

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

AT DAR ES SALAAM

LAND APPEAL NO. 177 OF 2019

*(Originating from Kibaha District Land and Housing Tribunal as per
Mbuga, Chairman in Land Application No. 160 of 2018)*

MSHAMU SAIDI (Administrator

Of the estate of SAIDI MBWANA APPELLANT

VERSUS

KISARAWA DISTRICT COUNCIL1ST RESPONDENT

ZENO KAHUMBA2ND RESPONDENT

ABDALLAH SAIDI OMARY3RD RESPONDENT

FREDRICK SUMAYE4TH RESPONDENT

KAMALU MUSTAFA KHALID5TH RESPONDENT

MAIGE, J

JUDGMENT

The appellant is the administrator of the estate of the late Said **Mbwana** who demised on 18th September 1992 intestate (“the deceased”). He was constituted administrator of the estate on 1st day of December 2014 by the Mailimoja Primary Court. In pursuit of his administrative power, the appellant instituted, at the District Land and Housing Tribunal for Kibaha (“trial tribunal”), a suit for recovery of a landed property at Makuranga village worth TZS

100,000,000/= (“the suit property”). The factual allegations constituting his cause of action was pleaded in paragraph 6 of the amended Application as follows:-

- (i) *That with all times the land in dispute was legally owned and enjoyed peacefully by the said SAIDI MBWANA.*
- (ii) *That following demise of Saidi Mbwana the applicant made an application to Kibaha Primary Court and on 1st day of December 2014 he was appointed an administrator of the estate of the late Said Mbwana. “A copy of the letters of administration of the estate of the deceased property (SAIDI MBWANA) as issued to the applicant by Kibaha Primary Court is annexed and marked as “**Annexure A1**” leave of this Honourable Tribunal is craved for the same to form part of this application.*
- (iii) *That after the applicant’s appointment as an administrator of the deceased estate for the purpose of distributing the same to the lawful heirs where he was prevented by the respondents who were busy destructing uprooting valuable plants and leaving extreme loss to the applicant.*
- (iv) *That after the applicant came to notice that the 1st Respondent facilitated reallocation of the land in dispute to respondents who trespassed into the land of the deceased, the applicant drafted a demand notice to the respondents to require them to peacefully vacate and yield up the disputed piece of land to the applicant but the respondents neglected to comply with the same and instead replied to the applicant’s demand notice via letter with reference number LA/MY1/2018/01 claiming ownership of the disputed land as it was purported to be reallocated by the 1st Respondent. “Attached herein is a copy of the demand notice with reference number OA/DN/JAN/2018 and demand notice dated 25th Feb 2019 to the first Respondent and the respondents reply to the demand notice with reference*

*number LA/MY1/2018/01 collectively marked as “**Annexure A2**” leave of this court is sought for the said documents to form part of this application.*

In the strength of the preliminary objection raised by the respondents, the suit was dismissed for being time barred. Aggrieved, the appellant has instituted the current appeal faulting the **trial tribunal** in holding that the suit was time barred.

In accordance with the ruling of the **trial tribunal**, time limit for an action to recover land of a deceased is 12 years from the date of the death of the deceased. The trial chairperson placed reliance on the provision of section 9(1) of the **Law of Limitation Act, Cap. 89, R.E., 2002** (“the LLA”). Counting from 1992 when the deceased passed away to 2018 when the suit at the **trial tribunal** was instituted, the trial chairperson came out with an opinion that, the suit was hopelessly time barred.

In the prosecution of this appeal, the appellant was represented by Mr. Stephen Ndila Mboje, learned advocate. The first respondent was represented by Dionisia Beatus, learned solicitor. The second, third, forth and fifth respondents were represented by advocates Patrick Lusama, Omary Abubakar Ahmed, Edward Nelson Mwakingwe and Rutasingwa, respectively.

The appeal was argued by way of written submissions. My reading of the rival submissions suggest of there being a common understanding of the parties and their counsel on the time limit for claim of recovery of possession of land. It is, according to section 3 of the **LLA**, 12 years from the date of the accrual of the cause of action. The dispute between them, it would appear to me, is when did the cause of action arise.

