

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 52 OF 2019

OSWARD PIUS KITALI & 21 OTHERS PLAINTIFFS

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED..... DEFENDANT

RULING

Date of Last Order: 29/04/2021 &

Date of Ruling: 28/05/2021

S.M KALUNDE, J:-

In response to the Plaint, the Defendant raised point of preliminary objection "**the PO**" challenging the suit to be time barred since the suit arose from a claim of compensation. The defendant prayed for the suit to be dismissed with costs.

The point of preliminary objection was scheduled to be argued by way of written submissions. Both parties adhered to the scheduled date accordingly. **Lauran H. Kyarukuka** from the Legal Department of the defendant filed submission in support of the PO while Advocate **George Dogani Mwalali** fended the Plaintiff accordingly.

Advocate kyarukuka submitted that according to paragraph 3, and 4 of the plaint, reveals that the claim arose from compensation around November and December 2015 that they were not fully, fairly and promptly compensated and the present suit has been filed on 24th April, 2019 almost 4years and 4 months lapsed contrary to Part 1 Column 1 item of the scheduled of **the Law of Limitation Cap. 89 R.E 2019**, which provides that the suit originating from claim of compensation have to be instituted to the Court within a period of one year from the date of cause of action.

He also added that, even if paragraph 12 and 14 of the amended complaints states that the plaintiffs had previously filed **Land Case No. 130 of 2017** on 19th April 2019 after filing the representative suit still the same suit was filed out of time after expiry of one year. Even after the court rejected the plaint for being defective and left the option to file afresh the suit on 3rd December 2018, the plaintiff failed to observe **Order XXIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E 2019**.

He concluded by saying this Court lack mandate to entertain the matter as the plaintiff was required to seek extension of time to file this suit from the Minister of Legal Affairs as provided for under Section 44 (1) of Cap. 89, otherwise, he prayed the suit be dismissed according to section 3(1) of Cap. 89.

In reply Advocate Mwalali submitted that, the suit is within time as the plaintiff properties were revalued and plaintiff's properties were demolished on 30th March 2019. They are waiting for supplementary compensation payments. He further stated the preliminary objection can be vacated based on the principle of overriding objective where the Court is required to deal with substantial justice as Decided in the Case of **Yakobo Magoiga Gichere vs. Peninah Yusufu**, Civil Appeal No. 55 of 2017, CAT (Unreported). Even so the plaintiffs were busy prosecuting their cases in good faith until the plaint was rejected. He is in opinion that the same can enjoy the mercy of this court under section 21 (1) of Cap. 89.

He further prayed for this Court to disregard the PO for not following the guidance under the Case of **Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors Ltd** (1969) E.A. According to him the PO call for evidence and perusal of the annexure to the pleading and not based on point of law alone.

I have carefully considered the rival submissions by learned counsel. Before considering the merit or otherwise of the preliminary objection, I should first decide whether the so-called preliminary objection is really a preliminary objection. A rational answer to this question can be found in what the court observed in the case of **Mukisa Biscuits**

Manufacturing Company LTD v West End Distributors LTD (1969)

EA 696. At page 700 Law, J.A observed as follows:-

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a **plea of limitation**, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration."*

At page 701 **Sir Charles Newbold P.** had this to say:-

"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 what is the exercise of judicial discretion."

Applying to the principle of law above the point of preliminary objection based on plea of limitation of time is pure point of law and therefore there is no doubt that the current preliminary objection falls under the Mukisa case above. The question remains is, whether the current suit is time barred or not? and if the answer is affirmative then the second question is whether the same can be treated under the overriding objective principle?

From the information gathered from pleading specifically in Accordance to paragraph 3, 4 and 11 of the complaints, it is clearly indicating that the Cause of action arose out of compensation from to the Plaintiff by the defendant for not been fully, fair and prompt compensated. And the said compensation was conducted on November and December 2015. And the notice to vacate the premise was issued around the same time. The Law of limitation Act under Part 1 Column 1 item of the provides;

"For compensation for doing or for omitting to do an act alleged to be in pursuance of any written law is one year"

From the above reading it is clear that, those who are aggrieved by the manner of compensation based on acquisition of their properties by the Government or its agencies, should file their complaint within one year. In the recent matter the plaintiffs were compensated and issued a notice to demolish their properties around November 2015, if I can apply the provision of law above, it is clearly the cause of action arouse around November 2015 and the plaintiffs were required to institute this suit November 2016. This case, Land Case No. 52 of 2019, was filed on 25th April 2019 almost four years contrary to the requirement of law above.

However, upon the perusal of the plaint I came across paragraph 8 to 12 where plaintiffs pleaded to have open have been in court corridors busy prosecuting his grievance, he filed several applications and **Land Case No. 130 of 2017**. The first application to be filed to this Court was representative suit under certificate of agency on 28th January 2016 three months from the time of compensation was made and notice of demolition was issued. Upon the order been granted the Plaintiff instituted Land Case No. 130 of 2017 where the Court **suo moto** rejected the plaint for being defective on 28th October 2018. Thereafter the Plaintiffs filed another representative suit through **Misc. Land Application No. 42 of 2019** and the same was granted on 28th march 2019 hence the recent suit.

It is from the above set of facts that, I find that the current suit is within time frame. I say so because **Section 21 (1) of the Law of Limitation Act** (supra) allow exclusion of time spent by plaintiff in prosecuting the matter with due diligence and good faith within the Court Corridor over the same parties. Well from the narration above I feel duty bound to implore the provision of Section 21 of the Law of Limitation Act (supra) that;

"21.-(1) In computing the period of limitation prescribed for any suit, the time during which

the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it."

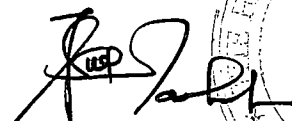
Having said all that, I am persuaded by the decision of this Court in case of **Makamba Kigome and Gregory Matheo and 32 Others Vs. Ubungo Impements Ltd and PSRC, Civil Case No. 109 of 2005, High Court of Tanzania**, Dar es Salaam Registry where **Kalegeya, J** (as he then was) stated;

"Section 21 (1) gives opportunity to a person who has been diligently prosecuting with due care another Civil proceeding which finally came to netted by defect of jurisdiction or any cause of like nature making it incompetent. The period should be legally excluded".

For the foregoing reasons, I find the preliminary objection to have no merit, the same is accordingly overruled. Costs to be in cause.

It is so ordered.

DATED at DAR ES SALAAM this 28th day of MAY, 2021.


S.M. KALUNDE
JUDGE

