UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

LAND APPEAL NO. 36 OF 2023

(Originating from Land application No. 3 of 2022, District Land and Housing Tribunal Mororgoro)

ELIZABETH JEREMIA LORENZI ..... APPELLANT

VERSUS

EMILIAN APORONAL NOGOLE ..... RESPONDENT

JUDGEMENT

Date of last order: 13/06/2023

Date of Judgement: 11/08/2023

MALATA, J

Before the District Land and Housing Tribunal for Morogoro the respondent successfully sued the appellant herein in Land Application no. 3 of 2022.

The factual background leading to the application was that, in 2016 respondent filed the petition for divorce at Chamwino Primary Court whereas the divorce decree was issued. Thereafter the divorce, the court

ordered the division of the matrimonial properties of which the suit premises comprises of two houses with total of twelve rooms.

The applicant alleged that, the suit premises is not a matrimonial property rather it is the estate of the late Mkawa Aporonal Mgandi. Whereas the applicant and the respondent were only offered to live into the suit premises by the deceased Mkawa Aporonali Mgandi who was the elder brother of the applicant.

In 2020 it came to the applicant's knowledge that, one of the two houses found into the deceased estate was marked with no. 318 and upon inquiry to the respondent, she confirmed to have changed the same claiming that she got it from the order of the court on division of matrimonial properties. Following that finding, the applicant reported the incidence to the ward tribunal for chamwino, where the chairman summoned the applicant and the respondent.

On 9th March, 2021 the applicant filed letters of administration of the estate of late Mkawa Aporonali Mgandi before Mikongeni Primary Court, all the procedures for petitioning for letter of administration was followed and the applicant was appointed the administrator of the deceased's estate. The applicant being the administrator of the estate of the late

Mkawa Aporonali Mgandi filed land application no. 3 of 2022 before the DLHT.

After hearing the case, the DLHT declared the applicant as the administrator of estate to be the lawful owner of the disputed land located at Mapomwe, in Chamwino Ward, Morogoro Municipality, House no. 179 within Morogoro region. The respondent was ordered to vacate the premises and condemned to pay costs of the suit.

Aggrieved by that decision, the appellant appealed to this court with six grounds of appeal as stated hereunder;

1. That, the trial chairperson of the DLHT erred in law and fact by failure to consider the adverse possession of the disputed land.
2. That, the trial tribunal chairman of the DLHT erred in law and fact by failure to consider the time limitation of filing the suit of the deceased property.
3. That, the chairperson of the DLHT erred in law and fact by failing to make good evaluation of the evidence that was adduced during the hearing of the case.
4. That, the trial chairperson of the DLHT erred in law and fact by relying on the documents that were not related to the disputed land.

5. That, the trial chairperson of the DLHT erred in law and fact by failure to consider other decisions that adjudicated the disputed property.
6. That, the trial chairperson of the DLHT failed totally to adjudicate justice in this case.

Based on the aforementioned grounds of appeal the appellant prayed to this court to allow the appeal and set aside the decision of the DLHT and allow the appeal with costs.

The parties agreed to argue the appeal by way of written submission, both parties filed timely their respective submission according to the scheduling order.

Submitting in support of the first ground of appeal, the appellant stated that, the property in dispute was subject to matrimonial assets, but the respondent is trying to use the back door to seize her right and while she worked hard to ensure that the property stands and the tribunal did not consider this point and still make the decision in favour of respondent.

On the second ground of appeal the appellant faults the trial tribunal for failure to consider the adverse possession of the disputed land. on this ground the appellant bolstered his submission with the case of **Gesero Chacha Kengenwa vs. Sarah Chacha Obogo and others,** Land

Appeal no. 12 of 2021 (unreported), specifically page 17 and 18 of the judgement where the court stipulated different factors to be proved before someone claim over adverse possession.

On the fourth ground of appeal that, the trial Chairperson of the District Land and Housing Tribunal erred in law and fact by failure to consider time limitation to bring the suit of the purporting to belong to deceased. The respondent herein, tendered judgment of case number 6 of 2021, and respondent prayed to be appointed as administrator of the late Mkawa Apolinary Mgandi who died in 1960, the appellant cited the case of **Abel Rwegoshora. vs Raphael Mukaja (1970). HJC.D n. 100** and section 9(1) of the Law of Limitation Act, in Abel's case the court held that;

> *" a claim for possession of land is barred if brought after twelve (12) years from the date the claim arose..."*

The respondent herein claimed the property belongs to his late brother after lapse of sixty (60) years. Further, in the first schedule of the Law of Limitation Act part 1, and number 22 explain that;

> *"a suit in respect of claim to recover land should be filed within twelve years"*

The appellant stated that, the case at hand was filed in the court out of time, and its effect has been discussed in different cases such **Fredric Rwemanyira (Administrator of the estate of the late Wenceslaus Ndyamukama vs Joseph Rwegoshora,** Land case no 13 of 2021, High court of Tanzania of Bukoba (unreported).

