

IN THE HIGH COURT OF TANZANIA
MTWARA DISTRICT REGISTRY
AT MTWARA
LAND CASE NO 1 OF 2022

DICKSON GIDEON MBILINYI and KELVIN JOHN KASSIAN

(Joint Administrators of the Late Teresia Wanuka).....**PLAINTIFFS**

VERSUS

HTT INFRACO LIMITED1ST DEFENDANT

MIC PUBLIC LIMITED COMPANY/T/ATIGO TANZANIA

.....**2ND DEFENDANT**

RAJABU SAID MWASI3RD DEFENDANT

RULING

4/4/2023 & 23/5/2023

LALTAIKA J.

This is a ruling on a point of preliminary objection raised by the first defendant. Whereas the second and third defendants unwaveringly support the objection, the plaintiff strongly opposes the same.

Pursuant to the prayer by the counsel, a schedule was jointly agreed upon which to dispose of the objection by way of written submissions. Whereas Mr. Ali Kassian Mkali, learned advocate fended for the plaintiff, the 1st, 2,nd and 3rd respondents enjoyed legal services of Makaki Masatu, Nuhu Mkumbukwa and Rajabu Saidi Mwasi, learned Advocates, respectively.

Counsel for the first defendant Makaki Masatu argued that the cause of action in this matter arose on the 12th of April 2006, and the nature of the suit, as gathered from the facts pleaded, is about the recovery of land. He further mentioned that according to item 22 of Part I of the Schedule to the **Law of Limitation, CAP. 89 R.E. 2019**, an action or suit for the recovery of land must be filed within 12 years from the date the cause of action arose. He pointed out that since the cause of action arose on 12th August 2006, the twelve-year period within which a suit should have been filed expired on 11th August 2018. He emphasized that this suit was filed on **30th June 2022**, which means it was filed out of time **by approximately 4 years**.

Mr. Masatu cited the relevant provisions of the Act and argued that any proceeding instituted after the prescribed period of limitation should be dismissed, regardless of whether limitation has been raised as a defense. Referring to the policy objectives of the Law of Limitation Act, the learned counsel quoted the Court of Appeal's decision in the case of **Stephen Masato Wassira vs. Joseph Sindi Warioba & AG [1999] TLR 332**. He quoted Samata, JA, as he then was who stated,

'The law of this country, like laws of other civilized nations, recognizes that, like life, litigation has to come to an end. Those who believe that litigation may be continued as long as legal ingenuity has not been exhausted are clearly wrong.'

Regarding the Plaintiffs' claim that they were granted an extension by the Minister responsible for Legal Affairs, he raised several points. **Firstly**, he argued that the Plaintiffs never sought or received an extension from the Minister responsible for legal affairs. He pointed out that the individuals who apparently sought the extension and those who initiated the present suit are different. **Secondly**, he emphasized that the purported extension clearly

indicates that it was not sought or granted to commence a suit or proceedings against the first respondent. Therefore, it cannot be used to initiate a suit against the first defendant, averred Mr. Masatu.

Thirdly, he referred to the Court of Appeal's decision in the case of **Rajabu Hassan Mfaume (The Administrator of the Estate of the Late Hija Omari Kipara) Vs Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children & 3 Others**, (Civil Appeal 287 of 2019) [2022] TZCA 148. He quoted the Court, which stated that the period of extension granted by the Minister must commence immediately after the expiry of the period prescribed by the Law of Limitation Act. He argued that since the cause of action arose on 12th August 2006, any lawful extension, if granted, should have commenced from 12th August 2018. However, instead of following this timeline, the Minister ordered the time to run from 22nd September 2021, which goes against the law.

In light of the arguments presented, he concluded by requesting the court to sustain the objection and dismiss the suit with costs due to being time-barred.

Counsel for the 2nd defendant Nuhu Mkumbukwa stated that it was worth noting, albeit briefly, that the Plaintiffs had initially instituted and filed their plaint on the 30th of December 2021. He further mentioned that the Plaintiffs' Counsel, Mr. Ali Kassim Mkali, had made a prayer to amend his plaint during the Necessary Orders hearing on the 9th of June 2022. The prayer was granted, and the amended plaint was filed on the 30th of June 2022. The Amended Plaint included the parties Dickson Mbilinyi and Kelvin John Kassian (Joint Administrators of the Estate of the late Teresia Wanuka) versus HTT

Infraco Limited, MIC Public Limited Company t/a Tigo Tanzania, and Rajabu Said Mwasi.

