THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 35 OF 2022

(Originating from Land Application No. 22 of 2020 of Kyela District Land and Housing Tribunal)

YONA KYAMPIKU MWANYAMA (as the administrator of the estate of the late **Kyampuku Mwanyama Mwakipesile) .....APPELLANT**

VERSUS

ANYITIKE MWAKILEMBE .....RESPONDENT

JUDGMENT

Date of last order: 29th August,2022

Date of judgment: 18th October, 2022

NGUNYALE, J.

The appellant instituted a suit against the respondent for trespass of the land located at Ibungu Village within Kyela District in Mbeya Region. After the appellant had closed his case, the chairman raised *suo moto* the issue of competence of the application on the ground that it was time barred. Parties fully addressed the tribunal and in its ruling the chairman dismissed the application for being time barred. Aggrieved the appellant filed the present appeal consisting of three grounds namely;

1. *That, the trial chairperson erred in law and fact in dismissing the application on ground of time barred while the application was not out of time.*
2. *That, the trial chairperson erred in law and fact for allowing the tribunal assessor to give their opinion on points regarding the law.*
3. *That, the chairperson erred in law and fact in holding that the application for letter of administration was out of time while it had no jurisdiction to entertain matters relating to grants of letters of administration.*

When the appeal came on for hearing parties had no legal representation, by consensus of the parties indorsed by the court the appeal was disposed through written submission.

On the first ground whether the application was time barred, the appellant submitted that according to section 5 of the Law of Limitation Act [Cap. 89 R: E 2019] (henceforth "LLA") right of action accrues on the date in which cause of action arise. He stated that as per pleaded facts in paragraph 6(b) of the application cause of action arose in 2013 when the respondent trespassed the suit land. He added that from 1973 to 2013 the respondent was not in possession of the suit land. He referred to section 9(2) of the LLA which provides that right of action on deceased estates start to run when he is dispossessed. He faulted the Chairman for relying on sections 9(1) and 35 of the LLA in adjudging the application time barred which were inapplicable.

Regarding opinion of assessors in second ground, the appellant submitted that the issue being a point of law the chairman was not required to seek opinion of the assessors. He cited and quoted the District Land and Housing Tribunal Regulation G.N No. 174 of 2003 without indicating a relevant regulation. The case of **Fredrick Rwemanyira vs Joseph Rwegoshora**, Land Appeal No. 13 of 2021, HC at Bukoba was cited to support the argument.

On the third ground questioning letter of administration granted to the appellant, it was submitted that the tribunal had no jurisdiction to question it because that is the domain of the probate court. He rounded up his submission that whether the application for letter of administration was made in time or not could not be adjudicated in the land tribunal. He prayed the court to sustain grounds of appeal and order hearing *de novo*. He too pressed for costs.

In rebuttal the respondent supported the tribunal's decision that it was time barred as it took almost forty-seven years for the appellant to obtain letter of administration and institute the claim for recovery of land which was beyond twelve years prescribed by the law. He cited the case of **Aloysius Benedicto Rutauhwa vs Stanslaus Mutahyabarwa & 7 Others,** Land Appeal No, 22 of 2020 to support the argument.

On involving assessors on point of law, the respondent replied that it was just to mislead the court. He distinguished the case of **Fredict Rwemanyira** (supra) relied by the appellant for being inapplicable. He referred to section 24 of the Land Disputes Courts Act [Cap. 216 R: E 2019] and regulation 19(1)(2) of G.N. No. 174 of 2003 which requires the chairman to consider assessors opinion in the judgment.

Replying to adjudging letter of administration being sought out of time the respondent submitted that the chairman did nothing wrong as he just considered whether the matter was instituted in time and not whether the appellant was appointed within time.

The respondent concluded for the appeal to be dismissed with costs and the decision of the tribunal to remain intact.

Having read submission of both parties and the record before this court. The appeal can only be disposed on one issue as to whether relying on bare pleadings it can safely be ruled that the appellant's suit was time barred before the tribunal. At this juncture, it is crucial to revisit the appellant's claim before the tribunal;

> *'Paragraph 6(b). That, the late Kyampuku Mwanyama Mwakipesile used the suit land and developed until 1973 when he met death.*

paragraph 6(c). That; in the year 1974 after the demise of the original owner, the suit land placed under the custodian of Asinati Kyampuku Kanyande until 2019.

paragraph 6(d). That in the year 2019 the applicant having been legally appointed as administrator of the estate of the late Kyampuku Mwanyama Mwakipesile.

paragraph (6)(e). That sometimes in 2014 the respondent without any legal justification invaded and trespassed the suit land and started to use as unlawful.'

