

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

LAND APPEAL NO. 35 OF 2022

(C/F Application No. 23 of 2021 District Land and Housing Tribunal of Moshi at Moshi)

**VICTORIA MOSSES SANING'O APPELLANT
VERSUS**

DANIEL KILEO RESPONDENT

JUDGMENT

Last Order: 15th June, 2023

Judgment: 26th July, 2023

MASABO, J.:-

Victoria Mosses Saningó, the appellant herein, suing in the capacity of an administratrix of the estate of her late husband one Felix January Massawe, is aggrieved by the decision of the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal) in Application No. 23 of 2021 which dismissed his application for being barred by the law of limitation.

The brief facts giving rise to the appeal was that, the appellant sued the respondent in the trial tribunal claiming ownership of 3 acres of land located at Mnadani ward in Mijongweni Village and Hai district (the suit land). She alleged that the respondent had trespassed into the suit land and she prayed that, the tribunal make a declaratory order that the suit land belonged to the late Felix January Massawe and is administered by her, an order for vacant possession of the suit land against the respondent, costs of the suit and any other relief it deemed fit. Her prayers were

premised on the allegation that, the late Felix January Massawe owned the suit premise. After his demise on 4th June, 2007, the suit land remained under the care of the deceased's mother who resided there and cultivated various crops to wit beans, coffee and bananas until 2012 when she too demised. The respondent, taking advantage of this unfortunate advents, unlawfully trespassed into the suit land. In his written statement of defence, the respondent filed a preliminary objection that the application was defective for being hopelessly time barred. The trial chairman heard the preliminary objection and sustained the same. Consequently, the application was dismissed for being time barred.

Aggrieved, the appellant has filed this appeal on 4 grounds in which she faulted the decision of the trial tribunal for the following reasons;

1. That the tribunal erred in dismissing the application on account of being time barred;
2. That, the tribunal erred by overlooking the fact that the Appellant's husband was in possession of the suit land since 1997 but the cause of action arose in 2012;
3. That, section 9(1) of law of Limitation Act Cap. 89 R.E 2019 was misconceived.
4. That, the tribunal erred in determining the issue of time prematurely.

On the basis of these grounds, she has prayed that the appeal be upheld and the decision of the trial tribunal be quashed and set aside. The appeal was heard in writing. The appellant enjoyed the services of Mrs. Elizabeth Maro Minde while the Respondent was represented by Mr. Gideon Mushi both learned advocates.

Supporting the appeal, Mrs. Minde consolidated the first, second and fourth grounds and argued that the issue in controversy in the present appeal revolves around the interpretation and application of the provision of section 9(1) and 33 of Law of Limitation Act, Cap 89 RE 2019. As to the issue of ownership, she argued that the suit land was owned by the deceased person. She explained that, according to paragraph 6(a) (iii) of the application, Felix January Massawe was allocated the suit land in 1997, a fact which was not disputed by the respondent in his written statement of defence. She proceeded that, this question however calls for evidence and the same was not established. She proceeded that, if ownership is yet to be determined, calculation of when time starts to run cannot at this stage be determined.

In her further submission, she has argued that, in his reply, the respondent argued that the time be calculated from the date of death of Felix January Massawe as per section 9(1) of Law of Limitation Act. However, in his pleadings, paragraphs 6 and 7 suggests that the late Felix January Massawe is not the last person entitled to the suit land and nether was he the last person in possession of the same. That, the original owner of the suit land was Boniphace Lenguyana Kileo and upon his death in 1985, the suit land passed to his wife Anna Boniface Kileo who owned and possessed the same until her death on 28th November 2012 when it passed over to him. Mrs. Minde argued that, this is the main contention as the appellant claims ownership before death of Anna Kileo whereas the respondent claim trespass after the death of Anna Kileo in 2012. It was her argument that, if

Anna Boniface Kileo was in possession of the suit land in 2012 then the appellant husband cannot be deemed to be the last person in possession of the suit land and the accrual of the right of action cannot be calculated from 1997. She proceeded that, after the death of Felix January Massawe no action was taken by the respondent. Trespass occurred in 2012 after the death of Anna Boniface Kileo. Thus, if Anna Boniface Kileo was the last person entitled to occupation then the calculation of time for accrual of right ought to start in 2012. Since the application was filed in 2021 which is nine years after the death of the last person in possession of the suit, there can be no doubt that the application was filed timely.

