

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

LAND CASE NO. 183 OF 2020

MUGISHA ENTERPRISES LIMITED..... PLAINTIFF

VERSUS

CONSOLIDATED INVESTMENT LTD1ST DEFENDANT

ZAMZAM ABDALLAH HAMZA.....2ND DEFENDANT

KCB BANK TANZANIA LIMITED.....3RD DEFENDANT

R U L I N G

Date of last order:

Date of Ruling:30/11/2021

T. N. MWENEGOHA, J.

On 2nd November, 2020 the plaintiff filed this suit against the defendant praying for judgment and decree of this court against the defendant as follows: -

- a. Declaration that the purported loan agreement between the Plaintiff and first defendant is void,**
- b. A declaration that the attachment and sale of the house situated on Plot No. 170 Block F, CT No. 53092 and L.O Number 145994, Mbezi Beach are Dar es salaam (herein suit property) is void abnitiio;**
- c. An order that the second defendant's ownership of the suit property be cancelled and restored to its to its immediate previous original owner;**
- d. An order that the original certificate of title of the suit**

property sold to the second Defendant be returned to its original owner;

- e. Payment of general, punitive and exemplary damages by the defendants as they shall be assessed by this honorable court for conducts stipulated in paragraphs 21(a-e) above;**
- f. Payment of cost of the suit by the defendants**
- g. Any other relief which this honorable court may deem fit and just to grant.**

Upon filing their written statement of defense each defendant raised a point of preliminary objection. The 1st defendant raised the following objections: -

- a. The suit is time barred as it contravenes the provisions of item 4 of Part I to the schedule of the Law of Limitation Act, Cap 89 (R. E. 2019) which prescribes two years period of limitation for filing a suit to set aside sale in execution of a decree of a court exercising civil jurisdiction.
- b. The suit is misconceived in two ways:
 - i. The Plaintiff has not exhausted other remedies available to her like application to set aside sale under order XXI rule 87 or 88 of the Civil Procedure Code;
 - ii. The court has no jurisdiction to entertain a suit founded on the execution of a decree of a Resident Magistrate's Court;
 - iii. The suit is not founded on a land dispute.

The second defendant raised the following point of objections,

- a. The suit is time barred

b. The prayers are overtaken by the events hence untenable by law.

The preliminary objection was heard by way of written submissions whereby the first defendant was represented by Constantine Kakula, Advocate the 2nd defendant was represented by Hamza Abraham Senguji, Advocate while the plaintiff was represented by Fikirini Liganga, Advocate.

Undisputed facts from the submission of both the plaintiff and the defendants' are that this suit originated from the decision of Resident Magistrate Court of Dar es salaam at Kisutu (henceforth Kisutu RM's Court) whereby, the 1st defendant sued the plaintiff herein at Kisutu for recovery of a sum of USD 31,614 comprising of USD 24,614 as principal amount advanced by 1st defendant herein to the business of the plaintiff herein and USD. 5831 being profit accrued from the principal amount advanced to the plaintiff herein. The judgment was entered in favor of the 1st defendant herein with costs.

Following that judgment, and during execution of decree, the house which was used as a security when the plaintiff secured loan agreement from the 1st defendant was sold. Although this fact of attachment of the house for the reasons that it was used as security for loan is one of the disputed facts and it is the center of this suit. The said house was sold in 2011. The current application was filed in this court in 2020.

The time when this suit was filed and the time when the execution was done is what caused the defendants to raised their preliminary objections.

On the first objection Mr. Kakula submitted that Item 4 of Part I of the Schedule to the Law of Limitation limits the action for filing a suit to set aside sale in execution of a decree of a court exercising civil jurisdiction to two years.

He submitted that in 2010 Kisutu entered judgment against the plaintiff. He added that following that judgment and during execution of decree, the house which was used as a security when the plaintiff secured loan agreement from the 1st defendant was sold. He insisted that the said house was sold in 2011 and this suit subject to this objection was filed in this court in 2020. It is his submission that from the date when the order of sale was made to the date when this case was filed, almost nine years have elapsed contrary to the provision of item 4 of Part I of the Schedule to the Law of Limitation which limits the action for filing a suit to set aside sale in execution of a decree of a court exercising civil jurisdiction to two years as it provides.

He added that the issue is that this case follow on suit to set aside the sale as prescribed by the law of limitation act, under paragraph 5 of the plaint, the plaintiff seeks the declaration by this court that the attachment and sale of the house in issue was void and an order that the house be restored to the plaintiff. He concluded that from the wording of the plaintiff prayer under paragraph 5, it is clear that the prayer sought is for the court to set aside a sale in execution of a decree which limited to two years.

Mr. Senguji was of the same view and he added that the matter originates from an agreement between the 1st defendant and the plaintiff termed as Memorandum of Understanding. He added that if that is the position, the Case is also based on a contract. He cited Part 1 of the schedule to the Law of Limitation Act Cap 89 R. E. 2002 the time for claims based on a contract is six years.

He also referred to paragraph 6 of the Plaintiff which clearly states that on 8th day of October 2007 the 1st defendant and the plaintiff entered into a Memorandum of Understanding where it was agreed that the 1st defendant give a total amount of USD 31,732.07 to the plaintiff for the purposes of advancing her business. It was further agreed that within sixty days (60) the plaintiff should refund the 1st defendant USD 43,394.07. In 2008, the first defendant instituted Civil Case No. 121 of 2008 at Kisumu demanding the refund of USD 31,732.07. It was his submission that this is clearly narrated at paragraph 10 of the Plaintiff. He added that according to paragraph 13 of the Plaintiff, Kisumu RMS Court delivered its Ruling on 20th day of October 2010 in favor of the 1st defendant.

