

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

**LAND CASE NO. 180 OF 2020**

**KHALID MOHAMED.....1<sup>ST</sup> PLAINTIFF**  
**SALUM MOHAMED.....2<sup>ND</sup> PLAINTIFF**  
**RAHMA MOHAMED.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MAHAD HADI.....DEFENDANT**

Date of Last Order: 26.01.2022  
Date of Ruling: 21.02.2022

**RULING**

**V.L. MAKANI, J**

This is the ruling in respect of the preliminary objection raised by the defendant that:

*"The suit is based on trespass which took place after the defendant transferred the title to the plaintiffs on 5<sup>th</sup> May 2005 as per paragraph 5,6,7 and 8 of the plaint which is tort, in that regard the suit was filed out of time contrary to item 6 of part I of the Schedule to the law of limitation Act, Cap 89 RE 2019."*

The preliminary objection was argued orally. Mr. Buberwa Abdul, Advocate represented the defendant. The plaintiffs were represented by Mr. Abdulfattah, Advocate.

Arguing the preliminary objection, Mr. Buberwa said that, it is the law that the plaint is required to contain facts constituting cause of action and when it arose. He said this is according to Order VII Rule 1 (e) of the Civil Procedure Code, Cap 33 RE 2019 (the **CPC**). He said the importance of indicating the time when the cause of action arose is to enable the court to determine whether the suit is time barred. He said that in order to be certain whether the suit is founded on tort or not the court has to look at the pleadings and the reliefs sought by the plaintiffs so as to understand the nature of the cause of action and when it arose. That the plaintiffs filed a suit against defendant on 13/11/2020 seeking perpetual injunction to restrain the defendant from interfering with the premises unlawfully. They also prayed for declaratory order that defendant's interference with the suit property is unlawful and to be paid a sum of TZS 300,000,000/= as general damages and TZS 500,000,000/= as a punitive damage for the interference plus interest and cost. He said that the plaint is clear that the suit is founded on tort since the issue of ownership is not in dispute. He pointed out that paragraphs 4,5,6 and 7 of the plaint contain facts constituting the cause of action and when it arose. He argued that according to paragraph 5 and 6 the transfer of ownership to the plaintiffs' names was dully affected by on 05/05/2005. That

from that date it is alleged that defendant has been continuing with interference until the date of filing this suit on 13/11/2020. He observed that it is clear as per paragraph 5 of the plaint that the cause of action accrued when the title was transferred to the plaintiffs, and counting from 05/05/2005 when the cause of action arose to the date of filing this suit on 13/11/2020 it is almost 15 years which is contrary to Item 6 of Part I of the Schedule to the Law of Limitation Act, CAP 89 RE 2019 (the **Limitation Act**) which sets 3 years as the time limit to institute suits founded on tort. He insisted therefore that this suit was filed out of time and therefore this court has no jurisdiction to entertain it. He was of the view that limitation of time goes to the root of the case as well as jurisdiction of the court. That the remedy for the suit filed out of time is dismissal order under section 3(1) of the Limitation Act and in terms of the case of **Obeto Werema Joseph @ Obeto Joseph Werema vs. CATA Mining Ltd, Land Case No.20 of 2020 (HC-Musoma)** (unreported). Counsel prayed for the suit to be dismissed with costs.

In reply, Mr. Abdulfattah said that the preliminary objection has no merit and that it should be dismissed. He gave reasons that the defendant was an administrator of the estate of the late Mohamed

Mahfudh who is the father of the plaintiffs and two others. He said the defendant was the administrator of the late Mohamed Mahfudh until 2019 when he was removed by the High Court. He said since the death of Mohamed Mahfudh in 2005 until 2019 the defendant was administering the estate of the late Mohamed Mahfudh.

He said that though the transfer was in 2005 the defendant was still using the premises where he took one shop and used it as an office to administer the estate of deceased and he occupied it until 2021. That the defendant was only allowed to do so and therefore was an invitee. He said when the plaintiffs realized that the defendant was holding the Title Deed they asked him to surrender for the reasons that transfer had been affected to the plaintiffs and two other heirs. That the defendant did not surrender the said Title Deed. That upon follow up at the Ministry for Lands, they secured a copy in 2019 and they then started to inform defendants to vacate the suit premises as the property was under the names of the Plaintiffs and two others. Mr. Abdulatif said the defendant has refused to vacate the suit premises and therefore it has led to this suit. That defendant has interest on the suit premises that is why he has refused to vacate. He said that, in terms of the case of **Mukisa Biscuits Manufacturing**

