

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LAND DIVISION**

AT MOSHI

LAND CASE NO. 1 OF 2022

ELDEPHONCE LEON MMASY..... 1ST PLAINTIFF
DEUS LEON MMASY..... 2ND PLAINTIFF
(All suing as Administrators of the Estate of the Late Leon Paul Mmasy)

VERSUS

**ARUSHA URBAN WATER SUPPLY AND SANITATION AUTHORITY
(AUWSA)..... 1ST DEFENDANT**
CUTHBERT NDESIKA KWAY..... 2ND DEFENDANT
THE HONOURABLE ATTORNEY GENERAL..... 3RD DEFENDANT

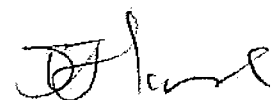
RULING

05/12/2022 & 14/02/2023

SIMFUKWE, J.

The Plaintiffs Eldephonc Leon Mmasy and Deus Leon Mmasy (Administrators of the Estate of the Late Leon Paul Mmasy) claims against the Defendants compensation over one acre of land located at Kinamiri hamlet Mbatakero village within Hai District, alleged to have been trespassed by the 1st Defendant.

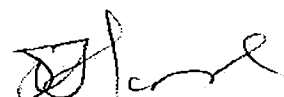
The defendants herein raised the following preliminary objections in their Written Statement of Defence:



1. *That, the suit, being on compensation, is time barred as it contravenes **Item 1 Part I of the First Schedule to the Law of Limitations Act Cap 89 R.E 2019.***
2. *That, the Plaintiff is bad in law for having defective verification which violates **Order VI Rule 15 (1) and (2) of the Civil Procedure Code Cap 33 R.E 2019.***
3. *That, the plaintiffs have no cause of action against the 2nd Defendant thus the plaint be dismissed with costs.*

The preliminary objections were ordered to be argued by way of written submissions, Mr. Yohana Marco learned State Attorney argued the preliminary objections for the first and third Defendants, the second Defendant was unrepresented while Mr. Charles Mwanganyi opposed the preliminary objections for the Plaintiffs.

In support of the first ground of preliminary objection on point of law that the suit is time barred; Mr. Yohana submitted that they are unreservedly of the settled mind that this suit is based on compensation on land. That, the Plaintiffs have twisted the facts into a trespass alongside raising the question of ownership in a bid to circumvent the cause of action. He was of the view that if one read the whole of the plaint at hand, they will find that the Plaintiffs do not seek to recover land but to secure compensation thereof. He made reference to paragraph 8 of annexure "**M-2**" attached to paragraph 14 of the plaint which is a statutory notice issued to the first Defendant. The learned State Attorney also made reference to the prayers in the plaint. That, the Plaintiffs have not prayed for re-entry or re-possession of the land but to be declared owners, the court declare that compensation paid to the 2nd Defendant by the 1st Defendant is void ab



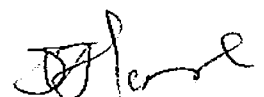
initio, the 1st Defendant to compensate the Plaintiffs, general damages and other usual reliefs.

Mr. Yohana elaborated that from the above analysis of facts, it is clear that this suit is not a suit to recover land. He cited **section 2 (3) of the Law of Limitation Act, Cap 89 R.E** which shows categorically how a suit/action to recover land should look like. He quoted the said provision which provides that:

"References in this Act to a right of action to recover land include, save where it is otherwise provided, references to a right to enter into possession of the land, and references to the bringing of an action in respect of such a right of action include references to the making of such an entry."

Referring to the above quoted provision, Mr. Yohana said that the law, on the face of it, does not make mention of ownership and a reason thereof is not farfetched. That, the question of ownership of land is not a suit per se or else it will end up only in a declaratory order without affording the plaintiff full realization of his right which, in his considered view, shall be an academic exercise. That being the case, claim of ownership of land must be accompanied by other claims such as re-entering into possession which will, in turn make it a suit to recover land, to be compensated which will make it a suit for compensation on land as it is in this suit.

