordered to vacate the disputed land. Mr. Otieno contended that the suit was not time barred on the ground that, the appellant trespassed on it in 2016.

Having gone through the facts deposed in the pleadings and evidence adduced by the respondent against the submissions by the counsel for the parties, I agree with Mr. Mjungu that the respondent's claim was premised on the judgment delivered by the Nyaburongo Primary Court in 1990. This fact is deduced from paragraph 6(a) (c) (e)(e) of the application in which the respondent averred as follows:-

(b) That, on 16th November, 1990 at Nyaburongo Primary Court, there was a land dispute between late Gaspa Aliwa

Orwa and Albetus Samwel the respondent herein above and it was decided that he should vacate the suit land.

(c) That, after the death of the late Orwa no application for execution was done, as he was terminal ill to proceed with execution so as the Respondent to give vacate of the suit land.

(d) That, in 2016, the Respondent without a rightful color of eye trespassed and started constructing a house and removing all boundaries made out of sisal claiming to be his lawful land, despite several warning and stoppage from the Applicant. He has turned a deaf ear."

Also, paragraph (c) of the reliefs sought shows that the respondent prayed for a declaration that he was the lawful owner of the disputed land "in conjunction with the judgment delivered in 1990 which stands unchanged."

Apart from the pleadings, the respondent's evidence suggests that the suit was based on the judgment of 1990. He also deposed that the appellant did vacate the dispute land after the judgment issued in favour of the late Gaspa Aliwa Orwa. The relevant part of the respondent's evidence is reproduced hereunder:-

*"Respondent we are living in the same village he invaded the land owned by the late **Gaspa Orwa**. After he invaded **Gapsa** complain (sic) in Nyaburongo Primary Court. He was complaining on the land he invaded. Decision of Nyaburongo Primary Court was in favour of the late **Gaspar Orwa**. This is judgment of 1990...*

*...After judgment Respondent never vacate (sic) the disputed land. In 2016 Respondent built another house in the disputed land. **Albetus** is at home."*

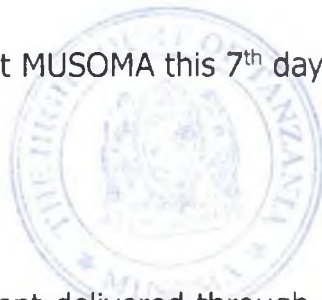
In view of the above excerpt of the pleadings and evidence adduced by the respondent, the cause of action arose in 1990 when the judgment relied upon by the respondent was delivered in favour of the late Gaspa Aliwa Orwa. The fact that the appellant built another house on the disputed land in 2016 does not imply that the cause of action arose in that year. This is so when it is considered that the appellant did not vacate the disputed land after the judgment of 1990.

As rightly submitted by Mr. Mjungu, the time limitation on the suit founded on judgment or suit for recovery land is twelve years. This is pursuant to paragraphs 16 and 22, Part I of the Schedule to the LLA. It is therefore, apparent that the suit which led to this appeal was hopelessly time barred because it was lodged in 2018.

From the foregoing reasons, the suit before the trial Tribunal was incompetent as the respondent failed to prove that he was duly appointed to administer the estates of the late Gaspa Aliwa Orwa. Furthermore, the suit was time barred for it being filed far beyond the time prescribed by the law. In that regard, the trial Tribunal had no jurisdiction to entertain the matter. I, therefore, find and hold the whole proceedings and judgment of the trial Tribunal a nullity.

In the final analysis, I exercise the revision powers vested on this Court by section 43(1)(b) of the LDCA to nullify the proceedings of the trial Tribunal, quash and set aside the judgment and decree made thereon. In lieu thereof, I make an order to the effect that the preliminary objection raised before the trial Tribunal is sustained. Considering the settled law that costs follow the event, the respondent is condemned to pay the same.

DATED at MUSOMA this 7th day of December, 2021.




E.S. Kisanya
JUDGE

Court: Judgement delivered through teleconference this 7th day of December, 2021 in appearance of Mr. Egbert Mjungu, learned advocate for the appellant and Mr. Onyango Otieno, learned counsel for the respondent. B/C Ms. J. Millinga present.

Right of appeal explained.


E. S. Kisanya
JUDGE
07/12/2021