

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 61 OF 2020

(Arising from the decision of the DLHT for Mwanza in Land Application No. 316 of 2012)

WILLIAM FRANCIS MASANJA (Administrator of
the estate of the late Francis Makoye Masanja) **APPELLANT**

VERSUS

1. KAFULA MASHAURI
2. MICHAEL JAULOLA
3. WILLIAM KISUNA
4. ELIAS MTALAZI
5. MCHEMBE SOLOLO
6. PAULINE KACHWELE
7. AICT CHURCH ILUNGE **RESPONDENTS**

JUDGMENT

30/8/2022 & 23/9/2022

ROBERT, J:-

The appellant, abovenamed, is appealing against the decision of the District Land and Housing Tribunal for Mwanza, hereinafter the DLHT, in Land Application No. 316 of 2012 dated 05/02/2015. The DLHT dismissed the appellant's application after sustaining a preliminary objection raised by the respondents to the effect that the matter was time barred. Aggrieved by the dismissal of his application, the appellant instituted this

appeal in order to challenge the said decision on the grounds set out in the petition of appeal as follows:

- 1. That the District Land and Housing Tribunal erred in law by departing from the proper pleading as well as annexures attached thereto and hence decided on the issues which required ascertainment by way of evidence on a point of law.*
- 2. That District land and Housing Tribunal also erred by making a decision basing on time limitation and or doctrine of adverse possession without affording the parties a right to be heard on the issues.*
- 3. And that the Tribunal wrongly interpreted the doctrine of adverse possession / the limitation of time against a person holding a certificate of title without consulting the proper law hence arrived at a wrong decision.*

Hearing of this appeal proceeded by way of written submissions. The appellant was represented by Mr. Dennis Kahangwa, learned counsel whereas the respondents, with the exception of the 5th respondent against whom this appeal proceeded *ex-parte*, and the 4th who was reported dead and thus the appellant withdrew an appeal against him, were represented by Mr. Mathias Mashauri, learned counsel.

Submitting in support of the first ground of appeal, counsel for the appellant submitted that, the issue before the DLHT was who the owner of the disputed piece of land is and when the allocation of the disputed

land was made. He argued that, the application before the DLHT indicated that the respondents invaded the disputed land in 2009 and started engaging in different activities on the land thus the cause of action commenced therefrom whereas the respondents claimed to have been allocated different plots in the disputed land by the Village Land Allocation Committee of Ilungu Village in different years commencing from 1973/1974, 1982/1983 and 1984/1985 and that the applicant was allocated the said piece of land illegally in 2009. Hence, he was of the view that since there was such uncertainty, the DLHT was required to seek proof of the alleged facts because the issue of time limitation could not be determined on the face of the application alone without proof. To further his argument, he cited the case of **Mukisa Biscuits Manufacturers Ltd vs West End Distributors Ltd** [1969] EA 696 which stated among other things that a preliminary objection cannot be raised if any fact has to be ascertained.

He submitted further that looking at the impugned decision, the DLHT relied heavily on the documentary evidence attached to the joint reply to the application in order to reach at its findings. This means the determination of the preliminary objection necessitated consideration of evidential proof. He maintained that, determining the said objection while

referring to the documentary evidence which was in itself contentious and needed proof was wrong and amounted to denial of the right to be heard. He made reference to the case of **MS Safia Ahmed Okash (As administratrix of the estate of the late Ahmed Okash) vs MS Sikudhani Amiri & 82 Others**, Civil Appeal No. 138 of 2016, CA (unreported) in which it was held that *"where a preliminary objection raised contains more than a point of law, say law and facts it must fail..... for, factual issues will require proof, be it by affidavit or oral evidence"*

He was of the view that, since the facts on the preliminary objection were subject to a contest, the DLHT could not determine the objection at that preliminary stage as the facts were calling for proof at the trial.

With regards to the second and third grounds of appeal, the learned counsel opted to argue them together and submitted that, the issue before the DLHT was that the applicant/appellant had acquired the title to the disputed land illegally and if it was legally obtained, the applicant/appellant slept on his right for 23 years and therefore he could not claim for restoration of the said piece of land. On his part, he maintained that the appellant was the lawful owner of the disputed piece of land and he attached a certificate of title as conclusive evidence of ownership. To support his argument, he cited the authority in the case of

Amina Maulid Ambali & 2 Others vs Ramadhani Juma, Civil Appeal No. 35 of 2019, CA-Mwanza (unreported) and **Okello vs Uganda Examination Board** [1986-1989] EA 436.

He concluded his submissions by faulting the DLHT for going beyond the fact of registration and make a decision on the basis of time limitation. Further to that, he submitted that, the issue of adverse possession could not arise where there was a lawful title. To support his argument, he made reference to the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo & 136 Others**, Civil Appeal No. 193 of 2016, CA-Arusha (unreported). On the basis of the reasons above, he prayed that the appeal be allowed with costs.