The effect of the matter which is filed out of time is provided under section 3(1) of the Law of Limitation Act which is to dismiss the suit or any proceedings.

On the fifth ground of appeal the appellant stated that, the primary court ordered the disputed house to be divided equally to the appellant and respondent as it was part of the matrimonial property which was determined in Matrimonial case No. 2 of 2016 at Chamwino Primary Court.

The respondent was aggrieved with the decision of the primary court and filed appeal in District Court of Morogoro, the District court upheld the primary court decision and the respondent herein never appealed against such decision. Since, the respondent never appealed against the decision the district court, then the that decision continue to be valid to date. The house still belongs to the appellant and respondent as matrimonial house and not otherwise.

In the case of **Hamisi Mohamed (as the administrator of the Estate of the late Risasi Ngawe) vs Mtumwa Moshi (As the Administratix of the Estate of the late Moshi Abdallah)** Civil Appeal no 87 of 2020, Court of appeal of Tanzania at Dar-es- Salaam, in this case court stated that;

> *" while the matter had already been decided by the primary court in the decision which is intact, the appellant was in liberty to challenge that decision before the District Court."*

The appellant submitted that, the respondent failed to follow the proper procedure of challenging the District Court decision to the contrary decided to file fresh case by using another forum which is the District Land and Housing Tribunal and claimed the same property.

Finally, the appellant prayed to this honorable court to allow this appeal with cost and quash all judgment, proceeding and decree of the district land and housing tribunal for Morogoro.

Submitting on the sixth ground of appeal the appellant submitted that application must be read together in their totality including the exhibits thereto. At the hearing of the case the respondent tendered contract and receipts which does not reflect the place where the disputed land or house situated.

Another contradiction while preparing the judgment. At page 5 of the Tribunal judgment at the time PW1 (respondent herein) tendered the evidence explained that the disputed land was bought in 1950 and built a house but sales agreement of the disputed land annexure as exhibit shows the land was bought in 02/08/1959. It was the appellant submission that the respondent intentionally uses forgery document to get the property and she prayed this court to allow the appeal.

Based on the grounds of appeal and the submission the appellant prayed that this Honorable Court be pleased to allow this appeal and set aside the decision, proceeding and decree of the DLHT and declare the appellant the lawful owner of the disputed land.

In reply thereof, the respondent submitted that before the trial Tribunal the appellant stated that, she was not present when the disputed property was bought nor when a house was built.

Moreover, the respondent and the appellant never lived together in the disputed premise. This can raise doubt that she may not know the whereabout of her the alleged matrimonial property if it was truly bought by her ex-husband. The respondent and his witness testified that the disputed premise is the lawfully property of the late Mkawa Aporonal Mgandi and that all payments in land authorities and property tax the

receipt bear the name of the late Mkawa, this proves that the disputed premise was registered under the name of the late Mkawa and not the appellant nor the respondent herein in his personal capacity.

Submitting on the second ground the respondent stated that the doctrine of adverse possession does not apply in this scenario as the appellant was a mere invitee who refused to go back to her home village after being attracted to the disputed premise. The case of **Gesero Chacha** cannot be applicable in this instant appeal as the Appellant does not fit the stipulated conditions set out in this case. The disputed premise has never been abandoned, the Clan members decided not to sale it. He referred to the case of **Joseph Alphonce and another vs. Mariamu Masanja (the administratrix of estate of late Makula Masanja)** where it was held that;

> *"mere long use of the landed property does not entitle a person or trespasser to ownership of the landed property."*

The Appellant did not tender any exhibit in order to prove that, the disputed premise was subject to her matrimonial property. Section 62 of the Evidence Act, CAP 6 R.E 2022, oral evidence must in all cases be direct.

On the fourth ground the respondent stated that, the DLHT is not the court that appointed the respondent as administrator rather the primary court that was competent to grant the same. Moreover, the administrator ship was granted to him after he met all necessary requirement and qualifications.

However, the time limit for the dispute at hand is not barred as the dispute arose on 2016 and came to its epic on 2021 when the Appellant decided to divide the disputed property without a color of right.