She contended that section 9(1) of the Law of Limitation Act has set the following condition precedents for its application which are; **one**, that the suit must be for recovery of land of a deceased person; **two**, the deceased was on the date of his death in possession of the land; **three**, that the deceased was the last person entitled to the land and; **four**, the right of action shall be deemed to have accrued on the date of death. She argued that the 2nd and 3rd conditions are disputed hence subject to proof and because of this, the issue of when the right of action accrued requires proof. The application of section 9(1) of the Law of Limitation Act was, therefore, misconstrued.

Mrs. Minde further maintained that, even assuming that the time started running from 2007 upon the death of Felix January Massawe, the pleadings do not suggest the existence of any cause of action by then. Hence one

could not have filed a claim against an unknown person without any cause. She averred that the trespass took place in 2012. She supported this argument with the case of **Michael Kulwa (Administrator of the estate of the late Marget Bundala) vs Aron Shija**, Land Application No. 4 of 2010 High Court at Shinyanga. She further argued that since trespass is a tort, then one must establish actual or constructive possession before or after the alleged trespass as observed in **Mshamu Saidi (Administrator of the estate of Said Mbwana vs Kisarawe District Council and 4 others**, Land Appeal No. 177 of 2019 where the Maige, J stated;

"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."

She argued that in the present case, in the present case trespass occurred after the death of Anna Boniface Kileo as seen in paragraph 6(a)(iii), (iv), (v), (vii) of the application. Thus, it is obvious that no action could have been taken in absence of trespass. The trial tribunal did not take into consideration section 33 of the Law of Limitation Act. It only considered the date of death of Felix January Massawe and in so doing, prematurely

concluded that the suit was time barred. She maintained that while it is true that parties are bound by their pleadings, the interpretation of the law is a legal process she supported the argument with the case of **Michael Kulwa** (supra). Hence, section 9(1) ought to have been read together with section 33 of the same Act. Mrs. Minde finalized her submissions by praying that this court allow the appeal with costs and have the file remitted to the trial tribunal for hearing.

In reply, Mr. Mushi, counsel for the respondent while mimicking the order of submission employed by Mrs. Minde, consolidated grounds of appeal and opened his submission with an argument that, a large part of Mrs. Minde's submission was based on analysis of evidence which is very premature at this stage as the decision being challenged emanated from a preliminary objection. He reasoned that, the only issue of controversy that this court should consider is the date of demise of the last person entitled to the suit land and in doing so, invoke the mandatory provision of Section 9(1) of the law of Limitation Act. He proceeded that it is settled law that parties are bound by their pleadings as held in **Jame Funge Ngwagilo vs Attorney General** [2004] TLR 161. Hence, in the present appeal, the appellant's submission cannot hold any water than to mislead this court because, in paragraph 6(a) (iii) and (iv) of the appellant's application it is pleaded that the last person in possession of the suit land was the late Felix January Massawe who having acquired the same in 1997 used occupied it peacefully until his death on 4/6/2007.

In controverse, the respondent pleaded in paragraph 9 his written Statement of defence that, after the death of Felix January Massawe on 4/6/2007 the appellant took no action and for these years the appellant never bothered to obtain the letters. She obtained the letters of administration in 24/2/2021 with the sole intent of disturbing his peaceful enjoyment of the suit premise. In fortification of his argument that the suit was incompetent for being barred by time, he cited the case of **Yusufu Same and Another vs Hadija Yusufu** [1996] TLR 350 arguing that the limitation period in respect of land, irrespective of when letters of administration were obtained, is 12 years reckoned from the date of death of the deceased.

Mr. Mushi argued further that, the tribunal made no error by invoking section 9 of Law of Limitation Act as, according to the appellant's pleading, the last person to be in possession of the suit land was Felix January Massawe who died in 2007. As per item 22 of the Schedule to the Law of Limitation Act, the time limit within which to claim ownership of land is within twelve years from the date when the cause of Action. Now, counting from 2007 when late Felix January Massawe died to the year 2021 when the appellant instituted the application before the trial tribunal there are about fourteen years. Thus, the application was filed out of time and the sole remedy is dismissal of the application under section 3 of the Law of Limitation Act. Thus, the tribunal's Chairman was correct in his findings. He concluded that all the cases cited by the appellant are distinguished as they

are irrelevant to the case at hand and he prayed that this appeal be dismissed with costs as it is devoid of merit.

