IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND CASE APPEAL NO. 13 OF 2021

(Arising from Misc. Land Application No. 9 of 2020 HC-Bukoba and Original Application No. 69 of 2019 of District Land Housing Tribunal for Kagera at Bukoba)

FREDRICK RWEMANYIRA(Administrator of the estate of the Late Wenceslaus Ndyamukama)**..APPELLANT**

VERSUS

JOSEPH RWEGOSHORA..... RESPONDENT

JUDGMENT

23/3/2022 & 12/04/2022

NGIGWANA, J.

This is an appeal from the ruling and drawn order of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in Application No. 69 of 2019 delivered on 14th day of November, 2019 in favor of the respondent.

Despite being aggrieved by the findings and decision of the DLHT, the appellant did not lodge an appeal within the prescribed time. In 2020, vide Misc. Land Application No. 9 of 2020 the appellant successfully applied for extension of time within which to file an appeal to this court out of time hence this appeal.

The brief background of the matter was that the appellant who is the Administrator of the estate of the late Wenceslaus Ndyamukama alleged that the disputed land whose estimated value is Tshs. 50,000,000/=, located at Hamugembe Ward, within Bukoba Municipality in Kagera Region was allocated to the late Wenceslaus Ndyamukama by the Bukoba Town

Council in 1988 and that late Wenceslaus Ndyamukama occupied and developed the said land by planting eucalyptus trees therein whereas, in the same year, 1988 Joseph Rwegoshora, respondent in this matter interfered the disputed land and built therein a small house. It is further alleged by the appellant that, since the late Wenceslaus Ndyamukama was very old and ill, he did not report the matter to any authority until 2006, when the present appellant reported the matter to the Local Government Authorities.

It is further alleged that the Local Government Authorities discovered that the respondent had trespassed into the disputed land, only that they could not estimate to what extent he had interfered into the disputed land. That the appellant successfully sued the respondent for Trespass in Hamugembe Ward Tribunal vide Civil Case No. 97 of 2017. That the respondent was aggrieved by the decision of Hamugembe Ward Tribunal, hence lodged an appeal to the DLHT to wit; Appeal No. 85 of 2017 whereas the matter ended in the appellant's (now respondent) favor. The DLHT found that the present appellant had **no locus standi** because he was not appointed by the court as the administrator of the estate of the late Wenceslaus Ndyamukama.

Consequently, the proceedings and decision of the Ward Tribunal in Civil Case No. 97 of 2017 were declared a nullity hence quashed. From there, the present appellant petitioned for letters of administration of the estate of the late Wenceslaus Ndyamukama whereas on 22/11/2018 two administrators were appointed, the appellant Fredrick Rwamanyira and Kroeber Fidelis Rugaiyamu.

That, after obtaining the letters of administration, the appellant on 01/08/2019 filed Application No. 69 of 2019 against the respondent seeking for the following reliefs: -

(i) *A declaration order that the applicant is the rightful owner of the suit premises.*

(ii) *An order for permanent injunction restraining the respondent from interfering the suit premises.*

(iii) *Cost of the case*

(iv) *Any other relief or the Tribunal may deem fit to grant.*

The respondent upon being supplied by the appellant's plaint filed the Written Statement of Defense. The respondent strongly disputed the applicant's claim, alleging he purchased the disputed land from one Peter Kabatenga in 1995 who owned the same under customary ownership. In the Written Statement of Defense, the respondent raised two Preliminary Objection on points of law: -

(i) *That the application is misconceived and bad in law for being time barred hence in breach of the Law of Limitation Act, cap. 89 R: E 2019*

(ii) *That the application is incompetent and bad in law for being preferred by a single administrator of the estate.*

As matter of practice, when a preliminary objection is raised, the same must be disposed first. That being the case, at the DLHT, parties opted to dispose the objections by way of written submissions.

As regard the 2nd limb of the PO, the DLHT acknowledged that the administrators who were duly appointed were two, but since there is no law

requiring the administration to file a suit in court jointly, the omission is not fatal because one administrator can sue on behalf of other administrators. The 2nd limb of objection was therefore found devoid of merit hence overruled.