**Company Limited. vs. West End Distributors Limited (1969)**

**EA 696**, a preliminary objection cannot be raised where facts have to be ascertained or there is judicial discretion. Counsel also relied on the case of **Katikiro of Uganda vs Uganda (1958) EA 765** where the court stated that a plaint is not to be rejected where an important point of law is to be determined, and it is not desirable to refuse cases raising serious arguments so that parties may have them decided in the ordinary way and may enjoy the right to appeal. He said that the defendant is claiming that the wrong was committed in 2005 but there is nothing in the plaint to that effect. He averred that 2005 is only the year when transfer was made. That defendant has close relationship with the plaintiffs and being an administrator, he was an invitee to the suit property. That he was in the said property six months back and is still occupying some of the properties of the late Mahfudh. He said following the decision of the court in 2019 which removed the defendant from administering the estates of the deceased the defendant was told to stay away from and not to interfere with the suit property and not to collect rent from 10 shops in the suit premises. He said the defendant has refused to stay away claiming he has interest of 35%. Counsel argued further that section 6 (c) and 7 of the Limitation Act provides for limitation of time in continuing

breach/wrong. That a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong continues. That is in view of section 7 of the Limitation Act the defendant was interfering with the estate of the late Mohamed Mahfudh until May 2021. That the wrong was not committed once but he continued to receive rent.

Mr. Abdulfattah said this court has jurisdiction under section 37 of Land Disputes Court Act CAP 216 RE 2019 because the wrong by the defendant is trespass to land. That there are two things in the suit that is land case and trespass to land by the defendant which is continuous. Counsel said that paragraph 6 of the plaint shows that the defendant was committing continuous trespass to land. He said that there are decisions of Court of Appeal which states that no invitee can oust the landlord from his premises no matter how long he has been on the suit premises. He referred the Court to the case of **Maigu Magenda vs Arbogast Magenda, Civil Appeal No. 218 (CAT)** and the case of **Musa Hassan vs Barnabas Yohana Shedafa, Civil Appeal No.101 (CAT)** both unreported. He insisted that continuous use of the land does not make him have the right of ownership. He distinguished cases cited by Mr. Buberwa with the

present case as there is continuous trespass. Counsel prayed for the preliminary objection to be dismissed with costs.

In his rejoinder, Mr. Buberwa reiterated his main submissions and added that what has been stated by the plaintiff's Counsel is from the bar and was not pleaded anywhere. That section 6 (c) of the Limitation Act is irrelevant as they deal with contract or a wrong which is different from this case.

Having gone through submissions by both parties, the main issue for determination is whether preliminary point of objection raised by the defendant has merit. I would wish to state at the outset that the objection raised is purely a point of law as it is on limitation of time hence falls within the confines of the case of **Mukisa Biscuits Company Limited** (supra). Mr. Abdulfattah's argument to the contrary has no merit.

It is Mr. Buberwa's argument that this suit is time barred. That since 2005 when the suit property was transferred to the plaintiffs by the defendant it is almost 15 years. On the other hand, Counsel for the plaintiff is of the view that the defendant had been interfering with

the activities of the suit property since 2005 to date. But in 2019 is when he was removed from administration of the estate of the late Mohamed Mahfudh by the High Court. He was ordered not to interfere with the said estate, but to date he has not adhered to the said order.

The undisputed facts by Counsel for the parties is that the defendant was administering the estate of the late Mohamed Mahfudh from 2005 to 2019. During that time, as the law requires, the defendant could do any act in the suit property which is legally in the interest and by the consent of beneficiaries. In other words, being an administrator, the defendant could in no way be restrained from dealing with the estates of the deceased. In the circumstances therefore the period from 2005 to 2019 the beneficiaries, the plaintiffs inclusive, could not have dealt with/sued the defendant in any other cause rather than in the Probate Court which appointed him. Now as said by 2019 the defendant no longer had mandate of managing the estate of the deceased, save that if he had any legal interest over the estate, he could have filed a case against the appointed administrator. My point here is that the cause of action by the plaintiffs against the defendant arose in 2019 when the defendant continued to deal with the estate of the deceased while he was no longer the administrator



of the estate of the late Mohamed Mahfudh. And from 2019 when the defendant was removed from being an administrator to 13/11/2020 when this case was filed is about one year. In other words, the time within which any action could be taken against defendant in respect of the deceased's estate started to run from 2019 when he was removed from administering the estate. Therefore, be it tort on land or pure land case, still the time is in favour of the plaintiff as only one year has lapsed.

In view thereof, the objection raised is devoid of merit as the claim in this matter has been brought in court within time. In the result, the preliminary objection raised by defendant is hereby dismissed. Costs shall be in the cause.

  
**V.L. MAKANI**  
**JUDGE**  
**21/02/2022**

