

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

**LAND CASE NO. 29 OF 2022**

**HURUKA SAID ABDALLAH** (Administratrix of the Estate  
of the late MWAJUMA MWISHEHE HASSAN).....**PLAINTIFF**

**VERSUS**

**NYUMBA HASSAN NYUMA**.....**1<sup>ST</sup> DEFENDANT**  
**ABDUL-WAHID ABDLLAH MOHAMED**.....**2<sup>ND</sup> DEFENDANT**  
**SAMIR GULAMABBAS DATOO**.....**3<sup>RD</sup> DEFENDANT**

Date of Last Order: 19.12.2022  
Date of Ruling: 30.01.2023

**RULING**

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

This ruling is in respect of preliminary objections on points of law that was raised by the 1<sup>st</sup> defendant in the main suit and the plaintiff in the counterclaim.

The 1<sup>st</sup> defendant raised two objections that:

- (a) *the suit is time barred.*
- (b) *the suit is res judicata.*

The 1<sup>st</sup> defendant prayed for the suit to be dismissed with costs.

On the other hand, the plaintiff raised an objection that:

*The counterclaim raised by the 1<sup>st</sup> defendant contravenes Order VIII Rule 9(2) and Order VII Rule 1(a) and (b) of the Civil Procedure Code CAP 33 RE 2019 (the CPC).*

The plaintiff prayed for the counterclaim to be struck out with costs.

The objections were argued by way of written submissions. The submissions on behalf of the 1<sup>st</sup> defendant were drawn and filed by Gwantwa R. Kasebele, Advocate. While the submissions on behalf by the plaintiff were drawn and filed by Abdul Azizi, Advocate.

I will start with the objections by the 1<sup>st</sup> defendant. Mr. Kasebele submitted that the deceased one Mwajuma Mwishehe Hassan acquired a piece of land namely Plot No. 54 Block K, with Certificate of Title No. 48776, Kariakoo area, Dar es Salaam (the **suit land**). The acquisition of the suit land was from her late father Mwishehe Hassan by way of inheritance as the sole heir and administratrix. The said Mwajuma Mwishehe later sold the suit land to the 1<sup>st</sup> defendant in 1983 whereas transfer was done, and according to the Certificate of Title No. 48776 (the **CT**) the suit land was registered in his name on 10/06/1999. Mr. Kasebele said according to section 5 of the Law of Limitation Act CAP 89 RE 2019 the right of action arises in respect of any proceeding on the date of which the cause of action arises. He said the right of action accrued when the 1<sup>st</sup> defendant bought the land in 1983 and that is 39 years ago, and he officially became the owner in 1999 that is 23 years ago. He said reading the cited section together with section 9(2) of the

Limitation Act the right of action shall be deemed to have accrued on the date of dispossession or discontinuance of ownership of the property. He thus submitted that the plaintiff is time barred because the suit is brought after 12 years contrary to section 3(1) read together with Item 22 of Part 1 to the Schedule of the Limitation Act. He relied on the case of **Yusuf Same & Another vs. Hadija Yusuf [1996] TLR 347.**

As for the second objection Mr. Kasebele submitted that the suit is *res judicata* to Probate Cause No. 94 of 2008 of Kariakoo Primary Court, Misc. Application No. 17 of 2009 of Ilala District Court and Land Application No. 23 of 2011 of Ilala District Land and Housing Tribunal (the **Tribunal**). He said it is the principle that when a matter has been duly adjudicated upon by a court of competent jurisdiction it should not be re-opened or challenged by original parties or successors in interest. He cited section 9 of the CPC and the case of **Peniel Lotta vs. Gabriel Tanaki & Others [2003] TLR 312.** He said in the cases referred above, it was decided that the 1<sup>st</sup> defendant was the owner of the suit land whereby through **Application No. 25 of 2012** between **Mwajuma Abdulrahman Jongo vs Nyumba Mussa & Others** at the Tribunal, the Chairman declared that the Tribunal was *functus officio*. Mr. Kasebele further submitted that in Land Application No. 122

of 1991 at the Regional Housing Tribunal, the late Mwajuma Mwishehe was witness of the 1<sup>st</sup> defendant and the Regional Tribunal declared the 1<sup>st</sup> defendant as the landlord purchaser. He relied on the cases of **Said Himid Mwilima vs. Tabora Regional Trading Company [1997] TLR 156** and **Felician Credo Samwel vs. Quamara Massod Baltezy & Another, Civil Appeal No. 10 of 2020 (HC-Sumbawanga)** (unreported). With the above, Mr. Kasebele prayed for the suit to be dismissed with costs.