On the fifth ground of appeal which states that, the DLHT erred in fact for its failure to consider other decisions. The Appellant's allegations that, the disputed premise is subject to the matrimonial property as it was divided in the case no 02 of 20216 at Chamwino Primary Court. The Appellant submission's that, the Respondent failed to choose a proper forum to challenge decision by the District Court is misconceived one. It should be noted that the Respondent wears the shoes of the late Mkawa Aporinali Mgandi who cannot defend his interests and rights due to his death.

The presence of matrimonial case which divided the disputed premise cannot stop the Respondent herein to protect and defend the interest of the late Mkawa.

The dispute at hand is a land dispute and not matrimonial dispute. It was the duty of the Appellant to prove before the DLHT that the disputed premise is surely subject to the matrimonial property. The Respondent herein provided ample evidence which support that the disputed premise to be subject to the estate of the late Mkawa Apolinal Mgandi. Therefore, the tribunal did what it was required to by the law, and it correctly declared the respondent owner because respondent managed to prove the claim in the balance of probabilities

On the sixth ground of appeal, it is with no doubt that the appellant did not correctly pass through the proceedings of the trial tribunal as it was clearly elaborated that the street name of the disputed premise has changed due to passing out of time. That was clearly addressed before the trial chairman and there was no any objection on the side of the appellant regarding the differences of the name of disputed premise.

The minor difference on the name of late Mkawa does not in any way give the appellant the ownership of the disputed premise. Finally, he prayed for dismissal of the dismissal of the appeal with costs.

Before determining the appeal, this court find prudent to air out the issues raised in course of arguing the appeal. ***One,*** that the land application no.3 of the DLHT for Morogoro was time barred by virtue of section 9 (1) of

the Law of Limitation Act, **two**, the landed property was subject to matrimonial properties in Matrimonial case No. 2 of 2016 at Chamwino Primary Court. Chamwino Primary Court declared the property in dispute to be a matrimonial property.

Dissatisfied thereof, the respondent appealed to the District Court of which the Primary Court decision was upheld. The Respondent did not appeal, thus the District Court decision sealed the position as there was no further appeal. Thus, whether the property is matrimonial property or not is no longer an issue as the position has been put by the District Court for Morogoro in matrimonial Appeal no. 3 of 2016

Three, that after decision by the District Court for Morogoro in Matrimonial Appeal No.3 of 2016 declaring the property in dispute to be matrimonial property the respondent applied for letter of administration of the estate of the late Mkawa Apolinali Mgandi who passed away in 1960. The appointment of the respondent gave power to administer the estate of the late Mkawa Apolinali Mgandi. The respondent subjected the house which was in in dispute in Matrimonial case No. 2 of 2016 at Chamwino Primary Court and appeal no..... as one of the properties of the late Mkawa Apolinali Mgandi.

Four, based on the facts on record then who is the owner of the property in dispute.

Further, it is on record and undisputed fact that, ***first***, the appellant and respondent were married and their marriage was nullified through matrimonial case no. 2 of 2016, ***second***, the appellant and respondent got married in 1959 and lived as husband and wife up to 2016 when the marriage was dissolved by Chamwino Primary Court, ***third***, that, the appellant and respondent lived as husband and wife for about 59 clear years, ***fifth***, that the court ordered the division of matrimonial properties, the house in dispute inclusive, ***sixth***, the respondent herein was aggrieved with division of the house in dispute thus appealed to the District Court for Morogoro via appeal no.3 of 2021, ***seventh***, the District Court for Morogoro confirmed the Chimwano Primary Court decision that, the house is dispute is matrimonial property and be divided accordingly, ***eighth***, the respondent did not appeal against the District Court for Morogoro, ***nineth***, the respondent applied for letter of administration of the estate of the late Mkawa Apolinali Mgandi who passed away in 1960, ***tenth***, that the respondent was appointed administrator of the estate of the late Mkawa Apolinari Mgandi in 2021 via Probate no.6 of 2021, ***eleventh***, that the respondent included the house in dispute to be one of property of the estate of the late Mkawa Apolinali Mgandi, ***twelveth***,

that the respondent filed application no. 3 of 2022 claiming that the house in dispute is one of the estate of the late Mkawa Apolinali Mgandi

Since there grounds of appeal which touches the jurisdiction of the tribunal as well as this court, I shall start to deal with it as it is capable of disposing this matter to the finality.

The first issue raised in this appeal is that, land application no.3 of 2022 was time barred.