The first limb of the preliminary objection was found meritorious hence sustained. The DLHT relied on the pleadings and discovered that the cause of action arose in 1988, but the matter was reported to the Government Authority and that brings 18 years. The DLHT, further considered the submission of the appellant the year 1988 was incorrectly stated, the proper year was 1995, but application No. 69 of 2019 was filed on 1/08/2019 that is to say 24 years after from 1995. Consequently, the application was dismissed with costs for being time barred. Aggrieved by the decision of the DLHT, the appellant has now come to this court armed with two grounds of appeal;

1. *That the trial tribunal's decision was illegal for want of proper composition of the trial tribunal and assessors' opinion.*
2. *There was miscalculation in respect of Limitation of time by the trial tribunal.*

Wherefore, the appellant prays for the following reliefs: -

(i) *Appeal be allowed.*

(ii) *Quash the trial tribunals ruling of dismissing the application.*

(iii) *An order to hear the main application on merit.*

(iv) *Any other relief this court may deem fit to grant.*

When the matter came for hearing, the appellant was represented by Mr. Pereus Mutasingwa, learned advocate while Mr. Zedy Ally, learned advocate appeared for the respondent.

Submitting in support of the first ground, Mr. Mutasingwa argued that the proceedings and the ruling of the DLHT do not reflect that Assessors were present and whether they were called upon to give their opinion as required by the law. Mr. Mutasingwa added that the omission offends section 24 of the District Land Disputes Courts Act, Cap. 216, R: E 2019 which requires the Chairman to sit with not less than two assessors. He further stated that, the ruling is one of the court decisions as per section 2 of the Land Disputes Courts Act Cap. 216 R: E 2019. To support his argument, the learned counsel referred to the decision of this court in the case of Elina **Antony versus Edison Imba Antony**, Land Case Appeal No. 65 of 2020.

Mutasingwa further argued that, probably, the chairman confined himself under regulation 22 of the Land Disputes courts (The District Land and Housing Tribunal) Regularities, 2003 which provides for special powers of the chairman, but according to section 36 (1) of the Law of interpretation Cap. 1 R: E 2019, subsidiary legislation must always be consistent with the parent Act and for that matter, Regulation 22 of GN. 174 of 2003 cannot rescue the situation.

As regard, the 2nd ground, Mr. Mutasingwa stated that, the trial tribunal erred in law when held that the matter was time barred. He added that the matter of time limitation can only be proved by evidence and not otherwise. The learned counsel referred to the case of **Said R. Mnyange versus**

Abdala Salehe [1996] TLR 77 that where time limitation is contentious, parties must be allowed to address it.

On the other hand of the coin Mr. Zeddy, responding to the first ground of appeal argued according to section 23(2) of the Land Disputes Courts Act, the tribunal is said to have been properly constituted when it is held by the chairman and not less than two assessors but regulation 22 of GN. No. 174 of 2003 provides for an exception to the general rule as it allows the chairman to sit without Assessors. Zeddy further said, as a matter of practice, Assessors who are lay person cannot give opinion in matters involving points of law. He urged the court to borrow the experience in murder cases.

As regard, the 2nd ground, Zeddy submitted that parties are always bound by their pleadings. He referred me to the case of **Makuri Wassaga versus Joseph Mwaikambo and Another** [1987] TRL 88.

He went on submitting that; looking at the application filed by the applicant now appellant in the DLHT, specifically paragraph 1, 2 and 3, the cause of action arose in 1988, but no suit filed in court before the expiry of 12 years. The suit was filed in court in 2017 in which the proceedings and decision ended being nullified and quashed at the appeal stage, as a result, Land application No. 69 of 2019 was filed and it was which was properly dismissed for being time barred. Mr. Zeddy ended urging the court to dismiss this appeal with costs for want of merit.

In his brief rejoinder, Mr. Mutasingwa stated that land matters are very crucial, and where the regulations are inconsistent with the parent Act, the parent Act must prevail. He admitted that parties are bound by their

pleadings, but that the issue of time limitation need to be ascertained by evidence. Mr. Mutasingwa ended his rejoinder submission urging the court to allow this appeal with costs and nullify the proceeding and set aside the judgment and orders of the DLHT.

On the basis of the above rival arguments, questions to be asked in relation to the 1st ground of appeal is whether the DLHT erred in law when sat in Application No. 69/2019 without assessors; and the question to be asked in relation to the 2nd ground in whether the DLHT erred in law when held that the matter was time barred.

