

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
LAND APPEAL NO. 46 OF 2022

*(Arising from Land Application No. 53 of 2021 of the District Land
and Housing Tribunal for Moshi at Moshi)*

BARAKAEL RASIEL SAULE (Administrator of the estate

Of the late Grace Andrea Kimambo) **APPELLANT**

VERSUS

ESTER ANDREA KIMAMBO **RESPONDENT**

JUDGMENT

08/06/2023 & 06/07/2023

SIMFUKWE, J.

The appellant herein was aggrieved by the decision of Moshi District Land and Housing Tribunal (trial tribunal) in Land Application No. 53 of 2021 which dismissed his application on the reason that the matter was time barred.

The historical background of the matter in a nutshell is that the appellant herein instituted the matter before the trial tribunal as the administrator of the estate of his deceased mother who died on 22/08/1992. The deceased left the appellant and her sister and a registered land which was in the name of the deceased. The respondent herein is the auntie of the

appellant (the sister to their deceased mother). On 27/10/2020 the appellant was appointed as administrator of the estate of the deceased. Thereafter, he decided to institute the land dispute over the said piece of land after he had faced incumbrances from the respondent when he wanted to distribute the said property to the beneficiaries whereas the respondent claimed to be compensated some improvements made to the suit land.

When the matter was placed before the trial tribunal, the trial Chairman raised the issue of time limitation *suo motto*. However, he invited the parties to address him on whether the matter was time barred or not. After hearing both sides, the tribunal decided that the matter was instituted out of time. Hence, dismissed the application. The appellant was aggrieved, he instituted this appeal on the following grounds:

1. *That, the trial Tribunal grossly erred in law and facts when it held that Land Application No. 53 of 2021 was time barred and dismissed it for reason of being time barred.*
2. *That, the trial Tribunal erred in law and facts for holding and finding that the cause of action against the respondent arose in the year 1992 upon the death of Grace Andrea Kimambo, and not in the year 2020 when the Respondent interfere with the Appellant's duties of administered the deceased estate (the suit land). (sic)*
3. *That, the trial Tribunal Chairman erred in law in interpreting section 9(1) of the Law of Limitation Act, Chapter 89 Revised Edition 2019, in isolation with other provisions of the same Act and dismissed the case for being time barred.*

- 4. That, the trial Tribunal Chairman erred in law and fact for overlooking the essential fact that the Appellant has been in possession of the suit land, and the Respondent did not claim ownership of the suit land, thus, the dispute was not about the ownership of land but rather the purported improvement made by Respondent to the suit land.*
- 5. That, this appeal has been filed within time.*

During the hearing, the matter proceeded through filing written submissions, the appellant was represented by Mr. Tumaini Materu, learned advocate while the respondent was represented by Ms. Esther Kibanga, learned advocate.

Submitting in support of the grounds of appeal, the learned counsel for the appellant dropped the 2nd, 3rd, 4th and 5th grounds of appeal. He opted to submit on the 1st ground of appeal on which he faulted the trial Tribunal for dismissing Land Application No. 53 of 2021 on the reason that the same was time barred. Expounding this point, Mr. Materu explained that the issue of time limitation was raised by the Tribunal Chairman *suo motto* before the hearing of the case on merit. He condemned the Tribunal Chairman for dismissing the said application at preliminary hearing stage while the case was not heard on merit. He was of the view that Land Application No. 53 of 2021 was prematurely decided.

Mr. Materu insisted that the case was filed within time, as the dispute arose in the year 2020 when the Respondent claimed for compensation for improvements, she had made to the suit land after the Appellant had been appointed as an administrator of the estate of the deceased. Under such circumstances, the learned advocate was of the view that the issue

of time limitation can only be resolved by full hearing of the case on merit. That, the issue of time limitation needs evidence as it cannot be resolved at the preliminary hearing by mere submissions from the advocates. Reference was made to the case of **Mshamu Saidi (Administrator of The Estate of Saidi Mbwana vs Kisarawe District Council And 4 Others, Land Appeal No.177 of 2019, HC (Land Division)** (Unreported) in which this Court at page 9, 10 and 11 of the typed judgment held that:

