

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 59 OF 2016

NGUDJE NEHEMIA MICHAEL PLAINTIFF
VERSUS
NATIONAL BANK OF COMMERCIAL (NBC) DEFENDANT

5th October & 4th November, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a two-point preliminary objection raised by Mr. Gaspar Nyika, learned counsel for the defendant. The preliminary objection (hereinafter "the PO") is couched thus:

1. The suit is hopelessly time barred
2. The plaintiff lacks of *Locus Standi* to sue the defendant.

The PO was argued before me on 05.10.2016 during which both parties were represented. Mr. Stephen Mosha and Gaspar Nyika; both learned counsel represented the plaintiff and defendant respectively. Both learned counsel had filed skeleton written arguments ahead of the hearing as required by the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. Both learned counsel adopted the skeleton arguments earlier filed.

Arguing for the PO, Mr. Nyika, learned counsel submitted that

The suit is for redemption of property which was mortgaged to the defendant following full repayment of the loan. Para 9 and 10 show that the loan is said to have been fully paid in 2001. It is therefore from that time that the plaintiff was entitled to the redemption of the property. So if there is a cause of action, that cause of action arose in 2001, he argues.

The learned counsel goes on to submit that para 17 of Part I of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 sets the time limit of twelve (12) years for a suit to redeem land in possession of a mortgagee. The 12 years expired in 2013 and this suit was filed in May, 2016; almost three years after expiry. On that basis the learned counsel submits that the suit is time barred and prays that it must be dismissed with costs.

On the second point, the learned counsel submits that the plaintiff is suing by virtue of a Power of Attorney issued by one Raymond Shauri Nkingo which power of Attorney has not been registered. He submits that the Power of Attorney giving rights to another person to claim over land is compulsorily registrable under section 8 of the Registration of Documents Act, Cap. 117 of the Revised Edition, 2002. The absence of that registration the right of the Plaintiff to bring this case is rendered defective and vitiate, he submits. Thus the plaintiff lacks *locus standi* to bring this case on behalf of Raymond Shauri Nkingo. The learned counsel thus prays that the suit be struck out for want of *locus standi*.

Arguing against the PO, Mr. Mosha, learned counsel submits that by virtue of section 120 (1) of the Land Act, Cap. 113 of the Revised Edition, 2002, the cause of action arises at the time the request to discharge is made by the mortgagor; not on full payment. This is perceived from the use of the words "at any time" in the section. Thus the cause of action in this matter arose in

2015 when the plaintiff wrote a letter to the defendant and such a letter received no reply. Having received no response, he submits, the Plaintiff felt there were no chances of redeeming the said mortgaged property. On this argument, the learned counsel submits that the first point of PO be overruled with costs.

On the second point, Mr. Mosha, learned counsel, submits that the point is not a Preliminary Objection within the standards of ***Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd*** [1969] 1 EA 696. He submits that ascertaining whether the Power of Attorney was registered or not, evidential proof will be needed to substantiate that fact. The learned counsel submits that the plaintiff has evidence to prove that the Power of Attorney was registered. In the premises, he prays that the second be overruled as well.

Mr. Nyika, learned counsel rejoined that section 120 (1) of the Land Act merely recognizes the right of a mortgagor to redeem the property upon payment of the sum secured. The word "any time" used refers to the rights, accruing after the payment; it does not in any way to set the time limit upon which such right has to be exercised. That is why we have to go back to the Law of Limitation Act which sets twelve (12) years from when the loan was fully paid.

On the second point of the PO, Mr. Nyika, learned counsel, rejoined that the objection comes out clearly out of pleadings especially para 3 of the plaint. This court will not require any evidence to determine whether or not the Power of Attorney is not registered. The Preliminary Objection thus falls squarely within the standards set in ***Mukisa Biscuit***. The *locus standi* of the plaintiff to sue goes to the root of the matter and that can be determined by

looking into the pleadings including the attached Power of Attorney. The learned counsel thus reiterated his prayers in the submissions-in-chief that the suit, with costs, be dismissed for being time barred or struck out for want of *locus standi*.

In determining the PO, I, like both learned counsel, will start with the first point. In this point, the learned counsel for the defendant is of view that the suit is time barred for offending the provisions of para 17 of Part I to the schedule of the Law of Limitation Act which sets twelve (12) as limitation time for instituting a suit founded upon redemption of land in possession of a mortgagee. The learned counsel for the plaintiff does not seem to dispute this position but states that the cause of action does not arise at the time when the loan is repaid in full but when the mortgagor writes the mortgagee to ask for such redemption and the latter makes no meaningful response thereof. The learned counsel relies on the provisions of section 120 (1) of the Land Act for this proposition. For the defendant, Mr. Nyika thinks the provision is not applicable as reference to "any time" in the section is not meant to set the time limit within which to bring a suit but to the rights accruing after the payment. For easy reference, let me reproduce this subsection:

"Subject to the provisions of this section, on payment of all moneys and the performance of all other conditions and obligations secured by the mortgage the borrower shall be entitled to discharge the mortgage **at any time** before the mortgaged land has been sold by the lender or a receiver under a power of sale and any agreement

or provision in the mortgage instrument or otherwise ..."

