

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

**MISC. LAND APPEAL NO. 53 OF 2021**

**MOHAMED KIGESU MAHEGU..... APPELLANT**

**VERSUS**

**LAURENCE ASSELI NSANYA.....RESPONDENT**

Date of Last Order: 21.12.2021  
Date of Judgment: 31.01.2022

**JUDGMENT**

**V.L. MAKANI, J.**

This is a second appeal. The matter originated from Chanika Ward Tribunal (the **Ward Tribunal**) in Land Application No. 68 of 2020 where the appellant **MOHAMED KIGESU MAHEGU** succeeded in the recovery of land located at Yongwe within Chanika Ward (**the suit land**). The respondent was dissatisfied with the decision of the Ward Tribunal so he appealed to Ilala District Land and Housing Tribunal (the **District Tribunal**) in Land Appeal No. 104 of 2020 (Hon. A. R. Kirumbi, Chairperson) where the decision was in his favour. Being dissatisfied with the decision of the District Tribunal the appellant has filed this appeal on the following grounds of appeal:

- 1. That the Honourable Chairman erred in law and fact for allowing the appeal basing on wrong and inapplicable law.*
- 2. That the Honourable Chairman erred in law and fact in holding that the application filed in the Ward Tribunal in Land application No.68 of 2020 delivered on 29<sup>th</sup> December 2020 was time barred.*
- 3. That the honourable Tribunal erred in law and fact in relying on the respondent's evidence to find the application to be time barred rather than basing on the appellants pleadings and evidence.*
- 4. That the Tribunal erred in not considering or giving weight to the appellant submissions opposing appeal without giving any cogent reasons hence leading to miscarriage of justice.*

The appellant has prayed for the appeal to be allowed and the decision of the District Tribunal be reversed, quashed or set aside and costs of the appeal be provided for.

With leave of the court the appeal was argued by way of written submissions. Submissions by the appellant were drawn and filed by Mr. Amin Mshana, Advocate. While Emmanuel Simon, Advocate drew and filed submissions in reply on behalf of respondent.

Mr. Mshana for appellant gave a brief background of the matter and proceeded to argue the first ground of appeal that Item 22 of the Law

of Limitation Act, CAP 89 RE 2019 (**Limitation Act**) is not applicable at the Ward Tribunal. That the proper law is Customary (Limitations of Proceedings) Rules 1964, GN No. 311 of 1964 (GN No. 311). He said section 52 (2) of the Land Disputes Courts Act, CAP 216 RE 2019 provides that that the Limitation Act shall be applicable in the District Tribunals proceedings when exercising their original jurisdiction. That the District Tribunal was exercising its appellate jurisdiction not original jurisdiction. Counsel relied on the case of **Batamanagwa Cornelius Pomonhi vs. Martine Kuloba, Land Appeal No.14 of 2020 (HC-Mwanza)** (unreported).

On the third ground of appeal, Mr. Mshana said that the issue of time barred was not proved since there was no proof that was brought to the District Tribunal to prove the period of trespass. He said the appellant told the Tribunal that he was told by one Tatu Mpemba that before 2016 some people were trespassing in his land. That it is unknown whether the respondent was part of the said trespass. That there was no evidence as to when the dispute arose between the parties, that is whether it was 2015 or before. He said what is on record is just when the parties came into possession of the suit land. Counsel insisted that there is no proof that the suit was time barred.

Mr. Mshana went on saying that they were no cogent reasons given in the decision as to why the District Tribunal did not believe the appellants evidence that he came to know of trespass by respondent in 2016 and on other hand relied on defence evidence. Counsel added that the ground based on limitation raised is based on the respondent's evidence and not pleadings and evidence of the respondent. He went on arguing that the appellant clearly stated that he came to know of trespass by respondent in 2016 after coming out of jail which is when the cause of action arose and the time to be reckoned in counting the period of limitation. Counsel insisted that the objection on limitation ought to have been raised as a preliminary objection not based on respondent's defence but pleadings and evidence of the appellant.

On the other hand, Advocate Mshana said that the criteria for adverse possession were not met as stated in the case of **Bhoke Kitang'ita vs Makuru Mhemba, Civil Appeal No.222 of 2017**. That the criteria were not cumulatively met as required in the case of **Bhoke Kitang'ita** (supra). He insisted that there was no proof that the absence of possession by the true owner was through abandonment and therefore the issue of adverse possession cannot stand.

On the fourth ground of appeal Counsel said that the reason for the decision in the District Tribunal is time limitation inferred from a non-applicable law as well as insufficient evidence of adverse possession as submitted. He added that the Chairman did not also give reasons for disregarding appellants submissions. That the said conduct contravenes Regulation 19 (1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003. That the District Tribunal's re-evaluation of evidence has led to the errors by the Chairman. He prayed for this appeal to be allowed with costs.

In reply Mr. Emmanuel Simon said that GN. No. 311 on Item 6 of the Schedule, proceedings for recovery of land is 12 years. That the same applies for Item 22 Part 1 of the Schedule to the Limitation Act. He said that clerical error by the District Tribunal should not occasion injustice to the respondent as per section 46 of the Land Disputes Courts Act. He said the court can correct clerical errors which has the same legal consequences to the law which ought to be cited. That the suit for recovery of land has been brought by the appellant out of 12 years without extension of time and the only remedy available is to dismiss the suit. Counsel relied in the case of **Paul Reginald**

**Bramely Hii vs security Group Cash in Transit (T) Ltd, Revision No. 21 of 2013 (HC-Labour Division)** (unreported). He insisted that the inapplicable law can be cured by overriding objective principle as the wrong cited law and the proper one both provide for 12 years as the time limitation within which a suit for recovery of land should be instituted. Mr. Simon added that the issue of time limitation touches on the root of the case and this court can suo motto raise the issue on appeal stage and determine it. He relied on the case of **Kenya Commercial Bank (T) Ltd vs. Kusire Anael Mwashu t/a Maxumum & Company, Civil Appeal No.63 of 2018 (HC-DSM)** (unreported).