In rejoinder, Mrs. Minde argued that the issue as to who is the last person in possession of the suit land was not yet settled and requires evidence as evident in paragraph 6(a) (iii) of the Application and paragraph 4 and 6 of the reply. She argued that all parties are bound by their pleadings. She also contended that, in the present case, section 9(1) of the Law of Limitation Act need be cautiously applied as the facts require identification of the last person entitled to the suit land and therefore it calls for evidence. She reiterated her prayer for the appeal to be allowed with costs.

I have dispassionately considered the submissions by the parties alongside the lower court record and I am now ready to determine the appeal. From the submissions it is evident that the parties do not dispute the fact that the late Felix January Massawe, through whom the appellant is suing in the capacity of legal representative, demised in 2007. They are similarly at common that the application leading the present appeal was instituted in the trial tribunal in 2021. The only controversy between them is on the date of the accrual of the right of action. All the grounds of appeal revolve around this issue hence, the consolidation made by both parties. The appellant has maintained that, the cause of action did not arise in the year 2012 when she became aware of the trespass. The respondent as well of the trial tribunal share the view that, the accrual date should be computed

from 2007 when the late Felix January Massawe parted this world. Both, have found refuge under section 9(1) of the Law of Limitation Act.

Mrs. Minde for the appellant, is of an adverse view. She has passionately argued that, much as it is true that Felix January Massawe who was the original owner of the suit premise demised in 2007, the accrual of right of action should not be computed on the date of his demise as at that date, the respondent had not trespassed the suit land. He trespassed the same after the demise of Felix January Massawe. Hence, section 9 (1) of the Law of Limitation Act, is inapplicable as the cause of action accrued in 2012 after the respondent encroached into the said land. Mrs. Minde has argued further that, the application was prematurely dismissed as there was need to ascertain when the cause of action accrued and to identify who was in possession of the suit land when the right of action accrued, a question which required evidence to ascertain, hence it was prematurely determined at the preliminary stage and in the absence of such ascertainment. Impliedly, she has suggested that, the point raised by the respondent did not qualify as preliminary objection as it required evidence to ascertain.

It is a settled principle of law that, preliminary objections must be on pure points of law which arise by clear implication on pleadings as opposed to matters that require evidence (**Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1960] EA 701; **Karata Ernest and Others V. The Attorney General** Civil Revision No. 10 of 2010 [2010] TZCA 30 [Tanzlii]; **Salim O. Kabora vs TANESCO Ltd & Others** (Civil

Appeal No. 55 of 2014) [2020] TZCA 1812 [Tanzlii] and **Gideon Wasonga & Others vs The Attorney General & Others** (Civil Appeal No. 37 of 2018) [2021] TZCA 3534 [Tanzlii]. In **Karata Ernest and Others vs The Attorney General** (supra) the Court of Appeal of Tanzania, instructively stated that;

"At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law."

In the present appeal, the preliminary objection raised by the respondent regarded time limitation. Hence there is no doubt that it was properly raised. The lingering question is on the peculiar facts of the said point and whether, based on such facts, it was correctly to determine it at that stage and consequently dismiss the application. Determining this question requires me to ponder on the provision of section 9(1) of the Law of Limitation Act and item 22 Part I of the Schedule of that law. The alter

which is undisputed, sets 12 years as the time limit for actions for recovery of land. On its part, section 9(1) which is at the center of controverse states;

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."

As correctly argued by Mrs. Minde, for the provisions above to apply, the following three conditions must be satisfied, that is, *one*, that the suit must be for recovery of land of a deceased person, *two*, the deceased was on the date of his death in possession of the land, and *three*, that the deceased was the last person entitled to the land. If these conditions are satisfied, the right of action shall be deemed to have accrued on the date of death of such person. Explicitly, therefore, the phrase 'shall be deemed' suggest that, when such three conditions exist, there shall be a presumption that the cause of action accrued from the date when such person died.

