

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO. 349 OF 2023**

**(From the Decision of District of Land and Housing Tribunal of Mkuranga District in Land
Case No. 27 of 2022)**

BEDA MARWA CHACHA.....APPELLANT

VERSUS

HAMISI KILUNGI.....1ST RESPONDENT

MOHAMED SELUNGWI.....2ND RESPONDENT

YUSUPH KAMBANGWA.....3RD RESPONDENT

JUDGMENT

07/03/2024 & 16/04/2024

GWAE, J

On 6th July 2022 the a respondents herein filed an application before the District Land and Housing Tribunal of Mkuranga at Mkuranga (“the DLHT”) against the appellant herein and another claiming among other things for a declaration that, they are entitled for possession of a parcel of land measuring three (3) acres for the use as a market place (soko). The appellant raised preliminary objection on the six points of law resisting the competence of the respondents’ application vide his written statement of defence, these were;

1. That, the respondents' application is hopelessly time-barred at it contravenes item 22 of part I to the Schedule of the Law of Limitation Act, Cap 89, Revised Edition, 2019 (LLA)
2. That, the applicants now respondents have no locus standi to bring and prosecute the application before DLHT due to
 - a. The land in dispute is alleged and purported to be the Village Land for Public (Market Place and facilities) its ownership and management are vested to the Village Government through the Village Council under section 8 (1) and (2) of the Village Land Act, Cap 114, Revised Edition, 2019 (Village Land Act).
 - b. The Application is in contravention of the Provisions of Order 1 Rule 8 (1) of the Civil Procedure Code, Cap 33, Edition Revised, 2019 (CPC)
3. That, the application is pre-mature for its failure to be referred to the Ward Tribunal for mediation procedure and obtaining Certificate under section 13 of the Land Disputes' Court Act, Cap 216, Revised Edition, 2019 (LDCA)
4. That, the DLHT has no jurisdiction to the application based on the points of preliminary objection raised in number 2 (a) & (b) above

5. That, the application is bad in law for non-disclosure of the cause of action against the 2nd respondent under Order VII Rule 1 (i) of the CPC
6. That, this application is incompetent for containing incurable defective verification meted by the failure to verify all paragraphs in the application

The DLHT's chairperson heard the appellant's PO and eventually overruled point one on limitation of time and point (6) on alleged failure to verify all paragraphs. The 2nd and 3rd limb of objection on locus standi and alleged non-compliance of the law requiring the disputants to refer their dispute to Ward Tribunal prior to the filing of the matter before DLHT were sustained. Nonetheless, the 4th and 5th points of respondents' objection were not determined on the basis that, the same though raised but were not argued.

Aggrieved by the ruling of the DLHT dated 17th August 2023, the appellant is now before the Court challenging the DLHT's decision with the following grounds of appeal;-

1. That, the tribunal's chairperson erred in law and in fact for its failure to uphold the 1st limb of objection of ,imitation of time

2. That, the tribunal's chairperson erred in law and fact by failing to make a decision on the 4th point of objection while the appellant argued it in his written submission filed on the 8th May 2023, hence erroneous decision, which prejudiced the appellant in the appeal
3. That, the tribunal's chairperson erred in law and in fact by failing to consider and take into consideration the submission and arguments of the appellant herein set out in the pleadings and written submissions

On the 19th February 2024 the court ordered the appeal be disposed of by way of written submission. The appellant's advocate one Selemani Matauka represented the appellant whereas the respondents appeared in person, unrepresented. Subsequent to the court's order, the appellant was found to have filed his written submission in conformity with the filing schedule. However, it was noted that, the respondents, who were also absent, did not file their reply to the appellant's written submission. Hence, necessitating issuance of an order for ex-parte judgment was on 7th March 2024. Surprisingly, when I started composing this judgment, I came to learn that, the same was filed since 5th March 2024, in that premises, I hereby vacate the court's order dated 7th March 2024 as the

respondents bear no fault. Consequently, the respondents' reply is also going to be considered in this judgment.

Prior to submitting on the said grounds of appeal, the appellant's counsel opted to have the 3rd ground of appeal herein abandoned and this court to abide by the salutary principle of law that requires a first appellate court to re-evaluate the evidence adduced before trial court or tribunal as the case may be.

Arguing the 1st ground, the appellant's learned counsel stated that the respondents' application before DLHT was time barred since it was brought after lapse of 12 years pursuant to items 22 of LLA and as per pleadings. He referred to Annexure BEDA-1 a sale agreement made Asha Khatibu Kidekwa (Asha Binti Hatibu) to the appellant in the year 1995, showing almost 27 years have lapsed. Therefore, a requirement to invoke section 3 (1) of the LLA, he added.