Mr. Mkumbukwa further stated that after the service of the Amended Plaintiff to the 2nd Defendant, the latter raised points of preliminary objection in her Written Statement of Defense. He added that it was important to reproduce the parties mentioned in both the initial filed plaintiff and the filed amended plaintiff.

In his submissions, Mr. Mkumbukwa emphasized that the court and the parties were bound by their own pleadings and nothing else. He referred to previous court cases to support this point. He also mentioned that the Amended Plaintiff and the 2nd Defendant's Written Statement of Defense should bind both the court and the parties in determining the preliminary objections raised by the 2nd Defendant.

Mr. Mkumbukwa proceeded to argue the preliminary objections, citing the defects in the order for extension of the period of limitation and the non-inclusion of the 1st Defendant's name in the order. He stated that these defects rendered the suit time barred. He referred to relevant laws and previous court decisions to support his arguments.

In conclusion, Mr. Mkumbukwa submitted that the suit was time-barred due to the defects in the order for extension of time and the non-joinder of necessary parties. He requested the court to dismiss the suit with costs.

Advocate Rajabu Saidi Mwasi who appears to be the 3rd respondent missed the whole point of a PO. He stated that the 3rd defendant also asserted that he was the legal and registered owner of the disputed piece of land through a Customary Right of Occupancy issued by LUKULEDI B Village Council and Masasi District Council. He mentioned that he had purchased the land

from JONATHAN W NKYA. He requested the court's permission to include a copy of the Customary Right of Occupancy as annexure RM O1 in the Written Statement of Defence.

Counsel for the Plaintiffs took great interest in replying to each of his three learned brother's submissions. I provide the summary of his detailed submissions below.

In opposition to the 1st Defendant's submission, Mr. Mkali stated that he was referring to the contracts dated June 1, 2011, and June 1, 2016, between Rajabu Saidi Mwasi, HTT INFRANCO Limited, and MIC Tanzania Limited. He pointed out that the 1st Defendant's written statement of defense clearly indicated that they encroached on the Plaintiffs' land starting from May 5, 2011, and thereafter, following the expiration of the earlier agreement. Mr. Mkali argued that based on the limitation period provided by the Law of Limitation Act, the Plaintiffs still had time to institute proceedings against the 1st Defendant. He mentioned that the 1st Defendant claimed that the cause of action arose **on June 1, 2011, and June 1, 2016**, which fell within the 12-year limitation period for suits to recover land.

Mr. Mkali addressed the allegations that the Plaintiffs had **never sought an Order of Extension of Time from the Minister**. He stated that the 1st Defendant had complained about annexures that may or may not be produced as exhibits during the hearing. He argued that the 1st Defendant did not fault the Amended Plaint lodged in court on July 30, 2022. Mr. Mkali explained that the Minister had the power to grant extensions of time under Section 44(1) of the Law of Limitation Act, and he had granted an extension to the Plaintiffs. He emphasized that the Plaintiffs had adhered to the law in their pleading.

Mr. Mkali referred to the decision in **Swilla Secondary School versus Japhat Petro** and stated that parties are bound by their own pleadings, and courts determine disputes based on those pleadings. He reiterated that the Plaintiffs had followed the law in their pleading.

Mr. Mkali pointed out that the Plaintiffs suing were Dickson Gideon Mbilinyi and Calvin John Kassian **in their capacity as administrators of the estate of the late Teresia Wanuka**. The relation between the suit property and the Plaintiffs was that of administrators of the estate, and they also had interests as beneficiaries of the estate.

The learned counsel stated that the proceedings were commenced with an Amended Plaint filed on September 21, 2021, pursuant to an extension of time granted by the Minister. He argued that any evidential proof on the pleadings should be considered as a preliminary objection involving matters of law, not mixed law and fact.

Mr. Mkali discussed the clause in the Plaint regarding the institution of the suit and the period of limitation. He emphasized that the Plaintiffs had applied and were granted an extension of time, and the court needed to determine the issue based on evidence.

