

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND APPEAL NO. 57 OF 2022

(Arising from the ruling and drawn order of District Land and Housing Tribunal for Maswa at Maswa in Land Application No. 97 B of 2018 dated on 27th july 2022 before Hon J.T Kaare)

MUNISI HAMISI MPIGAHODIAPPELLANT

(suing as Administrator of estste of the late **Hamisi Mpigahodi**)

VERSUS

ROBERT NDUTA HAMISI.....1ST RESPONDENT

AIRTEL TANZANIA PUBLIC LIMITED COMPANY...2ND RESPONDENT

MWINULA HAMISI MPIGAHODI.....3RD RESPONDENT

PILI CONSTSNTINE.....4TH RESPONDENT

MIC TANZANIA LIMITED5TH RESPONDENT

HTT INFRANCO LTD6TH RESPONDENT

JUDGMENT

14th April & 23rd June 2023

MASSAM, J:

Munishi Hamisi Mpigahodi as administrator of the estate of the late Hamisi Mpigahodi Michael filed Land Application No.97B of 2018 before the District Land and Housing Tribunal of Maswa where the matter was not heard on merit as the advocate for 4th and 5th respondent raised a

preliminary objection that the dispute before the tribunal was for trespass and not on ownership (recovery) so the matter filed was time barred at the end the trial tribunal agreed that the case was filed out of time as it was trespass matter and not for ownership.

The background of the case is that, Munisi Hamisi Mpigahodi as administrator of the estate of the late Hamisi Mpigahodi claimed after the respondents for return that he acquired the land in dispute by clearing the suit land which has been trespassed into and occupy the same. He said that on 2013 1st respondent entered on the said land without licence consent or authority of the applicant and fraudulently leased the same which was measured 15 footsteps length X 30 Footsteps width in the suit land to the 2nd respondent who agreed to be entered in the said lease agreement without carrying due diligence. So the advocates for 4th and 5th respondents filed the said objection challenging that the said application was filed out of time as in para 6(a) of the applicants application claiming for trespass by respondents so the dispute before this court was of trespass to land which needs possession of the same as respondent trespassed without his consent. so the 2nd, 3rd and 6th respondents are trespassers .

Munisi Hamisi Mpigahodi was aggrieved with the decision of the tribunal he then preferred this appeal before this Court with limb of three grounds of appeal namely;

- 1. That the trial chairman of the District Land and Housing Tribunal erred in law and facts to hold the dispute at hand as trespass to land while it was dispute on ownership (recovery) of land which led to improper findings.*
- 2. That the trial tribunal erred in law and facts to hold disputed issues as undisputed which led to improper findings.*
- 3. That the trial Tribunal erred in law and facts to entertain a preliminary objection which not qualifying to be a pure point of law.*

During the hearing the appellant enjoyed legal service of Mr. Steven Kaswahili advocate while the respondents appeared in persons. By leave of the court this appeal was heard by way of written submission.

Mr. Stephen Charles Kaswahili submitted that the trial chairman erred in law and facts to hold the dispute at hand as trespass while it was a dispute of ownership (recovery) of land which led to improper findings. He added by stating that trespass means wrong against possession rather than ownership and its condition for it are lawful

exclusive possession ,direct interference and that interference must be voluntary.

Coming to the applicants application in para 6 (a) (I) the applicant as administrator of the estate of the late Hamisi Mpiga Hodi who was the original and true owner of the suit land and the cause of action clearly is on return of the land which meant recover of the same. He said that all other paragraphs shows how the suit land firstly leased by the first respondent to the 2nd respondent again 3rd respondent who had no title entered into another place of disputed land and sold to the 4th respondent and another transaction to the 5th and 6th respondent to him that is not the trespass rather the ownership so the tribunal was required to decide who was the real owner among the rival parties. He added by saying that in determining the preliminary objection the court has to scrutinize pleadings of both sides he cement his urgement with the case of **Hotels and Lodges T Limited Vs The Attorney General And Another** in Civil Appeal No 27 Of 2013 before Juma J.A in page 9 of the typed judgment which held that *"pure point of law must be elicited from what has been pleaded or must be implied from reading the pleadings we think that the law is now settled that the parameters for determination of pure point for purposes of preliminary objections are restricted within the confines of the pleadings for purposes of*

present appeal the appeal consists of the amended plaint and amended written statement of defence”

He stated that the trial tribunal misdirected itself when holding that cause of action arose from trespass to land and not ownership while the pleadings are clear that there was deprivation in ownership of land. so it was wrong for tribunal to hold that he did not plead the issue of ownership which is clearly state under para 6 (a) (ii) of the application and appellant claims for return of land and appellant sought for relief to be declared the lawful owner and if the reliefs are not related to the pleadings is a matter of evidence which can not be used to determine the PO.