The contention of Mr. Patrick Lusama for the second respondent which is shared by his learned counsel for the rest of the respondents is to the effect that, the cause of action accrued on the date of the death of the deceased. Their contention is based on their understanding of section 9(1) and 35 of the **LLA** as judicially considered in **Yusuf Same & Another vs. Hadija Yusuf (1996) TLR 347.**

On his part, the counsel for the appellant takes the view that, the provisions of section 9(1) and 35 of the **LLA** do not come in unless the land in question is in adverse possession of the persons in whose favour limitation period would run. He submits further that, in accordance with the facts pleaded at the **trial tribunal**, until 2014, the **suit property** was yet to be in adverse possession of the respondents or either of them. It can therefore, in his understanding, not be said that a cause of action had accrued there before while no one had taken possession of the **suit property**. It is further the understanding of the learned counsel that, for a cause of

action to arise from the date of the death of the deceased within the meaning of section 9(1) of the **LLA**, the dispute might have been in existence before the death of the deceased.

Let me start by saying, right away that, section 9(1) of the **LLA**, is not, as contended for the appellant, related with causes of action that arose before the death of the deceased. It relates to a situation where a dispute had not, at the time of the demise of the deceased, accrued. It provides as follows:-

*9(1) Where a person institutes a suit to recover Land of a deceased person whether under a will or intestacy and a deceased person was, on the date of his death, **in possession of the land and was the last person entitled to the land to be in possession of land**, the right of action shall be deemed to have accrued on the date of death.*

In my understanding of the law, where the cause of action accrues before the death of the deceased, the period of limitation does not stop running save for the exclusion under section 25 (1) which provides as follows:-

25(1) Where a person dies after a right of action in respect of any proceeding accrues to him, the time during which an application for letters of administration or for probate have been prosecuted shall be ~~ex~~cluded in computing the period of limitation for such proceeding.

From the express provision of the section just referred, the only time which would have been excluded, had the cause of action

arisen before the death of the deceased, is that which was spent by the appellant in prosecuting the proceeding for his appointment as an administrator of the estate and no more.

There was also a contention from the counsel for the appellant that, under the provision of section 35 of the **LLA**, the period between the death of the deceased and the appointment of an administrator should be excluded. The contention seems to be deduced from the counsel's understanding of the expression "*shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration*" in the respective provision. In order to appreciate the argument, I will reproduce here below the said provision. Thus;-

35. For the purposes of the provisions of this Act relating to suits for recovery of land, an administrator of the estate of a deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration or, as the case may be of probate.

In **Shomari Omari Shomari (as administrator of the estate of the late Seleman Ibrahim Maichila) vs. Mohamed Kikoko, Land Appeal No. 171 of 2018**, while dealing with a similar issue, I expressed my opinion on the import of the respective section, the expression which I still stand for, in the following words:-

*As I understand the law, exclusion of time for the purpose of limitation is a question of law. It is specifically provided for in part IV of the **LLA** which is entitled "Computation of Period of Limitation". Section 35 is not in it. It is in Part V which is entitled "Special Provisions Relating to Land". The marginal note in the respective provisions are "**Administration dates back to death**". In their clear and unambiguous meaning, the respective notes would mean in my view that, letters of administration or probate speaks from the date of the death of the deceased. This is in line with the provision of section 9 (1) of the Law of Limitation Act. My understanding of the clause "shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration" in section 35 of the **LLA** is that, the period between the death and the grant shall be counted as if the deceased was alive.*

A similar position was shared by my learned sister Judge Dr. Levira in **Helena Mwaipasi vs Philip Mwambungu and Two Others, Land Case No. 10 of 2012 (High Court- Mbeya, Unreported)** where she observed that:-

The plaintiff is unfortunately caught in the web of limitation. It is uncontroverted fact that by the time the plaintiff was granted the letters of administration in 2012, she was already time barred. I am bold to hold therefore that, the suit at hand was filed while time barred as per section 35 of the Law of Limitation Act, Cap. 89 R.E. 2002.

This appears also to be the position in **Yusuf Same & Another vs. Hadija Yusuf (supra)** where it was held that "the limitation period in respect of land, irrespective of when letters of administration had been granted is 12 years as from the date of the death of the deceased".

In **Panayotisi Nicolaus Catrava vs. Khanubhai Mohamed Ali Harji Bhanji**, [1957] EA 98, the Court of Appeal for Eastern Africa, commenting on whether or not, the period of limitation stops after the death of a deceased, stated as follows:-

There is no doubt that the period of limitation continues to run after the death of the deceased and before probate has been taken out by his executor

Armed with the above authorities, I have no hesitation to hold that, in terms of section 35 of the **LLA** read together with section 9(1) of the same, the period between the death of the deceased and the appointment of an administrator is not excluded in counting the period of limitation. I will therefore not accept the submissions by the counsel for the appellant in that respect.

