

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO 109 OF 2021

VICKY DAMAS MTEFU..... PLAINTIFF

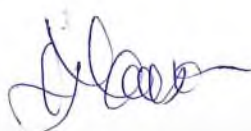
VERSUS

JOVITHA BYERA NJUWA.....DEFENDANT

RULING

DATE OF RULING- 15TH /SEPT/2022

The plaintiff alleges to be the owner of the suit land situate at Plot No. 644 Block F Tegeta Area within the City of Dar es Salaam. She alleges to have been allocated this piece of land by the Ministry of Lands since 08th October 1993, and she was provided with the Letter of Offer on 8th October 1993. She also alleges that there was an exercise of verification of owners in 2007, and after the exercise she was confirmed to be the owner, and she was given another letter of offer on 3rd May 2007 and a Certificate of Title No. 110052 on 5th February 2009. She also alleges that she was given the building permit to build a one storey building on the suit premises on 17th May 2007. She alleges that she found the defendant



trespassing into the suit land in 2012, and she states at paragraph 8 of the plaint that the defendant demolished her one storey building in 2012. Again, she states at paragraph 9 that the defendant demolished the foundation of a one storey building and confiscated all the building materials in 2012. The plaintiff avers that she asked the defendant to vacate the suit premises but they defendant did not vacate, and on 12th December 2012, the plaintiff complained to the Executive Director of Kinondoni Municipal Council regarding the trespass, and on 31st December 2012, the Executive Director of Kinondoni Municipal Council required the defendant to produce her documents proving ownership of the suit land, but the defendant did not comply. The plaintiff decided to institute a suit against the defendant in 2013 asking for vacant possession. The suit was struck out for being incompetent, and again in 2021, she filed the present suit asking the court to declare her the owner of the suit land, and she is asking for a court to declare the defendant a trespasser, and an order to demolish the house of the defendant erected onto the land. She also prays for an order of payment of specific damages, general damages, punitive damages, and costs of the suit.




The defendant resisted the claim, she filed the written statement of defense in which at paragraph 5 of the defense she said that she had constructed a single storey building in 1997-1998, and has been living in the house since 1998, almost over 15 undisturbed. She thus, raised an objection that the suit is barred by limitations.

The question of law involved in the present matter is quite significant. Whether the plaintiff is barred by limitations to claim for the land in 2012 while the defendant has been occupying the land since 1998. In other words, the defendant claims that the rights of the plaintiff have been extinguished by virtue of the defendant remaining in the adverse possession on the land undisturbed for over 15 years.

The parties during the hearing of the preliminary objection were represented by Advocates Albert Mulokozi Mukoyogo and Advocate Maunda Raphael who appeared for the plaintiff, and the defendant enjoyed the services of Counsel Geoffrey Lugomo. The Counsels made details submissions in support and in opposing the objection.

Counsel Lugomo submitted that the suit to recover land is time barred as per section 3 (1) of the Law of Limitation Act, Cap 89 R:

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E 2002 read together with item 22 of Part 1 to the Schedule of the Act, that a suit instituted in 2021 for an action whose cause of action arose in 1997 is hopelessly time barred and ought to have been dismissed. He also said under section 9(2) of the Law of Limitation Act, Cap 89 R: E 2002, cause of action for recovery of land starts to accrue on the date of possession, and in this case the date of possession as per the pleadings is 1997, when the defendant obtained the building permit, and started the construction. Section 9(2) of the Law of Limitation Act reads:

9(2) Where the person who institutes a suit to recover land, or some person through whom he claims, has been in possession of and has, while entitled to the land, been dispossessed, or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

The Counsel for the defendant argues further that the right of action has accrued on the date of dispossession, and that date is when the defendant started construction of the house in 1997. The Counsel continues to argue that the defendant moved in the house



since 1998 and has remained in occupation of the house since 1998 uninterrupted and undisturbed until 2013 when she received a demand from the plaintiff to vacate her premises. Thus, the time to file a suit for recovery of land has run out, as a suit filed in 2021 for an action which arose in 1997, 25 years has passed and thus the suit is time barred and this Court lacks jurisdiction to entertain the suit for reasons of limitations. The Counsel referred the Court to the case of **Bhoke Kitang'ita vs Makuru Mahemba, Civil Appeal No. 222 of 2017, Court of Appeal sitting at Mwanza**, in which at page 7, the Justices held that "*it is settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within time prescribed by law, such person (the averse possessor) acquires ownership by adverse possession.*"

