

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

LAND CASE NO. 3 OF 2022

PASKAZIA JOHN.....1ST PLAINTIFF
KENNEDY MUGARULE *(The Administrator of the estate of the late*
Sebastian Babiligi Kaizilwa)**2ND PLAINTIFF**

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT
BUKOKA MUNICIPAL COUNCIL.....2ND RESPONDENT
DIANA E. BUBERWA.....3RD RESPONDENT
GODELIVA PETER MULIMA.....4TH RESPONDENT
JUSTINIAN RWEYEMAMU.....5TH RESPONDENT
STELLA MUTOKA.....6TH RESPONDENT

RULING

Date of last order: 22.08.2023
Date of Ruling: 25.08.2023
A.Y. Mwenda, J.

On the 4th of November, 2022, this Court delivered a ruling and sustained the Preliminary objection which was raised by the then 3rd defendant's advocate. In the said preliminary objection, the learned Counsel for the then 3rd defendant claimed that the suit against his client was time barred. Having sustained the said point of objection, this Court dismissed the suit against the 3rd defendant and

ordered the learned counsel for the Plaintiff to amend the pleading to accommodate the subsequent changes.

The learned Counsel for the Plaintiff partly complied to the said order by filing an amended plaint but did not honour an order which required him to, between the two plaintiffs, select, the one with locus standi to sue. After being served with the amended plaint, the Learned State Attorneys for the 1st and 2nd defendants filled a reply accompanied with a Notice of one preliminary point of objection while for the 3rd and 4th defendant, Mr. J.S Rweyemamu also replied and issued a notice with two preliminary points of objection. For ease of reference, the points of objection raised by the learned State Attorneys is referred/itemised hereunder as the 1st point whilst the ones filed by Mr. J.S Rweyemamu are itemised as the 2nd and 3rd points of objection as follows:

1. That this suit is time barred contrary to Item 22 of the 3rd schedule made under section 3 of the Law of limitation Act, Cap 89, against the surveyed of the disputed land. (Sic)
2. This suit is time barred contrary to Item 22 of the 3rd schedule made under section 3 of the Law of limitation Act, Cap 89 Revised Edition 2019 against the physical occupation and the use of the parcel of land No. 120 Block "A" at Nyangoye area Bukoba

Municipality from one ENZO SESOLO in 2004 and the same was registered in the name of PETER MULIMA.

3. That the plaintiffs have no cause of action against the 4th Defendants the 4th Defendant obtained plot 284 Block "AA" separately in 1992 as per certificate of Title No. 8826. This case was instituted on 15th March 2022 when the 4th Defendant had occupied the plot for more than 30 years.

After the completion of exchange of necessary papers by the parties, this Court fixed a date for hearing of the said preliminary points of objection.

During the hearing, Mr. Eliphaz Bengesi appeared for the plaintiff. On the other hand, Mr. Nestory Lutambi and Athuman Msosole, learned State Attorneys appeared for the 1st and 2nd Defendants while Mr. J.S Rweyemamu appeared for the 3rd and 4th defendants and in the end, Mr. Alli Chamani, learned Counsel appeared for the 5th Defendant.

Before the parties could start submitting, the Court, Suo motu directed the parties during their submission to also submit regarding failure by the learned Counsel for the Applicant to comply with the order which required him prepare an amended plaint which accommodate the proper plaintiff.

In his submission, Mr.J.S Rweyemamu submitted that the 3rd Defendant owns Plot No. 120 Block "A" at Nyangoye area-Bukoba Municipality since the year 2004 when he acquired Certificate of Title No. 11621 LO.130363 issued in 1995.He said the said title was issued in the name ENZO SESOZO which was later sold and transferred to Peter Mulima on 16.04.2004.The learned Counsel further submitted that after the demise of Peter Mulima the said property was transferred to the administrator of the estate of Godliver Peter Mulima (the 3rd Defendant) who also transferred it to her son one David Rwegoshora Peter on 02.07.2013. According to him this history is covered in the certificate of title which is annexed to the 3rd and 4th Defendants Written Statement of Defence. He stressed further that the land in question has been in the hands of the 3rd defendant since 2004 and added that since this case was filed in 2019 when the plaintiffs instituted the suit before the District Land and Housing Tribunal which was thrown overboard with an order of instituting a fresh suit before this Court. He said that by counting from when the suit was filed in 2019, it is almost fifteen (15) years and on that basis 12 years as time limit set by the law had already passed. In support to this point the learned Counsel cited item 22 part 1 of the 1st schedule to the Law of Limitation Act [Cap 89 R.E. 2019]. Regarding consequences, the learned Counsel submitted that under Section 3 (1) of the Law of Limitation Act [CAP 89 R.E.2019] provide dismissal as the only available remedy.