It is trite law that, the cause of action touching the estate of the deceased commenced on the date of demise. The legal foundation of the above position is gathered from section 9(1), (2) and (3) of the Law of Limitation Act. The section provides that;

> *(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.***
>
> *(2) Where the person who institutes a suit to recover land, or some person through whom he claims, has been in possession*

of and has, while entitled to the land, been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

(3) Where a person institutes a suit to recover land, being an estate or interest in possession and assured otherwise than by will, to him, or to some person from whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

Certainly, the above provision needs to be read together with section 24 and 26 of the Law of Limitation Act.

Section 24 *(1) and (2) provides that;*

(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.

(2) Where a person against whom, if he were living, a right of action would have accrued, dies before the right accrues, the period of limitation shall be computed from the date when there is a legal representative of the deceased against whom such proceeding may be instituted or from the date when the right of action accrues against the estate of the deceased, whichever date last occurs.

***Section 25** (1) and (2) provides that;*

(1) Where a person dies after a right of action in respect of any proceeding accrues to him, the time during which an application for letters of administration or for probate have been prosecuted shall be excluded in computing the period of limitation for such proceeding.

(2) Where a person dies after a right of action in respect of any proceeding accrues against him, in computing the period

of limitation for such proceeding, there shall be excluded the period of time commencing

from the date of the death of the deceased and expiring on the date when there is a legal representative of the deceased against whom such proceeding may be instituted.

The appellant and the respondent are in agreement that, the deceased Mkawa Apolinali Mgandi passed away in 1960 and the land was in possession and occupied by these spouses, the Appellant and respondent before the death of Mkawa Apolinali Mgandi.

Further, these spouses-built house on land in dispute after the demise of Mkawa. However, while the respondent claim that the land belonged to the late brother one Mkawa Apolinali Mgandi who passed away in on 10th June, 1960, the appellant claim that the land belongs to the spouses as they bought and owned it since 1959 and developed it by building house which they used up to 2016 when their marriage was dissolved. The late Mkawa passed away without living neither child nor wife.

As per the record, upon the death of Mkawa Apolinali Mgandi in 1960, there was no clan meeting held to collect and ascertain the deceased's estate and none of the clan member ever claimed anything from whoever. No register of the deceased's properties. The property in dispute was under ownership of the appellant and respondent back 1959 and it has

been developed and continuously used for more than sixty-four (64) years undisputed.

Counting from 1960 when Mkawa Apolinali Mgandi passed away to a year 2022 when the respondent filed land application no.3 of 2022 claiming that, the land belongs to his late Mkawa Apolinali Mgandi, it is clear sixty-two (62) years passed without any claim of ownership by whoever. The problem came after issue of division of matrimonial landed property upon dissolution of marriage by the court between the respondent and appellant who together are very much aware of how jointly acquired, developed, used and owned the land in dispute for more than sixty-four (64) years.

Under the circumstances, one of the questions drew interest is whether land application no 3 of 2022 of the DLHT by the respondent filed after sixty-two (62) years claiming that the land belongs to late Mkawa Apolinali Mgandi who passed away on 10th June, 1960 is within time.

Reading the import of sections 9(1), 24 and 25 of the Law of Limitation Act cited herein above, it is clear that, whoever wants to wear the shoes of the deceased to raise claim for recovery land belonged to the deceased has to do so within twelve years from the date of demise of the deceased or the from the date when the right to sue accrues to the estate of the deceased, whichever is the later date.

In this case the time limit against any interested person acting on behalf of the deceased commenced on the date of death, as the appellant without any colour of right continued to develop, live, use, own and or trespass for more than sixty-two (62) years without any interruption from any person from the date of demise of the said owner the late Mkawa Apolinali Mgandi who passed away on 10th June, 1960.

What matters is that the interested person/heir who wants to wear the shoes of the deceased to recover land on that behalf has to do so within twelve years from the date of death not otherwise. The appellant and respondent have together occupied, developed, used and owned the property in dispute for more than sixty-two (62) years from the date of death of the deceased. This cannot be accepted either under our customary or Acts of Parliament. Where were they for the entire period of more than sixty two (62) years?

To allow the respondent's position to stand on will be like committing a murder against the surviving persons, the appellant inclusive. The law has by virtue of section 9, 24 and 25 of the Law of Limitation Act discouraged such uncalled and unbearable for behaviour of some of the people who tends to cause discomfort to others in a similar circumstance.

The respondent's act of filing suit in a year 2022 after lapse of sixty-two (62) years from the date of death, is with no iota of doubt that, land application no.3 of 2022 before the District Land and Housing Tribunal for Morogoro was hopelessly time barred by virtue of sections 9 (1), 24, and 25 of the Law of Limitation Act.

