

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA**

LAND CASE NO. 12 OF 2022

JOSEPH TARETA MASINA PLAINTIFF

VERSUS

MAHITI MALIMALI 1ST DEFENDANT

GUYEYA SHIGHARERA 2ND DEFENDANT

PAMBA GAMEJA 3RD DEFENDANT

NYIBEREKELA VILLAGE COUNCIL 4TH DEFENDANT

SERENGETI DISTRICT COUNCIL 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

29th August & 05th September, 2023

M. L. KOMBA, J.:

Plaintiff in this case is complaining that the 1st, 2nd and 3rd defendants herein have trespassed to his land and cause damage to the tune of Tsh. 150,000,000/-. According to pleadings, the land in dispute is 125 acres situated in Mariwa Hamlet within Nyiberekela village in Serengeti District, within Mara Region.

According to pleadings, the disputed land was acquired through clearance of virgin land in 1991 since then it is used for agriculture and residential. It was in 2017 when the 1st and 3rd defendants trespassed in the plaintiff land and started to plant beacons alleging the said land has been located to the 3rd defendant by the Land Committee of Nyiberekela village. Due to frequent complains the plaintiff was informed officially that land which plaintiff is occupying, 125 acres was allocated to 3rd defendant. While this was unsolved, the 2nd defendant also trespassed into 5 acres of the disputed land without plaintiff consent. The plaintiff institute a suit in District Land and Housing Tribunal (Land case No. 163 of 2017) which was decided in favour of 2nd and 3rd defendants. During appeal the matter was directed to be heard *de-novo* due to irregularities. Following that re hearing directive, the 4th defendant applied to be part to the suit which necessitated the 5th and 6th defendants to be joined by virtual of their position. Plaintiff prayers are;

- 1. This court to order the 1st, 2nd and 3rd defendants to pay plaintiff Tsh 150,000,000/= for the act of trespass into the plaintiffs' land.*
- 2. That 4th defendant to be ordered to pay punitive damage of Tsh 10,000,000/= for the act of convincing the 2nd and 3rd defendants to enter into the plaintiffs' land without his consent.*

- 3. To permanently restrain the 2nd, 3^d and 4th defendants to interference with plaintiff peaceful enjoyment of his land.*
- 4. General damage as determined by this court.*
- 5. Costs of this suit.*

Defendants are grouped into three parts according to WSD filed in response to the plaint. 1st defendant was a village chairman within the 4th defendant and his tenure was between 2010 to 2014 and he claims that plaintiff has no cause of action against him.

The 2nd and 3rd defendants claim to own the disputed land legally as it was allocated to them by authority and prayed the suit to be dismissed with costs. The 4th, 5th and 6th defendants are of the position that the disputed land belongs to the 4th defendant since 1974 via operation *vijiji* and 2nd and 3rd defendants followed procedures of owning land therefore they are not trespassers and prayed the suit to be dismissed with costs. Further to that, 4th, 5th and 6th defendants raised Preliminary Objection (PO) on point of law that;

That the suit at hand is bad in law for being hopelessly time barred.

As custom, PO has to be determined first. See **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, CAT at Mwanza. When the date fixed for hearing

the matter was due, plaintiff was represented by Mr. Cosmas Tuthuru, an advocate, 1st and 3rd defendants appeared in person without representation while the 4th , 5th and 6th defendants was represented by Mr. Anesius Kamugisha, Mr. Abdalah Makulo and Ms. Neema Mwaipyana, all being State Attorneys.

It was Mr. Makulo who lead the team and submitted that according to paragraph 11 of the plaint, cause of action is the act of trespass which was done by the 1st defendant in July, 2017. He submitted that in plaint the plaintiff did not pray for declaration rather he is claiming for payment of damage for trespass. He submitted that the issue of trespass is folded in tort and that under the Law of Limitation Act, Cap 89 (here in after will be referred as Cap 89) Item 6 of the schedule direct the claim under tort to be filed within 3 years. He said, according to section 3 of Cap 89 the suit needs to be dismissed as the same was supposed to be filed in 2020.

Mr. Kamugisha, State Attorney insisted that the matter is out of time as trespass falls under the law of tort and is regulated by Cap 89 under item 6 of part I of the 1st schedule. He also pray this court to dismiss this suit with costs as trespass started in 2017 that means three years already lapsed.

In response, **Mr. Tuthuru** submitted that the plaintiff is claiming for not only damage but permanent injunction to restrain 2nd , 3rd and 4th defendants from interference of the land in dispute as narrated in paragraphs 8, 9, 10 and 11 of the plaint.

It was his submission that trespass is not pure tort as tour in land, time of limitation is twelve years and not otherwise. He referred this court to annexure (A2) as plaintiff have annexed ruling of the High Court which was decided on 26/6/2020 the matter was in court and therefore the time should be excluded as the matter was in court. If is said to be tort then he submitted that the suit is within 3 years from 2020 when the decision of the high court was issued. He complained that defendants has raised new issue which does not have authority claiming that limitation on tort is three years. Mr. Tuthuru believe the trespass in land its limitation is 12 years from the date tort begins.

It was his submission that when there is more than one defendants and there is different cause of action the matter cannot be dismissed basing on few parties as was in **Thomas Ngawaia vs. Attorney General and TANROAD** (2018) TLR 592 in the cited case (though is the High Court case) it was decided that when there is more than one party court should

look at other cause of action too. He elaborated that there is dispute between plaintiff and the village and other dispute is between plaintiff and 1st , 2nd and 3rd defendants and it is not about trespass only but they claim for the permanent injunction. He insisted the time spend at DLHT should be considered and prayed the objection to be overruled with costs.

