

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 72 OF 2019

ASHA RAMADHANI HASSAN.....1ST PLAINTIFF
IBRAHIM RAMADHANI HASSAN.....2ND PLAINTIFF
(All Administrators of the Estate of The Late RAMADHANI HASSAN)

VERSUS

SELEMANI ATHUMANI SWAI.....1ST DEFENDANT
BAKARI ATHUMANI.....2ND DEFENDANT
OMAR ALI OMAR.....3RD DEFENDANT

Date of Order: 13.04.2021
Date of Ruling: 10.05.2021

RULING

V.L. MAKANI, J

The 1st defendant in this suit SELEMANI ATHUMANI SWAI simultaneously with filing his Written Statement of Defence has preliminary objections on points of law as follows:

- 1. That the suit is hopelessly time barred in terms of Item No. 22, Part I of the Schedule to the Law of Limitation Act CAP 89 RE 2002 read together with section 3(1) of the said Act.*
- 2. That the suit is also bad in law for being preferred contrary to Item No. 24 Part I of the Schedule to the Law of Limitation Act CAP 89 RE 2002 read together with section 3(1) of the said Act.*

3. The suit is incompetent and cannot be entertained by the honourable court pursuant to section 9 of the Civil Procedure Code CAP 33 RE 2002, pursuant to the existence of a decree of the High Court in Civil Case No. 241 of 1996 between Selemani Athumani Swai vs. Fummo Company Limited & Others and ruling of High Court (Land Division) in Land Case No. 225 of 2005 between Iddi Hassan vs. Selemani Athumani Swai.

With leave of the court the preliminary objection was argued by way of written submissions.

As regards the first objection, Mr. Frank Chacha who was instructed by the 1st respondent to draw the submissions only, stated that the Limitation Act under Part I to the Schedule in Item 22 provides for a period of twelve years for a claim of recovery of land. He said the claim under paragraphs 6 and 10 of the plaint is pursuant to an Agreement made in 1985 for purchase of a house situated on Plot No. 1 Block 72 Lumumba/Pemba Streets, Ilala Municipality Dar es Salaam (the **suit house**). He said the plaintiffs' father died in 1990 as per paragraph 15 of the plaint and the plaintiffs' filed a probate case (Probate & Administration Cause No. 28 of 2018) and the suit herein was filed on 21/06/2019. He said according to the plaint he was of the view that the cause of action arose between 1985 when the sale was done and 1990 upon the demise of the plaintiffs' father as such

the suit is hopelessly time barred. He prayed for the court to dismiss the suit under section 3(1) of the Limitation Act.

As regards the second point, Mr. Chacha stated that Part I, Item 24 to the Schedule of the Limitation Act provides for a period of six years within which to lodge a suit. He said the plaintiffs' claim under paragraph 6 of the plaint is for restoration of shares held in the suit house. Also, in paragraph 19 of the plaint the plaintiffs claimed that the 1st defendant maliciously deceived the family of his late friend and fraudulently misrepresented himself to give them money as part of their father's division in 2011. He said since there is no time limit in respect of restoration of shares and considering what has been pleaded in paragraph 19 then the time limit for filing a suit expired in 2017 and since the suit was filed in 2019, it is therefore time barred and he prayed for the suit to be dismissed with costs.

The third point of objection was that the suit cannot be entertained as it is res judicata as provided for under section 9 of the Civil Procedure Code CAP 33 RE 2002 (the **CPC**). Mr. Chacha said the rationale behind the principle is to bar multiplicity of suits thereby guaranteeing finality to litigation. He went on saying that in a decree

of High Court dated 17/03/2005 in **Civil Case No. 241 of 1996 between Seleman Athuman Swai vs. Fummo Company Limited & Others** (Hon. Mihayo, J), the suit was marked as settled out of court in accordance with the Deed of Settlement filed in court. He further said in the ruling of the **High Court Land Case No. 225 of 2005** (Hon. Chingwile, J) said categorically that the court is barred from entertaining the application because there is a decree which has not been set aside. He said though parties may not be the same in the present and in the previous suits the contentious issue was ownership of the suit house, which is also the same subject issue in this case. In other words, the plaintiffs are suing for the same subject matter and the reliefs sought are in respect of the same disputed house. He said the proper procedure ought to have been for the plaintiffs to set aside **Civil Case No. 241 of 1996** instead of filing a fresh case predicated on the same subject matter which subject matter was directly and substantially in issue in the former suit, and also directly and substantially in issue in this subsequent suit. He relied upon the case of **Umoja Garage vs. NBC Holding Corporation [2003] TLR 339**. With the above submissions, Mr. Chacha prayed for the objections to be sustained and the suit to be dismissed with costs.