Above all, it is not in dispute that, the dispute on the ownership of landed property is a result of order of the court in Matrimonial case no 2 of 2016 to divide such the property which is a matrimonial property of the respondent and appellant. To deprive the right granted by the court the respondent through the back door lashed to Primary court applied for letter of administration and granted through probate no.6 of 2021 which also granted locus stand to file land application no.3 of 2022 in the DLHT, thence the present appeal. The case seems to have been filed out of grudges following dissolution of marriage and order to have matrimonial properties be divided the landed property in dispute inclusive.

Further, Item 22 of Part I to the schedule of the law of Limitation Act provides that ***"Suit to recover land the time limit is twelve years"***

It is a settled law in our land that, issues touching time limit of the matter goes to the very root of jurisdiction of the court to determine the

proceedings before it. Further, issues of jurisdiction have the effect of making the proceeding and judgement a nullity.

In **Sospeter Kahindi vs. Mbeshi Mashini**, Civil Appeal no. 56 of 2017 (unreported) where the court of appeal had these to say;

> *"At this point we would hasten to acknowledge the principle that the question of jurisdiction of a court of law is so fundamental and that it can be raised at any time including at an appellate level.* ***Any trial of a proceeding by a court lacking requisite jurisdiction to seize and try the matter will be adjudged a nullity on appeal or revision.*** *We would also stress that parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction."*

Also, I wish to borrow the wisdom from an Indian case of **Kiran Singh and others vs. Chaman Paswan and others**, 1954 AIR 340, 1955 CSR 117 where the Supreme court of India had this to say;

> *"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity,* ***and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage***

of execution and even in collateral proceedings. *A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."*

Finally, in the case of **Sospeter Kahindi vs. Mbeshi Mashini (supra)** and the case of **Richard Julius Rukambura Vs. Isaack Mwakajila** and Another Civil Appeal No. 3 of 2004, where the court of appeal held that;

"The question of jurisdiction is fundamental in court proceedings and can be raised at any stage, even at the appeal stage. The court, ***suo motu*** *can raise it and decide the case on the ground of jurisdiction without hearing the parties".*

With the above judicial precedents in mind, I am certain that, the DLHT entertained the matter without being clothed with jurisdiction as the suit was time barred.

The next question is what is the effect of the proceedings found to be time barred?

The answer is found in section 3 (1) and (2) of the Law of Limitation Act which provides that;

(1) Subject to the provisions of this Act, ***every proceeding*** *described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column,* ***shall be dismissed whether or not limitation has been set up as a defence.***

(2) For the purposes of this section a ***proceeding is instituted-***

(a) in the ***case of a suit, when the plaint is presented*** *to the court having jurisdiction to entertain the suit, or in the case of a suit before a primary court, when the complaint is made or such other action is taken as is prescribed by any written law for the commencement of a suit in a primary court;*

(b) in the case of an appeal, when the appeal is preferred either by filing a memorandum of appeal or in such other ***manner as may be prescribed by any written law;***

(c) in the case of an application, when the application is made.

In view of the above legal position, land application no.3 of 2022 before the DLHT was a nullity for being time barred and ought to have been dismissed. As such, the DLHT had no jurisdiction to entertain it.

Since, the present appeal emanates from a nullity proceeding of land application no.3 of 2022 before the DLHT equally this appeal is as well a nullity.

The second pertinent point of law which attracted more attention before dealing with the matter substantively is that, the house in dispute was declared a matrimonial property by Chamwino Primary Court in Matrimonial cause no.2 of 2016. That was done after grant of divorce petition between the parties herein. The respondent was aggrieved thereof and appealed to the District Court for Morogoro in matrimonial appeal no.3 of 2016 and upon hearing the appeal the court confirmed that, the landed property in dispute was a matrimonial property acquired through joint efforts by the parties herein during their marriage tenure with effect from 1959 to 2016 when it was dissolved after having lived together for more than 57 years.

The decision was not appealed against by the respondent, as such, the decision by the District Court conclusively determined the issue on whether the landed property was a matrimonial property or not.

To the contrary, instead of appealing, the respondent decided to apply for a letter of administration for appointment as administrator of estate of his late brother Mkawa Apolonali Mgandi who passed away on 1960. Upon

being granted letter of administration in 2021, the respondent started assignment as administrator and included the landed property in dispute which was confirmed by the District Court for Morogoro to be matrimonial property in matrimonial appeal no.3 of 2016 by preferred by the respondent herein.

The question is whether it was proper for the respondent to institute land application no.3 of 2022 in the DLHT in respect to the issue which has already been determined by the court of competent jurisdiction, the Chamwino Primary Court and confirmed by the District Court for Morogoro.

