

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

LAND CASE NO. 189 OF 2021

JANE KIMARO.....PLAINTIFF

VERSUS

THADEUS SIMON MWAKILEMA.....1ST DEFENDANT

VICKY ADILI (Administrator of the Estate of the late
Adili Daniel Mande)2ND DEFENDANT

**THE COMMISSIONER FOR LANDS,
MINISTRY OF LANDS, HOUSING &
HUMAN SETTLEMENTS DEVELOPMENT.....3RD DEFENDANT**

**THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA.....4TH DEFENDANT**

Date of Last Order: 27.09.2022
Date of Ruling: 12.10.2022

RULING

V.L. MAKANI, J

This ruling is in respect of preliminary objections that were raised by the 1st, 2nd and 3rd and 4th defendants. The 1st and 2nd defendants raised two points of preliminary objections that:

- 1. The suit is time barred against the 1st defendant as the dispute between the plaintiff and the 1st defendant hereinafter commenced and was decided before Kinondoni Land Disputes Resolution Committee on 2006 as per Annexure JK-6 of the Plaintiff.*

- 2. That the suit is res judicata against the 2nd defendant as the disputes between parties was finalized by the Court of Appeal in Civil Appeal No.212 of 2016 between Jane Kimaro vs. Vicky Adili (as administratrix of the estate of the late ADILI DANIEL MANDE) as per Annexure BSM-1 of the Written Statement of Defence.*

Simultaneously, the 3rd and 4th defendant raised preliminary points of objection that:

- 1. The suit is untenable and bad in law for being res judicata as per section 9 of the Civil Procedure Code, Cap 33 RE 2019 (the **CPC**).*
- 2. The suit is untenable and bad in law for being time barred contrary to the 1st Schedule of the Law of Limitation Act, CAP 89 RE 2019.*
- 3. The plaint is bad in law and incompetent for failure to disclose and state as to when cause of action accrued contrary to Order VII Rule 1 (e) of the CPC.*

The matter proceeded orally. Mr. Octavian Mushukuma, Advocate represented the plaintiff, Mr. Bernard Maguha, Advocate represented the 1st and 2nd defendants while Ms. Happiness Myagunya and Doreen Mhina, State Attorneys appeared on behalf of the 3rd and 4th defendants.

On the issue that the suit is time barred, Mr. Maguha for the 1st defendant said that **Annexure 6** of the plaint shows that the dispute commenced on 2006 which is almost 16 years to date. That the

matter is time barred in terms of the Limitation Act CAP 89 RE 2019 and should be dismissed with costs. He relied on the case of **Godbless Foster & Others vs. Anthony Faustin Msacky & Others, Land Case No.6 of 2020** (HC-Land Division) (unreported)

On the second point of objection, Mr. Maguha said the suit is *res judicata* against the 2nd defendant. He said according to **Annexure BSM1** of the Written Statement of Defence (the **WSD**) filed by the 1st defendant there is attached a decision of the Court of Appeal No. 212 of 2016 between Jane Kimaro vs. Vicky Adili, that is, the Plaintiff and the 2nd defendant in this suit and it concerned the same subject matter. That the disputed land is Plot No.37 Block E Tegeta as shown in paragraph 3 to the plaint and the matter was finally determined by the Court of Appeal. He said the plaintiff's act to institute this matter to include the 1st, 2nd and 3rd defendants is to invite this court to deal with the same subject matter which has already been determined by this court and the Court of Appeal. He said section 9 of the CPC prohibits any court to deal with the matter already determined and which involve the same parties. He relied on the case of **Praven Girdhar Chavda vs Yasmin Nurdin Yusual, Civil Appeal No.165**

of 2019 (CAT-DSM)(unreported). He prayed for the court to dismiss this case with costs.

On her side, Ms. Myagunya for the 3rd and 4th defendants supported the submissions by Mr. Maguha, and she prayed for the suit to be dismissed with costs.

In his reply, Mr. Mushukuma for the plaintiff said that as for the first objection Counsel has referred to **Annexure 6** to the plaint that the cause of action arose in 2006. That the point of objection is misconceived because the suit is not time barred as no provision has been stated by the Counsel. He said the point of time limitation is not specifically pleaded in the WSD and this contravenes the principles of raising preliminary objection as stated in the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd (1969) EA 696** and **Jackline Hanson Ghikas vs. Mllatie Richie, Civil Application No. 656/01/2021 (CAT-DSM) (unreported)**. That the issue of time limitation being not pleaded is just a statement from the bar. He said Counsel did not cite any provision of the law and it is a matter of looking at annexures which means looking at evidence which will be met during trial. As for the case of **Godbless**

Foster (supra) Mr. Mushukuma said it is distinguishable to this case as the facts are different. He prayed for this point of objection to be dismissed as it does not qualify as preliminary objection in terms of **Mukisa Biscuits and Jacklin Hanson Ghikas** (supra).

