

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT MOROGORO**

**LAND CASE NO. 107 OF 2021**

**ALLY MOHAMMED KIKWAMBA (Suing as an Administrator of the Estate of  
the Late Mohammed Kikwamba) ..... PLAINTIFF**

**VERSUS**

**LEBABA SAIMON MSISI ..... 1<sup>ST</sup> DEFENDANT**

**YUSUFU AMINI..... 2<sup>ND</sup> DEFENDANT**

**AZIZI HABIBU ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**6<sup>th</sup> & 12<sup>th</sup> Dec, 2022**

**CHABA, J.**

The Plaintiff, Ally Mohamed Kikwamba is suing as an administrator of the estates of his late father, Mohammed Kikwamba. He instituted this suit against all the Defendants jointly and severally over the ownership of the suit property measured 130 acres located at Majambawa Village, Msowero Ward within Kilosa District, Morogoro Region worthy TZS. 330,000,000/= (Three Hundred and Thirty Million Tanzania Shillings Only).


The Plaintiff's claim against the Defendants is grounded on the fact that, the deceased being the rightful owner of the disputed suit land and having descendants, therefore these offspring form's part and parcel of the deceased's properties which is subject to distribution to all respective beneficiaries/heirs.



The Plaintiff averred that, he and his family are lawful owners of the disputed land measured 130 acres which they inherited the same from their late father, Omary Mohammed Kikwamba who obtained the same since the year 1940's through bush clearing and lived in the disputed land peacefully without any interference for more than fifty (50) years now.

According to the Plaintiff's Complaint, the cause of action sprang from the sale of the disputed suit land to the 1<sup>st</sup> Defendant way back in 2012 when the grand-children of the late Mohammed Kikwamba (the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) without having any lawfully title, they sold 100 acres of the disputed land to one Libaba Simon Msisi, the 1<sup>st</sup> Defendant for TZS. 8,000,000/=, and that the 1<sup>st</sup> Defendant currently is alleging to be the lawful owner of the disputed land claimed to have brought it from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who had no good title to pass to any other person.

As hinted above, initially the Plaintiff filed Land Case No. 10 of 2018 at Msowero Ward Tribunal which after full trial it was decided in his favour. Aggrieved, the 1<sup>st</sup> Defendant appealed to the District Land and Housing Tribunal for Kilosa, at Kilosa vide Land Appeal No. 41 of 2018, whereby the proceedings and Judgment of Msowero Ward Tribunal were nullified on the ground that the Plaintiff had no locus stand, as he filed the matter at the Ward Tribunal on his own capacity and not as the representative of his late father, Mohammed Kikwamba.



Later, the Plaintiff instituted or filed the matter afresh before the District Land and Housing Tribunal for Kilosa, at Kilosa but again, the matter was struck out on the ground that the District Land and Housing Tribunal had no pecuniary jurisdiction to entertain the matter. The Plaintiff, therefore had no other option other than knocking the doors of this temple of justice praying for the judgment and decree to be entered against the Defendants jointly and severally for the following orders: -

1. A declaratory that the disposition of the disputed land from 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the 1<sup>st</sup> Defendant was illegal ab initio;
2. A declaratory that both Respondents are trespassers to the disputed land;
3. A declaratory that the Plaintiff is the lawful owner of the disputed land;
4. That, this Honourable Court be pleased to issue an eviction order and permanent injunction against the Defendants and any other person acting on their behalf from doing anything in the disputed land;
5. Five, that the Defendants be ordered to pay the Plaintiff general damages in the tune of TZS. 50,000,000/=,
6. Costs of the suit be borne by the Defendants.
7. Any other relief or orders as this Honourable Court may deemed fit and just to grant.