Regarding the 3rd point of objection covering the 4th Defendant, Mr. Rweyemamu submitted that from 28.12.1994 when the certificate of title on Plot No. 284 Block "AA" Hamgembe Area -Bukoba Municipality District under L.O 130144 was issued, it is about 25 years and, on that basis, he said, the suit against the 4th defendant is time barred.

Regarding the issue raised by the Court Suo Motu following failure by the Learned Counsel for the plaintiff to comply with the Court's order requiring filing amended plaint by the proper plaintiff, Mr.J.S Rweyemamu said that the said order was not an empty order which can be escaped without explanation this is a disobedient of the lawful order. In conclusion, Mr.J.S Rweyemamu prayed the suit against the 3rd and 4th Defendants to be dismissed.

On his part, Mr. Nestory Lutambi, learned State Attorney, submitted that the suit against all the defendants is time barred. While supporting the submission by Mr. J.S Rweyemamu, he said that under item 22 of the schedule to the Law of limitation Act [CAP 89 RE 2019], claims as the present one is to be filed within 12 years accrual of cause of action. According to him, under paragraph 11 of the plaintiffs' plaint, the area was survey and allocated to the various persons including the defendants in the year 1992 when they started lodging complaints before the Municipal authority. The learned State Attorney stressed that by filing the suit in 2022 from the time of accrual of cause of action, almost thirty years have passed.

He went to submit further that by virtue of section 5 of the Law of Limitation Act [CAP 89 RE 2019], time starts to run when the cause of action arises. He added that by virtue of section 9 (2) of the Law of Limitation Act [CAP 89 RE 2019], the right to sue arises when a person is disposed of his land. Further to that he said that from the pleadings, the plaintiffs became aware since 1992 when they started writing letters claiming for compensation. While citing the case of FORTUNATUS LWANTANTIKA MASHA AND 1 ANOTHER V. CLAVER MOTORS LIMITED, CIVIL APPEAL NO. 144 OF 2019, CAT (Unreported) the learned state attorney prayed this suit to be dismissed.

Regarding the issue raised by the court Suo Motu on failure to comply the order directing the filing of the amended plaint accommodating the proper plaintiff, Mr. Athumani Msosole, learned State Attorney submitted that the contents of paragraph 11 of the plaint shows the 1st plaintiff as the person with locus stand to sue is. He was of such observation based on the fact that the 1st plaintiff acquired the land from her late father before his demise. On that basis he prayed this suit to be dismissed for failure to comply with the court order.

On his part, Mr. Ali Chamani, learned Counsel for the 5th Defendant challenged the plaintiffs' 3rd relief praying the defendants to be declared as trespasses per excellence. According to him, trespass is a tort which ought to be filed within three

(3) years. In support to this point he cited item 6 'part 1 of the law of limitation Act.

Regarding failure by the Plaintiff to comply with the Court's order. Mr. Chamani submitted that the same amount to disobedience of the lawful order warranting dismissal of the present suit. To wind up, he joined hands to the submissions by the learned counsels for the 1st, 2nd, 3rd and 4th Defendant and prayed this suit to be dismissed.

In his response to the submissions by the learned Counsels for the defendants, Mr. Eliphaz Benges commenced with the issue which was raised by the Court *Suo Motu* regarding the plaintiffs' locus standi to sue. In his submission he said that both plaintiffs have locus standi to sue because the 2nd plaintiff allocated the land to the 1st plaintiff as a result, the 2nd respondent appears as a necessary party. In support to this point, he cited the case of JUMA KADARA V. LAURENT MUKANDE [1983] TLR 103. According to him, non-joinder of the 2nd plaintiff would be fatal in the proceedings.

