

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA DISTRICT REGISTRY)**

AT MWANZA

LAND APPEAL NO. 58 OF 2020

(Arising from decision of the District Land and Housing Tribunal for Mwanza in Application No. 306 of 2019 dated 17/07/2020 Delivered By, Mayeye S.M, Chairman)

CHARLES WASHA..... APPELLANT

VERSUS

DEREFA ROBERT (As the Administrator
of the Estate of the Late Faluku Bakari..... **1st RESPONDENT**
SHAKILI.....**2nd RESPONDENT**
FELISTER FELESIAN.....**3rd RESPONDENT**
SAID ABDUL.....**4th RESPONDENT**
ZAKARIA GABRIEL.....**5th RESPONDENT**
KALEMAGI STANLY.....**6th RESPONDENT**
MRISHO.....**7th RESPONDENT**
DAYANA.....**8th RESPONDENT**
RASHID JAFARI.....**9th RESPONDENT**
BARAKA PETRO.....**10th RESPONDENT**
FLORA NGOWI.....**11th RESPONDENT**
AYUBU SESE.....**12th RESPONDENT**
YUSUFU BONYELA.....**13th RESPONDENT**
ZAPHOROZA.....**14th RESPONDENT**
WITNES KIWILE.....**15th RESPONDENT**

JUDGMENT

13th May & 29th August, 2022

ITEMBA, J.

The appellant herein had filed a land application before the District Land and Housing Tribunal (DHLT) which was registered as Application no. 306 of 2019. The subject matter was Plot no. 495 Block 'KK' located at Nyakato within Mwanza municipality.

The said application was faced with preliminary objections as follows:

- i. That the application is time barred.
- ii. That the application is incompetent for failure to sue the administrator of estate of the late Faluku Bakari the 1st Respondent having been revoked.
- iii. That the applicant has no locus standi to institute the suit against the 2nd to 15th respondents as well as the prayers craved for being untenable.

In determining these points of objection, the DLHT chairman's views were that; the appellant had purchased the suit land in 2001 and filed the application in 2019. That; there is a period of 17 years between 2001 and 2009. He found that the suit was time barred, upheld the 1st preliminary objection and dismissed the application. The appellant was dissatisfied, hence this appeal challenging the dismissal of his suit on preliminary objection.

The appellant has filed 2 grounds of appeal which are:

1. That the court erred in law to hold that the suit was time barred.



2. That the whole decision was against the law.

When the matter came up for hearing, the learned counsels namely Mr. Emmanuel John and Mr. Julius Mushobozi appeared for the appellant and the respondents respectively.

Submitting in support of appeal, Mr. John opted to argue both grounds jointly. He stated that the DLHT erred in deciding that the application was time barred. He avers that, when the appellant bought the disputed land, the respondent's family filed a case to challenge the ownership and that was in application no.126/2008 which ended in 2016. Therefore, based on section 8 of the Civil Procedure Code the appellant could not file any other case. He adds that, later, another application no. 226 of 2018 was filed by a personal representative of the appellant and that there was another application no. 126B of 2017 which was dismissed. He argued that the time of limitation should have run from 2017 when the matters were finalised. In the second ground which is related to the first, the counsel for the appellant submitted that the last order which was issued on 14/7/2017 was equal to suit on judgment therefore, the time limitation of 12 years should start counting from that date. He relied on the case of **Mohamed vs Sardar** 1970, EALR 358, in supporting his



arguments. Based on the above contentions, he prayed the Court to allow the appeal.

Submitting in rebuttal the learned counsel for the respondents started by pointing out that, the learned counsel for the appellant misdirected himself because suit on judgment emanates from objection procedure while the application before the DHLT was relating to sale contract and ownership of the property. He faulted the cited decision in **Mohamed's** case (Supra) because section 3 of the CPC does not state that an order amounts to judgment but rather a judgment may contain decree or order.

In respect of the limitation of time, he partly agrees with the appellant's counsel that Application No. 126B of 2017 and other applications which followed were before the DLHT, at Mwanza. But he states further that the dispute was about the ownership, that the appellant was the party and he filed a counter claim hence he has participated and he was a party thereof and he cannot claim that he had no chance to file his dispute. And that, under order VIII rule 9 of the CPC any person has a remedy to a counter claim.



In the alternative, he argued that even if the appellant was neither a party nor filed a counter claim, presence of a case pending before a court does not automatically preclude time to run against the appellant. He added that parties were different in Application No. 126 of 2008 and the issue was trespass while in Application No. 306 of 2019 the issue was on contract. He states that the appellant decided to stay the suit by himself while the suit is to be stayed by the Court. He prays for the appeal to be dismissed with costs of this appeal and lower Court.

In his quick rejoinder, the counsel for the appellant stated that parties to the suit were not different. He is of the view that orders are referred to numbers of the case, the cases were all originating from the same number and it was about the same properties of Frank Bakari. In respect of the counter claim he stated that he is not aware whether they had filed any counter claim, but even if, there was a counter claim it does not make the appellant out of time. In the end he reiterated his prayers that the appeal be allowed with costs.

Having summed up the rival arguments from both sides, the issue is whether the appeal has merit.