As required by the provisions of Order VIII D, Rule 40 (1) of Civil Procedure Code [CAP. 33 R. E, 2019] (the CPC), that issues for determination should be





framed immediately before commencement of a trial, therefore the following issues were framed after the requisite consultation with the parties, namely: -

1. Who is the lawful owner of the suit land / property,
2. To what reliefs are the parties entitled.

At the hearing of this case, the Plaintiff appeared in person, unrepresented whilst the Defendants enjoyed the service of the learned advocate Mr. Benjamin Jonas. The Plaintiff's case had three witnesses and on the side of the Defendant's case had three witnesses, forming an aggregate of six (6) witnesses.

To substantiate the case, three witnesses testified on the Plaintiff's side. These are Ally Mohammed Kikwamba who testified and feature as PW.1, Salehe Makati (PW.2) and Mohammed Salum (PW.3).

Briefly, the Plaintiff Ally Mohammed Kikwamba, affirmed and testified that, he is claiming his rights over the parcel of land which belonged to his parents who are now no longer alive. He submitted that, when the disputed land was sold, he was appointed by his family to stand as the administrator of the deceased's estate of the late Mzee Mohammed Kikwamba. He concluded that, he is before this temple of justice seeking for his rights over the disputed land.

On being cross examined by the learned counsel for the Defendants, the Plaintiff said, he is claiming over the rights of the late Mohammed Kikwamba



under the umbrella of the administrator of his estate. He agreed however that, to justify his claim that he is an administrator of the deceased's estates, he hasn't submitted any proof over the same, and that the present case has been filed about 15 years after the demise of the deceased.

The second witness is Salehe Makati who featured as PW.2. Upon affirming, he went on testifying that, the Plaintiff is his neighbour to the land in dispute and that sometimes in between, he came to learn that the Plaintiff's land was sold by his son namely, Aziz Kikwamba and that the person who bought the land was Simon Libaba Msisi, 1<sup>st</sup> Defendant herein about 6 - 7 years ago.

During cross examination Mr. Benjamin, PW.2 told the Court that, the disputed land that has been sold to the 1<sup>st</sup> Defendant belongs to Ally Mohammed Kikwamba (PW.1) who got the land when his father Mohammed Kikwamba passed away about 10 - 20 years ago. He added that, he has never witnessed a village meeting allocating the 3<sup>rd</sup> Defendant in respect of the disputed land.

The third and last witness is Mohammed Salumu Mtangwala, PW.3. After being affirmed, he went on stating briefly that, the 3<sup>rd</sup> Defendant, Mr. Aziz Mohammed Kikwamba sold the parcel of land which belongs to the Plaintiff's father, Mohammed Kikwamba.



On being cross examined by Mr. Benjamin, PW.3 testified that the Plaintiff got an opportunity to own the disputed land after the Plaintiff's father passed away, and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants used to till/dig/cultivate the suit and.

After close of the Plaintiffs' case, the Defendants were accordingly afforded with their rights to be heard, and accordingly entered their respective defences. The learned counsel for the Defendants invited three witness, Abdul-Aziz Kikwamba (DW.1), Yusufu Amini (DW.2), and Lebaba Simon Msisi (DW.3). in essence, the Defendant's evidence intended to establish that the 1<sup>st</sup> Defendant's ownership of the disputed land is safe. In summary, their defence was as follows: -

Abdul-Aziz Kikwamba (DW.1) upon affirmation, recounted that the disputed land is situated at Msowero Village, Dumila Ward in Kilosa District. He continued to state that, on his personal capacity he started owning his own land from 1998/99 after he had been allocated the same by the Msowero Village Authority whereby he owned the land until in the year 2011/12 when he decided to sale the same to the 1<sup>st</sup> Defendant herein (Mr. Lebaba Simon Msisi) but upon adhering to all sale transactions. He prayed to tender the document of the sale transaction as an exhibit before this Court, which admitted as Exhibit DE.1.