On the second ground of appeal, Mr. Simon said that the ground has been abandoned by the appellant. He insisted that the Chairman did not error in law and facts as alleged.

On the third ground of appeal, Counsel said that it is evident at page 8 of the Ward Tribunal's judgment that the respondent has been owner of the suit land for 30 years (from 1990 to 2020). That the appellant alleged to have bought the suit land in 1997 which is 7 years after respondent had purchased it in 1990. That the period of

limitation started to run from 1997 when appellant alleged to have purchased and assigned a caretaker (Mohamed Hamis). That the caretaker had an obligation to look after and act according and in the instance that required owner's attention. That the caretaker was never called as a witness at the Ward Tribunal. That the situation raises alarm that the caretaker and appellant knew that the respondent had settled on the suit land 7 years before them. He insisted that respondent had been in suit land for the past 30 years. Counsel added that appellant claimed that he had been in jail for 17 years from 1999 to 2016 but there was no any proof to support his claim. That the caretaker one Mohamed Hamis had an obligation of reporting any discrepancies to the appellant, but he did not do so.

On the issue of adverse possession, Counsel said that the concept is misconceived. That respondent purchased the suit land in 1990 while the appellant bought the suit land in 1997. That the same was testified at the Ward Tribunal by the appellant's witness one Bruno Timothy Haule. That the issue of adverse possession cannot stand since it was respondent who first bought and settled on the land in 1990. That the situation would have been different if the appellant bought the suit land prior to the respondent.

On the fourth ground of appeal, Counsel said that the District Tribunal considered submissions by both parties. That the District Tribunal provided reasons for its decision. He insisted that the ground is novel and the court should dismiss it. He prayed for this appeal to be dismissed with costs.

In rejoinder, Advocate Mshana reiterated his main submissions and added that in the petition of appeal, the appellant was Mohamed Kigesu Mahegu and respondent was Lawrence Asseli Nsanya. That in his reply, respondent termed himself as appellant while appellant was termed as respondent. In that regard Mr. Mshana said that the submissions in reply filed by respondent are defective and ought to be dismissed with costs. To support his position, Counsel relied on the case of **MIC Tanzania Ltd vs Hamisi Mwinyijuma and others, Civil case No.64 of 2016 (HC-DSM)** (unreported).

Having gone through submission by both parties, the main issue for determination is whether this appeal has merit. It is noted that the decision of the District Tribunal was based on the limitation of time which is mainly reflected in the second and third grounds of appeal.



main issue Indeed, Mr. Mshana in his submissions mentioned the second ground but proceeded to submit on the third ground. However, reading the second and third grounds of appeal I find them to be intertwined and Mr. Mshana though submitting on the third ground he in a way also covered the second ground.

I will start with the second and third grounds of appeal on limitation of time as it goes to the root of the matter. I had ample time to revisit the records of the Ward Tribunal where the appellant herein testified that he bought the suit land in 1997 and handed it under the care of one Mohamed Hamis and he was incarcerated in 1999. That he came out of jail in 2016 and he told the street Chairman that his land had been trespassed by unknown persons but for about a year there was no cooperation from the Chairman, so he decided to go to the Police and ultimately to the Ward Tribunal.

The record is evident that there was trespass to the land between 2015 and 2016 and the matter was filed in the Tribunal in 2020. I agree with Mr. Mshana that, in establishing time limit, the District Tribunal ought to have confined itself to the applicant's pleadings and not respondent's evidence. That since the appellant stated that he

became aware of the trespass in 2016, then the exact time when the course of action is deemed to arise is 2016 which is only 4 years from the time when this matter was filed. In that respect, the District Tribunal erred in holding that the matter was time barred.

Mr. Mshana said that the decision of District Tribunal Chairman was based on the evidence by the respondent, but going through the judgment by the Chairman it is apparent that the only problem was analysing the concept of time limitation and course action which in my view as stated hereinabove was wrong.

As for the first ground of appeal, that the District Tribunal erred in applying Limitation Act instead GN No. 311. I wish to state that, both laws provide for 12 years within which the suit for recovery of land should be instituted. In that regard even if GN No. 311 was to be applied the result would have been the same. This omission in my view is not fatal and is curable by invoking the overriding principle under section 3A of the Civil Procedure Act CAP 33 RE 2019 as I hereby do. In any case, the omission has not occasioned any injustice to either party. This ground of appeal is devoid of any merit.

On the reasons for the decision, I wish to put it clear that, in the District Tribunal the respondent herein preferred 6 grounds of appeal. However, the entire appeal was disposed of by the second ground of appeal that the matter at the Ward Tribunal was time barred. The reasons for the decision are contained in page 10 of the District Tribunal's judgment. We cannot therefore state that the Chairman failed to give reasons for his judgment. This ground therefore has no merit.

From the above analysis, I am of the considered view that, the main issue for contention, that of limitation of time has been answered in favour of the appellant. In that regard the appeal is allowed. The decision of the District Tribunal is hereby quashed and set aside. The judgment and decree of the Ward Tribunal is hereby restored. Costs of this appeal to be borne by the respondent.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**31/01/2022**