During rejoinder Mr. Makulo insisted the suit is pure tort and the applicable law is Cap 89 as cited. He said parties are bound by their own pleading reading paragraph 11 and prayers he said plaintiff did not play for declaration of ownership of the land and therefore his claim is trespassing and the time limitation is 3 years. He said the law cited is enough and cases are used to subscribe what the law explains and therefore citing decided case is an option and argue this court to be guided by the section of law.

In distinguishing the cited case of **Thomas Ngawaia vs. Attorney General and TANROAD** (supra) defendants, he submitted that in the case at hand the cause of action is only one which is trespassing and so far as plaintiff combined all defendants in one suit that mean cause of action is only one.

Mr. Kamugisha, concede with submission by his fellow State Attorney that plaintiff claim that he was in court and he pray the time spent in court to be counted. By that submission, he said, the counsel for the plaintiff agrees to be out of time and should not hide that fact by saying he was in court. It is trite that when the matter is out of time the plaintiff must explain what happened and pray for extension of time to waive the limitation basing on the case as in the case at hand counsel said he was in court.

Further, he said plaintiff was supposed to pray for extension of time to Minister responsible for Legal affairs or to pray in court but the counsel did not plead in plaintiff that he was in court so that the time can be deducted. On the issue of different cause of action, Mr. Kamugisha was of the submission that permanent injunction cannot be claimed if there is no prayer of declaration of rightfully owner. He said if there is no declaration of ownership of the land, then there cannot be injunctive order.

Mr. Kamugisha said the counsel mislead himself believing that the suit is founded in land and the limitation is 12 years as the case at hand is founded in tort which the time is 3 years and the law is clear.

That mark the end of submission by both parties on Preliminary Objection, it now the time of this court to determine whether PO has merit.

I will start with the paragraphs from the plaint which was used to institute the suit at hand, specifically paragraph 11;

11. that, the plaintiff continues using his land peaceful without interference from any body till on the month of July, 2017 when the 1st defendant trespassed into the plaintiffs' land together with the 3rd defendant and started planting beacon to the land of 5 acres within the land of the plaintiff claiming that the same was allocated to the third defendant by the land committee of Nyiberekela village.

According to plaint cause of action is trespass although among the prayers as submitted by the Mr. Tuthuru is permanent injunction restraining 2nd, 3rd and 4th defendants from interference with plaintiff peaceful enjoyment of his land. Among the players as quoted in previous paragraphs. There is none of them where the plaintiff pray for declaration of lawful owner. That means plaintiff believe the suit land belong to him and as pleaded in paragraph 11 of the plaint, defendants have trespassed to it. That being the case then, this court finds that the cause of action is revealed at paragraph 11 which is trespass to land. What does the law provide?.

State Attorneys submitted that limitation of action for tort is three year as is provided under item 6 of the first schedule of Cap 89 which is made under section 3 that limitation of action for suit founded in tort is **three years**. Mr. Tuthuru argue that limitation is twelve years. I read the relevant

schedule, specifically item 22 it provides the action for recovery of land is twelve years. Was the plaintiff demand for recovery of his land/ or was he claiming to be declared a lawful owner? The answer is no. From pleading as recited, plaintiff is complaining of trespass by the defendants and therefore according to law limitation of action is three years.

In **Makori Wassaga vs. Joshua Mwaikambo & Another** [1987] TLR 88 the Court said:

'A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case.'

See also **Martin Fredrick Rajab vs. Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019) [2022] TZCA 434 (18 July 2022)

There is nowhere in the court record that the plaintiff file an application for extension of time for enlargement of time for the suit to be maintained just as submitted by the State Attorney. It must be true that plaintiff had cases before institution of the suit at hand, that could be a good cause for extension of time for the current suit, but was not the case. Mr. Tuthuru was of the position that he is within limitation of time as the matter is land matter. That is not the case and the issue that he had cases and the time

should be counted does not carry water as his position was the suit is for tort in land and the limitation is twelve years. This court finds the suit was tort and the limitation is three years. The fact that cause of action arose in July, 2017 then limitation was June, 2020 and not otherwise.

Section 3 of Cap 89 provides;

'3.-(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.'

Mr. Tuthuru claim that there are more than one defendant with different cause of action and therefore dismissal is not correct remedy. Mr. Kamugisha, the State Attorney (Mr. Makula) submitted that the cause of action is only one which is trespass as he combined all defendants in a single suit there cannot be more than one cause of action. Reading the cited case of **Thomas Ngawaia vs. Attorney General and TANROAD** (supra) it was decided that court should look at the relief sought and see whether there is more than one claim based on different cause of action as one may be time barred while the other may not. In the case at hand plaintiff is only complaining of the trespass by 1st, 2nd and 3rd defendants and claims for payment for the act of trespass against 1st, 2nd and 3rd

defendants. This court finds the case of Thomas Ngawaia is distinguishable as cause of action is one which is trespass.

Guided by the provision in Cap 89, I find the suit is time barred in law and therefore the objection raised by the 4th, 5th and 6th defendants has merit and is hereby sustained. The suit is dismissed with costs for it being time barred.

It is so ordered.




M. L. KOMBA
Judge

05th September, 2023

Ruling delivered in chamber before the 1st, 2nd and 3rd defendants who appeared in person. In the absence of the plaintiff and the 4th, 5th and 6th defendants was represented by Ms. Neema Mwaipyana, State Attorney.


M. L. KOMBA
Judge

05th September, 2023