DW.1 admitted the fact that, the late Mohammed Kikwamba was his grandfather ~~who~~ is the father to the Plaintiff and his late father. He said, the dispute arose in the year 2021 which resulted to this case. He averred that that, the land in dispute was allocated to him in a clan meeting and that is why he



sold the same to the 1<sup>st</sup> Defendant as part of his own share. He however stated that the 2<sup>nd</sup> Defendant was not involved in the sale of the disputed land as he was just a witness when the sale transactions took place. He concluded by praying the Court to recognize Lebaba Simon Msisi, herein 1<sup>st</sup> Defendant as the lawful owner of the disputed land.

When cross examined by the Plaintiff, DW.1, stated that being one among beneficiaries of the estates of their late father Habib Mohammed Kikwamba (the son of the late Mohamed Kikwamba), he decided to sale his properties whereby he sold his share of land distributed to him in 2012 to the 1<sup>st</sup> Defendant.

The testimony of DW.2 one Yusuph Amini is to the effect that, DW.1 (Abdul-Azizi Habibu Kikwamba) is his young brother, as their fathers are brothers born of the same father. In respect of the Plaintiff, DW.2 said, "*All/y Mohamed Kikwamba ni Baba mdogo kwa kuzaliwa na Baba yangu kutoka kwa Baba mmoja lakini Mama zao tofauti/mbalimbali*". He denied the Plaintiff's allegation and told the Court that, he didn't involve selling the disputed land, but he just witnessed the sale transaction on 3/7/2012. He further added that, the disputed land was the property of DW.1 who later decided to sell the same to Lebaba Simon Msisi, (1<sup>st</sup> Defendant).

He goes on narrating that, Mr. Abdul-Aziz had been tilling/digging/ cultivating only 5 acres out of 100 acres on the disputed land. He however later on, expanded the area by clearing the bushes and finally sold it to Mr. Lebaba

Simon Mlisi. He stated further that, it is not true that DW.1 sold the land which belonged to the late Mohamed Kikwamba. He told the Court that, he knows very well the late Mohammed Kikwamba as he used to stay with him, and he had never showed him the disputed land and claimed that he owned the same. On the contrary, DW.1 was the one living in the disputed land and not Mohammed Kikwamba.

He contended that, all the deceased's properties were divided to the heirs, whereas he got his shares as well as DW.1. He finally prayed the Court to declare that the Plaintiff's claims are useless and should be dismissed accordingly.

On being cross examined by the Plaintiff, DW.2 insisted that, he was part and parcel of the deceased's family and they never stayed at the disputed land. On further cross examination by the Court, DW.2 stated that, the Plaintiff has neither stayed with his father Mohammed Kikwamba nor their grandfathers. He detailed further that; the dispute arose after the death of their grandfather. The family meeting decided that, DW.2 be given the ownership of the land in dispute.

He reiterated his testimony that, he didn't involve to sell the land in dispute but he was the witness to the seller of the land (DW.1), and that DW.1 sold his parcel of land legally involving village leaders and the Plaintiff has nothing to claim from him.





DW.3, Libaba Simon Msisi upon taking oath he goes on testifying that, the disputed area belongs to him after he had bought it from DW.1 for consideration of TZS. 70,000 per one metre, and the total amount paid was TZS. 8,000,000/=. He said, he purchased the disputed land before one Majaliwa Mlinde and Julius Megirori as his witnesses, whereas one Aredi and Yusufu Amiri (DW.2) stood as seller's witnesses.

He submitted that, after concluding the sale agreement, they went to the Msowero village office so as the village leaders could measure the parcel of land. He paid the total amount of TZS. 3,240,000/= being the costs for measuring the area and hence assisted to get the land officers from Kilosa District who measured the disputed land as exhibited by Exhibit DE.2. DW.3. further prayed to tender sale agreement to prove that he bought the disputed land from DW.1 (Exhibit DE.3).

He submitted further that, after completion of the sale agreement he cleared the disputed land and planted some trees therein and built two houses with the estimated value of TSZ. 18 million and 22 million, respectively.

He went on describing that, at one time the village leaders called a meeting and approved him to be the rightful owner of the disputed land. He tendered the minutes of the said meeting to authenticate his statement (Exhibit DE.4).