The Counsel for the defendant argues further that the facts pleaded in the written statement of defense that the defendant was in occupation of the land since 1997, the facts have not been denied by the plaintiff as the plaintiff did not file any Reply to the Written Statement of Defense, making the issue of possession of the land by the defendant since 1997 an uncontested issue which requires

no proof. To buttress his point, he referred the Court to the case of **Fred Mgaya@ Sharo vs R, Criminal Appeal No. 365 of 2018 (unreported), High Court, Dar es Salaam**, in which Mgonya J said at page 7 paragraph 2 that *"it is according to law that a fact not disputed is admitted"*.

The Counsel urged the Court to dismiss the suit for being barred by the statutes of limitations.

The Counsels for the defendant have resisted the objections by stating that the submissions made by the Counsel for the defendant are based on facts and not on law and must be proved. They referred the Court to the case of **Mukisa Biscuit Manufacturing C. Limited vs West End Distributors Ltd, EALR at page 696**, in which at page 701, the East Africa Court stated as I quote:

"a preliminary objection is 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 must be ascertained or if what is sought is the exercise of judicial discretion."

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As to when the cause of action started to accrue, the counsels for the plaintiff says the court looks at what is pleaded in the plaint and not in the defense, and as per paragraph 8 and 9 of the plaint, the cause of action started to accrue in 2012 when the plaintiff discovered that there was trespass into the disputed land, and thus counting from 2012, to 2021 when the suit was instituted in court, only 10 years have passed and therefore the suit is filed within time. The Counsels have referred to the case of **Lucy Range vs Samwell Meshack Mollel and 2 others, Land Case No. 323 of 2016**, HC, Land Division, Dar es Salaam (unreported) where Makuru J at page 5 said "*in determining whether the suit is time barred or not, the court normally looks at the plaint to see as to when the cause of action arose, in other words when the right of action started to accrue*"

Regarding adverse possession, the Counsels said the defendant ought to have applied before the Court under Section 37 (1) of the Law of Limitations Act to be declared the adverse possessor, and that the doctrine of adverse possession does not apply on a surveyed land.



They argued that the Court cannot rely on the building permit obtained by the defendant in 1997 to determine possession as that permit itself is to be put into scrutiny as permits cannot be issued on a surveyed land without proof of ownership, and since the issue of the permit of the defendant attached to her defense requires scrutiny, the issue of possession of the land by the defendant requires proof and cannot be determined by way of a preliminary objection.

Counsel continues to argue that the averments in the plaint and its annexures shows that the plaintiff obtained a building permit in 2006, and this shows that until 2006 there was not any building in the suit premises, and this confirms that the trespass was in 2012, and the action to recover land was taken on time.

The counsels introduced the issue of abandonment of land when citing the English cases of **Moses vs Love grove (1952) 2 QB 533**, and the case of **Hughes vs Griffin (1969) 1 ALL ER**, cited in Bhoke's case (supra), that the defendant must prove that the plaintiff had abandoned the land since 1993, and they argue that the plaintiff never abandoned the land since she got the building

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permit in 2006. The Counsels for the plaintiff stated that the objection on jurisdiction raised at this stage is an afterthought, the suit is within time and prayed for the dismissal of the objection, with costs.

The Counsel for the defendant made a rejoinder by stating that the issues of jurisdictions are paramount and can be raised at any stage of the suit, the Court is duty bound to satisfy itself whether it has jurisdiction, otherwise the trial becomes a nullity.

The Counsel said the principles set in **Mukisa Biscuits** case are only applicable on contentious issues, and since the issue of possession of the land by the defendant since 1997 was not disputed in the pleadings, as the plaintiff did not dispute the issue of possession by the defendant in any of their statements in court, then the issue of possession of land by the defendant requires no proof.