This court finds that, the respondent's act is uncalled for and is prohibited by the law. First, by virtue of section 9 of the Civil Procedure Code, Cap.33 R. E. 2019 which provided that;

> *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.*

Since, the parties in matrimonial case no. 2 of 2016 were the same, the property in dispute was the same and the dispute was conclusively determined by the court with competent jurisdiction, then land application no. 3 of 2022 of the DLHT was res judicata against matrimonial case no. 2 of 2016 under the above cited provision of the law.

Guided by the position in the case of **Hamisi Mohamed (as the administrator of the Estate of the late Risasi Ngawe) vs Mtumwa Moshi (As the Administratix of the Estate of the late Moshi Abdallah**) Civil Appeal no 87 of 2020, Court of appeal of Tanzania at Dar-es- Salaam, where the court stated that;

> *"While the matter had already been decided by the primary court in the decision which is intact, the appellant was in liberty to challenge that decision before the District Court."*

In the case **of Mzee Omari Mzee vs. Mwanamvua Rashid Kilindi,** Civil Appeal no. 301 of 2021 the court of appeal of Zanzibar observed that division of matrimonial assets should be dealt by the court having jurisdiction on matrimonial causes.

The respondent's remedy in the circumstances was to appeal against the decision by the District Court for Morogoro and not to initiate a new proceeding.

Worse still, there was no heir of the estate of the late Mkawa Apolinali Mgandi who at point in time claimed for ownership of the said house or part of the landed property for the entire of sixty-two (62) years from demise of the late Mkawa.

Based on the conduct by the respondent, including the act of shifting a goal post and forum shopping by filing probate no.6 of 2021 and later land application no.3 of 2022 to fight for similar rights which has already determined by court of the competent jurisdiction, the respondent being emerged the loser in the battle, in my view, that act was married with evil spirit against the appellant. The respondent seems to have taken oath that at all cost, he must win the battle. Against all, the second step was time barred as resolved in issue No.1 herein above.

Following the decision in Matrimonial appeal no.3 of 2016 by the District Court for Morogoro which confirmed the decision by the Primary Court of Chamwino, whoever dissatisfied thereof ought to have appealed against and not otherwise. The respondent who emerged the loser did not appeal. The respondent missed the boat as he did not correctly pursue for what he was required by the law. As such, the decision by the District Court for Morogoro in Matrimonial Appeal No. 3 of 2016 still stand. Here we have the respondent fighting for himself and at the same time fighting for the

deceased's estate for his benefit as there is no heir. The deceased left neither wife nor child.

The court of appeal had once faced with the same situation in the case of **Hamisi Mohamedi Mtumwa (as the administrator of the Estate of late RISASI NGAWE) vs. Mtumwa Moshi (as the administratrix of estate of late MOSHI ABDALLAH) (supra)** where the land subject of the dispute was granted to the party through probate cause and later the other party filed the land suit and the court of appeal had the following to say;

> *"We are of the firm view that, although the District Court and the High Court advised the appellant to file a civil suit to claim the suit property,* ***the decision of the Primary Court was still intact having not been reversed by any higher court."***

Based on the position by the Court of appeal in the afore cited case, it is with no iota of doubt that, the DLHT had no jurisdiction to register and entertain land application No. 3 of 2022.

By way of obiter dictum and notwithstanding the above position, this court decided to look into the merit of the appeal in which its really dispute is on ownership of the landed property.

Ownership of land can be proved through various means, these are, ***one***, allocation by Government authority, ***two***, inheritance, ***three***, purchase, ***four***, adverse possession, ***five***, clearing of unoccupied bush, ***six***, gift, and ***seven***, allocation from matrimonial properties.

In land application no. 3 of 2022 of the DLHT, the applicant (the respondent herein) was required to prove strictly; ***one***, that the suit premises belonged to the late Mkawa Apolinali Mgandi, ***two***, how the land fall into the hands of the respondent and appellant, ***three***, if the land belonged to the late Mkawa then under which terms was it given to the appellant and respondent, ***four***, who developed it and under which terms if the land belonged to the late Mkawa.

The evidence on record shows that; ***first***, the appellant and respondent were married and lived together from 1959 to 2016 when their marriage was dissolved via Matrimonial cause no.2 of 2016, ***second***, that the appellant and respondent developed the land by building house in dispute, used, owned and lived therein throughout their marriage, ***third***, that the dispute arose after divorce in 2016 in particular on division of matrimonial properties whereby the respondent claimed that, the land in dispute belonged to his brother the late Mkawa Apolinali Mgandi and that the land was allocated to the respondent immediately after marriage on condition

that, they continue to use it but it shall remain the property of his late brother Mkawa, ***four***, that the appellant who participated in the development of the same has never been told the same at any point in time but only after divorce.