He submitted that after he bought the land on 30/7/2012, he stayed there for 6 years peaceful. It was later in 2018 when he saw the Plaintiff who told

him that he encroached his land, but he denied because he bought it legally from DW.1 who according to him, he was or is the original owner.

During cross examination by the Plaintiff, DW.3 stated that, all the documents that he has tendered in evidence as documentary exhibits proves that he is the legal owner of the disputed suit land.

At the close of defence case, the learned counsel for the Defendants informed the Court that, he noted one issue pertaining to limitation of civil actions. As a matter of procedure, I invited both parties to address the Court on the raised concern considering that the issue of limitation can be raised at any stage of hearing/trial.

To kick the ball rolling, Mr. Benjamin submitted that, at the suit in which declaratory reliefs claimed by the Plaintiff are sought are to be instituted in Court within six (6) years from the date the cause of action arose. He pointed out that, the cause of action arose in 2012 when the suit land was sold to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant, and this suit was filed on 19<sup>th</sup> July, 2021, a lapse of upward nine (9) years from the date of the sale which is the main complaint in this case.


He added that, it is also a fact that the Plaintiff is claiming to act in the capacity of an administrator of the late Mohammed Kikwamba who died in the year 2006, and this suit has been filed after a lapse of more than 15 years after the death of the said Mohammed Kikwamba.



He contended that, according to sections 9 and 10 of the Law of Limitation Act, [CAP. 89 R. E, 2019], the time for recovery of land starts to run from the date of death of the person in whose title the land is. He contended further that, the case has been instituted outside twelve (12) years period that is statutorily prescribed time for land, hence this Court need not to determine it on merit due to the fact that it is time barred.

In reply to above submission, the Plaintiff submitted that, in respect of the first argument, the same is not true because he instituted the matter in 2018 and thereafter, he filed the same before this Court. He added that, if the Court had no jurisdiction from the beginning, then the advocate was supposed to raise such issue from the beginning. In respect of the second argument, the Plaintiff submitted that the same is not true, as he filed his case within time and not beyond twelve (12) years.

To re-join, Mr. Benjamin accentuated that, the Court should take judicial notice that there was a Land Case No. 10 of 2018 which the DLHT decided on 13/3/2018 wherefore, the Plaintiff was claiming for the parcel of land in his own capacity, as by then he had never been appointed as an administrator of the deceased's property. According to the learned defence counsel, the said Land Case No. 10 of 2018 is not a continuation of the present matter. That means it ended there.






He added that, the present case, is a new one which was instituted on 19/7/2021 by the Plaintiff being an administrator of the properties of the deceased person.

Mr. Benjamin finally echoed his prayers that, since the Plaintiff's case has no merit, then the Court should not hesitate to dismiss it with costs.

Having considered the evidence adduced by the parties for and against the main case, and upon painstakingly gone through the parties' rival submissions in respect of the arguments raised which touches the issues of limitation of institution of civil actions before the Court, I find it appropriate to firstly, determine the point of law raised by the learned counsel for the Defendants before going into merits of case. And if I will find that, the issue raised on a point of law have no merit, then I will proceed with the determination of the substantive part of the case.

On the issue of limitation of time, it is a settled principle of law that, the question of limitation is a fundamental one and not merely a technicality since it goes to the root of the case. It can be raised at any stage of the case and once raised, the court is obliged to peruse the pleadings filed by parties and make a finding whether or not the suit is time barred before proceeding with the case on merits. This is because parties are in law bound by a lifespan of any legal remedy for the redress of the legal injury alleged to have been suffered.



From the parties' rival submissions, it is now my duty to evaluate and see whether the matter at hand, is time barred and therefore a subject of dismissal. I am alive to the settled principle that, for a suit to be tried, it must be brought before the Court within the time prescribed by the law. This is why, time limit is among the elements that gives a Court jurisdiction to try any matter.