The Counsel for the defendant also said preliminary objection on time limitations can be raised based on the pleadings, and pleadings includes the written statement of defense, and thus time must be reckoned from the date of the occupation or possession by

the defendant which is 1997 as pleaded in the written statement of defense.

The fact that the plaintiff obtained the permit in 2006 does not mean that when the plaintiff was chasing for the building permit in 2006, the land was not in possession of the defendant, and also did not mean that the plaintiff started to claim for the land, and what is required is not to process the building permit, but what is required is to show in the pleadings that the trespasser was disturbed by the owner, and that it is in the pleadings that the defendant has been in peaceful occupation of the land since 1997, and she started being disturbed only in 2013 when she received a demand to vacate the premises, thus making the suit or even the demand time barred.

Regarding section 37 (1) of the Law of Limitation Act, the Counsel for the defendant argues that this was upon the defendant to decide, and this section does not apply in the circumstances of this case, as for now the issue is that the suit filed by the plaintiff is barred by the statutes of limitations, and the issue is not whether the defendant wanted this court to declare her the adverse



possessor as when the right time comes to do so, she will apply for confirmation that she has acquired title by adverse possession.

I have heard learned counsels appearing for the parties at length. Various decisions of this Court and the Court of Appeal have been cited and I have taken into consideration all the decision in the cited cases in determining whether the suit is time barred.

The first issue to be determined is whether it is right to determine the issue of time limitations at the earliest stage of the suit. This is without any doubt that issues of law are determined before the issues of fact, and in particular issues of jurisdiction are paramount and need to be determined first as trials conducted without jurisdiction are a nullity.

That said, the second issue is whether the principles set in Mukisa Biscuit's case are applicable in this case. It is true that the issue of possession was raised for the first time by the defendant in the written statement of defense. The defendant clearly stated that she has been in possession of the suit land since 1998. She obtained the building permit in 1997 and built the one Storey house in 1997, and moved in the house since 1998, and has been living there

undisturbed since 1998 until 2013 when she received a demand from the plaintiff to vacate. There was no reply to the written statement of defense to refute the issues of possession. A Defendant is conferred with a statutory right to file the written statement of defense to disputing the claim and denying the plaintiff allegations. The defendant is also entitled to raise a counter claim by the provisions of Civil Procedure Act. Order VIII provides that a defendant in a suit, in addition to his right of pleading a set-off as may set up, by way of counter claim against the claim of the plaintiff, may claim any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit. Such counter claim shall have the same effect as a cross suit to enable the court to pronounce a final judgment in the same suit, both on the original claim and the counter claim. The plaintiff is permitted to file a written statement in answer to the counter claim of the defendant within the fixed time. The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints.

Looking to the scheme of Order VIII, I agree that that there are two modes of pleading or setting up a counter claim in a civil suit.

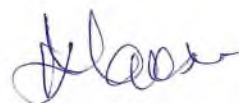
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Firstly, by way of the written statement of Defense, that a written statement of defence may itself contain issues which not only disputes and denies issues raised in the plaint, but may include facts which unless denied by the plaintiff in the reply, the issues could be termed as a counterclaim and the plaintiff has been given the right to reply by way of a Reply to the written statement of defense within seven days after service or as permitted by the court. Secondly, a counterclaim may be incorporated in the written statement of defense immediately after the written statement of defense and titled "the Counter Claim". Once the written statement of defense contains facts which needs to be denied by the plaintiff or disputed, the plaintiff is obliged under the law to file a Reply to the written statement of defense, and a written statement of defence to the counterclaim within the prescribed time. Since, in the present case, there was an issue of possession which was pleaded by the defendant in the written statement of defense but undisputed by the plaintiff since there was no Reply, the issues remain uncontentionous, and the court can consider it in determining the issues of limitation without requiring proof. The issues raised by the counsels for the plaintiff regarding possession of the premises

by the defendant since 1997 and whether the building permit was correctly and legally issued should have been pleaded in the Reply to the Written Statement of Defense, and these issues cannot simply be argued by the counsels from the bar. These facts should have been denied or disputed in the Reply to the Written Statement of Defense.