In reply, Mr. Abdul Aziz on the objection relating to limitation of time, submitted that the cause of action arose when the plaintiff's mother passed away on 17/12/2010 and the 1<sup>st</sup> defendant trespassed into the suit land, and they reported to the police. He said the plaintiff and relatives were surprised to learn that the 1<sup>st</sup> defendant bought the house in 1983 while their mother and family were still living in the said house until she passed away. He asked the whereabouts of the 1<sup>st</sup> defendant for all those years 27 years, without taking possession of the said suit land.

As for *res judicata* Mr. Aziz said the principles of *res judicata* are known and are well elaborated in the cases cited by the 1<sup>st</sup> defendant. But he

said the case at hand is different from those enumerated by the 1<sup>st</sup> defendant and are not attached to the submission in chief to prove that the plaintiff litigated these cases and that they were actually heard and finalised by courts of competent jurisdiction. He said the 1<sup>st</sup> defendant does not deny the fact the estimated value of the suit land is TZS 400,000,000/= and this is the only court vested with powers to hear and adjudicate the matter. He said none of the principles of *res judicata* has been proved. He prayed for the objections to be struck out with costs.

In rejoinder Mr. Kabasele reiterated what he stated in the submissions in chief and emphasized that at the time of the death of Mwajuma Mwishehe she was no longer in possession of the said suit land. He said the 1<sup>st</sup> defendant accommodated her because of her sickness and family issues. He said the former suits have been between the 1<sup>st</sup> defendant and the privies claiming under the same title, that is, Pili Saidi Abdallah who is the sister of the plaintiff herein who are the same family members in different cases interfering with the peaceful enjoyment of the 1<sup>st</sup> defendant in the suit land. He reiterated his prayer for the suit to be struck out as it is out of time.

As regards the plaintiff's objection that the counterclaim contravenes Order VIII Rule 9(2) and Order VII Rule 1(a) and (b) of the CPC, Mr. Aziz said since a counterclaim is a cross suit then the parties to the suit ought to have been shown as per Order VII of the CPC. He said Order VIII Rule 9(2) of the CPC makes it mandatory for the counterclaim to be treated as a plaint. He said the present counterclaim does not have names of the plaintiff or defendants as such it has not legs to stand on. He prayed for the same to be struck out with costs.

In response Mr. Kasebele submitted that the issue of not mentioning names of the parties was an error which is not a fatal irregularity and does not affect the merits of the case or the jurisdiction. He prayed for the court to invoke the principle of overriding objective as provided in sections 3A and 3B of the CPC, which is intended to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. He also prayed to amend the counterclaim to include the names of the parties. He relied on the case of **Charles S. Kimambo vs. Clement Leonard Kusudya & Another [2019] TRL** Mr. Kasebele prayed for the objection to be overruled so that the matter could be heard on merit.

In rejoinder, Mr. Aziz said the 1<sup>st</sup> defendant has conceded to the objection, so the counterclaim is subject to be struck out with costs.

I have gone through the submissions by counsel for the parties. The main issue for consideration is whether the objections raised have merit. I will first consider the objections by the 1<sup>st</sup> defendant as in essence they are challenging the jurisdiction of this court.

On the issue that the suit is time barred, the submissions reveal that while the 1<sup>st</sup> defendant states that the cause of action accrued when the late Mwajuma Mwishehe Hassan was dispossessed the suit land by way of sale in 1983 and by way of actual possession in 1999; the plaintiff claims that the cause of action accrued when the 1<sup>st</sup> defendant trespassed in the suit land in 2010 after the death of Mwajuma Mwishehe Hassan.

