

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 67 OF 2022

*(C/F Application No. 24 of 2021 District Land and Housing Tribunal for
Mwanga at Mwanga)*

ISMAEL ISSA LIANA (As Administrator of the

Estate of the late ISSA LIANA GHUHIA) APPELLANT

VERSUS

**BARAKA SELEMAN NANKUKU
SALIMU ALEX MGAMBA**

}

..... RESPONDENTS

JUDGEMENT

Date of Last Order: 10.08.2023

Date of Judgment: 05.09.2023

MONGELLA, J.

The appellant herein filed Application No. 24 of 2021 before the District Land and Housing Tribunal for Mwanga at Mwanga against the respondents for an acre of land situated at Hai District Council, at Kighare Ward within Kilaweni Village at Mombasa Store Cell area, valued at T.shs. 9,000,000/-. While replying to the application, the respondents filed four points of preliminary objection, to wit;

- 1. That, the application is incompetent for non-joinder of necessary party who will be affected by the decision.*

2. *That, the honourable tribunal has no territory jurisdiction over the matter since the suit land is located at Hai district.*
3. *That, the applicant has no locus stand to prosecute the matter.*
4. *That, the suit is time barred.*

The trial Chairman entertained only the fourth point of preliminary objection, which was on time limitation. After hearing the parties' submissions on that point of preliminary objection, he dismissed the application for being time barred. Aggrieved, the appellant has preferred this appeal on one ground being:

That the learned chairperson erred in law and fact by striking out the application on ground that the application is time barred.

The application was argued by written submissions. The applicant was represented by Mr. Mhendeni Wilson Msaki and the respondents were represented by Mr. Goodluck Joel Waziri, both learned advocates.

Mr. Msaki, while submitting in chief, averred that the matter was on a tenancy agreement whereby in 2021, upon arriving from his travels, the appellant found the respondents occupying his house and using some rooms therein. He tried to communicate with them to know the legality of their occupation, but they refused to cooperate. He contended that the suit land was not owned by the respondents before the demise of the late Issa Liana Ghuhia (whom the respondent administers the estate of), but they were mere invitees.

In that respect, he faulted the trial Chairman for failure to consider the relationship of the parties to the suit and that they had a duty to disclose how they became tenants in the said suit property. Explaining what amounts to being time barred, he made reference to the case of **FRANK EDWARD (Administrator of the Estate of the Late Asha Swalehe) vs. HAWA SWALEHE MKAMBA** (Land Appeal No. 07 of 2021) [2021] TZHC 6911 TANZLII. He argued that in the said case, four issues were resolved in determining whether the case was time barred; **one**, that the suit property did not belong to the respondent at the demise of the late Asha Swalehe; **two**, that the permission to occupy and use the land had no time limit, but had a condition that the same should be handled over to the heirs when they demand it; **three**, that the respondent had all along occupied and used the suit land at the expense of the lawful beneficiaries of the late Asha Swalehe, the appellant inclusive. **Four**, that it was clear that the respondents were authorized to enter, occupy, and use the land, thus it was erroneous for the Tribunal to rule that time started to run against the appellant. That, time limitation does not work in circumstances of host -invitee relationship whereby the decision settled in the case of **LAURENT BARNABA MBUKI vs. EVELIN GIDEON JOHN** (Land Appeal No. 18 of 2020) [2020] TZHC 3725 TANZLII was referred.

Mr. Msaki argued that in the above cited cases, the issues considered by the court were: (i) *whether the respondent was an invitee*; (ii) *whether the respondent was sued by the beneficiaries of the estate of the late Asha Swalehe*; (iii) *at what time in point, time will start to run against the appellant to institute the dispute against the respondent*; and (iv) *whether the principle of adverse possession apply to an invitee*. He considered these issues being similar to the ones in the case at hand whereby the same require evidence. In that respect, he was of the view

that the issues required evidence to be resolved, hence rendering the objections not qualifying as such. He supported his stance with the case of **MWANANCHI INSURANCE COMPANY vs. THE COMMISSIONER FOR INSURANCE** Misc. Commercial Cause No. 2 of 2016 (unreported), in which the case of **SOITSAMBU VILLAGE COUNCIL vs. TANZANIA BREWERIES LTD. AND ANOTHER**, Civil Appeal No. 105 of 2011 (CAT, unreported) was cited with approval. He further cited the case of **TANDAHIMBA NEWALA COOPERATIVE UNION (TANECU) LTD vs. CHIKUNDI HOLDING (T) LTD** (Civil Case No. 8 of 2019) [2022] TZHC 10452 TANZLII.

In consideration of the holdings in the above decisions, Mr. Msaki challenged the trial Chairman for holding that the dispute was time barred basing on averments under paragraph 6 (a) of the Application. He considered that erroneous and the act of dismissing the application at that stage amounting to denying the appellant the right to be heard, which vitiates the proceedings of the trial Tribunal. He insisted that the dispute is on tenancy as the respondents were mere invitees to the suit land owned by appellant's deceased father one Issa Liana Ghuhia.