Responding to the second respondent's counsel, Mr. Mkali stated that mentioned that the 2nd Defendant had raised three preliminary objections on points of law on July 22, 2022, and additionally raised and argued another preliminary objection on November 7, 2022. He informed the court that the three preliminary objections raised by the 2nd Defendant were: (i) that the suit was accompanied by a defective order for the extension of the period of limitation, which made the suit time barred. (ii) That the Plaintiffs obtained an extension of time in their own capacity and not as Joint Administrators of the

estate of the late Teresia Wanuka and that (iii) The order for the extension of time did not contain the name of the 1st Defendant (HTT INFANCO LIMITED), but instead, it mentioned a different party, HELIOS TOWER TANZANIA LIMITED, who was not a party to the suit. Mr. Mkali referred to this objection as the "Purported Incapacity to be Sued of HELIOS TOWER TANZANIA LIMITED and HTT INFANCO LIMITED or both."

It is Mr. Mkali's firm conviction that the 2nd Defendant had raised and argued a fourth preliminary objection on November 7, 2022, without the court's leave. The objection pertained to a statement in the 2nd Defendant's written submission about the existence of a company named "MIC PUBLIC LIMITED COMPANY T/A TIGO TANZANIA" and its identification as "MIC TANZANIA PUBLIC LIMITED COMPANY." Mr. Mkali dismissed the objection arguing that "MIC PUBLIC LIMITED COMPANY T/A TIGO TANZANIA and MIC TANZANIA PUBLIC LIMITED COMPANY is the same corporate person."

Mr. Mkali mentioned two contracts dated May 5, 2011, and June 1, 2016, between Rajabu Saidi Mwasi, HTT, and MIC Tanzania Limited. He stated that the 2nd Defendant's written statement of defense confirmed that the defendants encroached on the Plaintiffs' land starting from May 5, 2011, and thereafter, entered into a new agreement on June 1, 2016. Mr. Mkali explained that based on these dates, the Plaintiffs were within the limitation period to file the suit against the 2nd Defendant.

Coming to the third respondent, Mr. Mkali could not hide his frustration for inadequacy of the submission he was called upon to respond to. He stated that the preliminary objection as raised on matters of jurisdiction was misplaced, misguided, irrelevant and wastage of time of this honourable Court,

other parties in this suit and administration of justice generally. He called on this court to overrule the same with disgrace it deserve.

Mr. Mkali stated that the 3rd Defendant purported to enlighten the Court and the rest of the parties on matters of jurisdiction and court fee. He mentioned that the 3rd Defendant chose to refer to **Order VII Rule 1 (i) of the Civil Procedure Code, R.E. 2019** (sick 2021), claiming it to be a breach committed by the Plaintiffs. Mr. Mkali further explained that the 3rd Defendant did not provide an explanation as to why he specifically missed the statement on the value of the subject matter in dispute in the last sentence of paragraph 19. The statement indicated that the plaintiff had suffered damages beyond TZS Seven Hundred and Fifty Million.

In rejoinder counsel for the first defendant stated that the first defendant's written statement of defense neither directly nor indirectly acknowledged the plaintiffs' claim. He referred to Section **27(1)(a) of the Law of Limitation Act**, which states that a fresh accrual of a cause of action occurs when there is an acknowledgment or part payment. However, according to Section 28 of the same act, an acknowledgment must be in writing. The counsel explained that since there was no written acknowledgment pleaded, the cause of action, which the plaintiffs themselves claimed had accrued in 2006, made the suit time barred.

The learned counsel emphasized that the plaintiffs' statutory duty under Order VII Rule 1(e) of the Civil Procedure Code to plead the facts on the cause of action and when it arose. Additionally, Order VII Rule 6 of the Civil Procedure Code required the plaintiffs, who filed the suit after the expiration of the prescribed limitation period, to show the grounds upon which the suit was not time barred.

The counsel further explained that a preliminary objection should be argued based on the assumption that all the facts pleaded by the other side are correct, as established in the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] 1 EA 696**. Therefore, in addressing the preliminary objection raised by the defendant, the court should consider the facts pleaded by the plaintiffs and not rely on the written statement of defense as the plaintiffs requested.

Regarding the extension of time, the counsel argued that the plaintiffs, as joint administrators of the alleged estate of the late Teresia Wanuka, had not sought and been granted an extension by the Minister responsible for legal affairs. He cited Section 99 and Section 100 of the Probate and Administration of Estates Act, which state that only executors or administrators are legally allowed to act on behalf of a deceased person. As the plaintiffs were not granted an extension, the suit against the first defendant was time-barred.

The learned counsel concluded by stating that the plaintiffs' response regarding the extension of time to commence the suit against the first respondent was misleading and incomprehensible. He reiterated the principle that parties are bound by their pleadings, citing various authorities, and emphasized that there was no order of extension of time to sue the first defendant, making the suit time barred.

