

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MBEYA**

**AT MBEYA**

**LAND APPEAL NO. 45 OF 2021**

*(Originating from the District Land and Housing Tribunal for Kyela, at Kyela in Application No. 24 of 2020.)*

**KENTONI MWAKAJUMBA** (As Administrator of the  
Estate of the late Isack Fundi Mwakajumba) ..... **APPELLANT**

**VERSUS**

**ANTONY MWANSELE**..... **RESPONDENT**

**JUDGMENT**

*Date of Last Order: 10.05.2022*

*Date of Judgment: 12.07.2022*

**Ebrahim, J.**

The appellant, Kentoni Mwakajumba is challenging the decision of the District Land and Housing Tribunal for Kyela, at Kyela (the trial Tribunal) in Land Application No. 24 of 2020 the ruling dated 12/04/2021. In essence the ruling dismissed the appellant's application for being time barred.

The back ground of this case can be briefly narrated as follows; on 21/12/2020 the appellant instituted the land application before the trial Tribunal claiming the land which he

alleged to be the property of the late Isack Fundi Mwakajumba who died in 17/12/1992. The respondent resisted the application and raised a preliminary objection. The ground for objection among others was to the effect that the application was time barred.

Having heard the parties regarding the preliminary objection, the trial Tribunal upheld the objection, thus dismissed the application. Being disgruntled by the dismissal order, the appellant preferred this appeal. He raised six (6) grounds of appeal as follows:

1. That the trial chairman erred in law and facts by failing to interpret the provision of the **Law of Limitation Act, Cap 89 R.E 2019** pertaining to limitation on recovering of the deceased's land.
2. That the trial chairman erred in law and facts by relying much on precedent in deciding the preliminary objection while there provision of the law to that effect.
3. That the trial chairman erred in law and facts by contradicting the doctrine of adverse possession and

provision of **section 9(1) of Cap. 89** contrary to the nature of the preliminary objection raised.

4. That the trial Tribunal erred in law and facts by questioning the issuance of the letter of administration while the document was not tendered and was out of its jurisdiction.
5. That the trial Tribunal erred in law and facts by disregarding the rival arguments by appellant in respect of the interpretation of the provision of the laws which attributed to those preliminary objections and favour the respondent.
6. That the trial tribunal erred in law by its failure to look upon the pleadings and annexure in determination of the preliminary objection.

Basing on the foreside grounds, the appellant prayed for this court to allow the appeal by quashing and setting aside the trial Tribunal's decision and order the application to be heard on merits.

The respondent protested the appeal and raised a preliminary objection that the appeal was filed in this court out of time.

At the hearing, upon agreement by the parties, this court ordered the parties to argue the preliminary objection and the merits of the appeal together in line with the fact that the respondent have the right to begin regarding the preliminary objection. The arguments were by way of written submissions. The appellant was represented by advocate Pamela Kalala, whereas the respondent enjoyed the service of advocate Simon Mwakolo.

Submitting on the preliminary objection, counsel for the respondent prayed to withdraw the same without costs on the reason that he overlooked the date of filing. That the appeal was filed on 1/6/2021 but mistakenly he saw the date as 18/6/2021. On her part, counsel for the appellant conceded with the prayer for the withdrawal of the preliminary objection but prayed for this court to award costs to the appellant since he had already engaged her in relation to the same. She argued further that, the respondent's counsel had previously withdrawn the preliminary

objection before Hon. Mbagwa, Judge but he revived the same objection when the matter came before me for hearing.

Indeed, according to the record on 12/08/2021 the respondent prayed to withdraw his objection before Hon. Mbagwa, Judge (before his transfer to another duty station). The prayer was granted and the preliminary objection was marked withdrawn without costs. Again, when the matter came up for hearing on 16/3/2021, the respondent prayed to argue the objection but now he prays to withdraw the same. Under the circumstances I grant the prayer for withdrawal and hereby mark it withdrawn; but the respondent shall pay costs in relation to the withdrawal of the preliminary objection.

As for the merits of the appeal; I am compelled to begin by reminding the appellant and his counsel on the principle of law that an appellate court cannot allow matters not taken or pleaded in the courts below, to be raised on appeal. See the decision by the CAT in **Hotel Travertine Ltd and 2 Others vs NBC** [2006] TLR 133, and **James Funke Gwahilo vs A.G** [2004] TLR 168.

