

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

LAND APPEAL No. 60 OF 2021

*(Arising from the Ruling and Order of the District Land and Housing Tribunal
for Geita at Geita in Land Case No. 07 of 2021)*

**BUSUMABU KISANDU BUSUMABU (The Administrator
of the Estate of the Late BUSUMABU KISANDU----- APPELANT
VERSUS**

**TUNGA BUSUMABU-----1st RESPONDENT
MAGAIWA BUSUMABU-----2nd RESPONDENT
GERALD JOSEPH-----3rd RESPONDENT
JUMA CHARLES-----4th RESPONDENT
DEUS NDAHILA-----5th RESPONDENT
YEJI NDAHILA-----6th RESPONDENT
DEVOTHA MISUNGWI-----7th RESPONDENT
TIGIA SAMWEL-----8th RESPONDENT
PAULA BENJAMIN-----9th RESPONDENT
MASHAKA BENJAMIN-----10th RESPONDENT**

JUDGMENT

Last Order date: 18.08.2022

Judgment Date: 22.09.2022

M. MNYUKWA, J.

The Appellant Busumabu Kisandu Busumabu suing as the Administrator of the Estate of the Late Busumabu Kisandu is appealing



against the decision of the District Land and Housing Tribunal (trial tribunal) of Geita at Geita in Land Case No. 07 of 2021, which was dismissed. In the record, it goes that; the applicant sued the respondents over a piece of land measuring approximately 80 acres, which he acquired the same in the late 1950s. The applicant claimed before the trial tribunal that, the land was the property of the deceased Busumabu Kisandu his grandfather who died in 1976 and left the land as clan land under the guidance of the applicant's father. In the year 2003, the applicant's father died and the 1st, 2nd, 3rd and 4th respondents unlawful invaded the disputed land and divided the land among themselves and also sold it to the other respondents.

When the matter was due for hearing before the trial tribunal, the respondent learned counsel raised a preliminary objection on the point of law that the suit was time-barred. On the determination of the preliminary objection, the trial tribunal sustained the Preliminary Objection and dismissed the application on the point that the matter was time-barred.

Dissatisfied, the applicant has now appealed before this court against the decision of the trial tribunal with 6 grounds of appeal;

- i. That the learned District Land and Housing Tribunal chairman made a grave error in law and in fact by holding that the appellant suit was time-barred despite*



the fact that the respondent jointly and severally failed to prove that they had been in uninterrupted use, occupation and ownership of the disputed piece of land from the alleged time of the cause of action.

- ii. That the learned District and housing tribunal Chairman made a grave error in law and fact by holding that the suit was time-barred on the reasoning that the course of action arose in the year 1976 despite the fact that the death of the original owner, the disputed piece of land was used as a clan land, and contrary to the law that bars clan adverse possession on land used and owned by clan members.*
- iii. That the trial District Land and Housing Tribunal Chairman erred in law and in fact by holding that the suit was lime barred against the Appellant despite crystal clear admission by the Respondents jointly and severally that they do not had have never claimed possessory right over the disputed piece of land, either by adverse possession or usufructuary. In law, a right of action cannot accrue on a person who does not claim possession of a piece of land, either through adverse possession or otherwise.*
- iv. That the trial District Land and Housing Tribunal made a grave error in law and in fact failing to find and hold that what occurred in the year 2003 was not a land dispute between the 1st, 2nd, 3^d, ad 4th Respondents and the Appellant herein but rather an inheritance dispute*



between the said Respondents and the rest of Kisandu Busumabu's clan members, and further, the rest of the Respondents are not members of the said clan, by blood or adoption.

- v. That the learned District and Housing Tribunal Chairman made a gross error in law and in fact by failing to find and hold that the Respondent's preliminary objection was not solely a pure point of law as there were several matters which ought to have been proved by way of evidence. Once there are facts which require evidential proof, the issue raised cannot stand the acid test of a valid preliminary objection.*
- vi. That in general, the trial District Land and Housing Tribunal Chairman grossly erred in law and in fact by failing to thoroughly, exhaustively and adequately scrutinize the whole pleadings from both parties, hence failing to find and realize that in their Defence, the Respondent did not claim any possessory right over the disputed piece of land but was only claiming a share of inheritance as heirs of Busumabu Kisandu. As such, there was no point to sustain the claims for limitation.*

At the hearing, Ms. Matilda Joseph learned advocate represented the appellant and Mr. Laurent Bugoti represented the respondents



The appellant learned counsel, was the first to submit and she prayed this court to adopt her petition of appeal to form part of her submissions. she also opted to submit the 1st and 2nd grounds of appeal jointly and other grounds separately as they appear on the petition of appeal.

Submitting on the 1st and 2nd grounds of appeal, she avers that the trial tribunal erred in law and in facts holding that the dispute in question was time-barred. She went on that, it is undisputed that the disputed land was the property of the deceased who died in 1976 and the family members continued to use the land peaceful without interference and did not file a probate case.