He added by saying that the trial tribunal was wrong to treat that dispute as trespass basing on the use of the word tress pass as used in the application while in the plead facts were clear that there was a deprive on the ownership of the suit land and the respondents have transferred from one another without being lawful owners. Again appellant said that in order for the suit to be ruled time barred there some factors which should be considered by law as elaborated in the case of **Ital Food Limited Vs The Attorney General Zanzibar And Three Others** 2016 B TLR 354 the court gave some factors to consider to determine whether the suit is time barred it says *in or case at hand*

the period of limitation for that kind of the suit as prescribed by the law the time determining whether the suit is time barred or not the court is normally guided by the followings factors ;the kind or description of the suit reliefs or case at hand the period of limitation for that kind of the suit as prescribed by the law the time from which such period begins to run and the date the suit was filed in court.

Coming to the case at hand the appellant claims for return of land and as item 22 of part 1 to the schedule of law of limitation Act Part 1 provides for time limitation in suit for recovery of suit land to be 12 years so being that the cause of action arose in the year of 2013 so by filing the same on 2018 it was elapse of only 5 years that the the application was within time.

In the third ground of appeal that the trial tribunal erred in law and facts to entertain a PO which was not qualifying to be a pure point of law the ground is clear that a PO must on pure point of law as derived in the case of **Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors Ltd (1969) EA 696** this was the one who set the said principle that PO must be on pure point of law. Also this court ask itself if the said PO raised and dismiss the the case qualify and meet the standards set out in the case of Mukisa and if appellant agree that the dispute arise from trespass the same needs

proof that there was a right of possession by the appellant and the said right must be deprived. In second ground of appeal appellant complained that the trial tribunal erred in law and facts to hold disputed issues as undisputed which led to the improper findings as there was no any record which show that nature of the dispute was trespass and time limitation was three years. So he pray this court to allow the appeal and order the original file be remitted to the tribunal to be heard on merit before another chairman.

On the side of the 6th respondent averred that the authorities cited are contrary to the facts of the case so appeal by the appellant has no merit. In reply to the first ground, that the trial tribunal erred in law and in facts to hold the dispute at hand as trespass to land while it was dispute on ownership he submitted that the claim that the application was about return of land as return is equivalent to recovery of land he submits that appellant in para 7(1) sought a relief to be declared to be lawful owner of the disputed land. He said that it is trite law that the parties are bound by their pleadings as elaborated in the case of **Baclays Bank Ltd Vs Jacob Muro** Civil Appeal No 357 of 2019 at page 11 *which stated that*

"we feel compelled at this point to restate the time honored principle of law that the parties are bound by

their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at grievance with the pleaded facts must be ignored”.

He continued by stated that the facts pleaded in para 6(a) i-xi discoses the cause of action of trsspass where in the case of **Frank Safari Mchuma Vs Shaibu Allyb Shemdolwa** (1998) TLR 280 at page 288 defined the trespass to land entails unjustified intrusion of one person upon another land and the said was discussed in the said case as follows that

"By definition trespass to land is unjustifiable intrusion by one person upon the land in possession of another it has therefore been stated with a light touch that if the defendant place a part of his foot on the plaintiffs land unlawfully it is in law as much as a trespass as if he had walked half a mile on it."

He stated by submitting that because the facts in clause 6 (a) i-xi discloses the cause of action of trespass to the land the same was require to be filed within three years from the date the cause of action arose which was admitted to have occurred in 2013 so at the time of filing the same was out of time as stated in the case of **Obetho**

Werema Joseph @Obeto Joseph Werema Vs Cata Mining Limited Land Case no 20 of 2020 at page 8 where it was stated that

Thus I find that the relief sought in the case at hand is compensation arising from tort of trespass to land, this is not a suit for recovery of land whose time limitation is 12 years from the date of cause of action, pursuant to item 6 part 1 of the schedule to law of limitation act the time to institute the suit is three years. So according to that the trial court was right to find and hold that.