"It is perhaps useful to observe that, the accrual of right of action envisaged in section 9(1) of the LLA is not actual. It is merely constructive. This is implied by the use of the clause "shall be deemed to have accrued". Therefore, as I held in Shomari Omari Shomari (as administrator of the estate of the late Seleman Ibrahim Maichila) vs. Mohamed Kikoko (supra), for the purpose of determining accrual of right of action, section 9(1) should always be read together with section 33(1) so that, cause of action does not accrue on the date of the death of deceased until the defendant or his predecessor in title is in adverse possession of the suit property. It is equally significant to observe that, an action for recovery of land is technically based on tort of trespass to land which is nothing else other than unjustifiable intrusion by one person in land in possession of another. Therefore, for one to establish a claim for trespass on land, he must establish either actual or constructive possession soon before the alleged intrusion. Constructive possession can be established through holding legal title on the suit

*property. In this case, the appellant does not claim actual possession subsequent upon the death of the deceased. He is only alleging ownership of the suit property by the deceased at the time of his demise. Truly, being an administrator of the estate of the deceased, the appellant is deemed, under section 35 of the LLA, to be in constructive possession of the suit property, by virtue of being a paper owner, as effectively as if he was constituted an administrator of the estate at the moment immediately after the death of the deceased. Therefore, for the respondents to be entitled a defense of time limitation, they must establish adverse possession of the suit property twelve years after the death of the deceased
Therefore, since the parties were, at the trial tribunal seriously contentious as to when the respondents took adverse possession of the suit property, the dispute, factual as it is, would have not been resolved by way of submissions. Conducting a trial to ascertain the factual contention was thus inevitable. In my view therefore, the decision of the trial tribunal was premature. The appeal is henceforth allowed."*

Elaborating the above decision, Mr. Materu submitted that to establish whether the suit was time bared, the trial Chairman should have conducted full hearing by allowing the parties to give evidence on when the cause of action accrued. This is because the cause of action does not

accrue on the date of the death of deceased, but it is until the defendant or his predecessor in title is in adverse possession of the suit property.

Further to that, Mr. Materu explained to this court that the Court of Appeal has insisted several times that; the issue of time limitation in recovery of the suit land by Administrator of the deceased's estate needs evidence and thus it cannot be disposed off by a preliminary objection or by the Court *suo motto*. That, evidence on accrual of the cause of action needs to be proved before verdict. On that basis, Mr. Materu was of the view that it was incorrect for the trial Tribunal Chairman to dismiss the case for being time barred at early stage without hearing the parties' evidence on merit.

Mr. Materu cited the case of **Hamisi Mohamed (As the Administrator of the Estate of Risasi Ngawe) vs Mtumwa Moshi (As the Administratrix of the Estate of the late Moshi Abdallah), Civil Appeal No. 87 of 2020**, at page 6 of the typed judgment where the Court held that:

"The issue for our determination is whether the suit before the trial court was time barred. The respondent has given a sweeping statement that the late Moshi Abdallah and family lived in the suit property for more than fifty years undisturbed before a claim over that land was filed. No specific time of accrual has been given. Section 24 (1) of the Law of Limitation Act provides for the time when the right of action accrues in respect of the claim by legal representative of the deceased person's property According to this provision, in order to establish the accrual

of the right of action, the date of the death of the late Risasi Ngawe should have been established. What is in record is that he died in 1957 without further explanation. It follows therefore, that evidence would be needed to establish the date of accrual of the right of action on the deceased's estate."

According to Mr. Materu, to establish how and when the cause of action arose in cases for recovery of the deceased's estate by Legal Personal Representative, **section 9(1) of the Law of Limitation Act, Cap 89, R.E 2019** should be read together with **section 24(1), section 33(1) and section 35 of the of the Law of Limitation Act, Cap 89, R.E 2019**. He believed that the case was filed within time, because the dispute arose in the year 2020 when the Respondent entered the suit land after the Appellant was appointed as an administrator. That, the cause of action arose on date of encroachment in 2020. Cementing his argument, Mr. Materu referred to the case of **Habiba Bush (Surviving Legal Personal Representative of The Late Sushi Mwinyibohari vs Ramadhani Lila Gogo @ Jeba and Another, Land Appeal No. 40 of 2020, HC (Land Division) (Unreported)**, where at page 7 this court held that:

"None would ask as to when did the right to sue accrue to the estate of the late Bush Mwinyibohari. The prompt answer is that the right of action accrues on the date of the encroachment of the suit land since there is no any evidence that there was dispute before the death or after the death of the said Bush Mwinyibohari."