The respondent opposed the claim in his WDS in the following manner;

'Paragraph 7. The contents of paragraph 6(b) of the application are strongly disputed to the extent that the applicant's later father has never used the disputed land to the year 1973.

Paragraph 8. That, the content of paragraph 6(c) of the application are strongly disputed to the extent that the disputed land was never put into the custody of ESINATI KYAMPUKU KANYANDE from the year 1973 or 2019. It is further stated that IKIMBA ward tribunal on 22nd day of May, 2015 delivered its considered judgment that the disputed land belongs to the respondent.

Paragraph 9. That the contents of paragraph 6(d) of the application are strongly disputed to the extent that even if the applicant has been appointed as the administrator of the estate of the late KYAMPUKU MWANYAMA MWAKIPESILE it does not automatically make him the legal owner of the disputed land. He can administer other estates belonging to the deceased

Paragraph 10. That, the contents of paragraph 6(e) of the application are strongly disputed to the extent that the Respondent has never trespassed the disputed land as it actually belongs to him.'

Based on the pleading it is clear that there was contentious issue as to when the cause of action arose. In its ruling the Chairman based his decision under section 9(1) and 35 LLA, I quote;

> *'... katika mazingira ya shauri hili na kwa mujibu wa sheria haki ya kufungua shauri hili ilianza tangu tarehe ya kifo cha mmiliki yani tarehe 01/07/1973, kama ilivyoainishwa hapo juu maombi haya yamefunguliwa miaka 46 baada ya kifo cha Kyampuku Mwanyama Mwakipesile, hivyo maombi haya yalifunguliwa nje ya muda.'*

Going through the ruling and quoted passage above and all authorities cited by the chairman I have no flicker of doubt that it expounds the correct position of the law on accrual of cause of action of the deceased's estate.

However, the cited provisions of law and cases are distinguishable with the circumstances of this case. From the paragraphs of pleadings reproduced above there was dispute as to when cause of action arose. While the applicant contended it was in 2014 when the respondent trespassed the suit land, on the other hand the respondent disputed. Section 9(2) of the LLA provides that;

> *'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.'*

In the case of **Barelia Karangirangi Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017, CAT at Mwanza (unreported) the court expounded applicability of section 9(2) of the LLA in accrual of cause of action, the court stated;

> *'The right of action in this present case, accrued when the respondent claimed to have found the appellant and her children cultivating the suit land which according to the record, it was in 2007. The respondent had then immediately instituted the suit in the Ward Tribunal. The suit was hence instituted within the prescribed time of twelve years. In the premises, we find that the appellant's contention that the suit was time barred has no merit'*

See also the case of **Maigu E. M. Magenda versus Arbogast Maugo Magenda,** Civil Appeal No. 218 of 2017, CAT at Mwanza (Unreported).

From the above, the time for the deceased estates start to run from the time when the person entitled there to is dispossessed or discontinued from the possession. In the application it was alleged that the respondent trespassed in 2014, the fact which was disputed by respondent.

The question of when the twelve-year limitation period began to run against the appellant on a claim over the disputed land required proof because it was contentious in pleadings of the parties. The chairman in his ruling relied on pleadings and submission of parties which I find it was

irregular because pleadings and the written submission do not constitute evidence.

It settled law that where a preliminary objection raised contains more than a point of law, say law and facts it must fail because factual issues will require proof, be it by affidavit or oral evidence. See the case of **Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu vs Selemani Hamisi the Administrator of the Estate of the late Hamisi Abdallah,** Civil Appeal No. 314 of 2020, CAT at Arusha (Unreported). Although the above principle is on preliminary objection it equally applies to the point of law which is *suo moto* raised by the court or tribunal.

Therefore, the question of when the twelve-year limitation period began to run against the appellant on a claim over the disputed land required proof as such it could not be resolved at the preliminary stage. The issue was prematurely determined. Thus, I find the first ground meritorious.

With regard to the way forward, **I quash and set aside the impugned decision and the subsequent orders of the tribunal**. Considering that the appellant had closed his case when the issue was raised, it is the settled law that justice must not only be done but must be see to be done. In the circumstance I proceed to make an order for fresh hearing of the

Application No. 22 of 2020 before another Chairman with different set of assessors.

In view of the order I have made, the determination of the appellant's remaining grounds in the memorandum of appeal will be an academic exercise serving no useful purpose. Costs shall abide by the outcome of that application. It is so ordered.

DATED at MBEYA this 18th day of October, 2022

D.P. Ngunyale
Judge