Regarding the preliminary objections raised by the 1st to 4th defendants, the learned Counsel submitted that the said objections do not qualify to be referred to as preliminary points of objection. While relying on the decisions in the case of MUKISA BISCUITS MANUFACTURERS V. WEST END DISTRIBUTERS [1969] 1 EA.696 he asserted that what is raised by the learned Counsels for the 1st to 4th

defendants require evidence to prove. Further to that, he submitted that time limitation is a point of law-but it cannot apply when the title have not passed. He was of the view that since the plaintiffs were not compensated before surveying the land then the title did not pass to the defendants. To buttress this point, he cited the case of VICTOR ROBERT MKWAVI V. JUMA OMARY, CIVIL APPEAL NO. 222 OF 2019 and JAMES IBAMBAS V. FRANCIS SARIA MUSHI [1999] TLR 364. He said that even if time limitation could apply, the same started to run when the plaintiffs became aware and in this matter, his clients became aware in the year 2017. Having so submitted, the learned counsel prayed the preliminary points to be overruled.

In rejoinder, Mr.J. S Rweyemamu submitted that the role of an administrator exists when the estate is not distributed but that position ceases at the moment the properties are distributed to the heirs.

On time limitation Mr.J. S Rweyemamu rejoindered that time limitation is a point of law supported by the facts in the pleadings. He said that the submission by the learned Counsel for the plaintiffs focused on substantive matters instead of addressing the issue on the table which is time limitation. Further to that, the learned Counsel rejoindered that the plaintiff became aware since 1992 when the land was surveyed and allocated to various persons including the 3rd to 5th

Defendants. In conclusion he reiterated to his prayers which he made during submission in chief that this suit be dismissed.

On his part, Mr. Nestory Lutambi, Learned State Attorney rejoined that parties are bound by their pleadings. He said that paragraph 12 of the plaint supports the position made in the case of MUKISA BISCUITS since the plaintiffs became aware that the land was surveyed and allocated to others since 1992. Further to that, he submitted that time limitation has always been a point of law and added in that the argument by the learned counsel for the Plaintiffs that time limitation cannot be raised as the title did not pass is a misconception on his part. He stressed that compensation before survey of the land to the original owners is a good law, but it is not applicable in the circumstances at hand. He then concluded his submission by reiterating to his previous prayer he made during submission in chief that this suit should be dismissed.

On behalf of the 5th defendant, Mr. Ali Chamani, learned counsel rejoined that the learned Counsel for the plaintiff has failed to respond to his submission that the 3rd relief is covered under tort whose time limitation is three years. According to him, such failure entail admission by the learned counsel for the plaintiffs.

That being the summarized submissions for and against the raised points of objection, the Court is enjoined to determine as to whether the points raised by the counsels for the defendants are pure points of law and if so, whether the

present suit is time barred. It is important to do so because the issue of time limitation touches the jurisdiction of the Court.

In the landmark Case of MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD [1969]1 EA 696 (CAN) it was held inter alia that:

"So far as I am aware, preliminary objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..."

That position has been discussed in many authorities without number. For example in the case of MOTO MATIKO MABANGA V. OPHIR ENERGY PLC & 6 OTHERS, CIVIL APPEAL NO. 119 OF 2021, CAT (Unreported), the Court, while citing the case of SWILLA SECONDARY SCHOOL V. JAPHET PETRO, CIVIL APPEAL NO. 362 OF 2019(Unreported) held inter alia that:

"The law is settled that the issue of jurisdiction for any court is basic as it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. Courts or tribunals are enjoined not to entertain any matter which is time barred and in any event they

did so, the court unsparingly declare the proceedings and the consequential orders a nullity."

Based on the above authorities, it goes without saying that an objection on account of the time limitation is among the preliminary objections that the Court have held to be based on a pure point of law that touches on the jurisdiction of the Court whose determination does not require ascertainment of facts or evidence. In the case of the case of *MOTO MATIKO MABANGA V. OPHIR ENERGY PLC & 6 OTHERS*, (supra) the court, while citing the case of *ALI SHABAN AND 48 OTHERS* (Supra) held further that:

"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of other evidence."

