

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO.60 OF 2023**

**SULTAN RUGOME ..... PLAINTIFF**

**VERSUS**

**PENINA CLEMENT KILANGA (Administratrix of the estates**

**of the late Clement D. Kilanga) ..... 1<sup>ST</sup> DEFENDANT**

**HAPPINESS PETER SWAI ..... 2<sup>ND</sup> DEFENDANT**

**DAR ES SALAAM CITY COUNCIL ..... 3<sup>RD</sup> DEFENDANT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

*Date of last order: 20/6/2023*

*Date of Ruling: 21/7/2023*

**A.MSAFIRI, J.**

The plaintiff filed this suit against the defendants, claiming for recovery of land measured 4600sqm, Plot No 10 Block E Part 1 located at Tabata area within Dar es Salaam and that the defendants have trespassed and divided the said land thereby causing substantial damages to a tune of TZS 46,000,000/= and TZS 40,000,000/=.

*Alle*

The defendants have filed their written statements of defence and the 1<sup>st</sup> and 2<sup>nd</sup> defendants in their written statement of defence, raised preliminary objections on the point of law to the effect that: -

- a) That the suit is hopelessly time barred.
- b) That this Honourable Court lacks original jurisdiction to entertain the subject matter.
- c) That the suit is incompetent for failure to join a necessary party.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants prayed for the suit to be dismissed with costs.

The preliminary objection was heard by way of written submissions, whereby, the plaintiff was represented by Mr. John Michael, learned advocate and the 1<sup>st</sup> & 2<sup>nd</sup> defendants were represented by Dr. Sigsbert Ngemera, learned advocate.

Arguing in support of the first point of preliminary objection, Dr. Ngemera for the defendants submitted that this suit is time barred. He referred to Section 3 of the Law of Limitation Act [Cap 89 R.E 019] (hereinafter referred to as the Limitation Act) which provides for the dismissal of suit instituted after the period of limitation and Part I: Item *Aelle*.

6 of the Act, which provides that the suit to recover land is twelve years and the suit founded on tort is three years.

He further referred to Section 5 of the Law of Limitation Act, which provides that the period of limitation commences from the date on which the right of action for such proceeding accrues. He stated that the law provides further that the right of action begins to run when one becomes aware of the said transaction or act which is complained of.

To cement his argument, he referred the Court to the case of **Salim Lakhan and 2 others vs Ishfague Shabir Yusufali (As Administrator of the Estate of the late Shabir Yusufali)**, Civil Appeal No.237 of 2019, CAT, DSM, at Pg.13

He referred further to paragraphs 6 and 7 of the Plaint and submitted that, the plaintiff's claim is for the recovery of land which was subdivided and allocated to the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the year 1991 by the 3<sup>rd</sup> defendant. He stated that, the action was followed by issuing letters of offer and they built their buildings from that date.

Regarding the claim of trespass, Dr. Ngemera submitted that from the year 1991, it is almost 32 years from the date the cause of action appeared to commence. He referred to paragraphs 15, 17 and 21 of the *Atte*.

Plaint that reveal the time when the plaintiff became aware of the alleged cause of action.

He argued that, since the plaintiff was aware of the cause of action since 1991, 1996 and 2006 and no extension of time from the Minister has been sought for the institution of this proceedings, the matter is hopelessly time barred.

To bolster his argument, he cited the case of **CRDB (1996) LTD vs Boniface Chimya (2003) TLR 413** and the case of **Salim Lakhani and 2 Others (Supra) Pg.13.**

Regarding the second point of preliminary objection, Dr. Ngemera submitted that, the plaintiff ought to have appeared before this Court by way of appeal because he is challenging the decision of the Registrar who issued letters of offer after the subdivision to the 1<sup>st</sup> and 2<sup>nd</sup> defendant as it was confirmed vide the letter dated 26<sup>th</sup> October, 2021 – KUMB Na.AR/ILA/TAB/E/244/EEM- (Annexure SR – 15 collectively on a Plaint) and which is also Annexure MNL-3 to the 1<sup>st</sup> and 2<sup>nd</sup> defendant's Written Statement of Defence.

He referred to Sections 13, 101 and 102(1) of the Land Registration Act, Cap334,R.E.2019 and the case of **Adolphina Massaba**

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**(Administratrix of the Late Kulwa Sato Massaba) vs CRDB Bank PLC and 3 Others**, Land Case No.7 of 2021, HC, DSM, **Starcom Hotel vs National Microfinance Bank and 2 Others**, Civil Case No.11 of 2019, HC, DSM and the case of **Sheikh Nasser Hamad vs The Registrar of Titles**, Miscellaneous Civil Application No. 108 of 2019, HC, DSM, and contended that the right forum for the already issued decision is to challenge the said decision by way of appeal.

In the last point of objection, he submitted that the plaintiff is pleading that he was issued with a granted right of occupancy by the Commissioner for Lands and the same was registered by the Registrar of Titles, but they are not joined as necessary parties.

