

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

LAND APPEAL NO.84 OF 2020

(Originating from Kinondoni District Land and Housing Tribunal in Land Application No.313 of 2013)

**ADAM WAZIRI MTAMBULO.....1ST APPELLANT
HASSAN WAZIRI.....2ND APPELLANT**

VERSUS

**KIBWANA MADABA.....1ST RESPONDENT
ALPHONCE SHIRIMA.....2ND RESPONDENT
MOHAMED MOHAMED.....3RD RESPONDENT
DANIEL SAILEN.....4TH RESPONDENT**

Date of Last Order: 23.05.2022
Date of Judgment: 30.05.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by ADAM WAZIRI MTAMBULO and HASSAN WAZIRI. They are appealing against the decision of the Kinondoni District Land and Housing Tribunal at Ilala (the **Tribunal**) in Land Application No. 313 of 2013 (Hon. Chenya, Chairman).

At the Tribunal the 1st Respondent herein sued the appellants and the 2nd, 3rd and 4th respondents, seeking for orders among others of vacant possession and permanent injunction restraining them from

entering house No.62, Plot No.33, Block 17, Dosi Street, Magomeni area, Kinondoni Municipality (**the suit property**). The application was partly allowed in that the appellants were ordered to vacate the suit property and were permanently restrained from entering the suit property.

Being dissatisfied with the decision of the Tribunal, the appellants have preferred this appeal with seven grounds of appeal reproduced herein below as follows:

- 1. That, the trial chairperson erred in law for entertaining the land application which was time barred.*
- 2. That the trial chairman erred in law and facts for not holding that the 1st respondent had no locus standi to institute the land application since he is not the administrator of the alleged estate of SAUJI SALUM described as the suit property.*
- 3. That the trial chairman erred in law and fact in holding that the 1st respondent is the administrator of the estate of the late SAUJI SALUM, while he knew or ought to know that the said suit premises in the name of SAUJI SALUM did not/ does not exist.*
- 4. That the chairman erred in law and facts in holding that the 1st and 2nd applicants trespassed onto the suit premise while he knew or ought to know that the 1st and 2nd applicants could not trespass on to the suit premise*

whose owner or possessor is neither the 1st respondent nor the deceased person (SAUJI SALUM)

- 5. That the trial chairman erred in law and fact in treating the differences in names of the deceased persons and their respective dates of death in relation to the suit premise as a minor and curable, while he knows or ought to know that the said differences are fundamental and go to the root of the matter in dispute; hence they cannot be cured by either Article 107A (2) (e) of the Constitution of the United Republic of Tanzania or the overriding objective Principle.*
- 6. That the trial Chairman erred in law in disbelieving Exhibit D1 and D2 (official search reports) which were tendered by the defence, the pieces of evidence whose genuineness/ validity was neither questioned by trial tribunal itself nor disputed or disapproved by the 1st respondent during the trial.*
- 7. That the trial chairman erred in law in entertaining the land application which was incurably fatal for non-joinder of the necessary party to wit ABDULRAHMAN KHAMIS SAID who is the owner of the suit premise.*

The appeal proceeded orally and Mr. Lucas Kamanija, Advocate represented the appellants while Ms. Aziza Msangi, Advocate represented the 1st respondent. The 2nd 3rd and 4th respondents did not enter appearance, therefore the matter proceeded ex-parte against them.

Mr. Kamanija prayed to abandon the second ground of appeal on locus standi and adopted the rest of the grounds of appeal. As for the

first ground he submitted that the pleadings of the 1st respondent are based on the trespass from 2008 to when the Application to the Tribunal was filed in 2013 which is almost 5 years. He said a tort found on trespass has to be instituted within 3 years according to Item 6 Part 1 of the Law of Limitation. He went further to state that on 02/10/2013 when the suit was filed in the Tribunal it was already time barred. That according to Section 3 of the Limitation Act the suit was supposed to be dismissed. He relied on the case of **Stephen Masatu Wasira vs. Joseph Sinde Warioba [1999] TLR 291.**

Mr. Kamanija further said that appellants suit was not based on recovery of land because in the pleadings there is nothing of that sort except for the reliefs prayed for vacant possession. He relied on the case of **JB Shirima & Others vs Humphrey Meena t/a Comfort Bus Service (1992) TLR 90** where it was stated that reliefs do not amount to pleadings. He said even if it were a land matter still it would be time barred in terms of Item 22 Part 1 of the Schedule to the Limitation Act because the time limit for recovery of land is 12 years. He said section 9 (1) of the Law of Limitation Act provides that the right of action to recover land of the deceased accrues on the death of the deceased. He said that there is nothing in the application saying

that the 1st respondent possessed the deceased land or was dispossessed of the same by the 1st and 2nd appellants, or the 1st and 2nd appellants discontinued dispossession. He said that, **PW2** (the 1st respondent) never testified that he stayed in the suit premises. He pointed out that section 35 of the Limitation Act states that an administrator would be taken to claim that piece of land from the death of the deceased. That is, administration dates back from the death of the deceased. He said it is clear that the 1st respondent was appointed by Buguruni Primary Court on 21/02/2002 and the deceased died on 30/10/1998 and the matter was filed in the Tribunal on 02/10/2013 after about 15 years of the death of deceased (Sauji Salum Akida). That the matter was filed beyond 12 years and therefore time barred.