I would like to start with the first question. The law governing Land disputes is very clear that the District Land and Housing Tribunal established under section 22 of the Land disputes Courts Act cap. 216 R: E 2019 is said to be properly constituted when held by a chairman and two assessors. For easy reference, let the law speak for itself; -

Section 23 (1) of the Land Disputes Courts Act Cap. 216 R: E 2019 provides that;

"The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors"

Section 23 (2) of the Act provides that;

"The District Land and Housing Tribunal established under Section shall be composed of one chairman and not less than two assessors who shall be required to give out their opinion before the Chairman reaches the judgment"

Even appeals from the Ward Tribunals, (**which is not the case here since the DLHT did not deal with the matter at hand in its appellate jurisdiction)** the DLHT is said to be properly constituted when held by the chairman and not less than two assessors. Section 34 (1) of the Land Disputes Courts Act provides that;

*The District Land and Housing Tribunal **shall**, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors, and shall-*

(a) consider the records relevant to the decision;

(b) receive such additional evidence if any; and

(c) make such inquiries, as it may deem necessary.

Section 23 (2) the Act, read together with Regulation 19 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 generally imposes a duty upon the assessors to give opinion before the chairman reaches the judgment. The chairman before reaches a final verdict, is duty bound to consider the opinion of assessors though not bound by it, but in case of any disagreement with the opinion given, he/she must assign reasons for differing with such opinion. See section 24 of the Land Disputes Courts Act Cap 216 R: E 2019 and the case of **Zubeda Hussein Kayagali versus Oliva Gaston Luvakule and Another,** Civil appeal No.312 of 2017 CAT (Unreported).

One may ask himself or herself as to whether assessors need to be involved in any proceedings regardless of whether they have the duty to give their opinion or not. When somebody confines himself/herself only under section

23 (3) of the Land disputes Courts Act Cap. 216 R: E 2019, read together with Section 2 of the same Act, it is possible to answer the question in the affirmative.

Section 23 (3) provides that;

"*Notwithstanding the provision of subsection (2),* ***if in the course of any proceedings before the tribunal,*** *either or both members of the Tribunal who were present at the commencement of the proceedings is absent of remaining member, if any may continue and conclude the proceedings not withstanding such absence."*

Section 2 of the Land Disputes Courts Act, provides that;

"Proceedings includes any application, reference, cause, matter, suit, trial, appeal or revision, whether final or interlocutory, and whether or not between the parties".

In the case of **Elina Antony** (supra) the chairman did sit in Execution Application without involving Assessors. Interpreting section 23 and section 2 of the Land Disputes Courts Act, this court in one of its holding was to the effect that the Tribunal was not properly constituted.

However, it is common understanding that the parliament after laying the policy of the legislation, donates some of its law-making powers to the executive to fill in the details in order to get a kind of law the society deserves. Article 97 (5) of the Constitution of the United Republic of Tanzania 1977, as amended from time to time is very clear about delegated legislation. The same read;

"Masharti yaliyo katika ibara hii au katika ibara ya 64 ya Katiba Hii hayatalizuia Bunge kutunga sheria na kuweka masharti amabayo yaweza kukabidhi kwa mtu yeyote au kwa idara yeyote ya Serikali madaraka ya kuweka kanuni za nguvu ya kisheria au kuzipa nguvu kisheria kanuni zozote zilizowekwa na mtu yeyote au idara yeyote ya Serikali"

It is common understanding that the Act of Parliament is broader and more general thus specific and detailed regulations for the better carrying out of the provisions of the Act must be in place for the better carrying out of the provisions of this Act.

As regard to land matters dispute solving mechanism, the Parliament enacted the Land Disputes Courts Act, Cap. 216 R:E 2019 as **an Act to provide for the establishment of Land Dispute settlement Machinery and for matters incidental thereto**.

In compliance of Article 97 (5) of the Constitution, section 56 (1) was set in the Land Disputes Courts Act. The same provides that;

"The Minister may make regulations for ***the better carrying out of the provisions of this Act."*** *(Emphasis supplied)*

In that spirit, after the enactment of the Land Disputes Courts Act No. 2 of 2002, now Cap. 216 R:E 2019, the Minister responsible for land in compliance of section 56 of the Act, made regulations termed; Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 for **the better carrying out of the provisions of Act.**

Section 22 of the Regulations provides for special powers of the Chairman. The same provides that;

*"The chairman **shall** have powers to determine;*

(a) a preliminary objection based on points of law.

(b) application for execution of orders and decrees;

(c) objection arising out of execution of orders and decrees.

(d) Interlocutory applications.