In reply Mr. Sosthenes Mbedule, advocate for the plaintiffs submitted as regards to the first point that there suit is not time barred because the issue at hand is restoration of shares held in the suit house and this is continuation of breach and wrongs as provided for under section 7 of the Limitation Act. He said the cause of action arose when the plaintiffs were appointed to be administrators of the estate of the late Ramadhan Hassan which is in 2018 so it is within time as per Item 24 Part 1 of the Schedule to the Limitation Act.

As for the third objection Mr. Mbedule said the suit is not res judicata because the parties herein have never been in dispute, and this suit had never been determined to the finality. He prayed for the objections to be dismissed with costs for lack of merit.

Mr. Mbedule did not respond as regards the second point of objection.

In rejoinder Mr. Chacha as to the first objection said that the reliance on section 7 of the Limitation Act is misplaced and an afterthought as such facts were not alluded in the plaint and the principle is that parties are bound by their pleadings. As for the objection on res

judicata Mr. Chacha said Counsel has read the doctrine upside down. He said the subject matter in the previous suit, that is, **Civil Case No. 241 of 1996** was on ownership of the suit house or shares and was directly and substantially in issue with the former suit and Iddi Hassan was litigating on behalf of the plaintiffs' father and was doing so under the same title as the plaintiffs in the current matter. He reiterated his prayers for the objections to be sustained and the suit to be dismissed with costs.

I have gone through the submissions by the parties and the main issue for consideration is whether the preliminary objections raised have merit.

I will consider the first and the second points together as they all relate to limitation of time. The time limit for recovery of land is 12 years according to Item 21 of Part III of the Schedule to the Limitation Act. According to the plaint the plaintiffs are claiming recovery of their shares in the house which according to them was owned by their late father. The time limit for this is not specified but according to Item 22 Part III of the Schedule to the Limitation Act, the time limit for other claims is 6 years. Now, in assessing time limit we have to source

when the right of action accrued. It is apparent from the plaint that the plaintiffs are alleging that their father bought the suit house jointly with the 1st defendant in 1985, and their father died in 1990. The dispute on ownership of the suit property started after the death of the plaintiffs' father as it can be depicted in the paragraphs 16 to 25 of the plaint and the reliefs sought by the plaintiffs. Claim of shares in the suit house means claim of half of the suit house. In other words, the claim by the plaintiffs before the court is ownership of at least half of the suit house as they allege that their late father Ramadhani Hassan was the majority shareholder. It is apparent, and as correctly stated by Mr. Chacha that the cause of action started when there was purchase of the suit house in 1985 or when there were disagreements between the 1st defendant and the family of the late Ramadhani Hassan after his death in 1990, as to who is the owner of the suit house. Counting from 1985 to the date when this suit was filed on 21/06/2019 is 34 years; and it is 28 years after the death of the late Ramadhani Hassan.

As aforesaid, claim for recovery of land is 12 years and other claims not stated is 6 years. It is clear that the suit is time barred even if it had been brought in the name of claim of "shares in the suit house"

instead of claim of ownership of the suit house. Mr. Mbedule claimed that this is a continuation of breach. Unfortunately, he did not state the referred breach as no agreement was even annexed to the plaint. He also argued that the plaintiffs were appointed administrators in 2015 so the matter was within time. But this argument is without merit as there was one Iddi Hassan who was claiming ownership on behalf of the late Ramadhan Hassan and under the same title as the plaintiffs herein. Subsequently, as aforesaid the suit is time barred and is accordingly dismissed.

Another point of objection raised was that the matter is res judicata. Section 9 of the Civil Procedure Code CAP 33 RE 2002 governs the principle of res judicata. According to the case of **Umoja Garage v. National Bank of Commerce Holding Corporation** (supra) the rationale of the doctrine, as correctly stated by Mr. Chacha, is to ensure finality in litigation and to protect an individual from multiplicity of litigation. The matter at hand cannot fall under this doctrine per se considering that the parties have never been in any dispute involving the respondent. However, the subject matter is ownership of the same suit house which has all along been the issue in controversy in various cases including Civil Case No. 241 of 1996.

The said case which was in this very court declared the respondent as the legal owner of the said suit house. Mr. Mbedule has not said if there was any preferred appeal against the said case, and the record does not reflect any known appeal against the decision of the said case. In my considered view, if the court would embark on hearing of the matter, there would be two conflicting decisions from the same court. In other words, the court is barred from entertaining the suit since the decree in Civil Case No. 241 of 1996 is in existence and is yet to be set aside.

In the circumstances the preliminary objections have merit, and they are upheld. The suit is hereby dismissed with costs.

It is so ordered



V.L. Makani
V.L. MAKANI
JUDGE
10/05/2021