On the third ground, Mr. Kamanija said that the 1st respondent alleged that the appellants trespassed in the suit property. That the suit property in the name of Sauji Salum does not exist. Because when cross examined **PW1** Bakari Madaba said that the suit property has a Title Deed. He said that neither the 1st respondent nor **PW1** tendered the said Title Deed as evidence that the suit property exists and was owned by the late Sauji Salum. That **Exhibit D2** which is

the official search report tendered by **DW1** shows that the suit property is owned by Abdulrahman Khamis Said and not the late Sauji Salum. He said Abdulrahman Salum said he owns the suit premises under the Right of Occupancy of 99 years from 01/04/2009 long before the 1st respondent instituted the suit at the Tribunal on 02/10/2013. He pointed out that **Exhibit D2** was not disputed by the 1st respondent and even **Exhibit D2** was not challenged by the Tribunal, but the Chairman disputed it in the judgment. That **Exhibit D2** shows that there is no registered encumbrance on the suit property. He further said **PW1, PW2** and the Sale Agreement between the 1st respondent and Shabani Maranda (**Exhibit P6**) shows that the 1st respondent sold the suit property to Shabani Rajabu Maranda on 23/11/2005. That when filing the suit at the Tribunal on 02/10/2013 the 1st respondent had already sold the suit property to Shabani Maranda. That after noting that the suit property did not belong to the late Sauji Salum or the 1st respondent, the late Shabani Maranda went to the Registrar of Titles and was registered as owner of Plot No.33 Block 18 instead of Plot No.33 Block 17 which is the suit property bought from the 1st respondent as **Exhibit P6**. He said that neither the 1st respondent nor the Tribunal know the location of the suit property and none of them bothered to visit locus

in quo as the 1st respondent knew that the suit property does not exist.

On the fourth ground, Mr. Kamalija said that the owner of the suit property is not the late Sauji Salum or the 1st respondent. That the principal issue in trespass to land is ownership or possession. That in the present case there is no evidence that the suit property is owned or possessed by the late Sauji Salum or the 1st respondent. He said that the 1st respondent was cross examined to the effect and he said he never lived in the suit property and that deceased had leased it to the tenants who were not mentioned by the 1st respondent. That even the lease agreement was not tendered at the Tribunal to prove the ownership by deceased. Even tenants were not called to testify. He said **Exhibit D2** shows that the owner is another person hence no proof of trespass was established.

Regarding the fifth ground, Counsel said that the names and dates of the death of deceased were not minor and curable as stated by the Chairman. That in their defence appellants disputed the appointment of the 1st respondent and the 1st respondent testified that he was appointed by Buguruni Primary Court. That the names of the late

Sauji Salum and the name of the deceased in **Exhibit P1** are different. That the 1st respondent did not prove that the 1st respondent changed his names or the names refers to the same person. That even the names of the person appointed by Buguruni Primary Court is Kibwana Juma Madaba which is different from the names of the 1st respondent Kibwana Madaba. That there is no any proof or affidavit by the 1st respondent to show that he changed the names or the names refers to the same person. That the late Sauji Salum and Sauji Salum Akida died at different dates, the former on 30/10/1998 and the latter on 01/11/1998. That even **PW1** admitted on cross examination that by 30/10/1998 Sauji Salum was still alive. That even evidence by RITA (**Exhibit D3**) shows that it has no death records of the late Sauji Salum. Counsel insisted that the errors are not minor as suggested by the Tribunal.

As for sixth ground, Mr. Kamaliya said that **Exhibit D1** has been opposed by the trial Chairman without parties been given opportunity to address it on the genuineness though it was not objected by the 1st respondent during the trial.

On the last ground, Counsel said that the Chairman ought to have joined the owner of the suit property. That failure to join the owner of the suit property is fatal to the proceedings. Counsel prayed for the reliefs in the amended memorandum of appeal be granted.

