IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY
AT MOSHI
LAND APPEAL NO. 21 OF 2022

(Arising from Application No. 104 of 2019 before the District Land and Housing Tribunal for Moshi at Moshi)

THOMAS ALOYCE KITAU
LUCIAN ALOYCE KITAU
LADISLAUS ALOYCE KITAU
LADISLAUS ALOYCE KITAU (As Legal Representative of Aloyce Shakale Kitau)] **.....APPELLANTS**

VERSUS

PETER KULAYA KIRANGO (As Legal Representative of Matey Kulaya)] **.....RESPONDFENT**

JUDGMENT

Last order: 24/3/2023
Judgment: 24/4/2023

MASABO, J.:-

The appeal before this court emanates from a judgment and decree of the District Land and Housing Tribunal for Moshi at Moshi in Application No. 104 of 2019 in which the respondent successfully sued the appellants for trespass. According to the record, the respondent who was suing in the capacity of administrator of the estate of the late Matey Kulaya, alleged that the appellants unlawfully trespassed into a parcel of land measured at 1 1/2 acre forming part of the estate of the late Matey Kulaya situated at Kirima Kati area in Moshi whereby they fenced the area, planted trees, constructed a 3 room house and laid down tap water infrastructure. On their part, the

appellants who are all children of the late Aloyce Shakale Kitau, did not dispute to have entered the area and effected the development therein but alleged that, they did not trespass in the said land as it belonged to their father, the late Aloyce Shakale Kitau who purchased it in 2014 from Prisca Matey Kulaya, the widow to Matey Kulaya. Thus, they had a right of ownership devolving from the estate of their late father, hence not trespassers.

When the matter was called for hearing, the respondent called a total of three witnesses including himself. He testified as PW1 and told the tribunal that the suit land belonged to his young brother Mayey Kulaya who died in 2005 and that, following his demise, he was through Probate No. 95 of 2006 before Moshi Urban Primary Court, appointed an administrator of his estate, which included among others, the suit land. After the appointment, he collected and distributed all the assets falling under the estate, save for the suit land, to the sons and daughters of the late Matey Kulaya. The suit land remained under the occupation of the late Matey Kulaya's widow. Later, in 2019, the appellants trespassed into the said land and effected the development above stated and when he approached them, they told him that they acquired the land through their father who purchased it from the late Matey Kulaya's widow.

PW2, John Kulaya, the late Matey Kulaya's brother, testified that he is well acquainted with the suit land as it neighbors his land and it is part of the land originally owned by his father who later on distributed it to his sons, the

respondent herein, himself and the late Matey Kulaya among others. He claimed no knowledge of the disposition of the said land to the appellant's father. PW3, Leonila Matey, who is the late Matey Kulaya's son, just told the court that all he knows is that the suit land originally belonged to his grandfather who passed it to his father and that he had no clue that the land was sold to the appellant's father.

The appellants had 6 witnesses. DW1 Ladislaus Aloyce Kitau, told the tribunal that the land belonged to his father who purchased it from Prisca Matey Kulaya and that the sale followed all the procedures. Prior the sale, there was an advertisement a copy of which was admitted as Exhibit D2. He also produced the purchase contract executed by his father, the late Thomas Shakale Kitau and the Prisca Kulaya and witnessed by local government leaders including DW2 who was then chairman for Kirima juu village. The contract was admitted as Exhibit D3. DW2 testified further that the advert was placed in notice bords of hamlets and remained there for 90 days. Prisca Matey Kulaya, DW3, admitted to have sold the suit land to Aloyce Kitau and to have executed the sale agreement. She told the court that she sold the suit land as she jointly owned it with her late husband and after his death, she continued to occupy it. DW4, the elder son of Matey and Prisca Kulaya witnessed the sale as he accompanied his mother. Thomas Aloyce Kitau and Lucian Aloyce Kitau testified as PW5 and PW6, respectively.

After assessing the evidence rendered before it, the tribunal found the respondent to have proved his claims, nullified the sale agreement and

ordered the appellants to remove all the developments effected in the suit land.