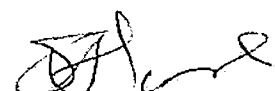
Mr. Yohana went to submit that having extenuated on the nature of the cause of action in the plaint and being alive that the Plaintiffs are administrators of the estate of the late Leon Paul Mmasy, the reckoning of the time in which the limitation started to count is governed by **section 24 (1) of the Law of Limitation Act** which provides that:



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

From the above provision, the learned State Attorney was of the opinion that the right to sue to the estate of the late Leon Mmasy accrued in 2018 as per paragraph 10 of the plaint. He gave the reason that, according to paragraph 7 of the plaint Leon Mmasy died in 2016 before his land was taken by the 1st Defendant. That, according to the said paragraph 10 of the plaint, the project of drilling borehole in the late Leon Mmasy's land by the 1st Defendant began in 2018 and counting the period of one year therefrom would end somewhere in 2019. Mr. Yohana said that this suit has been filed in this court on 07th March, 2022 almost two years after the expiry of the allowed time.

Mr. Yohana predicted that the Plaintiffs may hopefully rely on the fact that their appointment as administrators took place on 4th June, 2021 as per paragraph 5 of the Plaint and annexure "**M-1**" thereof and that before their appointment they had no locus standi to sue. He noted further that the Plaintiffs under the said paragraph 5 of the plaint read together with the annexures thereof are the sons of the deceased Leon Paul Mmasy. Cementing his argument, Mr. Yohana contended that when it comes to suing on their deceased father's estate, they were not required in law to wait for being clothed with powers of administration. He subscribed to the decision of this court in **Samson Mwambene vs Edson James**



Mwanyingili [2001] TLR 4-5, in which on the issue of the right of the heirs to sue on deceased's estate, it was held that:

".... As an interested member of his clan or family, the respondent had an independent right to sue for what he believed, and was founded to be, his deceased father's property due for inheritance. That power did not depend on his having been clothed with administration powers or consent of the clan or family members first..."

It was concluded that this suit was supposed to be brought within one year from the date when the 1st Defendant's project of borehole drilling began in the suit premise. That, being brought after the expiry of the allowed period this suit is hopelessly time barred. Mr. Yohana prayed that the suit be dismissed with costs.

On the preliminary objection raised by the second Defendant, on the outset the 2nd Defendant cited the case of **John M. Byombaliwa vs Agency Maritime International (T) Ltd [1983] TLR 1** in which it was held that:

"The expression "cause of action" is not defined under the Civil Procedure Code, 1966..... but may be taken to mean essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit."

Referring to the plaint in the instant matter, the 2nd Defendant submitted that item 6 of the Plaintiffs' plaint did not show how they came into ownership of the said suit land. That, the 2nd Defendant has owned and been in use and occupation of the property for the last 20 years without



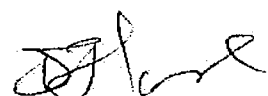
any disturbance. That, the Plaintiffs have not been able to show or prove to the contrary.

He submitted further that the Plaintiffs as well as the 2nd Defendant, were all paid compensation by the 1st Defendant after consulting the officials of the local government of the area, who gave assurance of ownership of the suit premises. He was of the view that the Plaintiffs with vice want to reap where they have not sown. He prayed the matter to be dismissed with costs.

Opposing the preliminary objections raised by the 1st and 3rd Defendants, Mr. Charles Mwanganyi learned counsel submitted that having gone through the entire submission of the 1st and 3rd Defendants, it seemed that the Advocate for the 1st and 3rd Defendant abandoned the 2nd preliminary objection although he did not state in his submission.

Responding to the 1st preliminary objection on point of law that the suit is time barred, Mr. Mwanganyi submitted that the preliminary objection is misconceived, frivolous, unfounded or otherwise baseless. He pointed out that, the suit before this court is about recovery of land of which according to **item 22 of Part 1 to the Law of Limitation Act, Cap 89 R.E 2019** the time limit to institute a suit is twelve years.

On the issue that in the reliefs sought among others the Plaintiffs prayed for compensation on land; Mr. Mwanganyi replied that the averment of the learned counsel for the 1st and 3rd Defendant was purely misconceived, frivolous and unfounded. That, he also misconceived the interpretation of **section 2 (3) of the Law of Limitation Act, Cap 89 R.E 2019**. In the alternative, Mr. Mwanganyi alleged that even if it is



assumed that the relief sought is compensation, still the suit is not time barred as alleged by the Defendants.