From the foregoing authorities, this Court is of the view that the points raised by the learned counsels for the defendants are pure points of law thus the submissions by Mr. Bengesi that the same are points of fact is unfounded.

Regarding the second issue as to whether the present suit is time barred, the law is clear that time limitation for suits to recover land is 12 years. This is by virtue of Item 22 of part I to the schedule of the Law of limitation Act, [Cap 89 R.E 2019]. The take away from the above provision is that once someone's land is occupied without permission, the cause of action accrues the moment the plaintiff becomes aware and the right to claim it back subsists within 12 years' time frame. In other words, the right to recover land ceases if the respondents have occupied the same without interruption for more than 12 years. This position was also stated in the case of BHOKE KITANG'ITA V. MAKURU MAHEMBA, CIVIL APPEAL NO. 222 OF 2017, CAT (unreported) where it was held that:

"It is settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession."

In this matter, a scrutiny of the record revealed that the 3rd to 4th defendants occupied the land in question for more than 12 years. This is by virtue of certificates of titles appended to their respective amended written statement of defence where the 3rd defendant acquired Plot No. 120 Block "A" at NYANGOYE AREA-BUKOBA TOWNSHIP since 06.07.1995; the 4th Defendant was allocated Plot No. 284, block

"AA" HANGEMBE AREA -BUKOBIA MUNICIPALITY since 28.12.1994 and the 5th defendant's plot was acquired since 1995.

The records are also clear that the plaintiffs were aware of such allocation since then. At paragraphs 11 and 12 in the amended plaint it is revealed that the late Sebastian kaizilwa (the 1st plaintiff's father) knew about the survey and allocation of the land in dispute to others in the year 1992. Having so discovered he complained against compensations on the said plots. On that basis, by virtue of S. 9 (2) of the Law Limitation Act, [Cap. 89 RE.2019], time started to run in 1992. For ease of reference the said section is hereby reproduced as follows, that:

"Where the person who institute a suit to recover land, or some person through whom he claimed has been in possession and has, while entitled to the land, been disposed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance".

On his part, Mr. Bengesi was of the view that since the plaintiffs were not compensated before surveying the land in question then the said principle regarding time limitation for recovery of land cannot apply since the title had not passed. With much respect to the learned counsel, his argument is erroneous because as it was stated in the case of BHOKE KITANG'ITA V. MAKURU

MAHEMBA(supra) this principle also applies to any person who occupy someone's land without permission like in a manner raised by the plaintiffs.


That being said, this court is of the view that the suit against the defendants is time barred and the consequences that follows is to dismiss it.

Another issue for consideration is failure by the plaintiffs to comply with this Court's order dated 04.11.2023. In that order, the Court having noted that, in the circumstances where the plaintiffs allege the land in dispute was allocated to the 1st plaintiff before her father's death, then the 2nd plaintiff who stands as the administrator of the estate of the 1st Plaintiff's father has no role to play since his duty to do administer the deceased's estate ceased to exist. Instead of complying to the said order, the amended plaint was refiled with no changes. When probed in court as to why there was such failure to comply to the said order, Mr. Bengesi alleged both plaintiffs are important in that the 2nd stood as the necessary party. I have assessed the learned counsel argument only to note that what the plaintiffs did was disobedience to the lawful order.

Since the 1st, 2nd and 3rd preliminary objection are capable of disposing this matter, I found no need to deal with the point of objection which was raised by Mr. Ali Chamani regarding the plaintiff's 3rd relief which fall under the law of tort, whose time limit according to Mr. Chamani is 3 years.

That being the case, I find merits in the Preliminary points of Objection, and they are hereby sustained. This suit is hereby dismissed, and the plaintiffs shall pay costs.

It is so ordered.



A.Y. Mwenda
Judge

25.08.2023

Ruling delivered in chamber under the seal of this court in the absence of the Plaintiffs and in the presence of Mr. Buntuntu Learned State Attorney for the 1st and 2nd Defendants and Mr. Scarious Bukagile learned counsel holding brief for Mr.J.S.Rweyemamu learned counsel for the 3rd and 4th Defendants and absence of the 5th Defendant with notice.



A.Y. Mwenda
Judge
25.08.2023