

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.57 OF 2020**

GUNGUTALA MKOROMA

(Suing as the Administrator of the Estate
of Late Mkoroma Mangalyuma Komba)**PLAINTIFF**

VERSUS

NICK ITUNGA & 5 OTHERS **DEFENDANTS**

RULING

Date of last Order: 6/9/2021
Date of Judgment: 21/10/2021

T. N. MWENEGOHA, J.

The plaintiff sued the defendants claiming for;

- a) For a declaration that the plaintiff's father was the lawful owner of the land currently known as Plots No. 2424/1, 2424/2, 2424/3, 2424/4, 2424/4, 2424/5, 2424/6, 2424/7, 2424/8, 2424/8, 2424/9, and 2424/10 at Block L. Mbezi, Kilongawima and the surrounding area to a total of fifteen (15) acres.
- b) For a declaration that the plaintiff is the lawful owner of Plots No. 2424/6, 2424/7, 2424/8, 2424/9 and 2424/10 unlawfully allocated to the 1st, 2nd, and 3rd defendants.

- c) For a declaration that the allocation of the plots by the 4th and 5th to the 1st, 2nd, and 3rd defendants was unlawful hence the 1st, 2nd and 3rd defendants are trespassers.
- d) For an order of eviction, demolition and vacant possession of the suit Plots to the Plaintiff, alternatively for an order that the plaintiff is entitled to compensation for unlawful eviction from the suit land.
- e) For general damages to be assessed by the court.
- f) For interest at the court's rate and
- g) For Costs of this Suit.

The defendants resisted the claim by filing their defense and raising a preliminary objection that;

- 1.) That the suit is hopeless time barred contrary to the provision of item 22 of Part 1 of the schedule of the Law of Limitation Act, Cap 89 R.E 2019 (here in after the Limitation Act).

Ms. Grace Lupondo the learned state attorney represented the 4th, 5th and 6th defendants while the Plaintiff was represented by Ms. Stellah Simkoko, Advocate.

Submitting in support of the preliminary objection, Ms. Lupondo said that, the plaintiff served the written statement of defense to the 4th, 5th and the 6th defendants on the 25th August, 2020. That, the plaint was filed on the 23rd July, 2020 which discloses the fact that, the plaintiff was living a peacefully life enjoying the suit property until in the mid of 2008.

She continued to submit that under paragraph 13 of the plaint is where one can find accrual of the cause of action against defendants, which is the recovery of land whereby the plaintiff claims to be declared a lawful owner of the suit property.

She submitted that, as per item 22 from part I of the Limitation Act, the suit for the recovery of land is limited to 12 years. Hence, that the plaintiff's cause of action accrued or lapsed on 4/5/2020. It was her view that, by filing the suit on the 23/7/2020 the plaintiff was already late for the period of 2 months and 19 days. Therefore, the main suit is time barred and it is supposed to be dismissed under Section 3 (1) of the Limitation Act. To support her submission, she cited the case of **Yusuf Vuai Zyuma Vs. Mkuu wa Jeshi la Ulinzi T.P.D.F & 2 Others, Civ. Appeal No. 15 of 2009.**

Ms. Lupondo finalized her submission by praying for the Court to dismiss the suit with costs.

When replying Ms. Simkoko, submitted that according to Section 3(2) A of the C.P.C, a suit commences with a plaint. That in this case the 1st plaint was lodged on the 3/4/2020 as against the 1st and the 2nd defendants, and that on the 9/7/2020 leave was granted to amend the plaint so as to include other defendants and that the amended plaint was lodged on 23/7/2020 including the 4th, 5th and the 6th defendants. She continued to submit that when the 1st plaint was lodged it was within time therefore the amendment does not render the suit time barred. She agreed that the cause of action arose on the 5/5/2008 in the sense that the plaintiff's house was demolished by the Municipal Council, but the allocation of the suit plot to the 1st, 2nd and 3rd Defendants were done on 2009, 2010, 2012 and 2013 therefore, that the suit is still within time.