It was submitted further that the averment that time accrued against the Plaintiffs as administrators, from the date when the right to sue accrued to the estate of the deceased was misconceived. Mr. Mwanganyi made reference to paragraph 8 of the Plaint where the Plaintiffs stated that they became aware of the said trespass sometimes in 2020. That, time starts to run from the day they came into knowledge of the trespass and not as alleged by the Advocate for the 1st and 3rd Defendant. In the alternative, Mr. Mwanganyi made reference to **section 24 (2) of the Law of Limitation Act** (supra) which provides that:

"Where a person against whom, if he were (sic) 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 legal representative of the deceased against whom such proceedings may be instituted or from the date when the right of action accrues against the estate of the deceased whichever date last occurs."

He added that from the cited provision, time starts to accrue from the date of appointment of the administrators of the estates which was done on 4th June 2021. Hence, this suit is within time.

Regarding the assertion that the Plaintiffs could have sued as sons of the deceased, the learned counsel for the Plaintiffs replied that the cited case is distinguishable. He supported his argument with the provision of **section 71 of the Probate and Administration Act, Cap 352 R.E 2019** which provides that grantee alone should act as representative. Mr. Mwanganyi also cited the case of **Swalehe Juma Sangawe (as Administrator of**

the estate of the late Juma Swalehe Sangawe) and Another vs Halima Swalehe Sangawe, Civil Appeal No. 82 of 2021, CAT at Moshi (unreported); in which it was held that:

"In our view, it is only an administrator of the deceased estates, once appointed, who could sue on the cause of action....."

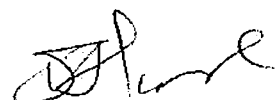
From the decision of the Court of Appeal, Mr. Mwanganyi submitted that the Plaintiffs could not have sued even if they were sons of the late Leon Paul Mmassy contrary to what has been submitted by the State Attorney of for the 1st and 3rd Defendant.

Mr. Mwanganyi finalized by praying the preliminary objections raised be dismissed for being devoid of merits.

Concerning the preliminary objections raised by the 2nd Defendant that the Plaintiffs have no cause of action against the 2nd Defendant, Mr. Mwanganyi submitted that the objection does not qualify to be a preliminary objection on point of law for the reason that the same call for proof of evidence. He cemented his point with a land mark decision of **Mukisa Biscuit Manufacturing Company Limited v. West End Distributors Ltd [1969] EA 696** in which at page 701 a preliminary objection was defined to the effect that:

"A preliminary objection is in nature of what used to be a demurrer, it raises a pure point of law....."

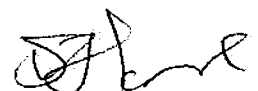
In the instant matter, Mr. Mwanganyi was of the view that the submission of the Advocate of the 2nd Defendant are facts which call for evidence. That, Nevertheless, from the pleadings the Plaintiffs have a cause of action against the 2nd Defendant to the extent of a trespasser and



deserves to be compensated for a claim of ownership of the suit land. The learned counsel prayed the raised preliminary objection to be dismissed for being devoid of any merit.

In his rejoinder to the submission that time began to run when the Plaintiffs were made aware of the trespass, that is sometimes in 2020 and not from the date of encroachment, that is in 2018, Mr. Yohana asserted that unfortunately the learned counsel for the Plaintiffs had not provided any authority on that issue which renders it a mere counsel's opinion. On submission that the right to sue accrued from when the Plaintiffs were appointed administrators; Mr. Yohana replied that given the circumstances of this case, time starts to run from the date of encroachment, and not from the date when one comes into knowledge of the encroachment. He said that **section 24 (2) of the Law of Limitation Act** (supra) cited by the learned counsel for the Plaintiffs is distinguishable to this matter as the section deals with a person against whom if he was alive, a suit would have been instituted for his action of encroachment but dies before he is sued. Stressing his argument, the learned State Attorney cited the case of **Leonard Kulwa (Administrator of the Late Mahenge Gakuba) vs Ciemence Lukanda and Another, Land Appeal No. 56 of 2021**, at page 7, High Court of Tanzania at Mwanza (unreported) in which it was held that:

"In a situation where the owner of the landed property dies before the cause of action arose, time starts to tick against a person who intends to sue an administrator of the deceased's estate, 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. This is what section 24 (2) of the LLA."