Aggrieved by the judgment and decree the appellants have knocked the doors of this court with an appeal based on seven (7) grounds of appeal which I summaries and consolidate as follows:

1. The tribunal erred in failing to properly evaluate the evidence hence reaching a wrong conclusion;
2. The tribunal erred in giving a decision in favour of the respondent while he had no capacity;
3. The claim by the respondent were time barred as the late Matey Kulaya died on 4/1/2005 and the respondent was appointed an administrator 6/7/2006 but he instituted the suit in 2019 in the capacity of administrator;
4. The sale agreement was wrongly nullified as it followed all the necessary procedures and the seller had capacity to sell it as it evolved to her following the death of her husband, the late Matey Kulaya;
5. In the alternative, the tribunal erred by recording the proceedings and the judgment in Swahili contrary to the law

Hearing proceeded orally. Both parties were represented. The appellants enjoyed the service of Mr. Elikunda Kipoko learned counsel and the respondent was represented by Mr. Joseph Peter, learned counsel.

Addressing the court, Mr. Kipoko consolidated the 1st, 2nd and 3rd grounds of appeal. He also consolidated the 4th, 5th and 6th grounds of appeal (the 4th ground above) and submitted separated on the 7th ground of appeal (5th ground above). Submitting in support of the consolidated 1st and 2nd ground of appeal Mr. Kipoko argued that the respondent had no capacity to institute the suit. He reasoned that, the late Matey Kulaya demised on 4/1/2000 and on 6/7/2006 the respondent herein was appointed an administrator of his estate. At all this time, that is, from the demise of the late Matey Kulaya in 2005 to 2014 the suit land was under the occupation of the widow, Prisca Kulaya. In 2014 she sold it to the appellants father, Thomas Kitau, now deceased and the sale followed all necessary procedures. Hence, there is nothing to fault it. The widow testified before the tribunal and was not anyhow controverted. Therefore, had the tribunal properly evaluated the evidence on record, it would have concluded that the seller had the capacity to sell the suit land as she was jointly owning the same with the deceased husband and upon the husband's demise the land automatically evolved to her. Also, had the tribunal properly evaluated the evidence it would have come to the conclusion that due to a long uninterrupted occupation of the suit land, the widow, even if she was a trespasser, acquired a good title over it and had the capacity to sell it.

On the consolidated 3rd ground of appeal and the consolidated 4th, 5th and 6th grounds of appeal which appears in the grounds above as 4th ground, he submitted that the claim if any by Peter Kulaya, the respondent herein, was time barred. This is because, the respondent was claiming the suit land not

in his capacity but in the capacity of administrator of the estate of the late Matey Kulaya who demised way back in 2005 and in 2006 the respondent was appointed the administrator of his estate but he never instituted the claim until 2019. He reasoned that, in the foregoing, the suit offended the provision of section 9 (1) of the Law of Limitation Act [Cap 89 RE 2019] and the authority in **Yusuf Same and another v Hadija Yusufu** [1996] TLR 347.

On the last ground he submitted that the proceedings of the tribunal were improperly recorded in Swahili which is not the language of the tribunal. Based on these grounds He submitted prayed that this could be pleased to allow the appeal request the judgment and decree of the tribunal it costs.

In reply Mr. Peter submitted that the tribunal properly evaluated the evidence rendered by both parties and upon weighing them it properly found the respondent's evidence heavier. This is because, it is on record that the respondent is an administrator of the estate of the late Matey Kulaya, the suit property belonged to Matey Kulaya who acquired it through inheritance from his father. Thus, his widow had no capacity to sell it. Further, he argued that the record vividly shows that the administrator did not distribute the suit land to the children of the late Matey Kulaya as they had not attained the age of majority. The widow occupied the suit land fully aware that all she had was the right to till it as opposed to ownership. Thus, by selling it she acted unlawfully.

Moreover, Mr. Peter submitted that the matter before the tribunal was not time barred as it was instituted on time. The respondent was still the administrator of the estate and immediately after he discovered that the widow has sold the land, he instituted the proceedings before the tribunal. Mr. Peter argued that section 24(1) of Cap 89 provide that the accrual of time may be computed from the time when the cause of action arose. In the present case, the application was instituted when the appellants trespassed into the suit land claiming that it was sold to them by the widow. The probate is still operational as it has not been closed. Therefore, the respondent was not time barred. Lastly, on the 7th ground, Mr Peter cited the case of **Gibson Kalishanga v Mariam Yotham**, Misc. Land Appeal No. 32 of 2021, HC at Kigoma and submitted that, in this decision the court dealt with a similar issue and stated that the language of the tribunal has been changed to Swahili. So, there is no any error for the proceedings to be in Swahili. In conclusion, he prayed that the appeal be dismissed with costs for want of merit. In a brief rejoinder. Mr. Kipoko reiterated his submission in chief and the prayers.