Again, the position is as argued by the Counsel for the defendant that the Court can look at the pleadings to determine issues of jurisdiction and time limitations, and pleadings as defined by the Civil Procedure Code includes complaints, written statement of defense and the subsequent statements.

The Counsels for the plaintiff did not back up the arguments on whether the doctrine of adverse possession is not applicable on surveyed land, thus, the court agrees with the defendant that doctrine of adverse possession applies even on surveyed land. I, also agree that the provisions of section 37 (1) of the Law of Limitations Act did not apply in the circumstances of this case as the defendant did not apply to be declared the adverse possessor,



she simply raised an objection on a point of law that the suit is barred by the statutes of limitations.

From the pleadings, it is without any flicker of doubt that the plaintiff was allocated this land in 1993 but never possessed it, however the defendant was in the possession of the suit land from 1997, and has built a one storey building since then, and she has moved into the house and has been living there since 1998 until 2013 when the plaintiff started to demand ownership of the land because she has the Letter of Offer and the Title Deed issued to her since 1993. In 2013, the plaintiff instituted the suit against the defendant for "recovery of possession" of the suit land based on the Letter of Offer which was granted to her since 1993. In the Letter of Offer, the plaintiff was given a condition to build a structure with permanent materials and the building ought to have been completed within thirty-six months from 8th October 1993. She was also required under the Letter of Offer to apply for a Building Permit within six months from 08th October 1993, but she applied for a building permit in 2007, almost 16 years after the commencement of the right. The defendant, on the other hand, had applied for a building permit in 1997, and was issued with a

building permit in 1997, and had constructed a one storey building since 1997, and has been living in the house since 1998 undisturbed. Apart from claiming that she acquired the land from the owner who had a customary title but again she claims that the plaintiff is barred by limitations to claim for possession of land after the passing of 12 years.

The mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi (intention to possess). The very fact that the plaintiff despite the purported Letter of Offer given to her since 1993, she never possessed the land and allowed the defendant to possess the same exclusively and enjoy the usufruct thereof, clearly goes to show that even before 2012, the defendant had been in possession thereof. In any event the plaintiff in her plaint prays for an order of demolition of the defendant's house built on the suit land and this clearly shows that, at least from 1998 onwards, there is the house of the defendant built on the dispute premises, and the defendant continued to exclusively possess the suit land with a knowledge of the plaintiff. The Limitation Act, therefore, would in a case of this nature have its role to play, if not from 1993 when the plaintiff got the Letter of Offer, but at least

from 1998 when the defendant possessed the land by constructing the one storey house and living there, the plaintiff is barred by limitation to claim possession of the property after the lapse of 12 years from the date of trespass. If that be so, the defendant perfected her title by adverse possession and the plaintiff's suit is barred by limitations.

The defendant has adverse possession, and this has been established by a consistent course of conduct of the defendant in the case, possession was to the full knowledge of the plaintiff as well as the municipality. This court observes that the plaintiff who claims to be the rightful owner did not come forward within the period of limitation, she has lost her right to claim for possession of the land, and the possessory owner acquires an absolute title. The defendant was in de facto possession and was entitled to remain in possession and cannot be evicted and her long time-built house cannot be demolished.

It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title and if the rightful

owner does not come forward and assert her title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, her right is forever extinguished, and the possessory owner acquires an absolute title. Therefore, the defendant who was peaceably in possession is entitled to remain in possession, and therefore a suit for possession should have been filed within 12 years from the date of trespass and in which the question of title could be raised. The defendant at least pleaded the statute of Limitation and asserted that the plaintiff suit is barred by limitations.

The limitation of 12 years runs from the date when the possession of the defendant becomes adverse to the plaintiff, and this is 1997. Thus, filing a suit in 2021 for an action which accrued since 1997, is against the law. The suit is dismissed for being barred by limitations, with costs.

DATED AND DELIVERED AT DAR ES SALAAM THIS 15TH DAY OF SEPTEMBER 2022.




(L. MANSOOR)
JUDGE

15TH SEPTEMBER 2022