To start with I must state out that for any preliminary objection to be sustained by the Court there must be true and pure points of law predicated on undisputed facts. As to what amount to true preliminary objection, the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v Wend End Distributors Ltd and another** [1969] EA at page 100 Law J.A has this to state:

"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 preliminary point of may dispose of the suit. Examples are an objection as to the jurisdiction of the Court, or a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

Similarly, Sir Charles Newbold had robust observation as follows:

"the second matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improper by way of preliminary objections. A preliminary objection is in 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 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 issue. This improper practice should stop”

Having established the above position, I think it is important to have the background of the cases which led to this appeal. The very first case to be filed was application **no. 126 of 2008** before the DLHT Mwanza, the applicants being **Chiku Faluku as a legal representor of Faluku Bakari** against **Charles Washa and the Director Mwanza City Council** as 1st and 2nd respondent respectively. This application was dismissed for want of prosecution on 3/10/2016.

An attempt was made in another **Application No. 126B of 2017** the applicant being **Edwin Mathias as an administrator of estate of Chiku Faluku Bakari** against the same respondents **Charles Washa and the Director Mwanza City Council**, where it was dismissed for citing wrong provision of the law.

Later in 2019 the appellant **Charles Washa**, filed an application **no. 306 of 2019** before the DHLT against **Derefa Robert as administrator of Estate of the Late Faluku Bakari) and 14 others.**



As mentioned earlier on this application was dismissed for being time barred something which led to this appeal.

Contrary to the above cited authority, as it can be learnt from the content of the preliminary objection raised, the issue of time limitation was not a pure point of law because as mentioned by the counsel for the appellant, there were issues which needed to be determined as regards other applications which were also pending before the DLHT. The point of objection raised by the respondent was not self-proof. It was subject to proof by some other material facts.

I tend to subscribe and support my arguments to the case of **Tanzania Red Cross Society v Dar es salaam City Council, Ilala Municipal Council, Kinondoni Municipality Council and Temeke Municipality Council**, Commercial Case no. 53 of 2005 (unreported) where Hon Massati, J as he then was, stated that, there is no dispute that a period of limitation starts to count from the date of accrual of the cause of action. However, the date of accrual of cause of action is a question of fact which cannot be resolved in an argument on a preliminary objection.

The counsel for the respondent has stated that the cause of action arose in 2001 when the plot in dispute was acquired therefore up to 2019



there is a period of 17 years. Meanwhile the counsel for the appellant state that between 2001 and 2019 there were other applications filed by the respondent like Applications No. **126 of 2008** and **No. 126B of 2017** therefore the time limitation should count from 2016 when Application No. 126/2008 was dismissed and not 2001.

My brother Hon. Ndyansobera, J, was faced with an almost similar situation in **Marco Tech Company Ltd v The Lindi District Council**, Civil Appel no. 2 of 2020. If I could quote the words, he stated that;

'the version above (between the appellant and respondents) indicates that both parties were involved in a clash of facts. This 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, witness called, examined cross examined, testimonies weighed and then finding of facts made by Court.....'

He stated further that *'the date when the cause of action arose in the present case was not a point of law which could be disposed of summarily.'* Having quoted these decisions and the reasoning thereof and having considered the facts of this appeal, it was wrong on part of the DLHT chair to hold that the cause of action arose in 2001 and that the suit was time barred. The cause of action in this appeal was not based on a pure point of



law as there were issues of evidence which needed to be tackled in order to determine the said objection.

That being said as a matter of record, while preparing this judgment, I came through a copy of counter claim filed by the appellant before the DLHT in Application No. 306 of 2019. It is also in record that the said counter claim was not determined to its finality after the main application being dismissed. Having consulted the parties on this aspect the counsel for the appellant was not aware of the existence of the said counter claim as he took over the case at a later state. The counsel for the respondent had mentioned that the counter claim existed but he stated that it does not affect the time limitation against the appellant. Although this counter claim is not before me, when the preliminary objection was raised before the DLHT, had the chairman checked on the status of these other cases he would have noted that there is a pending counter claim and that the appellant was not sitting on his rights for 17 years.

In conclusion, the appeal is allowed. The ruling and orders of the DLHT in application no. 306/2019 are quashed and set aside. The record should be remitted to the DLHT Mwanza for hearing on the application on merit, before another Chairman of competent jurisdiction.



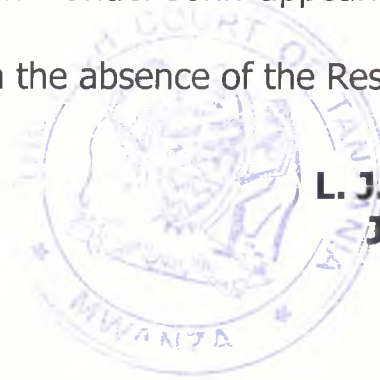
Under the circumstances that in determination of this appeal has to a large extent been a result of court's effort, each party bears its own costs.

DATED at **MWANZA** this 29th day of August, 2022.



L. J. ITEMBA
JUDGE

Ruling delivered on 29th day of August, 2022 in the presence of advocate Emmanuel John appearing remotely via virtual Court and Ignas RMA and in the absence of the Respondents.



L. J. ITEMBA
JUDGE