Ms. Msangi replied to the first ground of appeal that the matter was a land matter and not a tort. She said the recovery of land is 12 years according to Item 22 of the Limitation Act. She said paragraphs 5 (a) (i), (ii) and (iii) of the Application briefly states the claim of land in dispute and trespassers who have have refused to vacate. So, there is an action of unlawful entering in the land and refusal to vacate and that cannot be tort. She said the remedy for a tort ought to be damages however respondents has not claimed for damages or compensation but vacant possession. Counsel distinguished the case of **J.D. Shirima** (supra) saying that in the cited case the cause of action was totally not disclosed. She said in the Tribunal the cause of action was disclosed, that is, trespass and vacant possession. She said section 9 cited by the appellant's Counsel speaks about persons claiming land and who are not in the Will. She therefore said the provision is irrelevant as it does not state the administrator. She pointed out that this is the same as to section 9 (2) of the Limitation

Act. She said according to Counsel for the applicant section 35 of the Limitation Act counts time from 1998 when Letters of Administration was granted to 2003 when the case was filed. She said she is objecting because it is true that in 1998 Letters of Administration were granted to the 1st respondent but the cause of action according to the pleadings was 2008. So, the 1st respondent could not have filed a case in 1998 when there was no dispute, but it was in 2008 when the said appellants trespassed in land and refused to vacate. That the Letters of Administration of the 1st respondent were revoked in 2008 by Buguruni Primary Court in 182/2008 and it is the evidence of the 1st respondent that the trespass was after the revocation of the 1st respondent. She prayed for the court to take judicial notice of existence of the said judgment. She insisted that the cause of action was in 2008 and not 1998, therefore the matter is not time barred.

She said the appellant's defence at the Tribunal did not dispute ownership of the suit property by 1st respondent, but they only disputed that the 1st respondent is Administrator of the Estate of the deceased and the Probate Case is pending in the High Court. She said that the inference is that there was no dispute on ownership. She said that in Appeal No.44 of 2011 and Civil appeal No.48 of 2013 (**Exhibit**

P1 and P3) the 1st respondent was confirmed as an Administrator of the estate of the deceased and the parties involved were the same and mainly the 1st appellant and the 1st respondent and there was no appeal against those judgments. She said that the judgments are valid in terms of the case of **Ramadhan Anwar Dossa vs. Myange Juma & Others, Civil Appeal No.144 of 2020 (CAT-DSM)** (unreported) pg. 17. She insisted that since the decision of the High court has not been varied, the 1st respondent is the Administrator of the suit property.

Ms. Msangi argued further that in paragraph (i) of the defence by the 1st appellant in the Tribunal the 1st and 5th respondents, admitted that there is a pending appeal in respect of revocation of the 1st respondent as Administrator and they appended the Memorandum of Appeal in respect of Civil Appeal No.48 of 2013. So, the Administrator who is the 1st respondent is impliedly the owner of the suit property by virtue of his appointment as Administrator of the estate of the late Sauji Salum. That the issue of ownership or possession had already been established by the court. That the facts of ownership and possession were new issues in the evidence. She said, this was the

reason for the Chairman's holding that appellants were departing from their own pleadings.

Ms. Msangi argued the third and fourth grounds together. She reiterated her previous submissions, that the Tribunal was correct in holding that the 1st respondent is the Administrator of the estate of the late Sauji Salum, as such he had mandate to administer the suit property by virtue of the decision of High Court in Civil Appeal No.48 of 2013.

Regarding the fifth ground, Ms. Msangi said that to correct the names and dates of the death is to correct the judgment of the High Court which has never been varied. She said this is Land Division and the issue of probate cannot be varied or entertained here.

Submitting for the sixth ground, Counsel said that there is a difference in admissibility and weight of evidence. That evidence may be admitted but the court is at liberty to consider it or not. That the Tribunal was correct in disregarding **Exhibits D1** and **D2** (search reports). That the search reports were not proof of ownership.

On the seventh ground Counsel said that there is nowhere the interest of Abdulrahman Hamis Said was mentioned. She said there is no proof if Abdulrahman Said owned the suit property and he has never appeared in court. She went on saying that if the appellant had any other claim, he should have filed a counterclaim as suggested by the Tribunal. Since there was no claim there was no need of joining Abdulrahman Said.

In rejoinder, Mr. Kamanija reiterated his submissions in chief and added that it was pleaded by the 1st respondent that this is trespass, and the time limit is three years. That the definition includes other things as such damages may be included. He said that recovery of land was not pleaded in the body but in the reliefs. He added that even if the issue was recovery of land, but under section 9 (1), (2) and section 35 of the Limitation Act and Item 22 Part 1 to the Schedule of the Act, it states that the Administrator ought to have sued within 12 years and it dates back to the death of the deceased and the interval is not relevant. That even if it is based on recovery of land still the matter is time barred. He insisted that no Certificate of Title was tendered as evidence of 1st respondent's ownership of the suit property and further that there is misconception because the

suit premises is in the name of another person not the deceased of the 1st respondent. That the person in the possession has never sued the appellants.

