

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

**MISC. LAND APPLICATION NO. 740 OF 2021**

(Arising from Land Case No. 246 of 2015)

**ZIHIJA SELEMANI MUHEMA .....APPELLANT**

**VERSUS**

**MKOMBOZI COMMERCIAL BANK PLC.....1<sup>ST</sup> RESPONDENT**

**ALEXANDER GABRIEL MAYA.....2<sup>ND</sup> RESPONDENT**

**LOCUS DEBT MANAGEMENT.....3<sup>RD</sup> RESPONDENT**

Date of Last Order: 31.05.2022

Date of Ruling: 04.07.2022

**RULING**

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

This ruling is in respect of the preliminary objection on a point of law that was raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondents herein. The objection that was raised was as follows:

*"That the application is hopelessly out of time."*

With leave of the court the objections were argued by way of written submissions. The plaintiff had services of Mluge Karoli Fabian, Advocate; while the respondents were represented Makaki Masatu, Advocate.

In his submissions in chief, Mr. Masatu said that the applicant in his affidavit at paragraphs 1, 8, 11 and 14 has challenged the sale of the property namely Plot No. 505, Block 47, Kijitonyama (the **suit property**) that was sold to the 2<sup>nd</sup> respondent on 15/09/2021. According to Mr. Masatu, the applicant admits that she was served with 30 days' Notice of Transfer under Power of Sale dated 02/11/2021. He said under section 51(1) of the Land Registration Act CAP 334 RE 2019 the applicant was required within thirty (30) days from the date of the Notice to seek relief from the High Court. He said the notice which was acknowledged by the applicant was dated 02/11/2021 and the application herein was filed on 21/12/2021 so the application was late by at least 18 days without leave of the court. He said by virtue of section 46 of the Limitation Act, the provisions in the Limitation Act shall apply as if prescribed by the Act even if the limitation period has been prescribed by any other written law. He said in this case since there is no provision in the Land Registration Act which excludes the applicability of the Law of Limitation then the application instituted out of time should be dismissed.

He said the applicant has filed the application under Order XXI Rule 88 of the Civil Procedure Act CAP 33 RE 2019 (the **CPC**) which is

applicable where the sale is made in execution of a court decree despite that the sale of property was exercised under Power of Sale as per paragraph 11 of the affidavit of the applicant. He said an application to set aside sale of property under execution of a decree is supposed to be filed within thirty days (30 days) under Item 7 Part III of the Schedule to the Limitation Act. He said the 30 days time within which an application to set aside is to be instituted is counted from the date of sale. He cited an Indian case of **Lala Ram & Another vs. Bhajani AIR 1970 All ER 398** which considered in pari material provision of the Civil Procedure Code and stated *"limitation for making an application Under XXI Rule 90 is 30 days from the date of the sale."*

He said the applicant in paragraph 11 of her affidavit admits that the sale was carried out in 15/09/2021 as such the 30 days expired on 15/10/2021 and this application was filed on 21/12/2021 thus out of time for 65 days. He said since the application was filed out of time and without leave of the court then in terms of section 3(1) of the Limitation Act the said application is supposed to be dismissed with costs.

In his submissions in reply on behalf of the applicant, Mr. Karoli said his colleague missed a point. He said it true that the notice by the Registrar was dated 02/11/2021 but this needed to be communicated to the applicant through a posting agent. He said the effect of 30 days' notice of the Registrar under the posting rule is that as against the Registrar on the date the letter was posted, and as against the applicant when it came to her knowledge. The said notice reached the applicant on 16/12/2021 and under Regulation 9(1) and (2) of the Electronic and Postal Communications (Postal) Regulations, 2011 (the **Electronic and Postal Regulations**), the 30 days' notice ought to be counted at the time the applicant received the letter and not when the Registrar wrote the letter. He thus said counting from 16/12/2021 to when the application was filed on 21/12/2021 the application was within time in terms of section 51(1) of the Land Registration Act read together with the Electronic and Postal Regulations cited above.

Mr. Karoli further stated that it cannot be ascertained without evidence when the Registrar posted the said and the respondents are not able at this stage to state with certainty when the said letter was posted. He thus pointed out that the objection raised therefore does

not fall within the ambit of the meaning of a preliminary objection as was stated in the case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited (1969) EA 696**. He said the allegations when the Registrar posted the letter is not known. He said the application is not time barred as the allegations need not only evidence but also the court to investigate.

As for the limitation based on Item 7 Part II of the Schedule to the Limitation Act, Mr. Karoli said the alleged sale was not in execution of any decree. He said there is nowhere the applicant is claiming that the sale was made under the orders of the court. He said the Registrar made transfer on 28/09/2021 and wrote a letter to notify the applicant with intention to transfer ownership on 02/11/2021 knowing that the transfer was already done. But the letter to the applicant was received on 16/12/2021. He said all these transactions by the respondents and the registration is tainted with fraud and the respondents cannot benefit from the alleged provision of Item 7 Part II to the Schedule of the Limitation Act. He said an illegal act cannot render an application to be time barred and such an objection ought to fail.

Mr. Karoli went on stating that the objection by the respondents intend to hide illegalities of fraudulent transactions and in the circumstances the period of limitation does not begin to run until the victim of fraud has discovered the fraud as per section 26 of the Limitation Act and the case of **Calico Textile Industries Limited & Another vs. Tanzania Development Finance Company Limited [1996] TLR 257 (CAT)**. Mr. Karoli said with the explanations the application is within time and he prayed for the preliminary objections to be dismissed for lack of merit.