It is therefore apparent that, the Chairman has special powers to sit and to determine (a), (b) (c) and (d) herein above in exclusion of assessors.

Section 51 (2) of the Land disputes Courts Act Cap. 216 R: E 2019 provides that;

*"The District Land and Housing Tribunal **shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations, it shall apply the Civil Procedure Code**"*

In the matter at hand, regulation 22 as cited herein above is clear on the circumstances under which the Chairman should sit without assessors, and in that situation, it is my considered view that the regulation is not inconsistent with the Parent Act. That follows therefore that, the decision in the case of **Elina Antony (supra**) that assessors must be involved in every proceeding was given inadvertently, without considering other provisions of the law as stated and discussed herein above.

I am alive that under the doctrine of **stare decisis** which is a cardinal rule in our jurisprudence, a court of law which is a court of record is bound to adhere to its previous decision save in exceptional circumstances; where previous decision is distinguishable or was overruled by a Higher Court on appeal or by a new statute or was arrived per incuriam, that is to say

without taking into account a law in force or a binding precedent. Given to what I have indevoured to explain, I find myself compelled to depart from the decision given in the Case of **Elina Antony** (Supra)

When the matter at hand came for mention on 02/092019, assessors were **H. Muyaga and F. Rutabanzibwa**. On that date, the Ms. Pilly Hussein, advocate for the respondent informed the court that they have filed the Written Statement of Defense (W.S.D) together with preliminary objection on points of law. From there, the Chairman exercised special powers vested upon him under Regulation 22 (a) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 to entertain the two preliminary objection on points law. Had the objections been overruled, the Chairman would have re-called the said assessors after delivering the ruling and proceed with the matter according to law, but it was not so in the matter at hand because one of the objections was sustained, and consequently, the matter was dismissed for being time barred.

In that respect I do not agree with Mr. Mutasingwa that the Chairman erred in law when sat and entertained the objections on points of law without the involvement of assessors because assessors are judges of the facts and not of law since they are not legal experts. See **Batholomeo Paulo Chiza versus Essau William Ndize and 3 others**, Land Appeal No.216 of 2017 HC-Dsm (Unreported). The assessors' function in land matters is a bit like advisory jury, providing an opinion to the Chairman about their view of the evidence and not law. The presence of assessors during the trial, was not meant to increase the number of members but to ensure participatory decision-making process in land matters which seem to touch the community. The requirement is also meant, to ensure that justice

process involves the community where the dispute arose, assist the chairman in reaching a judicious decision. See **Finca Microfinance Bank versus Julietha Zacharia and another,** Land Appeal No. 124 of 2020. If at the end of the proceeding, the assessor will have no role to give his/her opinion, his/her presence in the proceeding is immaterial, that is why, as already stated, circumstances under which the Chairman should sit without assessors have been expressly stipulated under Regulation 22 of G.N No.174 of 2003, and not otherwise and should be considered as this an exception to the general rule.

On the other hand, I do agree with Mr. Zedy that the Chairman exercised his special powers according to law therefore, he cannot be faulted. In the event, the first ground of appeal is devoid of merit, thus I proceed to dismiss it accordingly.

The second question is whether the DLHT erred in law when held that the matter was time barred.

Section 5 of the Law of Limitation Act, Cap 89 R: E 2019 Provides that,

"Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises"

From the herein above provision, it is apparent that the period of limitation begins to run as against the plaintiff from the time the cause of action accrues until when the suit is actually filed in court.

It is the principle of the law that a suit that is time barred by statute must be rejected by the court because in such a suit, the court is barred by law from granting any remedy or relief. **See the case of Iga versus**

Makerere University (1972) EA 65. Indeed, the law of limitation knows neither sympathy nor equity. Emphasizing on this point, the Court of Appeal of Tanzania in the case of **Barclays Bank Tanzania Limited versus Phylisiah Hussein Mchemi,** Civil Appeal No.19 of 2016 (Unreported) cited with approval the decision in the High Court of Dsm Registry in **John Cornel versus A. Grevo (T) Limited;** Civil Case No.70 of 1998 in which it was held that;

"However unfortunate it may be for the plaintiff; the law of limitation is on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web"

In determining whether the suit is time barred or not, the court has to look at the plaint as a whole. In case of **Lucy Range versus Samwel Meshack Mollel & 2 Others,** Land Case No. 323 of 2016 High Court of Tanzania, Land Division, at Dar Es Salaam, where it was observed that;

"In determining whether the suit is time barred or not, the court normally looks at the plaint to see as to when the cause of action arose, in other words when the right of action started to accrue".