In the case at hand, Mrs. Minde's argument suggests that, such presumption does not arise because, much as Felix January Massawe died in 2007, the land remained in the possession of his family and was occupied by her mother Anna Boniphace Kileo who peacefully cultivated and occupied it until on 28/11/2012 when she too, demised and it is at this stage when the respondent trespassed into it. These facts were pleaded in

paragraphs 6(a) iii, iv, and vii of the applicant's application before the trial tribunal. Having carefully read the facts in these paragraphs, I am convinced that, it was a misconception to dismiss the application based on the presumption arising from section 9(1) of the Law of limitation Act as from the appellant's pleadings it is plainly clear that the cause of action accrued in 2012, a long while after the deceased's death. Since the respondent disputed this and claimed to have occupied the land earlier, clearly, the issue as to when the right of action accrued was not straight forward as it required evidence from both sides. As suggested by my learned brother Maige J (as he then was) in **Mshamu Saidi (Administrator of the estate of Said Mbwana) vs Kisarawe District Council and 4 others** (supra), in determining the time of accrual of right of action in circumstances such as the one at hand, section 9(1) of the Law of Limitation Act should not be read in isolation. It should be read together with Section 33 (1) of the same Act which states;

33(1). A right of action to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as "adverse possession") and, where on the date on which the right of action to recover any land accrues and no person is in adverse possession of the land, a right of action shall not accrue unless and until some person takes adverse possession of the land.

The said provision entails that a right of action shall accrue only when the land is adverse possession. In the present case, the appellant claims that the suit land was trespassed in 2012 and as such, she had no reason to file an application claiming ownership over the property prior the alleged

encroachment. This court addressed a similar issue in **Michael Kulwa (Administrator of the estate of the late Marget Bundala) vs Aron Shija** (supra) and **Mshamu Saidi** (Administrator of the estate of Said Mbwana) **vs Kisarawe District Council** and 4 others (supra). In **Michael Kulwa (Administrator of the estate of the late Marget Bundala) vs Aron Shija** (supra), the appellant had filed a suit against the respondent in 2018 claiming a plot of land belonging to the late Said Bwana who demised in 1992 but the same was dismissed for being time barred. In his application, the appellant had claimed that trespass occurred in 2014 while the respondents claimed to have been in possession from 2001. This court found that since the issue as to when the respondent took adverse possession was contentious, there was need for evidence. The court stated thus;

“The claim by the appellant in the pleadings was such that, the respondents took adverse possession of the **suit property** in 2014. In their defense however, the respondents claimed to have been in adverse possession of the same from 2001. In accordance with the principle in **Mukisa Biscuit vs. West End Distributors f1969] 696**, the determination of the preliminary objection was to be founded on the presupposition that the facts pleaded in the amended Application were true. 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.”

I fully subscribe to the above reasoning. As argued by both counsels, the parties are bound by their pleadings as held in **James Funge Ngwagilo**

vs Attorney General (supra). Since the parties herein are at variance regarding the date on which the adverse possession of the suit land took place, there was obviously a dire need of evidence to ascertain the same. As this could not and was not done at the preliminary stage, it is obvious that the application was wrongly and prematurely determined.

I may also add, in the alternative, that the above provision ought to have been read conjointly with the provision of section 24(1) of the same Act which deals with accrual of right of action after one's death. It states thus;

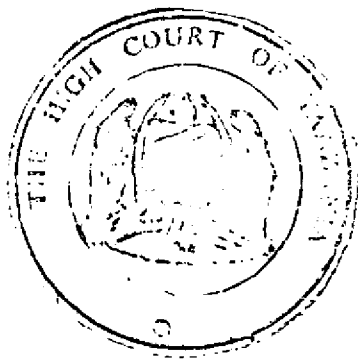
24. (1) Where a person who would, if he were living, have a right of action in respect of any proceeding, dies before the right of action accrues, the period of limitation shall be computed from the first anniversary of the date of the death of the deceased or from the date when the right to sue accrues to the estate of the deceased, whichever is the later date." [emphasis added]

This provision is relevant to the issue at hand because, as already discussed, the appellant's pleadings before the tribunal were to the effect that trespass, which is the cause of action in the present case, did not happen before or at the death of Felix January Massawe. It occurred in 2012, and for that case, the right of action accrued in the latter date as before this date, the appellant did not have a reason to institute a claim against the respondent as there was no one claiming adverse possession over the suit land. Reckoning from 2012 to 2021 when this case was filed in the trial tribunal, only 9 years had lapsed making the application filed within time.

In the foregoing, the appeal passes and is upheld. The dismissal order by the trial tribunal is quashed and set aside and it further ordered that case file be remitted back to the trial tribunal for the application to be determined on merits by another chairman.

It is so ordered.

DATED and **DELIVERED** at Moshi this 26th day of June 2023



A handwritten signature in black ink, appearing to read "J. L. MASABO", is written over a circular stamp.

J. L. MASABO

JUDGE