It was also submitted for the appellant that, for the cause of action to accrue under section 9(1) of the **LLA**, the person in whose favour the period of limitation would run, must be in adverse possession of the suit property. Though the counsel did not cite any supporting authority, it would appear to me that, his contention was based on section 33(1) of the **LLA** which provides as follows:-

33(1) A right of action to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as "adverse possession") and, where on the date on which the

right of action to recover any land accrues and no person is in adverse possession of the land, a right of action shall not accrue unless and until some person takes adverse possession of land

It is perhaps useful to observe that, the accrual of right of action envisaged in section 9(1) of the **LLA** is not actual. It is merely constructive. This is implied by the use of the clause “*shall be deemed to have accrued*”. Therefore, as I held in **Shomari Omari Shomari (as administrator of the estate of the late Seleman Ibrahim Maichila) vs. Mohamed Kikoko (supra)**, for the purpose of determining accrual of right of action, section 9(1) should always be read together with section 33(1) so that, cause of action does not accrue on the date of the death of deceased until the defendant or his predecessor in title is in adverse possession of the suit property.

It is equally significant to observe that, an action for recovery of land is technically based on tort of trespass to land which is nothing else other than unjustifiable intrusion by one person in land in possession of another. Therefore, for one to establish a claim for trespass on land, he must establish either actual or constructive possession soon before the alleged intrusion. Constructive possession can be established through holding legal title on the suit property.

In this case, the appellant does not claim actual possession subsequent upon the death of the deceased. He is only alleging

ownership of the **suit property** by the deceased at the time of his demise. Truly, being an administrator of the estate of the deceased, the appellant is deemed, under section 35 of the **LLA**, to be in constructive possession of the **suit property**, by virtue of being a paper owner, as effectively as if he was constituted an administrator of the estate at the moment immediately after the death of the deceased. Therefore, for the respondents to be entitled a defense of time limitation, they must establish adverse possession of the **suit property** twelve years after the death of the deceased. They cannot, without adverse possession, place reliance on non- use of the land subsequent to the death of the deceased. For, as further observed by the learned jurists Kevin Gray and Susan Francis Gray, at page 247 of their book entitled **Elements of Land Law, Third Edition, (2001), London, Butterworth**, the observation which I fully subscribe to:

“Mere non use of the land by a paper owner cannot in itself, initiate the limitation period”.

The claim by the appellant in the pleadings was such that, the respondents took adverse possession of the **suit property** in 2014. In their defense however, the respondents claimed to have been in adverse possession of the same from 2001. In accordance with the principle in **Mukisa Biscuit vs. West End Distributors [1969] 696**, the determination of the preliminary objection was to be founded on the presupposition that the facts pleaded in the amended Application were true. Therefore, since the parties were, at the **trial tribunal** seriously contentious as to when the respondents took adverse possession of the **suit property**, the dispute, factual as it

as it is, would have not been resolved by way of submissions. Conducting a trial to ascertain the factual contention was thus inevitable. In my view therefore, the decision of the **trial tribunal** was premature. The appeal is henceforth allowed. The ruling and drawn **order tribunal** is hereby set aside and the proceedings thereof quashed. The file is remitted to the **trial tribunal** for full trial. One among the issues to be framed before the trial is whether the claim by the applicant is not time barred?

It is so order and I will not give an order as to costs in the circumstance.

It is so ordered.

A handwritten signature in black ink, appearing to read 'MAIGE.I', with a stylized flourish at the end.

JUDGE

21.09.2020.

Date: 11/09/2020

Coram: Hon. S.H. Simfukwe - DR

For the Appellant: Absent

For the 1st Respondent: Absent

For the 2nd Respondent: Mr. Patrick Lusama, Advocate

For the 3rd Respondent: Mr. Omary Abubakar, Advocate

For the 4th Respondent: Mr. Saul Santu, Advocate

For the 5th Respondent: Absent

RMA: Bukuku

COURT:

Judgment delivered this day of September, 202 in the absence of the Appellant and in the presence of Mr. Patrick Lusama learned counsel for the 2nd Respondent and Mr. Omary Abubakar and Saul Santu learned counsels for the 3rd and 4th Respondents respectively.




S.H. Simfukwe

DEPUTY REGISTRAR

11/09/2020