It should not be forgotten that the plaint must be read together in their totality including the annextures attached thereto, it should never be read in peace meal fashion. See **Isack & Sons Ltd versus North Mara Goldmine Ltd,** Commercial Case No.3 of 2019 (Unreported).

In the instant matter, it is on record that when the plaint filed in the DLHT by the appellant is read alone, the cause of action arose way back in 1988. Let the same speak for itself;

"6 (a) Cause of action/brief statement of facts constituting a claim

(i) That the suit land was the property of the Late Wenceslaus Ndyamukama who was granted the same by the Council in 1988.

(ii) That the Late Wenceslaus Ndyamukama was in possession of the suit land and he developed the land by planting eucalyptus trees on the same.

(iii) That, Joseph Rwegoshora herein the respondent started interfering the land in dispute in 1988 where he built a small house which crossed and entered in the disputed land"

The record also reveals that, the appellant in his reply to the written submission in support of the Po, stated that, the year 1988 was mistakenly recorded, the proper was 1995.The DLHT considered all that and found that, whether it is considered that the cause of action arose in 1988 or 1995 still the matter was time barred.

However, it should be noted that written submissions are not part of pleadings. **See the Registered Trustees of Arch Dioceses at Dsm versus The Chairman Bunjo Village Government and 11 others,** Civil Appeal No.147 of 2006 CAT (Unreported). If there was that error, it is my view that, the appellant ought to have sought leave of the DLHT to his plaint.

As stated earlier, the plaint has to be read together with its annextures. According to Annexture "A2" attached to the appellant's application filed in the DLHT, Titled **KIKAO CHA USULUHISHI KATI YA FREDRICK NA JOSEPH**

RWEGOSHORA" dated 08/11/2006, the cause of action arose in 1995. The respondent claimed to have purchased the suit land on 6/7/1995, and in the very year, he started to construct the house. For the purposes of this appeal, the year 1995 is treated as the year when the cause of action arose. According to item 22 of the First Schedule of the Law of Limitation Act, Cap 89 R: E 2019 read together with section 3 (1) of the same Act, the period of limitation to recover land is 12 years. It was also held in the case of **Bhoke Kitang'ita versus Makuru Mahemba,** Civil Appeal No.222 of 2017 CAT (Unreported)

"It is a settled principle that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession"

In the instant matter, as stated earlier, the records revealed that, for the first time, the appellant successfully sued the respondent for Trespass in Hamugembe Ward Tribunal vide Civil Case No. 97 of 2017.The respondent was aggrieved by the decision of Hamugembe Ward Tribunal, hence lodged an appeal to the DLHT to wit; Appeal No. 85 of 2017 whereas the appellant was found to have no *locus standi* for want of letters of administration of the deceased's estate. Consequently, the proceedings and decision of the Ward Tribunal in Civil Case No. 97 of 2017 were declared a nullity hence quashed. From there, the present appellant petitioned for letters of administration of the estate of the late Wenceslaus Ndyamukama whereas on 22/11/2018 two administrators were appointed, the appellant Fredrick Rwamanyira and Kroeber Fidelis Rugaiyamu. That, after obtaining the letters of administration, the appellant on 01/08/2019 filed Application No.

69 of 2019 against the respondent. In any rate, the matter was time barred as correctly stated by Mr. Zedy as it was filed out 12 years, it is over 22 years from when the cause of action arose.

The plaint disclosed that in 2006, the parties had negotiations to settle the matter. The law is very clear that time does not stop running because the parties have entered into negotiations. Once the begins to run, it runs continuously and that this principle can be ousted only by a statutory provision and not negotiations of parties. The 2nd ground of appeal is also devoid of merit, hence fails.

In the event, I see no reason to fault the correctness of the findings, ruling and drawn order of the District Land and Housing Tribunal which are hereby upheld. Consequently, the appeal is dismissed with costs. It is so ordered.

Dated at Bukoba this 12th day of April, 2022.

E. L. NGIGWANA

JUDGE

12/04/2022

Judgment delivered this 12th day of April, 2022 in the presence of the Appellant in person, Respondent and represented by his advocate Ms. iisera Maruka, Mr. E. M. Kamaleki, Judges' Law Assistant and Ms. umaini Hamidu, B/C.

E. L. NGIGWANA

JUDGE

12/04/2022