[Emphasis supplied].

I have read the context of this provision between the lines. With due respect to the learned counsel for the plaintiff, I think he has misconceived the tenor and import of the provision. The "any time" referred to in the sub-section refers to the time within which the mortgage can be discharged. The "any time" is pegged to the phrase "before the mortgaged land has been sold". As has been rightly submitted by Mr. Nyika, the "any time" does not refer to the time limit within which the mortgagor may bring a suit in court. In the premises, the provisions of the Law of Limitation Act, are not precluded by the subsection from being applicable.

I am not prepared to buy Mr. Mosha's argument to the effect that the cause of action arose in 2015 when the defendant allegedly refused to communicate to him on the redemption of the mortgaged land. I am of the well considered view that the cause of action arose in 2001 when the plaintiff allegedly fully repaid the loan.

I therefore am in agreement with the learned ~~counsel for the~~ defendant that, by virtue of para 17 of part I of the schedule to the Law of Limitation Act, the present suit which is founded on the redemption of land in possession of a mortgagee, ought to have been filed within twelve (12) years after the cause of action arose; that is, in 2001 when the plaintiff allegedly fully repaid the loan money. The first point of the PO is therefore sustained.

The foregoing suffices to dispose of the matter before me. However, for completeness, I will also determine on the second point of the PO. This point

endorsement or receipt does not purport or operate to extinguish the mortgage or charge;

(h) any document evidencing the grant of a lease, or a right of occupancy, for a term of five years or less or from year to year or for periods of less than a year, whether or not the grant includes an initial fixed term, unless such initial fixed term exceeds four years, any document if the only interest in land dealt with thereby is derived from such a grant, or is an interest in standing trees or timber or growing crops or grass, where such trees timber or growing crops or grass are to be removed within one year from the date of the document;

(i) any document when the only interest in land dealt with thereby is an interest in fixtures or growing crops registered as a bill of sale;

(j) a mining lease or mineral oil mining lease granted under the Mining Act, or the right to work the same, and such lease or document is registered pursuant to the Mining Act *, or any regulations made or to be made under any of the said Ordinances;

(k) any document if the only interest in land dealt with thereby relates to land registered under the Land Registration Act

(l) a water right within the meaning of the Water Act ;

(m) a document disposing, or evidencing the disposition, of land in accordance with customary law if the law applicable to the disposition is customary law and the land is subject neither to a Government lease nor a right of occupancy granted under the Land Act."

I have quoted the section *in extenso* with a view to showing in full what it provides. My reading of the section, as already, does not unearth any requirement of a Power of Attorney as being compulsorily registrable. I find comfort on this stance in ***Hamidu Ndalahwa Magesha Mandagani Vs Raynold Msangi & Anor***, Commercial Case No. 52 of 2007; an unreported decision of this case. In that case, Massati, J. (as he then was – now Justice of Appeal), confronted with an identical situation, held:

"A power of attorney is to be used to represent persons who are absent from the local jurisdiction of the Court, or with physical disability. Although it is desirable to register a power of attorney, and it is normally registered under the Registration of Documents Act (Cap 117 – RE 2002) a power of attorney is not listed among those documents of which registration is compulsory under s. 8 of the Act. The registration of a power of attorney is only optional under s. 11 of the Act."

For the avoidance of doubt, I would not peck my nose into the question whether or not the donor of the Power of Attorney is or is not within the jurisdiction of this court or even whether he has any physical infirmity, for this is a question of evidence which cannot be applicable at his stage. I only wish to state that the law is fairly settled in this jurisdiction as to when the Power of Attorney can be applicable – see also: ***Naiman Moiro Vs Nailejlet K. J. Zablon*** [1980] TLR 274; the decision of the Court of Appeal.

On the basis of the foregoing, I would overrule the second point of objection. However, this does not change the final outcome of the case, the first point of objection having been sustained. Under section 3 of the Law of Limitation Act, any suit brought out of time must be dismissed. Having sustained the first point of PO, I have no option to take but to follow the letter of the law.

In the final analysis, the plaintiff's suit is dismissed for being filed out of time. Costs to follow the event.

Order accordingly.

DATED at DAR ES SALAAM this 4th day of November, 2016.

J. C. M. MWAMBEGELE

JUDGE