He contended further that, the cause of action in respect of contract arose in October 2010. This suit was supposed to be filed sometime in 2016 and not this year as the plaintiff did. It was his humble submission that in all four corners the suit is hopelessly time barred and it is ought to be dismissed with costs.

In reply Mr. Liganga submitted that what is before this honorable court is land case founded on ownership of the landed property, and not an application to set aside any sale, as implied by the 1st defendant. He submitted that consequently, this being not an application to set aside sale of immovable property, and thus the provisions of order XXI rules 87 and 88 cannot apply. That, it is not proper to cap its limitation period to two years under item 4 to part 1 of the schedule to the Law of Limitation Act, Cap 89 (R. E. 2019).

It was his submission that what is before this Court is a land dispute and that the final prayers in the plaintiff clearly indicates so. To him the plaintiff is claiming back ownership of the landed property. He contended that all other facts contained in the plaintiff are so as to give a concise, proper and chronological

sequence of series of events as to what exactly transpired up to the occurrence of what the plaintiff is using as the basis of her claim. He insisted that this being a pure land dispute founded on regaining back ownership of the landed property, the proper time limitation is twelve years as per item 22 of part I to the schedule of the Law of Limitation Act, Cap 89 (R. E. 2019), and not two years as wrongly put by the 1st Defendant.

Replying to Mr. Senguji's submissions on time limitation Mr. Liganga submitted that the counsel for the 2nd defendants seems to be confused as to the **plaintiff's** cause of action in this case as between one founded on contract (memorandum of understanding) with limitation of six years and one involving setting aside a sale in execution of a decree with limitation of two years.

He stated that this is not a suit involving setting aside sale in execution of any decree. To him there is nothing in the plaintiff's case to that effect. He stated that the plaintiff's case is based on regaining the ownership of the landed property illegally sold to the 2nd defendant as a result of combination of series of events including forgery by the 1st defendant and negligence by the 3rd defendant.

It was his submission that a suit for setting aside sale in execution of a decree must be preferred under the provisions of order XXI rule 87 or 88 of the Civil Procedure Code, Cap 33 (R. E. 2019) which provides for applications and not main suits like the present case. The plaintiff in this case did not choose to go that way given the nature of her claims and the parties to be involved.

He added that looking at the reliefs sought by the plaintiff in the plaint, the prayers are very clear. The plaintiff is seeking for declaration that the purported loan agreement between the plaintiff and the 1st defendant to be declared null and void and declaration of the resulting sale to be void ab *initio*, and thereafter gaining back the ownership of the disputed landed property. He insisted that this clearly indicates that this case is a land case founded on a dispute over a landed property; and hence , the proper time limitation is twelve years as per **item 22** of part I to the schedule of the **Law of Limitation Act, Cap 89 (R. E. 2019)**, and not two years or six years as wrongly put by the 1st defendant.

Having heard submissions by the learned advocates, I proceed to determine on issue whether the suit is time barred.

In addressing this objection, I find it prudent to put clear the meaning of the preliminary objection. It has been defined by number of decisions including celebrated case of **Mukisa Biscuits Manufacturing Co. L.T.D vs. West End Distributors L.T.D (1969) EA 696 (supra)**, which affirmed that:-

" A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".

It is clear that the plaintiff under paragraph 5 of the Plaint is praying for this court to declare that the attachment and sale of the suit property to be void *abnitio*. The plaintiff has also attached the decision of Kisumu RM's Court which was delivered in favor of the 1st defendant and executed by attaching the said suit property.

I am of the view that this case cannot be separated with the decision of Kisumu RM's Court, and therefore it is settled that the plaintiff is hereby praying to set aside sale in execution of a decree of Kisumu in exercising civil jurisdiction.

Therefore, from the facts provided in the pleadings, the sale of the house in dispute was conducted on 30th October 2011 while the present suit was filed on 18th November, 2020. This is more than eight years.

Thus, I am in agreement with the cited authority of Part 1 of the schedule in the Law of Limitation Act, Cap 89 R. E. 2002 which provides that,

"... for suit to set aside a sale in execution of a decree of a Court execution exercising Civil Jurisdiction.....two years"

Having said that I find that the suit is filed out of time.

I noted that even when we address the issue of Memorandum of Understanding as pointed out in paragraph 8 and 6 of the Plaint. That the plaintiff prayed for the same to be nullified due to the fact that the purported loan agreement between the plaintiff and first defendant is void. As stated by Mr. Senguji, the cause of action in respect of contract arose in October 2010.

The position as stated under Paragraph 6 of the Plaint is that on 8th day of October 2007 the 1st defendant and the plaintiff entered into a Memorandum of Understanding where it was agreed for the 1st defendant give a total amount of USD 31,732.07 to the plaintiff for the purposes of advancing her business. The condition was that the plaintiff should refund the 1st defendant USD 43,394.07 within sixty days (60).

According to Part 1 of the schedule to the Law of Limitation Act Cap 89 R. E. 2002 the time for claims based on a contract is six years. It is written as hereunder:-

"... suit founded on contract not otherwise specifically provided for... six years."

The cause of action in respect of contract which arose in October 2010 when Kisutu RM's Court decision was reached. Therefore, this suit was supposed to be filed sometimes in 2016 in order to still be within time and not in 2020 as the plaintiff did.

Therefore, this court finds that the suit is time barred.

Having said that I find no need to determine the other objections as the first one is capable disposing the matter.

The case is hereby dismissed with costs.

Dated at Dar es Salaam this **30th day of November, 2021.**




T. N. MWENEGOHA
JUDGE