He argued that, failure to join a necessary party is a serious procedural in-exactitude which may breed injustice. He referred to the case of **Abdullatiff Mohamed Hamis vs Mehbook Yusuf Osman and Fatna Mhamed**, Civil Revision No. 6 of 2017, CAT, at DSM, which was quoted with the approval in the case of **Adolphina Massaba (Administratrix of Estate of the late Kulwa Sato Massaba) (supra)**, at Pg. 6.

He was of the view that the Court may wish to give any orders to the Registrar of Titles and the Commissioner for Lands who issued the *Alleg-*

certificate of title, but unfortunately, they are not parties to this matter. That way they may be taken unheard. He cited the case of **Ngerengere Estate Company Limited vs Edna William Sitta**, Civil Appeal No.209 of 2016, CAT, at DSM, on Pg.13.

Responding to the first point of preliminary objection, Mr. Michael submitted that, the plaintiff interrupted the 1<sup>st</sup> and 2<sup>nd</sup> defendants several times from the year 2000 after being informed by a good Samaritan but the defendants refused to cooperate.

He argued that, in the year 2006 the 3<sup>rd</sup> defendant ordered to meet both parties for amicable settlement, but the 1<sup>st</sup> and 2<sup>nd</sup> defendants refused to attend.

Mr. Michael argued that, the plaintiff has absolutely right since 1987, therefore the Commissioner for Lands has got no land to give to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. To cement his argument, he cited the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others**, Civil Appeal No.193 of 2016, CAT, at Arusha (Unreported) Pg. 24, 25 and 26 where the Court was inspired by the case of **Mbira vs Gachuhi** [2002] 1EA 137 (HCK) and **Moses vs Lovegrover** [1952] 2 QB 533, where it was held that, it is trite law that

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a claim is in for adverse possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.

Further, Mr. Michael submitted that, the person seeking to acquire title to land by adverse possession has to prove that there had been the absence of the possession by the true owner through abandonment and that there had been no interruption to the adverse possession through the aforesaid statutory period.

As to the contention that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were duly subdivided, the counsel for the plaintiff averred that, the contention is opposed by a notice dated 20/10/2021 (Annexure MNL – 3) and SR 15 from the 3<sup>rd</sup> defendant directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to make follow ups to have their titles.

Arguing in response to the case of **CRDB (1996) LTD vs CHIMYA (Supra)** as cited by Dr. Ngemera, Mr. Michael submitted that the cited case cannot hold water as the 1<sup>st</sup> and 2<sup>nd</sup> defendants encroached the suit land and they are trespassers as they have no colour of right to contend legal owners.

As to the second point of preliminary objection, Mr. Michael submitted that, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the ones who may appeal to this *Aella*.

Court as they made application for registration from 1991 and 1996 and now the response letter dated 26/10/2021 directing the same to make follow ups to get their title is contrary to the Land Registration Act.

He further referred to Section 6(3)(4) and (5) of the Government Proceedings Act, (Cap 5 R.E 2019) which makes it mandatory for all suit against the government to be instituted in the High Court. He therefore submitted that this Court has jurisdiction.

Arguing in response to the 3<sup>rd</sup> point of objection, Mr. Michael argued that, the plaintiff sued the Attorney General as the necessary party as per Section 25(3) and (4) of the Written Law (Miscellaneous Amendment) Act, No.1 of 2020 which makes it mandatory to join Attorney General in all suits against the government.

Mr. Michael further referred to Order 1 Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019 which provides that the suit shall not be defeated by the reason of mis joinder or non – joinder of the parties.

He further referred to Order 1 Rule 10(2) of the Civil Procedure Code which empowers the Court to order that the name of any party or a name of any person who ought to have joined whether as a plaintiff or defendant be added. *Alles-*



To bolster his arguments he cited the case of **Daphne Parry vs Murry Alexander Carson 919760 EA515 Sir Ralph Windharm, CJ, at Pg 517.**

Mr. Michael contended that if there is a need in future, particularly during hearing of this suit, the Commissioner for Lands and the Registrar of Titles may be called as witness.

In his rejoinder, Dr. Ngemera reiterated his submissions in chief and averred regarding the first point of preliminary objection that, the plaintiff's submissions which he seeks an excuse for, from this Court is that, there were discussions between the parties. He referred to the case of **Sarepta Network Investment (SANEICO) vs Bukoba District Council and another**, Civil Case No. 16 of 2021, High Court of Tanzania, at Bukoba, page 6 and stated that pre – court negotiations between the parties do not halt time from running.

Regarding the issue of adverse possession raised by the plaintiff, Dr. Ngemera submitted that, the land is registered and the 1<sup>st</sup> and 2<sup>nd</sup> defendants were given letters of offer after the subdivision. He stated that, the plaintiff is challenging the sub division which is now caught by the web of limitation. *Alle*

Submitting on the second point of objection, Dr. Ngemera averred that, the plaintiff disputes that, from the decision of the registrar, it would be the defendants who were required to appeal against that decision. He argued that it was the plaintiff who ought to have exhausted the said remedy of appeal because he is alleging to have been aggrieved by the decision issued.