On the alternative, she submitted that the 4th, 5th and 6th defendants were served for the purposes of informing them as they are the one who allocated the Plots. That the allocation by the 4th defendants was done in 2009, 2010, 2011, 2012 and 2013 therefore that the time should run from

the date of the allocation. Ms. Simkoko finalized her submission by praying for this Court to dismiss the preliminary objection for being misconceived. When replying Ms. Lupondo advocate for the defendants submitted that when the plaint is amended the previous case cease to exist. That, the issue of allocation alleged to be conducted from 2009, 2010, 2011, 2012 and 2013 is misplaced because the suit before the Court is for recovery of title under the plots in question. That on 5/2/2020 the plaintiff issued the notice to sue the government and on 3/4/2020 the plaintiff filed the plaint which ought to have included all the defendants. That, amending the plaint in order to include the 3rd, 4th, 5th, and 6th defendants was an afterthought.

She finalized her submission by praying this for Court to allow the preliminary objection with costs.

Advocate Kephaz Mayenje for the 1st defendant submitted that though the award of the cost is under the Court's discretionary, he prayed for the 1st defendant to be awarded costs in case the preliminary objection is sustained.

I have thoroughly considered the rival submissions of the learned counsel for both parties, the main issue for determination is whether the preliminary objection raised is meritorious.

Ms. Lupondo submitted that on the 25th August, 2020 the 4th, 5th and the 6th defendants were served with the amended plaint. According to her the cause of action which is the recovery of land, occurred on the 5/5/2008, when the plaintiff's houses were demolished and that the main suit in which this preliminary objection was raised was instituted on the 23/7/2020. Ms. Lupondo further submitted that, according to the

Limitation Act, under item number 22 Part I, the time limit for a person to claim ownership of Land is 12 years. That calculating from when the cause of action arose to the date of the institution of the suit which to her is on the 23/7/2020, twelve years have already lapsed therefore the suit is time barred.

Ms. Simkoko submitted that according to Section 3(2) A of the C.P.C a Suit commence with the Plaint. That, in this case the first plaint was instituted on 3/4/2020, and on the 9/7/2020 the Court granted leave to amend the plaint in order to add the 3rd, 4th, 5th, and the 6th defendants. The amended plaint was filed on the 23/7/2020. I also note Ms. Lupondo's argument that when the 1st plaint was lodged on the 3/4/2020 still it was within time, and that the amendment does render the suit time barred.

I am in agreement with Ms. Simkoko's line of argument in a sense that the order for amendment did not aim at affecting the proceedings before the Court, rather it only aimed at helping the Court for the purposes of determining the real questions in controversy between the parties or for the Court to reach a just and fair decision. When the court allows amendment of the plaint it does not dismiss the case rather it adjourns it, pending the filing of the amended plaint. Order VI R.17 provides that:-

"The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Amending the plaint is different from rejecting a plaint, which has the effect of rendering a suit to be filed afresh. Under Order VII rule II of the C.P.C there are three situations which may lead to the rejection of the plaint which are; one, where the plaint does not disclose the cause of action; two where the relief claimed is undervalued and the plaintiff, upon being required by the court to correct the valuation within a specified time fails to do so, and three, where the suit appears from the statement in the plaint to be barred by any law. The effect of the order for rejecting a document is that it does not bar the party against whom that order is made from filing the document afresh after rectifying the defect which resulted into its rejection.

In the instant case there is no filing a fresh suit, as long as the suit was filed within time, after the court allowed the plaintiff to amend the plaint, one cannot come out and say that suit is time barred just because the amended plaint was filed after expiry of the time limit to claim the suit property. Therefore, the preliminary objection raised is not meritorious. Before reaching to the conclusion, I would like to say something on the role of advocate to the court. Advocates are officers of the court with the duty of assisting the court to reach fair and just decisions. They are not supposed to mislead the court. Ms. Simkoko in her submission she submitted that according to Section 3 (2) of the C.P.C, a Suit commence with the Plaint, it is true that the suit commences with a plaint, this is provided under the provision of Order IV Rule I and not Section 3(2)A of the C.P.C. and not Through Section 3A (2) as submitted by Ms. Simkoko. In fact, the provision cited by Ms. Simkoko deals with the overriding objective.

For the reasons stated above, the 4th, 5th and 6th defendant's preliminary objection have no merit and it is hereby dismissed. Costs to follow the cause in the main suit.

It is so ordered.

Dated at Dar es salaam this 21st day of October, 2021




T. N. MWENEGOHA.
JUDGE