To start with, it is trite law that, whoever desires any court to give judgement as to any legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exist. This is echoed by sections 110, 112, 115 of the Law of Evidence Act, Cap 6, RE 2022.

Section 110 provides that;

> *(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which* ***he asserts must prove that those facts exist.***
>
> *(2) When a person is bound to prove the existence of any fact, it is said that* ***the burden of proof lies on that person."***

Section 112 provides that;

> ***"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence,*** *unless it is provided by law that the proof of that fact shall lie on any other person."*

Section 115 provides that;

"In civil proceedings when any fact is especially within the knowledge of any person, ***the burden of proving that fact is upon him."***

Courts have, given special consideration to some of the civil suits and placed them under strict proof by whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts. In such special cases, the proof has been settled to be strict. A good example is on civil cases for claim of special damages. Reference is made to the case of **Bamprass Star Service Station Limited vs. Mrs Fatuma Mwale, [2000] T. L. R 390** where Mr. Justice Rutakangwa as then was had these to say;

"It is trite law that special damages being "exceptional in their character" and which may consist of "off-pocket expenses and loss of earnings incurred down to the date of trial" ***must not only be claimed specifically but also "strictly proved".***

Further in the case of **British Transport Commission v. Courley** [1956] AC 185 at 206 where it was held:

"In an action for personal injuries the damages are always divided into two main parts. First, there is what is

referred to as ***special damages, which has to be specifically pleaded and proved. This consists of out-of-pocket expenses*** *and loss of* ***earnings incurred down to the date of the trial and is generally capable of substantially exact calculation****. Secondly there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such that as to lead continuing or permanent disability, compensation for loss of earning power in the future."*

This court has in a number of authorities principled that, proof of ownership of land must be strict. The rationale behind is rooted from the land being sensitivity asset for every creature in this world and mushrooming conflicts on land which has gone to the extent of causing bereavements. In the case of **Ramadhani Rashidi Kuhuka vs. Jela Maiko Meja And 44 Others, Land Case No.25/2022** this court had this to say;

"The property involved being land which is peculiar and sensitive one, its ownership must be proved strictly. In other

words, there must be sufficient evidence to prove ownership strictly."

Placing standard of proof of ownership of land on balance of probability like any other civil suits, regardless of its sensitivity, ongoing conflicts and frauds will be reducing efforts to carb such problems on land matters.

In the present appeal, the respondent who was the applicant in land application no.3 of 2022 of the DLHT did not produce any document proving that; ***one***, the land in dispute belonged to the late Mkawa Apolinali Mgandi, ***two***, that the land was allocation to the respondent by Mkawa Apolinali Mgandi, ***three***, no proof of the terms accompanying allocation of the said land to the appellant and respondent including that, it was given with conditions that they develop, live for the entire and return back to the late Mkawa Apolinari who passed away in 1960, ***four***, there is no proof as to when the respondent and appellant were given such land and ***five***, there is no proof if at all the land was developed by the late Mkawa Apolinali Mgandi

At the trial tribunal the respondent testified that clan members agreed the land to be clan land and be used by all the clan members. However, there was no any evidence to prove this fact.

At the DLHT, the prayer was that, the respondent be declared the lawful owner of the land by virtue of being the administrator of the estate of his late brother Mkawa Apolinali Mgandi.

As per evidence on record, it is undisputed fact that, the appellant and respondent were husband and wife until the dissolution of their marriage in 2016, further they used to live in the suit premises for more that sixty-two (62) years.

The dispute lies as to whether the suit premises is the matrimonial property?

In my view, "matrimonial properties" can be defined to mean;

> *"a total number of assets and liabilities conjointly acquired and created by spouses during existence of marriage with view of securing matrimonial properties, including any activity done by either spouse directly or indirect in contribution thereto, but in exclusion of all assets and liabilities acquired or created before the date of union as spouses, unless there is an agreement that, such properties and liabilities shall be part thereto."*

From the evidence of the trial tribunal, throughout their marriage life it didn't came to the appellant knowledge that, the disputed land belonged to another person other than the respondent and appellant. As such, the

appellant conjointly participated towards acquisition and development of land, thence the house in dispute. The respondent did not refute that fact that they acquired, developed, lived and owned the landed property with the appellant. This confirms that, the appellant has stake on it.