I have listened to Counsel for the parties, and the main issue for consideration is whether this appeal has merit. I shall discuss the grounds of appeal together as they are closely related.

In order to determine whether the claim establishes recovery of land by the 1st respondent (then applicant), I had to go through the Application No. 313 of 2013 filed at the Tribunal. Paragraph 5 (i) of the said Application is clear, that the 1st respondent herein stated that he is an Administrator of the Estate of the late Sauji Salum which estate comprises of the suit property. At paragraph 5 (ii) of the same application, the applicant stated that respondents trespassed since 2008, and on the reliefs, he prayed for among others, the order of vacant possession. Being the Administrator, the 1st respondent herein stepped into the shoes of the deceased. Mr. Kamanija's argument that the the issue of ownership was nowhere established or rather stated by the applicant at the Tribunal is therefore misplaced. His suggested view that this case was fit for trespass on tort rather than recovery of

land cannot stand. Just to remind the parties, that to establish trespass on land, one has to first establish the ownership. Since the 1st respondent claimed at the Tribunal to be the Administrator of the estate of the late Sauji Salum, the suit property being among the properties in the estate, the rebuttable presumption is that he is on the same position as the owner. The issue of whether the suit was for recovery of land is therefore answered in the affirmative.

The issue raised by Mr. Kamanija that the owner, according to the search conducted is one Abdulrahman Hamis Said cannot be accorded any weight at all because there is no record that the said Abdulrahman Hamis Said had at any time instituted a suit for recovery of the said suit property against the 1st respondent or any other person. It is only the 1st respondent who claims to be the owner of the same by virtue of being the Administrator. Even the appellants do not claim ownership of the suit property instead they are speaking for someone else who is not even in court. On the same basis, it is a misconception to argue that there was misjoinder of Abdulrahman Hamis Said simply because there is nowhere the 1st respondent who was the applicant at the Tribunal stated his claim against the said Abdulrahman Hamis Said, and as afore said, if he had any claim, he

would have instituted the suit or rather personally applied to be joined at the Tribunal. The appellants are not in any position of speaking on behalf of Abdulrahman Hamis Said. Further, it is not the duty of the Tribunal to join the parties to the suit as suggested by Mr. Kamanija, except on application by a party. In the present appeal, no party applied to join the said Abdulrahman Hamis Said at the Tribunal and therefore the blame cannot be placed on the Tribunal as it is not mandated that duty.

As for the issue whether the matter was time barred, I would at the outset answer this issue in the negative. Based on the above analysis the matter was for recovery of land, and in terms of Item 22 Part 1 of the Schedule to the Limitation Act, the time limit for recovery of land is 12 years. The claim at the Tribunal is for trespass which occurred in 2008 and the Application was filed in 2013, that is, five years from when the alleged trespass occurred. Considering Item 22 of the Schedule to the Limitation Act the application was filed within 12 years prescribed by law and thus it was not time barred as claimed by Mr. Kamanija.

As for the controversy of the names, it is not disputed by the parties that the late Sauji Salum passed away. The only issue is the slight differences on the names and dates of death. According to Mr. Kamanija the records shows that the late Sauji Salum died on 30/10/1998 and the late Sauji Salum Akida died on 01/11/1998. The difference is only on the last name as said but his death is not disputed. That is why the Tribunal treated it as a minor defect. The situation would have been different if the death was in dispute, however it is not the case. The same is for the dates, that is, the dates are not prejudicial to the appellant as the death of Sauji Salum is not disputed hence minor as observed by the Tribunal.

As for the issue of the Tribunal disregarding the search report, which, Mr. Kamanija opined that it shows different name of the owner apart from the deceased Sauji Salum, this too in my considered view has no merit. The reason is simply because the applicant prayers was for vacant possession. The appellants herein had no claim of ownership against the 1st respondent and if they had they should have raised it as a counter claim instead of providing evidence that the suit property belongs to another person who has not claimed the suit property. Mr. Kumalija relied on the search reports **Exhibit D2** because it was

admitted by the Tribunal. But as correctly stated by Ms. Msangi, admissibility of a document as an exhibit does not compel the court to take it wholly. The court has to look into the said exhibit and make assessment in terms of its evidential value. In any case, a search report is not a conclusive evidence that a person is owner of a property, there requires further corroborative evidence to prove ownership which in this instance was not provided by the appellants. This ground too has no merit.

In conclusion, parties should take into consideration that, any challenge in respect of the 1st respondents as an Administrator of the estate of the late Sauji Salum should, if any, be preferred to the proper forum. As of now, there is no proof by the appellants that the appointment of the 1st respondent as an Administrator of the estate of Sauji Salum has been successfully revoked by the court of competent jurisdiction.

In the result, I hold that the entire appeal is without merit and is hereby dismissed with costs. It is so ordered.


V.L. MAKANI
JUDGE
30/05/2022