According to the Written Statement of Defence (**WSD**) and counterclaim the 1<sup>st</sup> defendant claims to be the owner of the suit land. It is clear from the annexures that the issue of ownership of the suit land was concluded in the Tribunal (Land Application No. 25 of 2012) (**Annexure Nyumba-1** to the WSD collectively) that the 1<sup>st</sup> defendant was the owner of the

suit property. The Tribunal was guided by several cases in respect of the same suit land but with different persons claiming under the same title. There has been no appeal to challenge the decision of the Tribunal as of this date because the matter before the High Court in Land Case No. 62 of 2011 was, according to Mr Kasebele, duly withdrawn and this has not been controverted by the plaintiff. In such a situation it is obvious that ownership of the suit land remains to be that of the 1<sup>st</sup> defendant, and as reflected in the several cases which the 1<sup>st</sup> defendant has attached and elaborated, the plaintiff, and his relatives have been attempting to challenge the ownership but have not succeeded to date. Now, with such a fact at hand the claim of trespass as raised by the plaintiff is not viable. In other words, a person cannot be a trespasser in his own land as such the claim by the plaintiff that time would start to run from 2010 on the basis of trespass cannot stand.

Section 9(2) of the Limitation Act states:

*"Where the person who institutes a suit to recover land, or some person through whom he claims, has been in possession of and has, while entitled to the land, been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."*

Simply stated the above provision asserts that a right of action/cause of action would accrue when the person entitled to the land is



dispossessed of the said land or his/her ownership is discontinued. In this present suit as established hereinabove, the 1<sup>st</sup> defendant purchased the suit land in 1983 and the property was duly registered in his name in 1999. In essence therefore the ownership of the suit land to the late Mwajuma Mwishehe Hassan, as correctly said by Mr. Kabasele, ceased to exist in 1983 and more official in 1999 when the 1<sup>st</sup> defendant was registered as owner of the suit land vide CT. No. 4877. And to make it clearer, in one of the cases between the 1<sup>st</sup> defendant and relatives of the plaintiff herein, the late Mwajuma Mwishehe Hassan supported the 1<sup>st</sup> defendant as a witness. Meaning that she knew about the sale transaction. In that regard, the cause of action accrued in 1983 or at the least in 1999 when the late Mwajuma Mwishehe Hassan was dispossessed of the suit land, and I hold as such.

Now, the limitation time provided for recovery of land under Item 22 of Part 1 to the Schedule of the Limitation Act is 12 years. In the present case as established hereinabove, the plaintiff has instituted this case beyond the 12 years from when the cause of action arose, that is, 1983 and/or 1999 which is 33 and 23 years respectively and in that regard the suit herein is without doubt time barred and I hold as such.

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 it has been established that the suit is time barred, then the preliminary objection raised by the 1<sup>st</sup> defendant has merit, and I proceed to dismiss the suit for being time barred.

This point alone suffices to dispose of the suit by the plaintiff and I shall not dwell on the other point of objection raised by the 1<sup>st</sup> defendant.

The plaintiff also raised a point of objection that the counter-claim is defective for want of names of the parties according to the mandatory provisions of Order Order VII Rule 1(a) and (b) and VIII Rule 9(2) of the CPC.

Indeed, the counterclaim as a cross plaint is supposed to have the names of the parties as required by the law. Mr. Kasebele has conceded to this error, and he prayed for the court to invoke the overriding principle. Certainly, the rationale behind the overriding principle is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes governed by the CPC. However, as stated in the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited & 4 Others, Civil Appeal No. 66 of 2017 (CAT-Arusha)**(unreported) the said principle should not be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case(in this instance Order VII Rule 1(a) and (b) and Order VIII Rule 9(2) of the CPC).

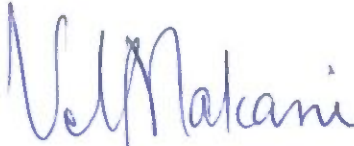
I agree with Mr. Aziz that names of the parties are very important in a plaint and as said without the names the counterclaim has no legs to stand on. I have also noted that in the counterclaim at paragraph 3,

there is a mention of an unknown applicant which confuses matters even more as the applicant is a total stranger to the pleadings. Clearly, without proper reference of parties then the counterclaim is as good as nothing. For that reason, the objection has merit, and it is sustained. I thus proceed to strike out the counterclaim.

For avoidance of doubt, the suit is hereby dismissed; and the counterclaim is struck out. There shall be no order as to costs.

It is so ordered.



  
**V.L. MAKANI**  
**JUDGE**  
**30/01/2023**