IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 271 OF 2021

HOBEKELA FRED MWANGOTA ..... 1ST APPLICANT
SUMA FRED MWANGOTA ..... 2ND APPLICANT

VERSUS

AUGUSTINO MWANGOTA ..... 1ST RESPONDENT

RULING

27th April, & 27th May, 2021

ISMAIL, J.

This is a ruling on a couple of preliminary objections, raised by the respondent, seeking to stifle progression of the application taken at the instance of the applicants. The application seeks to move the Court order a conviction and impose a sentence on the respondent for what is alleged to be a contemptuous act committed by the respondent. The contention by the applicants is that, pursuant to an order of the Court (Ihema, J as he then was) in Probate and Administration Cause No. 76 of 1990, the respondent was to handover ownership documents in respect of property known as Plot No. 2 Kawe Area, Dar es Salaam. The documents were to be handed over to

the children of the late Fred Mwangoka. They included the applicants herein. The contention by the applicants is that the said Court order has been defied, hence the prayer for citing the respondent for contempt and eventual imposition of a one-year custodial sentence.

As stated earlier on, the application is facing an acid test, by way of preliminary objections raised by the respondent. The notice listed three grounds of objection but the last ground of objection was dropped, leaving two grounds of objection which are to the effect that:

1. *That the application is time barred; and*
2. *In the alternative, that the applicants have no locus standi.*

Pursuant to an order of the Court, issued on 27th April, 2022, the objections were to be disposed of by way of written submissions the filing of which has duly conformed to the schedule drawn on the parties' consensual basis.

Setting the ball rolling was Mr. Elinihaki Kabura, learned counsel for the respondent. With respect to time bar, the contention by the respondent is that the instant application is for implementation of the order of the Court issued on 6th June, 2001, twenty years from the date it was delivered. Learned counsel argued that applications of that nature are to be filed within

sixty days, consistent with the Item 21 of Part III of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019.

Mr. Kabura contended further that, under Item 20 of Part III of the Schedule to Cap. 89 provides that the period of enforcement of a judgment, decree or order of any court is twelve years. The respondent's view is that, in view of the applicants' dilatoriness, the provisions of section 3 (1) of Cap. 89 ought to be invoked and have the application dismissed.

Turning on to the second ground of objection, the argument by the respondent is that, since the applicants are not administrators of the estate of the late Fred Mwangoka, then the applicants have no locus that would entitle them to receive the title deed in their individual capacities. Mr. Kabura's argument was premised on the position of the law as set out in ***Lujuna Shubi Ballonzi v. Registered Trustees of Chama Cha Mapinduzi*** [1996] TLR 203; and ***Mrs. Halima Mchora v. Robert Edward Hindi & 2 Others***, HC-Land Case No. 322 of 2014 (unreported). He also invoked the provisions of Order III rules 1 and 8 (1) of the Civil Procedure Code, cap. 33 R.E. 2019 (CPC), which requires that appearance be by authorization by law and not otherwise. In the learned counsel's view, the applicants have moved the Court without seeking permission from the rest of the children of the late Fred Mwangota. His take is that, as long as there

is no authorization, consistent with Order III rule 2A of the CPC, institution of the application by the applicants was flawed.

He urged the Court to sustain the objections and dismiss the application with costs.

In his rebuttal submission, Mr. Francis Mgare, learned advocate whose services were enlisted by the respondent, scoffed at the contentions raised by the respondent. With regards to the contention that the application is time barred, the view he has taken is that the contention is misconceived. This is in view of the fact that the instant application relates to contempt of the court order, a criminal law remedy. Mr. Mgare invoked the provision section 43 (a) of Cap. 89 which is to the effect that criminal proceedings are not bound by time prescription.

Learned counsel sought to reckon the period between 2011 and 2018, when the parties were involved in multiple legal tussles. He did so consistent with the provisions of section 21 (2), (3) (a) and (c) of Cap. 89. He further argued that, since the last of the court proceedings (Misc. Civil Application No. 620 of 2021) were terminated on 22nd February, 2022, and the instant application was filed on 10th June, 2021, then the application was filed timeously. He urged the Court to overrule the objection.

Regarding the applicants' *locus standi*, the contention by Mr. Mgare is that this is not a pure point of law. He argued that disposal of this point of law will require leading evidence that will prove or disprove that the applicants have any interest in the suit. The learned advocate's argument was predicated on the epic decision in ***Mukisa Biscuits v. West End Distributors Ltd*** [1969] EA 696.

Arguing further, Mr. Mgare submitted that the decision of Ihema, J., was quite clear that the Title Deed for property on Plot No. 2 Kawe should be handed to the children of the deceased, and that the applicants' names feature in the list contained in the said decision. He refuted the contention that the title deed had to be handed over to the administrator of the estate. He denied also that the ruling had a finding to the effect that the said property was co-owned with the late Abdon Ulisaja Mwangota as contended by the respondent. It was his contention that children of the late Fred Mwangota have joint and several rights to the property which bestow the *locus standi* on them to institute the proceedings.

On the applicability of Order I rule 8 (1), Mr. Mgare argued that the same is not applicable in the circumstances of this case as the applicants' permission and involvement in the proceedings was by virtue of the fact that they are children of the deceased who were recognized by Ihema, J. Learned

counsel took the view that all other provisions of the law cited are as distinguishable and irrelevant to the matter at hand as are the decisions cited by the respondent.