On the other hand, the respondents through their learned counsel Mr. Mashauri, replied to the submissions by the appellant's counsel and argued that the case of **Mukisa Biscuits Manufacturers Ltd** (supra) cited by the appellant is distinguishable from this case as the preliminary objection raised before the DLHT was purely founded on the point of law as the application had offended the provisions of section 3(1), 9(1) and 35 of the Law of Limitation Act [Cap 89 RE 2019].

He submitted further that, the respondents have been in occupation of the disputed land since time immemorial and have never abandoned it

therefore, if the appellant's father was allocated the same in 1983 then he was supposed to be occupying it with the exclusion of all respondents but that was not the case. He argued further that, even after the death of the appellant's father in 1996 the appellant was supposed to file his claim within 12 years but he did not until 2012. Therefore, he concluded that the DLHT was correct to dismiss the application for being time barred as the cause of action arose in 1996 when the applicant's father died and was supposed to claim the said piece of land within 12 years. It was his firm submission that the appeal lacks merits and thus the same should be dismissed with costs.

The main question arising from the rival submissions of parties and records of this matter is whether the DLHT was right to dismiss the appellant's application on account of the preliminary objection that the matter was time barred.

Before delving into the details, I find it pertinent to take guidance from the famous case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) on what a preliminary objection is all about where the defunct Court for East Africa stated that:

"A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law

which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"

Also, the case of **Musanga Ng'andwa vs Chief Japhet Wanzagi and 8 Others** (2006) TLR 351 defined the term to mean;

"a preliminary objection is an expression used in our jurisdiction to refer to objection to the jurisdiction of court, a plea of limitation of time and the like. It contains a point of law, which if argued as a preliminary point may dispose of a suit. A preliminary objection cannot be raised if any fact has to be ascertained, that is it cannot be based on unascertained factual matters"

From the authorities above, the question for determination is whether the preliminary objection raised by the respondents before the DLHT against the appellant's application met the standard set in the above quoted authorities. As stated, a preliminary objection has to be based purely on points of law and its determination must not invite factual proof or ascertainment.

Before the DLHT, the respondents based their objection on the fact that they have been in occupation of the disputed plot since 1973/1974 and 1984/1985 as evidenced in annexure "A" attached to their

submissions while the appellant's father illegally obtained the certificate of title of the disputed plot in 1983 and until his demise in 1996 he had never claimed the disputed plot to be his property nor sought an order to evict the respondents from the said land and they were never informed that the piece of land belonged to him. Hence, the applicant having failed to refer the matter before the tribunal within 12 years was barred by time limitation.

On his side, the applicant (now appellant) told the DLHT that the respondents trespassed into the disputed plot in 2009 and that his mother instituted a complaint before the Nyigogo Ward Tribunal which was dismissed by the DLHT for Mwanza for want of locus standi thus in 2010 he was appointed as an administrator of his late father's estate and instituted the matter before the DLHT in 2012.

Looking at the application, it is clearly indicated that the alleged invasion occurred in 2009 and the matter was referred to the DLHT in 2012 which is only three years after the said invasion. Therefore, based on the facts stated in his application at the DLHT, the applicant/appellant was well within the prescribed time. The fact that the respondents claimed to have been in continuous occupation of the disputed land since 1973

could not be taken from the face value to conclude that the applicant/ appellant was barred by time limitation.

This Court considers that, the issue as to whether or not the respondents were in continuous occupation of the disputed land since 1973 was a matter of fact which needed to be ascertained by hearing of evidence considering that there was another evidence indicating that the disputed plot was allocated to the appellant's father in 1985 and there is a title deed to prove that. More importantly, the allegation by the respondents that the appellant's father was illegally allocated the disputed land needed to be proved by evidence.

As stated above that, the legal principle is that objections must be of pure points of laws without requiring another facts/evidence to prove its existence. In the case of **National Insurance Corporation of Tanzania & Another vs. Shengena Ltd.**, Civil Application No. 20 of 2017 (Unreported) while referring to **Mukisa** case, where the court had this to say;

"We take that to be position of the law on the meaning of preliminary objection. With this in mind, we ask ourselves does the so-called Preliminary Objection in the instant case pass this test. We think that it does not. The two so called

points of objection are not self proof. They are subjected to proof of some other material facts"

In another case of **Shose Sinare vs Stanbic Bank Tanzania Ltd & Another**, Civil Appeal No. 89 of 2020, the Court of Appeal held that;

"a preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure to entertain application for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits"


I fully subscribe to the cited authorities as in the present matter records indicate that the respondents and the DLHT made reference to the documentary evidence attached to the pleadings which was also contentious in order to support the objection raised.

That said, this Court finds that, the preliminary objection raised and sustained at the DLHT against the application did not qualify as such as it contained both issues law and fact and required certain facts to be

ascertained. Consequently, I proceed to reverse the DLHT decision and make an order for retrial of the matter on merits. In the circumstances, I give no order for costs.

It is so ordered.




K.N.ROBERT
JUDGE
23/9/2022