She went on that in 2003, the dispute arises whereas some of the heirs inherited without following the procedures, until 2020 when the applicant decided to follow a proper procedure and filed a probate case where he was appointed as the administrator of the estate of the deceased on 17.10.2020.

She avers that as a general rule, there is no cause of action against the deceased and section 9(1) of the Law of Limitation Act Cap. 89 RE. 2019, provides for exceptions to the general rule under section 24(1) and 35, that the cause of action starts to run after the administrator is



appointed. Insisting, she cited the case of **Rashid Togwa vs Peapea Village Council**, Land Appeal No. 60 of 2020, HC Land Division at Dar es Salaam at pages 7 and 8. She also cited the case of **Rhodha Sobe (As the Administratrix of the late Sobi Masumari) vs James Fred Sagazia (As the Administrator of the Estate of the Late Wilson Wanusu)**, Land Appeal No 69 of 2019 HCT at Mwanza on pages 7,8 and 10 whereas this court gave factors to consider in computing the time when the cause of action arose. She insisted that the cause of action arose when the appellant was appointed as administrator in 2020 and in 2021 when he instituted the case, it was within time.

On the 3rd ground of appeal, it was her submission that, the respondents did not claim ownership of the disputed land for over 12 years but they claimed that, the disputed land belongs to their deceased father. She avers that the trial tribunal erred to rule out that there was adverse possession while the test of adverse possession does not fit in the circumstance referring to the case of **Rhodha Sobe** (Supra).

On the 4th ground of appeal, she avers that DLHT erred to hold that the cause of action arose in 2003. She insisted that in 2003, there was a family dispute and therefore, the cause of action did not arise in 2003.

Submitting on the 5th ground of appeal, she claims that the trial tribunal erred in treating the preliminary objection as a pure point of law



while there was an issue that needed to be proved including the issue of adverse possession. She went on to abandon the 6th ground of appeal and pray this court to quash and nullify the Ruling of the trial tribunal with costs and remit the file back to the trial tribunal for the matter to be determined on merit.

Responding to the appellant's submissions, Mr Laurent Bugoti on the 1st and 2nd grounds of appeal opposed the appellant's submissions insisting that, the cause of action as referred to applicant's application on para 6A(c) before the trial tribunal that, the cause of action arose in 2003 when the 1st, 2nd, 3rd and 4th respondent invaded the disputed land.

Referring to section 9(1) of the law of Limitation Act, Cap. 89 R:E 2019, he insisted that the law is clear that, the cause of action on the deceased estate arose when the person dies and the appellant's cause to recover the deceased estate was overtaken by event. He went on that, the time limit to recover the land was 12 years and since the time had lapsed, they were required to apply for an extension of time to the Minister under section 44 of the Law of Limitation Act Cap. 89 RE 2019 and any proceedings filed in contravention ought to be dismissed as per section 3(1) of Cap 89 R:E 2019. Insisting, he cited the case of **Nyanza Co-Operative Union (1984) Ltd vs Chimazi Bilebile and 26 Others,**



Land Appeal No. 48 of 2014 at pages 12,13 and 14 which gave position for a suit filed out of time.

On the 3rd ground of appeal, he submitted that the case was not heard on merit and therefore the issue of adverse possession was not determined and the same could have weight if the matter was determined on merit.

Reply on the 4th ground of appeal, he avers that the appellant at the trial tribunal expressly stated that, the cause of action arose in 2003 and insisted that, parties are bound by their pleadings.

On the 5th ground of appeal, he avers that, the written statement of defence filed before the trial tribunal, expressly stated that the suit was time barred and time limitation is a pure point of law. Insisting, he cited the case of **Karata Ernest & Others vs AG**, Civil Revision No. 10 of 2010 CAT, that the Court of Appeal stated that limitation is a pure point of law. Mr. Bugoti, the learned counsel retires by praying this court to dismiss the appeal with costs.

In her short rejoinder, Ms. Matilda Joseph reiterates her submissions in chief insisting that, despite the general rule stated under section 9 (1) of the Law of Limitation Act, Cap 89 RE: 2019, she insisted that there are exceptions as stated in sections 24(1) and 35 of Law of Limitation Act, Cap 89 R:E2019. She insisted that the cause of action arose when a



person has a right to sue and the right to sue was attained after the appellant was appointed as administrator of the deceased estate in 2020, for the deceased did not leave a dispute on his demise. She reacted to the cited cases by the respondent to be distinguishable.

Re-joining on the 3rd ground, she insisted that, parties are bound by their pleadings but also courts also do analysis through the pleadings and if the matter was heard on merit, the court could properly analyse the pleadings. She maintains that the preliminary objection was not a pure point of law and insist this court to quash and nullify the proceedings and the appeal to be allowed with costs.