Arguing further, he averred that the cause of action accrues when the dispute arises and time ought to be computed from the day the cause of action and right of action accrues. In support of his argument, he referred to **Section 4 and 5 of the Law of Limitation Act** [Cap 89 R.E 2019]. He contended that the cause of action accrued in 2021 as there had not been any dispute over the deceased's property at the time of his death and the respondents were not invited to the suit land by then. He thus prayed for the appeal to be allowed with costs and the matter be remitted to the trial tribunal to be heard on merits.

The respondents opposed the appeal. In the submission by their counsel, Mr. Waziri, it was argued that the trial Chairman did not err in dismissing the application since the same was indeed time barred and no leave was sought to allow the applicant to file the same out of time. Mr. Waziri further contended that the applicant failed to disclose in his application the time when the cause of action arose as evident under paragraph 6 (iii), (vi) and (viii) of the said application. Further that the appellant also failed to disclose the same before the trial Tribunal.

He contended that paragraph 6 (A) (i), and (ii) of the application states that the suit land was acquired by the appellant's deceased father who was in possession of the same for 54 years since 1928 when he cleared a virgin forest until his demise in 1988. That, the same has been in possession of the appellant and his family since then. That the appellant's averment in the said paragraphs contradicts with those in paragraph 6 (a) (ix) and (x) of the same application to the effect that the land was in possession of someone else since 1964 and not the appellant's deceased's father and that the same was administered from 2021 as proved in annexure A attached to the application. That, the appellant failed to disclose as to when the societies of thrift and loan ceased to operate.

Mr. Waziri further argued that it was undisputed that the suit was brought before the Tribunal in the interest of the estate of the late Issa Liana Ghuhia who demised in 1988 and the respondent had trespassed the same. That, both respondents acknowledged that under **Item 22 part 1 of the Schedule to the Law of Limitation Act**, the time limitation for recovery of land is twelve years and that this matter was filed on 08.10.2021, which was 33 years after the demise of the late Issa Liana

Ghuhia. Thus that, the pending question is from when the 12 years reckoned.

In his view, in consideration of the contents of paragraph 6 (A) (ii) of the Application, time reckons from the demise of the appellant's father which was 33 years before the date of institution of the suit. Thus, he argued, according to **section 9 (1) of the Law of Limitation Act**, the application was time barred. He therefore prayed for this court to uphold the decision of the trial Tribunal and dismiss the appeal with costs.

Rejoining, Mr. Msaki challenged the respondents' submission on the ground that they have replied to the application and not to the submission in chief he made. With regard to the argument that paragraph 6 (iii), (iv) and (viii) of the application did not disclose the cause of action, he reiterated his stance that in order to ascertain what time the cause of action accrued, evidence is needed to ascertain the same thus disqualifying the same from being a preliminary objection. He added that since the respondents alleged that the suit land belongs to another person and not the appellant, evidence was needed.

He further reiterated that the respondents were invitees to the suit land which is not disputed by them and that the same was owned by late Issa Liana Ghuhia whereby they had an agreement to use the suit property. He again cited the case of **FRANK EDWARD (Administrator of the estate of the late Asha Swalehe) vs. HAWA SWALEHE MKAMBA** (supra) arguing that the principle of adverse possession cannot apply to host - invitee relationship. He maintained his prayers for the appeal to be allowed with costs and the case be remitted to the trial Tribunal to be heard on merits.

I have dispassionately observed the submissions of both parties as well as the trial Tribunal record. While the appellant herein claims that the trial Tribunal erred in dismissing his application for being time barred, the respondents claim that the decision was justly reached. The appellant's claim was mainly based on the legal stance settled by this court in the case of **FRANK EDWARD (As Administrator of the Estate of the Late Asha Swalehe) vs. HAWA SWALEHE MKAMBA** (supra), which he found to have similar circumstances with the present case. That, in the cited decision, the court dealt with time limitation in host-invitee relationship and it held that the same was not affected by the limitation law.

It is well settled that time limitation is a matter of jurisdiction. In that respect, courts are barred from entertaining disputes which are time barred. See, **BARCLAYS BANK T. LTD. vs. JACOB MURO** (Civil Appeal 357 of 2019) [2020] TZCA 1875 TANZLII; **SWILA SECONDARY SCHOOL vs. JAPHET PETRO** (Civil Appeal 362 of 2019) [2021] TZCA 169 TANZLII and; **NBC LIMITED & ANOTHER vs BRUNO VITUS SWALO** (Civil Appeal 331 of 2019) [2021] TZCA 122 TANZLII.