In the instant appeal, looking at the complaints by the appellant as contained in the grounds of appeal most of them

are irrelevant to the case at hand. As already hinted earlier that the DLHT dismissed the application on the ground raised in the preliminary objection that the same was time barred. The issue for determination in this appeal is thus, *whether the DLHT was justified in dismissing the application on time limitation.*

In my considered view, the ground of appeal which reflects the above posed issue is ground one in the memorandum of appeal. In her submission, counsel for the appellant faulted the DLHT for dismissing the application basing on **section 9(1) of the Law of Limitation Act**. According to her, **section 9(1)** was supposed to be read together with **sections 24 and 35** of the same Act. She further contended that the DLHT was required to consider the fact that the duties of legal representative start when he/she obtains the letters of administration. To support her contention, she cited the decision of this Court in the case of **Tabu Mkwambe (Administrator of the Estates of the late Exavery Mkwambe) vs Mario Kasambala** Misc. Land Appeal No. 3 of 2018 HCT at Mbeya (unreported).

Counsel for the appellant added that the DLHT was wrong for failure to ask questions as to when did the right of action

accrued; and when did the cause of action arise. As the result it held that cause of action arose in 1992 when the deceased died while a cause of action arose on 4<sup>th</sup> August 2020.

Replying on the first ground of appeal, counsel for the respondent submitted that, the DLHT was right in dismissing the matter under **section 9(1) of Cap. 89**. According to him no error was committed for none consideration of **sections 24 and 35 of the same Act** since they are applied in exceptional circumstances which did not exist in the matter at hand. Counsel for the respondent therefore argued that the case of **Tabu Mkwambe** (supra) is distinguishable.

Counsel for the respondent also prayed for this court to rely on the case of **Yusuph Same and Another vs. Hadija Yusuph** [1996] TLR 347 where it was held that the limitation period in respect of land, irrespective of when letters of administration have been granted is 12 years.

I have passionately followed the rival submissions by counsels for the parties. I have also considered the law on time limit for recovery of land. **Item 22 of Part I of the schedule to the Law of Limitation Act**, Cap. 89 R.E. 2019 prescribes the twelve years

limitation period within which to institute actions for recovery of land.

In the instant matter, the suit filed in the trial Tribunal was for recovery of land hence, the limitation period is 12 years. As much as the disputed land was claimed to be owned by the deceased, the determination of accrual of right of action and computation of the time limitation is on the death of the deceased specifically when the dispossession of the land in question occurred regardless of the time when the letters of administration was granted. This is in accordance with **sections 9(1), (2) and 35 of the Law of Limitation Act**. Section 9 says:

*'9(1) Where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and 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.*** (Emphasis added).

And section 35 states that:

*'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.'*

Section 35 quoted above 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. Nevertheless, according to section 9(2) of Cap. 89 above, where a person is dispossessed from the use of the land, time accrues from the date when such dispossession started. **Section 33(1)** of the same Act (i.e Cap 89) 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."*

The above stance of the law was also underscored by the CAT in the case **Barelia Karangirangi vs Asteria Nyalwambwa** Civil Appeal No. 237 of 2017 CAT at Mwanza, (unreported) where it was stated that:

*"The right of action is deemed to accrue on the date of the dispossession of the land in question."*

In this court, Honourable Judge Maige (as he then was) in the case of **Mshamu Saidi (Administrator of the estate of Saidi Mbwana) vs Kisarawe District Council and four others**, Land Appeal No. 177 of 2019, HC Dar es salaam (unreported), 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 this case, as rightly observed by the DLHT the appellant averred in his application that the respondent invaded the suit land in 1994 after the death of the deceased in 1992. This means therefore that the cause of action arose in 1994. Again, as correctly observed by the DLHT, it took about 26 years for the applicant to institute the application. Therefore, the claim that serious cause of action arose in 2020 as argued by counsel for the appellant is untenable.

In the circumstance, though the DLHT did not consider other sections of the Law of Limitation Act which support section 9(1) of the same Act, it was justified in dismissing the application for being time barred.

In the end, I hereby dismiss the entire appeal for lack of merits with costs.

Ordered accordingly.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", is written over the seal.

**R.A. Ebrahim  
JUDGE**

**Mbeya**

**12.07.2022**

**Date:** 12.07.2022.

**Coram:** Hon. A.P. Scout , Ag-DR.

**Appellant:**

**For the Appellant:** } Absent.

**Respondent:** Absent.

For the Respondent Mr. Mwakolo Advocate.

**B/C:** Patrick Nundwe.

**Mr. Mwakolo Advocate** for the respondent and H/H of Ms. Clara Advocate for the appellant. The matter is coming on for judgement we are ready to proceed.

**Court:** Judgement is delivered in the presence of Mr. Mwakolo Advocate for the respondent with the absent of the Appellant; and C/C in Chamber Court on 12/07/2022.



**A.P. Scout**

**Ag-Deputy Registrar**

**12.07.2022**

DEPUTY REGISTRAR  
HIGH COURT OF TANZANIA  
MBEYA