Regarding the third point of preliminary objection, he argued that, as stated earlier, there might be orders issued by this Court to the Commissioner for Land and Registrar of Titles that cannot be issued to them as witnesses. Dr. Ngemera therefore prayed for the suit to be dismissed with costs.

I have carefully followed the rival arguments by the parties and in my considered opinion, it boils down to one issue and that is *whether the preliminary objection holds water.*

Starting with the first point of preliminary objection that the suit is hopelessly time barred, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' objection is to the effect that, since the plaintiff complains the 1<sup>st</sup> and 2<sup>nd</sup> defendants to have trespassed into his land, and that, he is claiming for the recovery of the said land, this suit is hopelessly time barred. *Amle*

In the Schedule to the Limitation Act, Part I, Item 6, the suit founded on tort is limited to a period of three years and in Item 22 of the said Act, the suit to recover land is limited to a period of 12 years.

Further, Section 5 of the Limitation Act provides on the accrual of the rights of action. The same provides as follows: -

*"Subject to the provisions of this Act, the right of action in respect of proceeding, shall accrue on the date on which the cause of action arose."*

The above cited provision was cemented in the case of **CRDB (1996) LTD vs BONIFACE CHIMYA** [2003] TLR 413 where it was held that: -

*"It is common knowledge that period of limitation to any Court, action runs from the date on which the right of such action accrues and the period is prescribed under the Law of Limitation Act, 1971..."*

Dr. Ngemera submitted that, the cause of action arose way back in 1991 and 1996 when the disputed land was subdivided and allocated to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and in 2006 when the plaintiff became aware of the cause of action.

On his part, Mr. Michael did not respond on whether the suit is time barred or not, rather he raised the issue of adverse possession. I must emphasize that the act of Mr. Michael to raise a preliminary objection *Ally.*

with a view of pre – empting the preliminary objection raised by the defendant is not allowed in law. In the case of **Juma Ibrahim Mtale vs K. G Karmali [1983] TLR 50**, it was held that *"..... once a notice of preliminary objection is lodged, the time to remedy the deficiency complained of lapses"*.

Further in the case of **Method Kimomogoro vs Board of Trustees TANAPA**, Civil Application No.1 of 2005, Court of Appeal of Tanzania (Unreported), it was stated that: -

*"This Court has said in a number of times that, it will not tolerate the practice of an advocate trying to pre – empty a preliminary objection either by raising another objection or trying to rectify error complained of"*.

Mr. Michael also tried to establish that there was the discussion between the parties prior to the institution of this suit, while forgetting the principal that pre – court negotiations does not stop time from running. This principal was stated in the case of **Serepta Network Investment (SANEICO) vs Bukoba District Council and Another (supra)**.

Back to the matter at hand and upon looking at the Complaint, paragraphs 13, 15, 16 and 17 specifically, it is stated by the plaintiff that, in 1991 and 1996, the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively, trespassed the suit *Alle*.

land and he became aware of their invasion in the year 1999 through the information laid to him by a Good Samaritan.

In this matter, the plaintiff had the knowledge of the dispossession on his land for the first time in 1999 when he was informed by the Good Samaritan. It is now about 24 years since the cause of action arose, where the time limit to institute a suit for recovery of land is 12 years as provided on Part I Item 22 of the Schedule to the Limitation Act.

The Court of Appeal in the case of **Idrissa Ramadhani Mbondera vs Allan Mbaruku & Another**, (Civil Appeal 176 of 2020) [2023] TZCA 204 held that;

*"any claim for recovery of land, the 12 years limitation period prescribed under Item 22 of Part I of the said Act, starts running against the claimant when he gets knowledge of the dispossession of ownership."*

In civil trials under Order VII Rule 6 of the Civil Procedure Code, the law provides for an exemption of time limitation if a party pleads in the Complaint the facts which would justify such an exemption. The said provision states as follows: -

*"Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the grounds upon which exemption from such law is claimed".* *Adde*



The above cited provision impose the mandatory obligation to a party to state in his pleadings, the reason or reasons to be considered for exemption. The Court of Appeal cemented that position in the case of **Ally Shaban and 48 others vs TANROADS and the Attorney General**, Civil Appeal No.261 of 2020 (Tanzlii) at page 9.

In the matter at hand the Plaintiff is silent on that issue of limitation and its exemption. Since the suit was lodged beyond the prescribed time and because the limitation goes to the jurisdiction of this Court, then this Court lacks jurisdiction to proceed with this suit.

On the basis of the position stated above, I find merit in the first ground of preliminary objection. Since the findings on that ground suffices to dispose the suit at hand, I do not find any pressing need to consider the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of the preliminary objection.

Consequently, I find that the suit is time barred, hence the same is hereby dismissed with costs under Section 3(1) of the Law of Limitation Act.

It is so ordered.

  
.....  
**A. MSAFIRI**  
**JUDGE**  
**21/7/2023**