Mr. Mkumbukwa, counsel for the 2nd defendant also came up with a rejoinder. He reiterated his submission in chief and proceeded to argue and submit that the counsel for the Plaintiffs was contradicting himself and intentionally misleading the court. He referred to the decision in **YARA TANZANIA LIMITED VERSUS DB SHAPRIYA 7 CO. LIMITED**, Civil Appeal No. 244 of 2018, and quoted the decision of **MOHAMED OGBAL V.**

ESROM M. MANYOGO, Civil Application No 141/01 of 2017, emphasizing the role of an advocate as an officer of the court.

Mr. Mkumbukwa pointed out that the Plaintiff was telling lies and departing from his pleadings. He referred to specific paragraphs and stated that the Plaintiff's submissions contradicted the facts stated in his pleadings. He noted that the Plaintiffs claimed to have an order granting them an extension of time, but according to their pleadings, no such order existed. He described this as a total lie and emphasized that it was apparent from the pleadings.

Regarding the first point of law, alleged lack of an order of extension of time, he reiterated his submission and stated that the Plaintiff had not provided any reply on the merits. He requested the court to disregard the Plaintiff's submissions and uphold their objections, dismissing the suit with costs.

Regarding the second point of law, the purported incapacity of joint administrators to sue, he referred to his previous submission and argued that the suit was time barred as the Plaintiffs were granted an extension of time to sue in their own names and capacity, not as joint administrators. He requested the court to disregard the Plaintiff's submissions and dismiss the suit with costs.

Regarding the third point of law, the purported incapacity of HELIOUS TOWER TANZANIA LIMITED and HTT INFRACO LIMITED or both to be sued, he stated that the Order of the Minister was defective and did not apply to the parties in the current suit. He requested the court to find the order defective and dismiss the suit with costs.

In conclusion, Mr. Mkumbukwa emphasized that the Plaintiffs were intending to mislead the court and stated that if the attached order was not

the one granting them time, as they had argued it was defective, the suit would be time-barred. He requested the court to dismiss the suit under **Section 3 of the Law of Limitation Act, [Cap 6 R.E 2019]**, and with costs. He also requested the court to disregard certain submissions made by the Plaintiff as they lacked relevance to the preliminary objections.

I have **dispassionately considered** the submissions by both parties. It goes without saying that a preliminary objection on appropriateness of a suit before a court touches upon the very fabrics of jurisdiction of a court.

As argued by counsel for the first defendant Makaki Masatu the cause of action in this matter arose on the 12th of April 2006 and it is the recovery of land. I have scrutinized the provisions of item 22 of Part I of the Schedule to the **Law of Limitation, CAP. 89 R.E. 2019**, as cited by counsel for the defendants.

I am fortified that an action or suit for the recovery of land must be filed within 12 years from the date the cause of action arose. Since the cause of action arose on 12th August 2006, the twelve-year period ended on 11th August 2018. As counsel for the 1st defendant correctly observed, this suit was filed on **30th June 2022**, which means it was filed out of time **by approximately 4 years**.

It is unfortunate that Mr. Mkali, counsel for plaintiffs not only wandered too widely beyond his pleadings but also spent unnecessarily long time explaining the validity (or otherwise) of (a purported) contracts that had (allegedly) been renewed. He also spent his time addressing points raised by counsel for the defendant which he pointed out that were not directly on time limitation. I agree. The issue here is whether or not the suit is time barred. I

do not therefore need to go further than this. The points as articulately argued by counsel for the first defendant bring this matter to a halt.

Premised on the above. I uphold the PO objection. I proceed to dismiss this suit entirely. I make no orders as to costs.

It is so ordered



E.I.LALTAIKA

Handwritten signature of E.I. Laltaika in blue ink.

JUDGE

23.05.2023

Court

Ruling delivered this 23rd day of May 2023 in the presence of **Mr. Ali Kassian Mkali**, counsel for the Plaintiffs and **Mr. Rafael Kambona**, learned Advocate holding brief for counsel defendants.



E.I.LALTAIKA

Handwritten signature of E.I. Laltaika in blue ink.

JUDGE

23.05.2023

Court

Right to appeal to the Court of Appeal of Tanzania fully explained.



E.I.LALTAIKA

Handwritten signature of E.I. Laltaika in blue ink.

JUDGE

23.05.2023