Contradicting the above decision, Mr. Yohana submitted that in this suit **section 24 (1) of the Law of Limitation Act**, remains relevant and applicable because it caters for a person who would, if he was alive, have a right of action against acts of encroachment by another person who is still alive. He made a conclusion that in this case time began to run from 2018 when the estate of the deceased, who is the late father of the Plaintiffs, was encroached and neither from when the Plaintiffs were appointed administrators nor when they became aware of the encroachment.

Regarding the cited case of **Swalehe Juma Sangawe** (supra), Mr. Yohana was of the opinion that it is distinguishable to this case as well as **section 71 of the Probate and Administration of Estates Act**. He stated the facts in the cited case to be that, the appellants had intermeddled with the estate of their late father and being the cause, the respondent therein sued them successfully in the High Court though she had neither been appointed administratrix nor executor of the estate. That, the Court of Appeal equated the scenario to **section 17 of the Probate and Administration of Estates Act** and labeled them executors of their own wrong, that is they were exercising the functions of office of executor of deceased's estate. That, the Court answered the question who would institute a suit against the said intermeddlers by referring to **section 71 of the Probate and Administration of Estates Act**.



Mr. Yohana elaborated further that section 71 of the Act was invoked by the Court of Appeal after being necessitated by the concept that, executor of his own wrong is answerable to the rightful executor or administrator. (Page 7 of the said judgment) under section 17 of the Act. The learned State Attorney went on to emphasize that it is evident that the Court of Appeal did not deal with the time within which the cause of action arose on deceased's estate. He made reference to page 8 of the judgment where His Lordship Ndika J.A stressed that:

"In our view, it is only an administrator of the deceased's estate, once appointed, who could sue on the cause of action as presented by the respondent against the alleged interlopers."

It was insisted that, in our case, the Defendants were not exercising the functions of office of executor of the late Leon Paul Mmasy's estate and as of consequence the said case of **Swalehe Juma Sangawe** is inapplicable. In addition, it was stated that section 71 prohibits other persons from usurping powers of executor after the rightful executor or administrator has been appointed. That, when the said section is construed in light of the facts at hand, answers the question what happens during the time in which no executor or administrator has been appointed.

On the issue whether this suit is for recovery of land or compensation; it was submitted in rejoinder that the suit is for compensation on land. Mr. Yohana was of settled mind that reading the plaint at hand and its annexures one can surely conclude that the gist of this suit is not recovery of land but securing compensation. He gave an example of paragraphs 10, 11, and 12 of the plaint, which reveal that all what the Plaintiffs are seeking is to secure compensation which was paid to the 2nd Defendant.




He gave another example of the prayers in the plaint where the Plaintiffs have not prayed for permanent restraint or re-entry into possession of the land. The learned State Attorney noted that once a land has been acquired by the Government, the affected party is entitled to compensation either in monetary form or in kind, recovery of land is not called for.

On the way forward in case this suit is struck out, Mr. Yohana suggested that the Plaintiffs should proceed by way of judicial review to test whether the procedure of determining the lawful owner of the suit premise, before paying compensation thereof, was followed by the 1st Defendant pursuant to paragraph 12 of the plaint.

Mr. Yohana prayed that this suit be strike out for being hopelessly time barred.

Starting with the 1st preliminary objection that this suit is time barred; according to the submission of the learned counsel of the Plaintiffs, they are seeking compensation against the trespass alleged to have been committed by the 1st Defendant. Contesting the objection, the learned counsel for the Plaintiffs underscored **section 24 (2) of the Law of Limitation Act** (supra) to the effect that right to sue accrued when the Plaintiffs were appointed as administrators. In his rejoinder, Mr. Yohana learned State Attorney was of settled opinion that given the circumstances of this case, right to sue accrues from the date of encroachment. In addition, he contended that, **section 24 (2) of the Law of Limitation Act** (supra) is not relevant to this case because it deals with a person against whom, if he were alive, a suit would have been instituted for his action of encroachment but dies before he is sued.



From the literal meaning of the wording of section 24 (2) (supra), I totally agree with the learned State Attorney that the section is applicable in suits in which the deceased could have been the defendant if he was alive. The words ***"Where a person against whom if he was living, a right of action would have accrued"*** speak loudly and do not need ***golden rule interpretation***. Therefore, the relevant provision in this case is section 24 (1) (supra) and not 24 (2) (supra).

Order XXX Rule 1 of the CPC provides that:

*"In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties."*Emphasis added

On the basis of the wording of the quoted provision of the CPC, with respect, I do not agree with Mr. Yohana that the Plaintiffs could have sued as sons of the deceased. The issue for determination in respect of the 1st preliminary objection is *whether the Plaintiffs' claim being compensation over the trespassed land, was filed within time?*

Item 1 of Part I to the Schedule of the Law of Limitation Act (supra) provides period of limitation *for compensation for doing or for omitting to do an act alleged to be in pursuance of any law to be one year.*



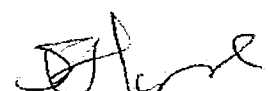
In the case of **Tanzania National Road Agency and Another v. Jonas Kinyagula, Civil Appeal No. 471 of 2020**, Court of Appeal of Tanzania at Kigoma, while discussing a scenario like in the instant matter held that:

*"Our starting point will be to restate that, **issues relating to compensation for doing or for omitting to do an act alleged to be in pursuance on any written law (land inclusive)** are covered under item 1 of Part I to the Schedule to the Law of Limitation Act which requires such claims to be lodged within the period of one year."*Emphasis added

From the above recent decision of the Court of Appeal, it goes without saying that this matter was instituted out of the prescribed time of one year. Thus, I find the 1st preliminary objection raised by the learned State Attorney has merit.

Regarding the preliminary objection raised by the 2nd Defendant that the Plaintiffs have no cause of action against him; on the outset I am strongly convinced to buy the definition from the case of **M. Byombaliwa** (supra) cited by the 2nd Defendant. That, cause of action means ***facts which are necessary for the Plaintiff to prove before he can succeed in the suit.***

In his submission, the 2nd Defendant submitted among other things that, the plaintiffs as well as the 2nd Defendant were all paid compensation by the 1st Defendant after consulting the officials of the local government of the area, who gave assurance of ownership of the suit premises. In their reply, the plaintiffs averred that the raise objection does not qualify to be



a preliminary objection on point of law on the reason that the same call for proof of evidence.

With due respect to both parties, I wish to make it clear that it is trite law that where the plaint does not disclose a cause of action, the same qualifies to be raised as a point of law which will not call for evidence to be proved. The facts pleaded on the plaint will be proof of the same. In the case at hand, paragraph 10 of the plaint reads as follows:

*"10. That the project of drilling borehole in that particular area began in 2018 whereas in the disputed farm measured one acre, one **CUTHBERTH NDESIKA KWAY** purported to be the owner of the suit land and he was dully compensated for the purpose while he is not the owner of the suit land rather the suit land is legally owned by the late **LEON PAUL MMASY** and our client are lawfully administrator (sic) of his estates."*

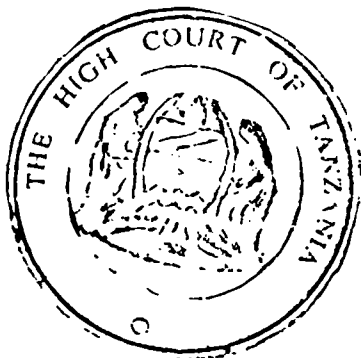
On my view, since the 2nd Defendant has agreed in his submission that he was paid compensation and that he was paid as the owner of the suit land, the cause of action against the 2nd Defendant derives from the above quoted paragraph 10 of the plaint. Those are the facts required to be proved by the plaintiffs which constitute the cause of action against the 2nd Defendant. Therefore, the preliminary objection raised by the 2nd Defendant has no merit, I dismiss it forthwith.


That said and done, on the strength of the first preliminary objection, which has been sustained herein above, I proceed to dismiss this suit for being filed out of the time limit prescribed by the law. No order as to costs as the objection raised by the 2nd Defendant has been overruled.



It is so ordered.

Dated and delivered at Moshi this 14th day of February 2023.




S. H. Simfukwe

Judge

14/02/2023