To buttress the above position, further reference was made to the decisions of this court in the cases of **Rashid Togwa (As administrator of the estate of the late Mohamed Togwa) vs Peapea Village Council, Land Appeal No. 60 of 2020, HC (Land Division)** and the case of **Rodha Sobe (As Administratrix of the estate of the late Sobe Masirori) vs James Fredy Sagaria (As Administrator of the estate of the late Wilson Wanusu), Land Appeal No. 69 of 2019, HC at Mwanza** (Unreported), in which the Court at page 7 and 8 held that:

"Guided by the above provision of law, a suit to recover landed property must be filed within 12 years. Moreover, in cases related to recovering of land an administrator of the estate can file a claim in court as if there is no interval of time between the death of the deceased person as stated under section 35 of the Law of Limitation Act Cap.89 [R.E 2019]. According to section 35 of the Law of Limitation Act Cap. 89 [R.E 2019], the time taken to apply for the administration of the estate of the late Sabi is excluded. Thus, time started to run against the appellant after obtaining letters of administration. Therefore, in computing time, the days started to run from the date when the administrator of the estate was appointed that is in 2016, thus, the application falls within time. As rightly stated by the learned counsel for the appellant that the respondent did not occupy the suit land for 12 years without being disturbed".

Also, Mr. Materu referred to the case of **Peter Peter Junior (As an Administrator of the Estate of The Late Masoud Mohamed Mgunga) vs Leornard James Mselle, Land Case No. 99 Of 2022** HC Land Division at Dar es Salaam, to cement the above position.

In his conclusion, Mr. Materu implored the Court to agree with the Appellant that the case was not time barred as it was prematurely decided, allow the present Appeal, quash the proceedings and set aside an Order which dismissed the Appellant's case and remit back the file to the trial Tribunal for full trial.

Replying the above submission, Ms. Kibanga strongly disputed the grounds of appeal and supported the findings of the Trial Tribunal giving the reason that the application was hopelessly time barred and the only remedy was to dismiss the same as provided for under **section 3(1) of the Law of Limitation Act** (supra). She referred to the case of **John Cornel vs Grevo (T) Ltd, Civil Case No. 70 of 1998** in which it was held that:

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

Responding to argument that the dismissal was wrongly made because the matter was on a preliminary hearing stage, Ms. Kibanga submitted that it is a settled law and practice that, where there is a preliminary objection raised, it must be determined first before hearing the substantive matter. She argued that the issue of time limitation is purely **Point of law**

and according to the law and procedure it can be raised at any time of the proceedings as observed in the case of **Hon. Mbwana Salum Kibanda (Treasurer) & Another vs Hon. Abdallah Mohamed Hamis (Vice Cha...) & Another, Misc. Civil Application No.128 of 2022 (HC)**.

Contesting the argument that the matter was filed within time, Ms. Kibanga submitted that this argument lacks legal basis because it is undisputable fact that the owner of the suit land is Grace Andrea Kimaro who passed away since 1992 and she possessed the same before she died.

Ms. Kibanga contended that the law governing limitation to recover land owned by a deceased person is very clear that, computation of time starts from his/her death as stipulated under **section 9(1) of the Law of Limitation Act** (supra). That, in terms of this provision, the right of action accrued in **1992** and not in **2020** when the Appellant applied for letters of administration as submitted by Mr. Materu. That, when the Appellant applied for letters of administration in **2020**, he was already time barred by virtue of the said section. Ms. Kibanga was of the view that since Application No. 53 of 2021 was instituted in **2021** which is **29 years** from **1992** when the said Grace died, then the same was filed out of time which is contrary to the provisions of **Part I, Item 22** of the First schedule of the Law of Limitation Act (supra).