In **NBC LIMITED & ANOTHER vs. BRUNO VITUS SWALO** (supra) the Court of Appeal held:

"It is that courts are enjoined not to entertain matters which are time barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which litigation period has expired"

It is also settled that preliminary objections should be on matters apparent on pleadings and not such matters that require evidence. See: **MUKISA BISCUIT MANUFACTURING CO. LTD. vs. WEST END DISTRIBUTORS LTD.** [1969] EA 701; **GIDEON WASONGA & OTHERS vs. THE ATTORNEY GENERAL & OTHERS** (Civil Appeal No. 37 of 2018) [2021] TZCA 3534 TANZLII; **SALIM O. KABORA vs. TANESCO LTD. & OTHERS** (Civil Appeal No. 55 of 2014) [2020] TZCA 1812 TANZLII; **THE SOITSAMBU VILLAGE COUNCIL vs. TANZANIA BREWERIES LTD. AND ANOTHER** (supra) and; **KARATA ERNEST AND OTHERS vs. THE ATTORNEY GENERAL** (Civil Revision No. 10 of 2010) [2010] TZCA 30 TANZLII.

In **MUKISA BISCUIT MANUFACTURING CO. LTD. vs. WEST END DISTRIBUTORS LTD.** (supra) the Court stated;

“... a preliminary objection consists 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...”

The Court further held;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained

or if what is sought is the exercise of judicial discretion."

In **THE SOITSAMBU VILLAGE COUNCIL vs. TANZANIA BREWERIES LTD. AND ANOTHER**, (supra) the Court held that: -

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection, such as exhibits."

As observed on the record, the appellant filed his claim in the capacity of administrator of estate of his deceased father, who demised in 1988. Contrary to the arguments by Mr. Msaki before this court, the application has not disclosed that the cause of action arose in 2021 when the respondents entered the suit property. Paragraph 6 (A) of the said application has sixteen (xvi) facts, but none of them disclosed when exactly the cause of action arose. In fact, the only paragraphs remotely

showing his right over the suit property are Paragraph 6(A) (i) and (ii) of the application which reads;

- i. *That the Applicant father is the lawfully owner of the piece of land described in paragraph 3 above, since way back 1928, whom the same inherited it through customarily adoption by starting clearing the bushes and hence become the owner. (sic)*
- ii. *That the Applicant father has been in the possession of the disputed land for more than sixty (54) years, until when he died on 1988 and let it under the administrator of Applicant and his family until today. **That the latter the Applicant as the administrator of late ISSA LIANA is hereby attached as ANNEXTURE "A" and forming the part of this Application.** (sic)*

The facts in the application as quoted above do not depict any host-invitee relationship between the late Issa Liana and the respondents. The nature of the claim rather shows that the respondents are trespassers to the suit property than tenants. There are no enough details to label them as tenants given that there is no any tenancy agreement provided therein or any explanation on the tenancy agreement details. The application also discloses that there had been a thrift and loan society which the appellant somehow alleged to be involved with the respondents' trespass to the suit property, but again no enough details were disclosed as to that state.

The facts disclosed in the application were not enough to properly disclose the cause of action and when the same accrued. This clearly shows that the issue that the application was time barred was not apparent on pleadings thus required evidence. Addressing a similar issue, in **ALI SHABANI & OTHERS vs. TANZANIA NATIONAL ROADS AGENCY (TANROADS) & ANOTHER** (Civil Appeal 261 of 2020) [2021] TZCA 243 TANZLII, the Court of Appeal held:

“ 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 abstracts without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence.”

In consideration of the above holding, I am of the considered view that since the details on the appellant's application were not enough to disclose when exactly the cause of action accrued, the application was clearly defective for failing to fully disclose the jurisdiction of the Tribunal as relating to time limitation. This was thus an issue of a defective application. If the trial Chairman had properly observed the application, he could have either ordered for additional information to be provided or reject the application as provided under **Regulation 5 and of the Land Disputes Courts (District Land and Housing Tribunal) Regulations GN No. 174 of 2003** which states:

“5. Where an application is made to the Tribunal, the Tribunal may after consideration of the application or chamber application:

(a) N/A

*(b) **require the applicant to produce more information as may be necessary; or***

*(c) **reject an application and record the reasons for the decision.”***

In the alternative, the trial Chairman could have also ordered the amendment of the same or allow the appellant if he requested to do the same as instructed under **Regulation 16 of GN 174 of 2003**, which state:

“16. The Chairman may, on his own motion or on application by either party order amendment of pleadings.”

Since none of the above options was done in the presence of the circumstances of the application as explained hereinabove, and since the issue of limitation cropped vide preliminary objection, the best option was to have the matter struck out for being preferred under a defective application.

In consideration of the foregoing, I am of considered view that the trial Chairman erred in dismissing the application for being time barred while there were no facts showing the time the cause of action arose thereby needing proof in evidence. In the circumstances, the ruling and order of the trial Tribunal are hereby quashed. The case file is remitted back to the trial Tribunal for hearing of the matter on merits or otherwise, after determination of the rest of the points of preliminary objection that were left undetermined. Given the outcome, I make no orders as to costs.

Dated and delivered at Moshi on this 05th day of September 2023.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA