

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

**MUSOMA SUB – REGISTRY**

**AT MUSOMA**

**LAND CASE NO. 22 OF 2023**

**BETWEEN**

**GENYA GIBASO GENYA AND 274 OTHERS ..... PLAINTIFFS**

**VERSUS**

**NORTH MARA GOLD MINE LIMITED ..... DEFENDANT**

**RULING**

*06<sup>th</sup> and 23<sup>rd</sup> May, 2024*

**M. L. Komba, J:**

This is a ruling regarding preliminary objection (PO) raised by defendant. Before the PO was entertained, defendant applied for and was granted leave to amend WSD where she includes counter-claims against plaintiffs. Upon being served with amended WSD, plaintiffs too file PO against counter-claim. I find I have to deal with both PO before I embark on main suit.

When the PO was set for hearing, Mr. Mwita Emmanuel and Raphael Lukindi both advocates fended plaintiffs while Mr. Lubango Shiduki represented the defendant. It was agreed by parties that both points of

objection to be argued serially. It was Mr. Lubango who started submission on three points of objection raised by defendant.

It was his submission that plaintiffs are claiming for declaratory relief as they state in plaint that the issue started on 29/8/2012 by a notice alerting plaintiffs to stop making any developments. To clarify the point, Mr. Lubango refer this court to paragraph 3, 4 and 7 and the first relief as found in plaint. Further he submitted that it was their assertion that there was another directive via letter dated 27/5/2014 and of 7/8/2013 where in the latter the defendant issue land acquisition plan. Message in all paragraph and referred letter is to the effect that plaintiffs are praying for declaration for action accrued in year 2012 and 2013.

Counsel Lubango pointed that the case at hand was filed in court on 18/8/2023 and it was admitted 29/8/2023 which is more than nine (9) years from 2014 and more than 10 years from 2013. As per part I of the Law of Limitation Act, Cap 89 and item 24 to the schedule, the limitation of the action claimed by the plaintiff is six (6) years from the date when cause of action arise. He said basing on his submission the suit is time barred and argued me to read **Herieth Kasidi vs Agustino Bushiri (Civil Appeal No. 480 of 2020) [2023] TZCA 17767 (23 October 2023)** at page 4

where it was decided that the time of limitation for seeking declaratory order is 6 years whether relief is incidental or ancillary. The same position was in **Semeni Abdu Kapera vs Ashura Hamisi, Morogoro Municipal Council and Attorney General (Land Case No. 36 of 2022) [2023] TZHC 16275 (16 March 2023)** at page 8. Finally, he submitted that the matter at hand has to be dismissed as it is filed beyond stated time.

He then joined the second and third points which are also on limitation that paragraph 3 (ii), (iii), (iv) and (v) of the plaint is about order and declaration that act of alienating plaintiffs is illegal and they pray for payment of compensation which is late for more than ten (10) years calculating from year 2013 and 2014 when the cause of action arose. He said destruction is tort per se and when any person read closely the claim is tort in nature as plaintiffs are complaining of cutting of trees, destruction of crops and loss of use. Plaintiffs' claims for loss of use of their land for ten (10) years. To him the claim by plaintiffs is tort, he said, under item 6 of part I of the schedule to Cap 89 the limitation is three years.

To cement his point Mr. Lubango submitted that plaint did not disclose exemption from limitation of time as per Order VII rule 6 of the CPC which was amplified in **Fortunatus Lwanyantika Masha & Another vs**

**Claver Woshi Limited (Civil Appeal No. 144 of 2019) [2022] TZCA 433 (18 July 2022)** that plaintiff must have a paragraph to show why the claim is delayed. Reflecting the current case, he submitted that the plaintiff is silent on why they are late in filing the suit although they have attached communication showing correspondences between various parties. However, counsel wedged that correspondences does not stop time. He finalized his submission by reminding this court that plaintiffs don't claim for recovery of land where the limitation is 12 years. He prayed this court to dismiss the matter with costs as is filed out of time.

The duo counsel for plaintiffs submitted interchangeably on all points as raised by Mr. Lubango. Submitted that Mr. Lubango has misinterpreted the plaintiff as there was no cause of action which arose on 29/8/2012 as what was undertaken in 29/8/2012 was the requirement of the Mining Act as the owner of the mineral right in land has rights in the same land. Further, in the year 2012 there was no dispute among the two as plaintiffs consented on defendant's notice. It is further wrong to impute that this is among the suit which fall under item 24 of part I of the schedule to Cap 89 they lamented. It was their submission that this suit falls under item 22 of Cap 89 as the claim and the dispute is on land which make the matter to be

purely a land matter and not tort as it was registered as land case and not civil suit.

Basing on the decision in **Herieth Kasidi vs Agustino Bushiri (supra)** they said CAT ruled that suit for recovery of land is 12 years and the part was declared the owner. In that case parties were seeking for declaration of ownership, recovery of land and not tort. The suit is land and the claim is 12 years and not 6 years as it does not fall under tort. Further they submitted that in **URU Central Cooperative Society Limited vs Laitolya Tours & Safari Limited (Civil Appeal No. 204 of 2020) [2023] TZCA 17918 (11 December 2023)**, where among the relief was declaration of ownership by appellant and CAT denied the 6 years and said it is 12 years. They prayed plaintiffs to be declared lawful owner and the time limit is 12 years.

On the second point the dual counsel submitted that the law applicable in this matter is the Mining act and section 15 requires the license owner to give notice and obtain consent. They did not dispute that notice was given since the year 2012. For them, the issue was when does the time start to run against plaintiff? They find refuge in the Land (Assessment of the Value of Land) for Compensation of 2021, GN No. 78 at regulation 13 (1) which

provides that time shall start to run after acquisition of the land and the acquisition was defined in **Turuki Haruna vs Director Mwanza City Council, Land Appeal 40 of 2016** that for purpose of compensation, acquisition is complete after valuation and notification to the parties. They said, there is nowhere plaintiff pleaded that valuation was completely done and they maintained that acquisition was not complete and therefore time cannot be said to start running.

Further the duo counsel disputed presence of tort of trespass on account that so far as defendant was the holder of mining license, there was no trespass as he legally entered in the disputed land as was decided in **Geita Gold Mining Limited vs Twalib Ismail & Others (Civil Appeal 103 of 2019) [2021] TZCA 3526 (3 December 2021)**. In the case at hand counsel for plaintiff submitted that defendant entered legally as holder of license and therefore the suit is not tortious case and the limit is not supposed to be 3 years. They cited **Gilian Bwire Bukori V Commissioner for Land, Ministry of Land, Housing & Human Settlement Development & 3 Others (Land Case No.295 of 2022) [2023] TZHC Land D 16566 (15 June 2023)** that computation is calculated from when the cause of action arose and trespass on land occur

when the action has no legal backup. Referring the case at hand, they said in plaint they have shown circumstances what happened from 2012 where defendant was exercising his legal rights under the Mining Act. They finally prayed this court to find the objection has no merit and overrule it.

I have considered the submission by both parties in this PO, the only task I have to determine if the matter was filed on time and therefore this court is vested with jurisdiction.

The law governing PO was elaborated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696 where Sir Charles New Bold stated that;

*'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.'*

Mr. Lubango referred paragraph 3, 4 and 7 of the plaint, plaintiffs are praying for declaration order for action arose in the year 2012 and 2013 which is more than 6 years contrary to the law as the suit was filed on 18/8/2023. On the other side plaintiffs claim that what was done in the

year 2012 was the requirement of the law and the plaintiffs did not dispute over the presence of notice. This court finds that it is not disputed that defendant issued notice to plaintiff rather, on the first point of objection the issue is orders prayed by plaintiffs.

I have read the plaint and find the following;

Wherefore the plaintiffs pray for the judgment and decree as against the defendant severally and jointly as follows;

- i. The declaration that the plaintiffs are the lawful owner of the disputed land located at Nyamichere Hamlet, Nyakunguru Village-Tarime.*
- ii. ....*
- iii. ....*
- iv. ....*

The prayer is clear that plaintiffs are claiming for declaratory order. A cited limitation of action in our jurisdiction is governed by Cap 89. Section 5 of the said law provides that:

*'Subject to the provision of this Act, the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises.'*

That is to say the right of action begins to run when one becomes aware of the said transaction or act which is complained of. These are not my words



but it was said in **Ramadhani Nkongela vs Kasiani Paulo [1988] TZHC 11 (1 June 1988)**. The cause of action may be looked at the plaint when specifically, the plaintiff started to be aware of the action of the defendant. Cause of action is facts as pleaded by the plaintiffs and which will be proved to win the case. See **John M .Byombalirwa vs Agence Martile Internationale (Tanzania) Limited (John M . Byombalirwa vs Agence Martile Internationale (Tanzania) Limited, Civil Appeal No. 15 of 1983) [1983] TZCA 21 (1 December 1983)**. The duo counsel for plaintiffs disputed the presence of cause of action which was said to occurred in the year 2012 when defendant issued notice because plaintiff did not resist so, to them, there was no dispute and it is not right to compute time from 2012. However, I have read the plaint and at paragraph 3 and 8 of the plaint plaintiffs are complaining of the right of use for ten (10) years with reference to notice and land acquisition plan. Basing on section 5 of Cap 89 as cited earlier, the cause of action arose in the year 2012 when notice was given and plaintiffs became aware.

The duo counsel for plaintiffs did not dispute that they pray for declaratory order. That fact moves me to item 24 of part I to the schedule of the Cap 89 which provides that;

*'Any suit not otherwise provided for six years.'*

The section was interpreted in **CRDB (1996) Ltd vs Boniface Chimya (Civil Appeal 57 of 1999) [2001] TZCA 15 (14 November 2001)**

thus;

*'Under the act we are clear in our minds **that a declaratory decree falls under item 24 in part 1 of the first schedule to the Act. The prescribed period of limitation is six years.** From 24<sup>th</sup> March 1994, when the motor vehicle was seized to 21<sup>st</sup> July 1996, the time when the suit was instituted, it is a period well within six years prescribed by law. As the basis of the claim was a declaratory order, we think it does not matter whether the relief sought was ancillary or incidental to the substantial relief claim as claimed by Rweyongeza. We think the period of limitation prescribed under the law is the same, viz six years. We are satisfied that the learned Judge was correct in holding that the limitation period was six years.'*

The same was elaborated by the Court in **Herieth Kasidi vs Agustino Bushiri (supra)**.

The suit at hand was filed in this court on 18/8/2023. Counting from the year 2012 when notice was given and year 2013 when land acquisition plan was issued to the filing date of the suit, it is more than ten years which is more and above the prescribed time of six years. At this juncture I differ

with submission by the duo counsel that in the years 2012 there was no dispute on the ground that in the same plaint they referred the plaintiffs were not using their land for more than ten years.

Further, I distinguish the case of **Herieth Kasidi vs Agustino Bushiri (supra)** which was interpreted by the duo counsel that plaintiff successful prayed for declaration that he was the lawful owner and it was decided that the limitation was 12 years twined with item 22 of part I of the schedule to Cap 89. In the cited case at page 4 Hon Justices explained why they depart from their early decision as follow;

*'We are satisfied that the suit the subject of this appeal was not founded on a tort of trespass but was one to recover land falling within the scope and purview of paragraph 22 of Part I of the Schedule to the Law of Limitation Act whose limitation is stated to be twelve years. This is substantiated by the fact that, in the pleadings, each party to the suit claimed to have been the owner of the disputed parcel of land.'*

In the case at hand, it is only the plaintiffs who claim to be the owner of the disputed land and therefore the position in **CRDB (1996) LTD vs Boniface Chimya (supra)** prevail. Further **URU Central Cooperative Society Limited vs Laitolya Tours & Safari Limited (supra)** is

distinguishable on the ground that the plaintiff claim was for recovery of land which was occupied by the defendant (each party was claiming for ownership) but in the suit at hand it is only plaintiffs who are claiming for declaration. This court find the first point of objection has merit.

The joined second and third points was about illegal practices of defendant on alienating plaintiffs from their land and the destruction caused. Mr. Lubango maintained that, that is tort and the limitation for action under item 6 of part I of the schedule to Cap 89 is three (3) years but the plaint is silent on the reason for delay to file a suit. On the other side, the duo counsel argues that the action by the defendant was legal as she owned the mining right. In their submission counsel dispute to register complain of illegal action by defendant. At this juncture I wish to remind the parties that it is settled in our legal regime that parties are bound by their own pleading. See **Herieth Kasidi vs Agustino Bushiri (supra)**, **Barclays Bank (T) Ltd vs Jacob Muro** Civil Appeal No. 357/2019 and **James Funke Gwagilo vs AG** Civil Appeal No. 67 of 2001.

Reading paragraph 3 (ii), (iii) (iv) and (v) of the plaint as rightly presented by Mr. Lubango, plaintiffs pleaded that the action by defendant was illegal, therefore, the duo counsel for plaintiff cannot, at this stage, submit that

what was done by defendant was legal as they are bound with pleading which was the base of this Preliminary Objection. This court finds that the complaint of cutting down of trees and destruction of crops and properties is tort and the limitation of action is three (3) years as per item 6 of part I of the schedule to Cap 89.

There was an issue as to when the time start to run against the plaintiffs. The duo counsel cited regulation 13(1) of GN No. 78 that time start to run after acquisition of the land and they insisted that acquisition process was incomplete as there was no evaluation and notification to parties as was in the case of Turuki Haruna (supra).

For easy of reference, I shall reproduce the regulation 13 of GN 78 as follows;

*13(1) for the purpose of computing payable upon compensation shall be paid by the government or the local government authority only where there is no prompt payment of compensation made*

*(2) Fair the purpose of computing interest payable upon compensation "prompt payment of compensation within six months after the subject land has been acquired or revoked.*

*(3) Where amount of compensation remains unpaid for six months after acquisition or revocation interest at the average percentage rate*

*offered by commercial banks on fixed deposits shall be recoverable until such compensation is paid.*

As can be captured above, regulation 3(1) is about computation of interest when there is no prompt payment, sub-regulation (2) defines prompt payment and (3) is applicable where some amount remains unpaid for six months after acquisition or revocation. It is my considered opinion that provisions of the cited regulation are relevant when there is amount remain unpayable as seen in the case of **Turuki Haruna vs Director Mwanza City Council** (supra) specifically at page 11 where appellants in that case were claiming for unfair compensation and appellate court noted the obvious mischief. The regulation and the **Turuki Haruna vs Director Mwanza City Council** (supra) are distinguishable to the case at hand as in here, there is no compensation paid. Furthermore, the time which was discussed in the **Turuki Haruna vs Director Mwanza City Council** (supra) was for payment after evaluation and not time to file a suit. Plaintiffs are time barred and there is no explanation in plaint. It is settled that communication and negotiation between the parties is not a ground for stopping the running of the time of limitation. See **Lwanyantika Masha and John Woshi Obongo** (supra) and **URU Central**

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(supra). To rescue the suit, plaintiffs were required to comply with requirement of Order VII Rule 6 of the Civil Procedure Code, Cap 33. The joined point of objection is meritorious and are hereby uphold.

Generally, the PO raised by counsel for defendant has merit and I find no need to analyse the other PO as raised by duo counsel for plaintiffs which originated form counter claim. All being done I uphold the Preliminary points as raised by defendant and finds the matter is filed out of time hence this court lacks jurisdiction.

The issue of jurisdiction is important to be considered as it is risky and not safe to proceed with the hearing of any matter on the assumption that this court has jurisdiction to adjudicate upon. Court to proceed to try a case on the basis of assuming jurisdiction has disadvantage, that, the trial may end up in futility as null and void on grounds of lack of jurisdiction when it is proved later that the court was not properly vested with jurisdiction which is a creature of the statute and a bedrock of the court's authority. See, **The National Bank of Commerce Limited vs National Chicks Corporation Limited & 4 Others**, Civil Case No. 129 of 2015, **Tanzania Revenue Authority vs Tango Transport Company Ltd**, Civil Appeal

No. 84 of 2009 (both unreported) and **Fanuel Mantiri Ng'unda vs Herman Mantiri Ng'unda & 2 Others** [1995] TLR 155.

From the analysis I have made in the case at hand basing on point of objection raised, this court lacks jurisdiction to entertain the suit which was filed out of time. As per section 3 of the law of limitation Act, Cap 89, the suit is hereby dismissed with costs.

**DATED** at **MUSOMA** this 23 day of May, 2024.



*Nk*  
**M. L. KOMBA**  
**Judge**

Ruling delivered in the presence of Ms. Mary Joakim who hold brief of Mr. Mwita Emmanuel for plaintiffs and Mr. Lubango Sheduk counsel for defendant.

*Nk*  
**M. L. KOMBA**  
**Judge**  
**23<sup>rd</sup> May 2024**