In reply that the trial court erred in law and facts to entertain P.O which was not qualified to be a pure point of law he stated that the ruling of the tribunal was clear and argued as per in paragraph 6(a) i-xi In dealing the issue that the trial tribunal erred in law and facts to hold that disputed issues as undisputed which lead to improper findings. In his view he stated that the issue that the tribunal did misdirect in holding that the disputed as undisputed he said that the said ground was baseless and unjustified so he pray the appeal to be dismissed with costs for want of merit.

In his rejoinder Mr. Stephen Charles Kaswahili reiterated what he submitted in chief that he pleaded the issue of return of land specifically in para 6 (a)(ii) and we describe it as basic claim on which appellant wants to regain ownership of the said land on behalf of the late Hamisi

Mpigahodi and time limitation is 12 years. Again because the application was filed on 2018 the application was filed after lapse of 5 years well within time. So the said PO did not met five assumption to qualify to be po so it was error for the trial tribunal to entertain it so he pray this court to find as such and allow the appeal.

Having heard both parties, I have now to determine this appeal and the major issue is **whether this appeal has merit .**

In regard to ground No.1 that the trial tribunal erred in law to hold the dispute at hand as trespass to land while it was dispute on ownership, this court visited the application filed which was a cause of this po especially in para 6 (a) (ii) it reads that applicant in his capacity herein above claims against the respondents jointly and severally are for return of the suit land which has been trespassed into and unlawfully occupied by the respondent herein this court after read the same agreed that appellant was claiming return of the land and not the trespass ,in the said facts were clear that there was deprive of ownership as the same was trasfered from one person to another so his claim here was to recover the suit as in his pleadings he said that the said land belonged to his late father and he claiming it as administrator of his estate. So this court is in support of appellants submission that the trial court required to deal with the crucial issue and resolve who owns the

disputed land and that will be the matter of evidence. Again this court is agreeing that appellants pleaded facts his intention was to return the suit and protect the ownership as elaborated in the cited case of **Charles Rick Mulaki Vs. William Jackson Magero** Hc Civil Appeal No. 69 of 2017 when cited with approval in the case of **Anderson Chale V Abubakar Sakapara** in Civil Appeal No. 121 of 2014 that *matters concerning land was defined to mean matter on which a right on land or interest thereon is in dispute.....* "So as I said earlier by looking to the appellant's pleaded facts his aim was for protection of the ownership as he said that the said land was transferred to another people who already have title deed so the tribunal required to deal with the issue of ownership in order to determine the illegality of the transfer of the title in the suit property between the parties so it was not right to hold that the claim was of trespass but of the ownership, and according to the law of limitation the matter was within time. So according to that this court finds this ground to have merit and allow the same.

On the second ground and third ground of appeal that the trial tribunal erred in law and facts to hold disputed issues as undisputed which led to the improper findings and to entertain a PO Which was not qualifying to be a point of law, 6th respondents said that the appellants' argument was baseless and unjustified as the issue reflected in the

submission of the parties was whether the application was time barred, and in his view the same was time barred as the application discloses a cause of action of trespass which ought to be filed within three years, but on the side of the appellant told this court that the cause of action arises was of recovery of the land as there was no where in the pleadings show that the suit land belonged to appellant but rather it shown that the land belonged to the late Hamisi Mpigahodi so again this court is support of the appellants submission that in order the PO to be termed PO must be purely point of law and not facts, the trial Chairman was required to see if there was a proof of ownership from the appellant after that he could deal with the issue of the trespass after proof the issue if the appellant was the owner of the said disputed land, this court finds the facts that the owner of the land was the late Hamisi Mpigahodi and appellant was just administrator of the estate and not the owner, so absence of the said facts make this court to find that the said PO raised was was not purely point of law so was not required to be entertained by the trial tribunal and this court make it to believe that the cause of action was of the ownership and not of trespass which time limitation was 12 years.

Having observed the same, my conclusive view is that there is no sufficient evidence to prove that the disputed land belonged to the

appellant in order to prove the dispute of trespass as there was a facts that he was administrsator of the estate of the late Hamisi Mpigahodi. Having so held, I must conclude that this appeal has merit and consequently is allowed with costs. So let the original file be remitted to the trial tribunal to procced with hearing on merit before another chairman with competent jurisdiction. It is so ordered.

The right to further appeal is explained.

DATED at **SHINYANGA** this 23rd day of June 2023.



A handwritten signature in blue ink, appearing to read "R.B. Massam".

R.B. Massam.
JUDGE
23/6/2023