In rejoinder Mr. Masatu submitted that the arguments by the applicant are not tenable in law for two reasons. That, parties are bound by their pleadings as was emphasized by the Court of Appeal in the case of **NBC & IMMMA Advocates vs. Bruno Vitus Swalo, Civil Appeal No. 331 of 2019 (CAT-Mbeya)** (unreported). Mr. Masatu said the matter that the applicant received the letter from the Registrar on 16/12/2021 was not pleaded in the affidavit in support of the application. Mr. Masatu further stated that once a party is aware that he is out of time then he/she has to plead facts which indicate that she is exempted from the Law of Limitation. This is per Order VII Rule 6 of the CPC and was interpreted in the case of

**National Bank of Commerce Limited vs. MM Worldwide Trading Company Limited & 2 Others, Commercial Case No. 166 of 2014 (HC-Commercial Division, DSM)** (unreported). Mr. Masatu also gave these same reasons when he was arguing the issue of the alleged fraud by the defendants.

On the argument that the objection is not purely an objection in law in terms of the case of **Mukisa Biscuits** (supra), Mr. Masatu said the objection is about limitation and it is based on facts pleaded by the applicant in her affidavit therefore the allegation that the claims are unascertained are not correct. He said the applicant is also challenging limitation in terms of Item 7 of Part II to the Schedule of the Limitation Act, however the application is under Order XXI Rule 88 of the CPC and this provision is exclusively for immovable property sold in execution of the decree. He said it is strange for the applicant to deny that her application is not challenging sale arising out of execution. He said the applicant is bound by her own pleadings. Mr. Masatu reiterated his prayers for the application to be dismissed with costs.

I have gone through the submissions by Counsel for the parties herein. The main issue for consideration is whether the matter before the court is time barred.

At the outset I would wish to deal with Mr. Karoli's claim that this is not a pure point of law in terms of the case of **Mukisa Biscuits** (supra). I am not in agreement with argument because the claim for limitation of time and jurisdiction are points of law which when argued disposes of the whole matter as such, they fall within the ambit of the case of Mukisa Biscuits (supra). This argument therefore has no basis.

As for the substantive arguments, it is not in dispute that there was sale of the suit property under power of sale. There is also no dispute that there was notice from the Registrar dated 02/11/2021 and the notice was for one month according to section 51(1) of the Land Registration Act. The dispute between the parties is when do we start the count in respect of the one-month notice period? According to the respondents it is on the date of the notice, while the applicant states that it is on the date of receipt of the notice. Section 51(1) of the Land Registration Act states:

*"A bona fide purchaser for value of a registered estate from a lender selling in professed exercise of his power of sale shall not be bound, nor shall the Registrar when a transfer is presented for registration be bound, to inquire whether default has occurred, or whether any notice has been duly served or otherwise into the propriety or regularity of any such sale, but the Registrar shall serve notice of such transfer on the owner of the estate and shall suspend registration of such transfer for one month from the date of such notice, and at the expiration of such period the Registrar shall register the transfer as at the date of presentation, unless in the meanwhile the High Court shall otherwise order, and thereafter the transfer shall not be defeasible by reason that default had not occurred, or that any notice was not duly served or on account of any impropriety or irregularity in the sale."*

Indeed, the above provision is very clear that registration of transfer is suspended from the date of the said notice, which in the present case it is 02/11/2021. There is nowhere in the Act that prescribes otherwise. I am therefore guided to believe that this was the reason Mr. Karoli decided to seek refuge in Regulation 9(1) and (2) of the Electronic and Postal Communications (Postal) Regulations which requires time to start to run at the date of receipt of the letter/notice. This may be the position, however, while the applicant is claiming to have received the said notice on 16/12/2021, there is nothing in the pleadings to state as such. The affidavit of the applicant is silent on the date of receipt of the said notice/letter and there is nothing

attached to evidence receipt of the notice on the said date. The alleged date of receipt of the notice/letter is a statement from the bar which is not supported by the pleadings hence an afterthought. As pointed out by Mr. Masatu, and correctly in my view, parties are bound by their pleadings, and if such an important fact is not pleaded in the affidavit, then the applicant cannot rely on it (see the case of **NBC & IMMMA Advocates** (supra)). It is my considered view that, there is nothing to show that indeed the applicant received the notice/letter on 16/12/2021 as alleged to warrant the counting of the notice to start from the date of the receipt as provided for under the Land Registration Act and the Electronic and Postal Regulations. The court cannot count from the air it has to have a basis. Failure by the applicant to state in the pleadings the date of receipt of the notice/letter is a fatal omission on her part. In such an instance therefore the only date that remains is the date of the notice/letter that is 02/11/2021; and counting from the said date to the date of the filing of this application on 21/12/2021 it is apparent that 30 days had elapsed. In the absence of leave to extend time then the application is in essence time barred.

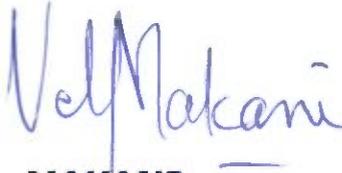
What are the consequences where a matter is time barred? According to section 3(1) of the Limitation Act when a matter is time barred it is subject to dismissal. The said section states:

*"Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence."*

This position was underscored in the case of **Hashim Madongo & 2 Others vs. Minister for Industry and Trade & 2 Others, Civil Appeal No. 27 of 2003 (CAT-DSM) (unreported)**, that once one is caught in the web of section 3(1) of the Limitation Act the only remedy available is dismissal. Considering the foregoing, the preliminary objection raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondents is sustained, and the application is hereby dismissed with costs.

It is so ordered.



  
**V.L. MAKANI**  
**JUDGE**  
**29/07/2022**