For the second point of objection, Mr. Mushukuma said that Counsel for defendants has referred to **Annexure BSM 1** to the 1st defendants WSD which was the case between plaintiff and the 2nd defendant. He said this suit is not *res judicata* against the 1st and 2nd defendants because section 9 of the CPC outlines the conditions under which the suit is deemed *res judicata*. He relied on the case of **Peniel Lotta vs Gabriel Tamaki & Others (2003) TLR 312 (CAT)**. He said the present suit is not between the same parties. Therefore, the second condition outlined in the case of **Peniel Lotta** (supra) has not been fulfilled. He added that in the former suit, Vicky Adili was litigating under different title and so was Jane Kimaro, that in the present suit the said Jane Kimaro is litigating under different title against Thadeus Mwakilema, Vicky Adili, Commissioner for Lands and Attorney General. That the prayer of dismissal of suit is wrong as submissions are in respect of only the 1st and 2nd defendants but not the other defendants that is the 3rd and 4th defendants. He added

that the two objections on time limitation and *res judicata* do not qualify as points of objection in law and should be dismissed with costs.

In his rejoinder, Mr. Maguha reiterated his main submission and added that all points of objection were pleaded as per order VIII Rule 2 of the CPC. That the case of **Godbless Foster** (supra) is a fit case for time limitation in instituting the land case which is 12 years. As for **Annexure 6** he said that the issue of limitation is a matter of law and it has to be determined by the court before going to the merit of the case. That it is prudent for this court to determine the time limit as determined by the court of competent jurisdiction which shows that the cause of action arose in 2006. He insisted that the matter is *res judicata* against the plaintiff and the 2nd defendant as the dispute is on the same subject matter as in the present case, so it was dealt with this court and the Court of Appeal. Ms. Nyagunya supported Mr. Maguha's rejoinder.

Having heard the submissions by Counsel the main issue for consideration is whether the preliminary objections raised by the defendants have merit. At the outset I would wish to state that Mr.

Mushukuma's argument that the objections are not purely points of law is misconceived as time limitation and *res judicata* are all matters of law and can dispose of the suit without proceeding to trial. The objections are in terms of the case of **Mukisa Biscuits** (supra).

In view thereof, I shall address the two points which go to the foundation of this suit. First, I shall deal with the issue of *res judicata* and thereafter the issue of time limitation.

The learned Counsels for the defendants, Mr. Maguha and Ms. Myagunya were both of the view that the matter at hand is *res judicata* against the 2nd defendant. That the Court of Appeal of Tanzania finalized the matter on the same subject matter against the 2nd defendant herein. In the Court of Appeal in Civil Appeal No.212 of 2016 in which it was between the appellant who was Jane Kimaro (the plaintiff herein) and Vicky Adili (the 2nd defendant herein). The appeal was partly allowed and stated clearly that the appellant legally surrendered her rights under customary law to pave way for the suit land to be surveyed and allocated according to the law (see page 11 of judgment in Civil Case No.212 of 2016). The Court of Appeal further stated that the transfer from Mr. Mwakilema (1st defendant herein) to

the deceased (Adili Daniel Mande) was incomplete for want of appropriate steps for transfer. In that regard, the 2nd respondent herein was left with a directive of the Court to complete the transfer process over the deceased land of which she administers.

Now, in the case at hand, it not disputed that the claim is on the same subject matter, and as we have endeavoured to study the matter, the Court of Appeal finalized the matter against the plaintiff and the 2nd defendant in Civil Appeal No.212 of 2016. The matter therefore is *res judicata* against the 2nd defendant as it was finalized by the Court of Appeal in respect of the same parties (plaintiff and the 2nd defendant) same subject matter and on the same reliefs. The suit against the 2nd defendant is therefore dismissed for being *res judicata*.

As for the point of time limitation. Mr. Maguha and Ms. Nyagunya were of the view that the matter at hand is time barred. Mr. Mushukuma resisted by stating that the learned Counsel did not state which provision of the law had been infringed. However, time limitation in instituting the suit for recovery of land is a matter of law and cannot be ignored. Item 22 Part I of the 1st Schedule to the Law of Limitation Act provides the time limit of 12 years within which a

party can bring a claim for recovery of land to the court. In that regard, time limitation has to be addressed before embarking on the substantive case.

The plaint tells it all, that the plaintiff's shamba was firstly surveyed by the 3rd defendant in 1989. It should be noted that, Plot No. 37 (the **suit land**) was created out of the shamba that was surveyed. The said Plot No 37 was in 1999 allocated to the 1st defendant who allegedly sold it to the 2nd defendant whom now the suit has been dismissed on the first point of objection for being *res judicata*. In that respect, I shall not discuss the chain of the title to the 2nd defendant. It was the 3rd defendant who surveyed the shamba in 1989 where Plot No.37 was created. Now, counting from 1989 when the plot was created by the 3rd defendant to 2021 when this suit was instituted in this court it is 32 years and according to the law it is out of time. As correctly stated by the Counsel for the defendants the matter is time barred.

As against the 1st defendant, the plot was allocated to him undisputedly in 1999 and counting to 2021, it is 22 years and the same is out of time. The 4th defendant is a necessary party to the 3rd

defendant who ought to have been joined as defendant any time if only, the suit was to be filed within time. Since the matter is time barred against the 1st and 3rd defendant, it follows that the same is time barred against the 4th defendant.

In the result, the suit at hand is *res judicata* against the 2nd defendant, and it is time barred against the 1st, 3rd and 4th defendants. The preliminary objections raised by the defendants have merit and are accordingly sustained. This suit is dismissed with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "V.L. Makani".

V.L. MAKANI
JUDGE
12/10/2022