In this case, the counsel for the Defendants has raised a point of law to the effect that this Court lacks appropriate jurisdiction to try the matter on the ground of limitation of time. He underlined that, the Plaintiff's claim on recovery of land is beyond 12 years. I am alive of the time limit provided by the law in a suit for recovery of land which is twelve (12) years as stipulated under 1<sup>st</sup> schedule, part 1, item 22 of the Law of Limitation Act [Cap. 89 R. E, 2019].

In our suit, and according to the Plaintiff, the deceased passed away in the year 2006 whereas it is evidently established that, the Plaintiff was granted letters of administration of the estate of his late father in the year 2018. This means that, the grant of letters of administration of the estate of the deceased, Mohamed Kikwamba was after twelve (12) years since his demise. That being the position, I am now bound to determine whether the Plaintiff's suit is time barred or not as provided by the the provisions of the Law of limitation Act.

The relevant provisions are sections 9 (1) and 35 of the Law of Limitation Act [Cap. 89 R. E, 2019]. The law provides that: -

*"Section 9 (1) - 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.*

*(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.*

*(3) Where a person institutes a suit to recover land, being an estate or interest in possession and assured otherwise than by will, to him, or to some person from whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect."*

And Section 35 of the Law of Limitation Act articulates 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 18 person and the grant of the letters of administration or, as the case may be, of the probate."*





Examining, the wordings of the provisions of the statute above, I am of the firm view that, a right to institute a suit on recovery of land which belonged or was possessed by a deceased person who was the last person entitled thereto (the deceased person was owner of the land sought to be recovered), accrues or reckons at the death of the deceased notwithstanding the time of the grant of letter of administration or probate as the case may be.

Since it is clear from the Court record that the deceased died in the year 2006 and it is evidently clear that, the Plaintiff initially lodged the suit in this Court in the year 2021, that is 15 years later, it means that the Plaintiff's suit is extremely time barred.

It is also my firm view that, the suit has no merit since the same is of declaratory orders. Looking at the reliefs sought by the Plaintiff under paragraph 13 of his Complaint, this can clearly be viewed that, the same are in form of declaratory orders in which the law of limitation to this suit is six (6) years under Item 24 of Part 1 of the Schedule to the Law of limitation Act (supra). From the record, the suit was instituted on 19<sup>th</sup> July, 2021 while according to section 9 of the Law of Limitation Act (supra), the cause of action arose in 2012 when the 3<sup>rd</sup> Defendant sold the land in dispute to the 1<sup>st</sup> Defendant and the Plaintiff became aware of the same.

As regards to declaratory orders and other matters, sub-section 2 of section 9 of the Law of Limitation Act provides specifically that the right of



action starts to accrue on the date of dispossession of the property. The law states 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**, "(Emphasis is mine).*

Relying on the above provision of the law, I am in agreement with the contention of the learned counsel for the Defendants that, the Plaintiff in the instant case is seeking declaratory orders on behalf of his deceased father. According to the law, his claim is time barred because the cause of action for a declaratory relief accrued on 30/7/2012. In this regard, the Plaintiff was supposed to lodge his claims for declaratory orders by 31/8/2018.

Looking at the consequences of filling the suit out of time, the Law of Limitation Act [Cap. 89 R. E, 2019] has provided for the way forward under section 3 (1) that, if the matter is filed out of the prescribed time, the remedy is to dismiss the suit. This was also the holding in the case of **NBC Limited and Another Vs. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019, where the Court of Appeal of Tanzania held that, the suit that has been filed out of time has to be dismissed in accordance with section 3 (1) of the Law of limitation Act.



Basing on the foregoing reasons, and extent of my findings, I am satisfied that the Plaintiff's case is time barred. As provided under section 3 (1) of the Law of Limitation Act (supra), I thus, dismiss this case for being time barred. The Plaintiff shall bear the costs of this suit. **It is so ordered.**

**DATED** at **MOROGORO** this 15<sup>th</sup> day of December, 2022.



  
**M. J. CHABA**

**JUDGE**

**15/12/2022**