As noted from the parties' submissions, and before embarking on the long submissions by parties, I find it wanting to settle the appellant's argument that the preliminary objection raised before the trial tribunal was not a pure point of law. The respondent objected that indeed time limitation is a pure point of law. In conjunction, therefore, the question as to what constitutes a preliminary objection has been the subject of several judicial pronouncements settled in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] EA 696, the Court pointed out three important legal points capable of terminating the suit at the preliminary stage to include a point on the jurisdiction of the Court, Arbitration and Limitation of time.



The same position was reiterated by the Court of Appeal in the case of **Ali Shabani and 48 Others v. Tanzania National Roads Agency and the Attorney General**, Civil Appeal No. 261 of 2020 at p. 8, the Court stated:

"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence".

(See also **Karata Ernest & Others vs AG** Civil Revision No. 10 of 2010 CAT)

Being guided by the afore authorities, I am settled that, what was determined by the trial tribunal was a pure point of law and therefore qualifies as a preliminary objection as against the claims by the appellant's learned counsel.

As submitted by the appellant on the 1st and 2nd grounds of appeal that, the trial tribunal erred in holding that the matter was time barred insisting that, the Law of limitation has exceptions under sections 24(1) and 35 of the Law of Limitation Act, Cap 89 R.E:2019, on the time when



the cause of action arose. The respondent opposed insisting that the Law of Limitation Act Cap. 89 RE: 2019 expressly provides under section 9(1) based on the circumstance of the appeal at hand that the cause of action arose way back when the deceased passed in 1976.

The Law of Limitation Act, Cap 89 R: E 2019 expressly provides under section 9(1) as it reads: -

"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".

In this matter at hand, the appellant is claiming the property of the estate of the deceased as against any other persons through the letter of administration. In the circumstance, what is stated by the appellant in the 2nd ground of appeal that after the demise of the deceased the land passed to the clan members and was used commonly, is contrary to his application for the reason that, he applied before the trial tribunal as the administrator of the estate of the deceased claiming for the estate which brings section 9(1) into play.



The same findings of this court in **Shomari Omari Shomari (as an administrator of the Estate of the Late Seleman Ibrahim Maichila) vs. Mohamed Kikoko**, Land Appeal No. 171 of 2018, before Maige J. (as he then was) had the following observation:

"...In their clear and unambiguous meaning, the respective notes would mean in my view that, letters of administration or probate speaks from the date of the death of the deceased. This is in line with the provision of Section 9 (1) of the Law of Limitation Act."

This court holds the same stand in **Helena Mwaipasi v. Philip Mwambungu & 2 Others**, Land Case No. 10 of 2012 HC page 16 and 17 in which Dr. Levira, J. (as she then was) when faced the similar issue like the matter at hand, comprehensibly observed that:

"Applying these provisions to the instant case, it is patently dear that the Plaintiff's right of action accrued from 1968 when the deceased died. The computation of this period still begins from that date regardless of the fact that Plaintiff was granted the letters of Administration."

(See also **Yusuf Same & Another v. Hadija Yusuf** [1996] TLR 47, **Monica Nkhoma (Administrator of the Late Daud K. Mbeyela @Daud Francis Mbeyela @Daud Mbeyela) Vs Emmanuel Kenneth Mbeyela (Administrator of The Late Keneth Mbeyela)**, Land Case No. 05 of 2021.).



The law is settled under paragraph 22 of Part 21 of the 1st Schedule to the Law of Limitation Act Cap. 89 RE 2019 which read together with Section 9(1) of the Law of Limitation Act, Cap. 89 R: E 2019 that, the time limit for recovery of land is 12 years. Reverting to the matter at hand, the appellant attempted to recover the land as an administrator of the estate of the late Busumabu Kisandu whereas, the computation of the time limit must be according to the law and not otherwise. As stated, the deceased died in 1976 and the applicant applied for letters of administration 2020 which makes 44 years, it is indeed that the applicant was time barred and the trial tribunal had no option but to dismiss the said suit.

The law is settled when the matter is time-barred, the remedy is to have it dismissed. In **Tima Haji v. Amiri Mohamed Mtoto & Another**, Civil Revision No. 61 of 2003 at page 16 the Court of Appeal stated that, the consequences of an application or proceedings filed out of time shall be dismissal. (See also **Nyanza Co-Operative union (1984) Ltd vs Chimazi Bilebile and 26 Others**, Land Appeal No. 48 of 2014).

In the circumstances of the above, this appeal fails for want of merit. I find that the 1st and 2nd grounds of appeal above disposed of the appeal and determining the remaining ground will serve no purpose. In line with



the findings above, this appeal is dismissed with no order as to costs due to the relationship of the parties in this appeal.

Order Accordingly.




M.MNYUKWA
JUDGE
22/09/2022

Right of appeal explained to the parties.


M.MNYUKWA
JUDGE
22/09/2022

Court: Judgement delivered in the presence of the appellant and in the absence of the respondents.


M.MNYUKWA
JUDGE
22/09/2022