Mr. Mgare prayed that the objections be overruled with costs.

In his rejoinder submission, the respondent's counsel, by and large, reiterated what was stated in his submission in chief. He maintained that 20 years was too long a time to wait and that the Court should not be tempted to condone this infraction of the statutory limitation. Learned counsel lashed out at the applicant's attempt to reckon time on account of the pending proceedings. He argued that the applicants' action is akin to automatic granting of time for themselves, contrary to the law. He urged the Court to show no sympathy and apply the law mercilessly, as was held in the case of ***John Cornel v. grevo (T) Limited***, HC-Civil Case No. 70 of 1998 (unreported).

Regarding the second limb of objection, the respondent's view is that being in the list of the deceased's children would not give an automatic right to the applicants to commence these proceedings. He took the view that provisions governing administration of estates must be followed. In this case, learned counsel argued, procedures governing appearance and authorization

to act on somebody else's behalf had not been conformed to. He maintained that the applicants cannot have the right of audience before the Court.

Having carefully reviewed the counsel's rival submissions in respect of both grounds of objection, my hastened conclusion is that these objections are destitute of fruits and the same are hereby overruled. Here is why.

With respect to the first ground of objection, the contention is that the application which was preferred 20 years from the date on which the decision, the subject matter of the application, was passed, is time barred. The basis for this contention is Item 21 Part III of the Schedule to Cap. 89. This has set the time prescription of 60 days which to prefer applications falling under the CPC of the Magistrates' Courts Act, Cap. 11 R.E. 2019.

A cursory glance at the application clearly reveals that the application falls under neither of the pieces of legislation cited in Item 21 Part III cited above. It falls under section 114A (b) of the Penal Code, Cap. 16 R.E. 2019 which provides as hereunder:

> *"Any person who:*
>
> *(a) N/A*
>
> *(b) willfully obstructs or knowingly prevents or in any way interferes with or resists the execution of any summons, notice, order, warrant or other process issued by a court, or any person lawfully charged with its execution; or*

..... is guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding one year."

The clear picture derived from the quoted provision is that this is purely a penal action that is intended to be taken against the respondent. The narrow question to be posed is whether provisions or statutes that impose penal liability are subjected to the provisions of Cap. 89. As Mr. Mgare rightly alluded to, the provisions of Cap. 89 have no application to matters of criminal nature. This is discernible from section 43 (a) of Cap. 89. It falls, therefore, that the time prescription set out in Item 21 of Part III is of no significance in the circumstances of this matter.

This renders the objection on time prescription hollow and I overrule it.

Regarding the *locus standi*, the respondent's contention is that the applicants, a handful of the deceased's children do not have the right of action in the absence of numerous other children listed in the decision of this Court. It should be recalled that, in law, a person is said to have a l*ocus standi* if he possesses the right to bring an action or to appear and be heard in a given forum, including a court. The decision of ***Lujuna Shubi Ballonzi***

v. Registered Trustees of Chama Cha Mapinduzi (supra), cited by the respondent serves to explain the import of this principle.

An astute definition of what *locus standi* means was accentuated by the Supreme Court of India in ***S.P Gupta v. Union of India*** AIR SC 149. Mr. Justice Bhagwati, who presided over the proceedings held at p. 185 at page:

> "…. *the traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury of violation of his legal right or legally protected interest by the impugned action of the state or public authority or any other person or who is likely to suffer."*

The footsteps in the cited decision were traced by the Court of Appeal of Tanzania in ***Godbless Jonathan Lema v. Mussa Hamis Mkangaa and Others***, CAT-Civil Appeal No. 47 of 2012 (unreported) (at p. 11). The upper Bench's inspiration position is a leaf borrowed from the holding of the Malawian Supreme Court of Appeal in ***The Attorney General v. Malawi Congress Party and Another***, Civil Appeal No 32 of 1996. The latter held:

> *"Locus standi is a jurisdictional issue. It is a rule of equality that a person cannot maintain a suit or action unless he has*

an interest in the subject of it, that is to say ***unless he stands in a sufficient close relation to it so as to give a right which requires prosecution or infringement of which he brings the action****."* [Emphasis supplied].

The key factor in demonstrating that a party has a *locus standi* is to demonstrate that he has an interest in the subject matter of a pending suit. In the instant case, the applicants are children of the late Fred Mwangota and they both feature in the list of the children to whom the title deed is to be delivered. While it is correct that these are not the only children of the deceased, nothing prevents them from instituting the instant application for and on their behalf, and in their own right, seeking to cite the respondent for contempt. Mere absence of other children of the deceased does not take away the applicants' right to found an action against the respondent or anybody. It is fallacious to contend that the application is defective simply because only a section of the beneficiaries have taken up the matter against the respondent.

The respondent has also cited the provisions of Order I rules 1 and 8 (1) of the CPC. With profound respect, these provisions are irrelevant in the circumstances of this case as the instant application is not a representative suit in respect of which Order I rule 8 of the CPC would be applicable.

I hold that this ground of objection is hollow and I overrule it.

In whole, I overrule the objection with costs and order that the application be heard on merit.

Order accordingly.

DATED at **DAR ES SALAAM** this 27th day of May, 2022.

M.K. ISMAIL

JUDGE