

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

**LAND APPEAL NO.4 OF 2021**

(Originating from the District Land and Housing Tribunal for Kinondoni  
at Mwananyamala in Application No.351 of 2018)

**STEPHEN OMARY MHANDO (as Administrator  
of the Estate of the late Kibibi Juma) ..... APPELLANT**

**VERSUS**

**MOHAMED YUNUS ISSA ..... RESPONDENT**

**JUDGMENT**

Date of last Order: 11.10.2021

Date of Judgment: 15.10.2021

**A.Z.MGEYEKWA, J**

The present appeal stems from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 351 of 2018. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them as follows. The appellant

filed an application before the District Land and Housing Tribunal for Kinondoni at Mwanayamala in Land Application No. 351 of 2018. The application stumbled upon a preliminary objection from the respondent. He claimed that the matter was time-barred. By the consent of the court, the preliminary objection was argued by way of written submission. The District Land and Housing Tribunal determined the objection and ended up dismissing the application for being time-barred.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala. He has raised one ground of grievance, namely:-

*That the District Land and Housing Tribunal for Kinondoni at Mwananyamala erred in law when it ruled that the matter was time-barred while there were no curtailed facts to prove the same.*

When the matter was called for hearing on 11<sup>th</sup> October, 2021, the applicant enjoyed the legal service of Mr. Stephen, learned counsel and the respondent did not enter appearance, despite the fact that he was served through substitution of service. Therefore, following the prayer by the appellant's Advocate to proceed *ex parte* succeeding the absence of

the respondent, this court granted the appellant's Advocate prayers. The matter proceeded *ex parte* against the respondent.

In his submission, the appellant contended that the District Land and Housing Tribunal erred in law to rule out that the matter was time-barred. He went on to argue that the Chairman's reason was purely based on evidence. He added that in arguing a preliminary objection evidence is not considered. The learned counsel for the appellant contended that the District Land and Housing Tribunal decision shows that the cause of action accrued from 2000 when the respondent entered and settled in the suit plot. The respondent tendered several documents on his defense and the Chairman relied on the said documents. He went on to submit that the Chairman in deciding the preliminary objection based or relied on the document of the respondent while the same was yet to be proved.

Mr. Stephen continued to argue that the evidence adduced by the respondent was supposed to be proved during the trial. He added that a preliminary objection is required to be a pure point of law. In his submission, he seeks the guidance of the holding of the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Company Ltd v West end**

**Distributors Ltd** (1969) EA 696. Mr. Stephen went on to state that in case the appellant would have pleaded that the action occurred more than 12 years then the tribunal could be in a better position to decide whether the application was time-barred. Stressing he argued that the issue raised by the respondent was not proved and the decision of the tribunal was premature to be accommodated in the preliminary objection. Insisting he argued that the issue in question; to enter into a suit land needs to be proven by evidence. He stated that the appellant raised his claim after being appointed as an administrator of the estate for that reason, it was his view that the matter was not time-barred.

On the strength of the above submission, he urged this court to dismiss the District Land and Housing Tribunal decision and afford parties the right to be heard on merit.

I have given careful consideration to the record of the case and the argument for the appeal filed by the appellant's Advocate. The central issue is based on the preliminary raised by the respondent at the District Land and Housing Tribunal whereas the respondent complained that the application is time-barred.

The Appellant's counsel contended that the purported preliminary objection needs evidence to prove when exactly the applicant occupied the suit land. The records reveal that when the matter was before the District Land and Housing Tribunal before hearing the case on merit the respondent lodged a preliminary objection claiming the suit is time-barred. The respondent claimed that the cause of action accrued when the respondent entered and settled in the suit plot in the year 2000 and the appellant lodged the instant application on 24<sup>th</sup> July, 2018. It was his view that 18 years lapsed while section 4 of the Law of Limitation Act provides that the period of limitation prescribed by the Act concerning any proceeding shall commence from the date on which the right of action for such action accrues.

On his party, the appellant replied and submitted that the cause of action started to run from the day when the appellant was appointed as administrator of the estate of the late Kibibi Juma on 20<sup>th</sup> December, 2017. To support his submission he cited section 35 of the Law of Limitation Act, Cap.89. It was his thinking that the appellant was within time.

In determining whether the application is time-barred, the court is supposed to examine when the cause of action arose. The same is reflected in the Plaintiff or Application in exclusion of defendant documents. Examining the Application specifically in paragraph 6 the applicant stated that he was appointed as an administrator of the estate of the late Kibibi Juma on 20<sup>th</sup> December, 2017. In his decision Hon, Mbilinyi determined the preliminary objection and came up with his findings that the time started to run when Kibibi Juma passed away on 8<sup>th</sup> August, 1992 so he found that 25 lapsed from the date when she passed away to the date when the applicant filed the Land Application No. 351 of 2018. I am in accord with the appellant's Advocate that the preliminary objection is not a pure point of law the issue of ascertaining whether the application was within time or not needs evidence when exactly the cause of action arose.

This Court wishes to borrow a leave the appropriate practice and procedure to adopt when faced with an application for a Preliminary Objection. The procedure was firmly established by the East African Court of Appeal in the celebrated case of **Mukisa Biscuits Manufacturing** (supra). The East African Court held that:-

*"So far as I am aware; a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which when is argued on the assumption that are facts pleaded by others aside are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion."*

The fact that the respondent settled in the suit land since 2000 requires to be proved considering that the applicant in his application has not stated that the respondent entered into the suit land in 2000. Again, the application is silent as to when the deceased passed away. The issue of ownership based on adverse possession needs evidence to prove the same and the issue for determination will guide the tribunal to determine the matter and arrive at a fair decision.

For the above aforesaid findings, I sustain the contention by the applicant's Advocate that the raised preliminary objection does not conform to a preliminary objection. Thus lacking the key elements thereto, quoting the holding from **Mukisa's** case (supra). Without a flicker of doubt, this Court holds the preliminary objection raised by the respondent did not qualify to be a point of law, it did not meet the requirements of being a preliminary objection. It is my respectful view that the District



Land and Housing Tribunal entered into an error to rule out the application is time-barred.

In the upshot, I quash the decision of the District Land and Housing Tribunal in Land Application No. 35 of 2018 dated 13<sup>th</sup> November, 2019. I remit the file to the District Land and Housing Tribunal and I order the matter to proceed before another Chairman.

Order accordingly.

DATED at Dar es Salaam this 15<sup>th</sup> October, 2021.



  
A.Z.MGEYEKWA

**JUDGE**

15.10.2021

Judgment delivered on 15<sup>th</sup> October, 2021 Ms. Jane Kisenya, learned counsel for the appellant and in the absence of the respondent.



  
A.Z.MGEYEKWA

**JUDGE**

15.10.2021

Right to appeal full explained.