I have dispassionately considered the submissions from both parties and the tribunal's record. Starting with the last ground of appeal as regards the language of the tribunal, I see no need to belabour on it as I fully subscribe to the position espoused by this court in **Gibson Kalishanga v Mariam Yotham** (supra) where it held that, the use of Swahili in DLHT is no longer an issue as the language of the tribunal has changed from English to Swahili. It would appear that this issue was raised oblivious of the law and policy

developments and the position of Swahili as a language not only of the tribunal but our statutes and the courts.

The next point I now turn to, concerns the competency of the application before the tribunal. While relying on section 9(1) of the Law of Limitation Act Mr. Kipoko has argued that the application was incompetent and ought not to have been entertained by the tribunal as it was time barred. His main argument is that, when the respondent instituted the application in the tribunal in 2019, the duration of 12 years within which to recover the suit land had already lapsed. Thus, it ought to have been dismissed under section 3 of the Law of Limitation Act. Bracing his argument further, he cited the case of **Yusuf Same and Another v Hadija Yusuf** (supra). On his party, Mr. Peter is of the view that, the application was salvaged by section 24(1) of the same Act. To appreciate these contending arguments, I have found it necessary to reproduce both provisions starting with section 9(1) which states thus:

> 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.

Section 24(1) on the other hand, states thus:

> 24.-(I) Where a person who would, if he were living, have a right of action in respect of any proceeding, dies before the right of

> action accrues, the period of limitation shall be computed from the first anniversary of the date of the death of the deceased or from the date when the right to sue accrues to the estate of the deceased, whichever is the later date.

Of these two provisions, I have found the provision of section 9(1) to be resonating very well with the circumstances of this case as the kernel of this appeal is an action for recovery of land, a subject which is specifically regulated by section 9(1). My inclination towards this position is also informed by cases previously decided by this court, the case of **Yusuf Same and Another v Hadija Yusuf** (supra), inclusive. In that case, Juma Abdallah Samanya, the original owner of the suit premise demised on 1979 being survived by a widow and children. In 1992, the widow sought and obtained letters of administration of estate. By then, the deceased's sons had sold one of the properties to third parties who also sold the same to another person. The respondent, acting on her capacity as administratrix of the estate sought to recover the suit land but the new buyers contended that the suit was time barred. In its finding which I shall quote in extenso to draw the point home, this court held that:

> The suit filed in the Trial Court is for recovery of land hence the limitation period is 12 years. As for the determination of accrual of right of action and computation of period of limitation for this suit the relevant provisions are ss 9(1) and 35 of the Law of Limitation Act. Section 9(1) says:
>
> > `Where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and deceased person was, on the date of his death, in possession of the land and was the E 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.'

And s 35 says:

`for the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator F 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 person and the grant of the letters of administration or, as the case may be, of the probate.'

Applying these provisions to the present case respondent's right of action accrued from 14 January 1979 when the deceased died. The computation of this period still begins from that date ....., at the time when she [the respondent] filed the suit on 8 July 1993 the respondent was late by over two years. The arguments of Mr. Raithatha on the issue of limitation are valid hence it is held that the suit against the appellants was incompetent as it was time barred. [Emphasis added].

Much as this finding is persuasive and not binding on me, I find no reason for departure as I have not been presented with a good cause for doing so. In the foregoing and considering that a total of 14 years reckoned from the date of the demise of the late Matey Kulaya in 2005 had lapsed when the respondent instituted the application for recovery of the suit land in 2019, it is obvious, as argued by Mr. Kipoko, that he was time barred.

Accordingly, I find merit in the 3rd ground of appeal and I allow it. As this sole ground sufficiently disposes of the appeal, I see no need to proceed to

the remaining grounds. In the foregoing, I allow the appeal, quash and set aside the judgment and decree of the tribunal for being predicated on an incompetent application. The costs of this appeal shall be borne by the respondent.

DATED and DELIVERED at Moshi this 24th day of April 2023.

J.L. MASABO

JUDGE

24th April 2023