The trial tribunal decided in favour of the respondent based on the evidence adduced before it, the question is whether the evidence before the trial tribunal proved ownership of the land.

Apart from oral evidence relied by the respondent he tendered evidence to prove that the land belonged to his late brother Mkawa. At the trial tribunal, the respondent tendered receipts of payments which read kodi ya jengo for the year 2003, 2004,2005, 2006, 2007, 2008, 20009, 2010,2011,2012 and 2014 and the property tax demand note of the year 2011 which were marked collectively as **exhibit P6**, also there was exhibit P1 collectively contained property rate demand note for the year 2016/2017, property rate demand note for the year 2018/ 2019 and CRDB receipts. All those exhibits bear the name Mkawa Aporonal and Aporonal Mkawa. However, all of them reflect different plots, as plot no. 1366/CH and plot no. 178/CH whereas the house in dispute is at plot No. 179.

Ownership of land cannot be proved by property tax receipts referred to Exhibit P6 and Exhibit 1. Further, the said exhibit made reference to as plot no. 1366/CH and plot no. 178/CH and not Plot 179.

There are things, there is no direct evidence suggesting that the receipt reflect the land in dispute or have any connection with the land in dispute. That being the case there is no cogent reason to support the claim by the respondent that the land in dispute belonged to the late Mkawa Aporonal Mgandi.

Additionally, the clan meeting held in 2021 was conducted in exclusion of the appellant who had worn two cases against the respondent in respect of the same property. The clan meeting had the effect of overturning the decision of matrimonial cause no. 2 of 2016 and Matrimonial appeal no.3 of 2016 thus such evidence of the meeting was illegal and ought not to have been acted upon by the DLHT.

In the case **of Mzee Omari Mzee vs. Mwanamvua Rashid Kilindi,** Civil Appeal no. 301 od 2021 the court of appeal of Zanzibar observed that division of matrimonial assets should be dealt by the court having jurisdiction on matrimonial causes

Regarding ground five and based on the above legal principle, this court reiterate that, since the Primary Court and District Court had already dealt

with the matter, conclusively in Matrimonial case no2 of 2016 and its appeal no.3 of 2016, then there was no door for the DLHT to deal with it. The decision by DLHT works as reversal decision of the decision by the Primary Court and District Court decided in matrimonial cases of which they are vest with. DLHT chairman acted without due adherence of rules of the game in trying in cases which he had knowledge that it was dealt by other court in other way. This is uncalled for.

It is evident that, the house which was given to the appellant has been the subject before the Primary court and District Court and DLHT and this court as well. However, the order distributing the house to the appellant has not been reversed in any way by the court of competent jurisdiction discharging matrimonial proceedings. The order which confirmed distributing of house to the appellant is final and conclusive and conferred ownership of the said house to the appellant.

Having said all, I am therefore holding that, ***one***, land application no.3 of 2022 was time barred thus contravening section 9(1), 24 and 25 of the Law of Limitations Act, Cap 89 R.E.2019 and that DLHT lacked jurisdiction to adjudicate it and ***two***, the District Land and Housing Tribunal had no jurisdiction to register and entertain the dispute which had already been determined by the court of competent jurisdiction via matrimonial cause

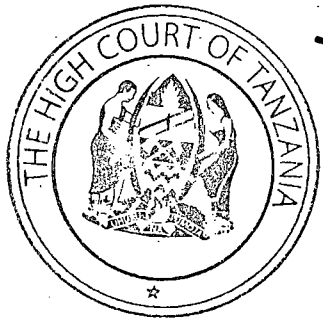
no.2 of 2016 and matrimonial appeal no.3 of 2016 both of which confirmed distribution of the house in dispute to the appellant. These two points of law disposed the appeal before me. The rest was just *an obiter dictum*

In the result, I hereby allow the appeal on the afore stated reasons, reverse the decision of the District Land and Housing Tribunal for Morogoro in land application No. 3 of 2022.

The respondent is condemned to pay costs of the appeal.

IT IS SO ORDERED.

DATED at **MOROGORO** this 11th August, 2023.

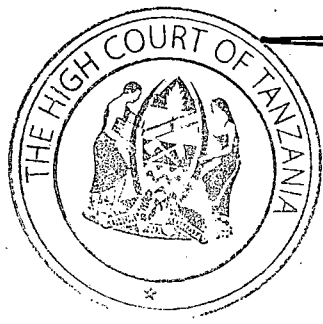


G. P. MALATA

JUDGE

11/08/2023

JUDGEMENT delivered at **MOROGORO** in chambers this 11th August, 2023.



G. P. MALATA

JUDGE

11/08/2023