Ms. Kibanga submitted that section 9(1) was supported in the case of **Aloyssius Benedicto Rutaihwa Vs Emmanuel Bakundukize Kendurumo and 9 Others, Land Appeal No. 23 of 2020 (HC)** at Bukoba in which from page 11 the court referred to several cases including a Court of Appeal decision in **Haji Shomari Vs Zainabu Rajabu, Civil**

Appeal No. 91/2001 (Unreported) in which the Court observed several issues and concluded that:

*" .. Based on the above position of the law, even if the Respondents were mere adverse possessors, the Appellant have lost right of claim over the Suit/and as the respondents have occupied and possessed the land for over **36 years** without interruption. In conclusion, apart from the fact that the Assessors were not invited to give their opinion according to the law something that renders the proceedings of the Trial Tribunal a nullity. Also as stated above the suit was time barred, I hereby quash the proceedings and set aside the decision of the Trial Tribunal. I have no reason to order retrial of the case because the suit was time barred."*

Concerning the cases cited by Mr. Materu, Ms. Kibanga submitted that apart from the cases being persuasive still the same are not applicable in the present case. she prayed the court to disregard them.

Contesting the submissions that **sections 9(1), 24(1) and 33 (1) and 35 of the Law of Limitation Act**(supra) should be read together in establishing as to when the cause of action accrued, Ms. Kibanga stated that Mr. Materu did not explain as to how and or why those provisions are to be read together as well as their applicability. Ms. Kibanga asserted that the applicability of the said provisions was discussed in the said case of **Aloyssius Benedicto Rutaihwa** (supra) in which it was held that:

"...Exclusion of time for the purpose of limitation is a question of law. It is specifically provided for in part IV of

the LLA which is entitled "computation of period of limitation." section 35 is not in it."

In the circumstances, Ms. Kibanga prayed the court to dismiss this appeal with costs and uphold the decision of the trial tribunal.

Having summarised the above submissions, I now turn to the merit or otherwise of this appeal. I have examined carefully the pleadings before the trial tribunal, as stated earlier the Trial tribunal dismissed the application at the preliminary stage for being filed out of time.

Mr. Materu submitted among other things that the matter was not time barred as the dispute arose in 2020 when the respondent claimed interest over the suit land.

Ms. Kibanga referred to **section 9(1) of the Law of Limitation Act** and argued that the matter was filed out of time. For ease reference, the provision reads:

"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."

From the above quoted provision, I hesitate to conclude that its contents fit the circumstances of this case because the facts of the application as per paragraph 6 speak loudly that, there was no dispute on the suit land before and even after the death of the deceased until in the year 2020 when the appellant (administrator of the estates of the deceased) faced

encumbrances from the respondent who according to **paragraph 6(vii)** of the Application, prevented the administrator to distribute the disputed property to her lawful beneficiaries. According to me that is when the cause of action arose and not in 1992 when the deceased died. As rightly submitted by Mr. Materu for the appellant, **section 9(1) of the Law of Limitation Act** (supra) should be read together with **section 35** of the same Act which provides that:

"35. For the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator 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."

Ms. Kibanga tried to persuade this court by citing the case of **Aloyssius Benedicto Rutaihwa** (supra) that the matter was time barred. However, I am of considered opinion that the cited case is distinguishable to the present case since in that case, the facts were clear that the respondents had occupied and possessed the land for 36 years without interruption while in this case, the respondent emerged and claimed interest in the suit premises when the appellant wanted to distribute the suit property to the beneficiaries. Paragraph 6(vii) and(viii) of Application No. 53/2021 and paragraph 6 (ii), (iii) and (iv) of the Written Statement of Defence of the respondent herein are relevant. Thus, the cause of action arose when the respondent resisted the distribution of the suit premises to the beneficiaries of the estate of the deceased.

In the event, I conclude that the trial Chairman erred in law and fact to dismiss the application on the reason that the same was filed out of time.

Therefore, I allow this appeal with no order as to costs. The case file should be remitted back to the trial tribunal for the same to be determined on merit. For the interest of justice, I find it prudent and order the matter to be placed before another Chairperson.

It is so ordered.

Dated and delivered at Moshi this 6th day of July 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

06/07/2023