It was his opinion that, the respondent did not show when cause of action arose and they did not plead any exception through their. He urged this court to make reference to the Order VII Rule 6 of the CPC and as well as judicial decision in the case of **Alphonse Mohamed Chilumba vs. Dar es salaam Small Industries Cooperative Society** (19860 TLR 91.

On the 2nd ground of appeal, the appellant's counsel submitted that the DLHT's chairperson (**R. Mwakibuja -Esq**) erroneously considered that the same was not argued while it was argued. He added that the omission to determine the same is constitute a denial of right to be heard on the part of the appellant. He thus invited the Court to refer Article 13 (6) (a) of URTC and the decision of the Court of Appeal in the case of **Geofrey Kabaka vs. Farida Hmza and another**, Civil Application No. 215 of 2008 of 2019 (unreported). He finally, prayed for orders replacing an order of DLHT striking out the respondents' application and in lieu thereof an order dismissing and an order upholding the preliminary objection on the 1st and 4th points of objection on the limitation of time and jurisdiction of the DLHT.

On the other hand, respondents' reply to the 1st ground of appeal is to the effect that their suit was not time barred since they were given the suit land for temporary business use by the family of Binti Hatibu, now deceased in 2021. They went on submitting that, the dispute in question arose between the appellant together with Hamisi Mduwilo and them in the year 2022. The respondent also argued that there was a dispute that existed between Hamisi Mdawilo together with the family of Binti Hatibu against the appellant where the issue of ownership was not resolved as

the family of Binti Hatibu was ordered by Vikindu Ward Tribunal to institute the dispute afresh. According to the respondents, the cause of action accrued on 24th March 2022 and that the alleged sale of the disputed piece of land to the appellant is highly disputed by the respondents.

In the 2nd ground of appeal, it was the submission that the appellant had failed to demonstrate how the DLHT lacked jurisdiction since the respondents' Application was filed within the prescribed period and that, the 4th point of objection was not argued by the appellant as correctly observed by DLHT's chairperson.

Admittedly, the respondents stated that contravention of section 13 of LDCA was due to change of the law. They thus sought an order restoring the application for reason. Bolstering their arguments especially in the need to substantively dispense justice. The respondents then cited the case of **Samwel Kimaro vs. Hidaya Dida**, Civil Application No. 20 of 2012 (unreported), where the Court of Appeal sitting at Mwanza had the following to say;

"It is my considered opinion; this Ruling will not be complete without making general statement in passing. In dispensing justice the court are no doubt or living a very valuable service to the society/consumers of our

justice system in particular. If so, society//consumers must continue to have trust and faith in our system. These will be lost if cases are sometimes struck out on flimsy, cheap or too technical reasons. I think it is to the best interest of anyone that cases should reach finality without being hindered in the process by preliminary objections which could be avoided or which do not ultimately decide the rights of the parties."

Having briefly given what the parties have argued for and against, it is now the duty of the court to determine 1st and 2nd ground as the third ground of appeal was abandoned by the appellant, of course for being nothing but a repetitive ground of appeal.

In the 1st ground, it is as argued by the parties that suits must or application must be filed within time prescribed by law as doing otherwise is to let litigants to come to courts at time of their own choice. Therefore, cases filed out of time must face consequential order provided for under section 3 (1) of LLA. Thus, indication of time the cause of action arises is vitally important as envisaged under Order VII Rule 1 (e) of the Civil Procedure Code, Cap 33, Revised Edition, 2019. This position was stressed by the Court ((**Mgeyekwa, J** as she then was now JA)) in **Camel in Camel Oil (T) Limited vs. Bahdela Co. Ltd**, Land Case No. 104 of 2021 in which it was;-

".....the time when the cause of action is not stated in the plaint which means the plaint is prepared contrary to the requirement of the law. Therefore failure to mention the date on which cause of action arose is fatal, since the court cannot determine the time limit of the suit, whether the suit is within time or not."

Back to the 1st ground of Appeal, I am therefore duty bound to examine the record of the trial tribunal especially the parties' pleadings in the record of the DLHT. The respondents' application before District Land and Housing Tribunal reveals that, there is no time stated or mentioned relating to when the cause of action arose leave alone that the application was neither signed by the applicants nor their advocate. Worse still, it seems clearly that, the respondents were not only acting for their interest but also for the interests other people.

Examining the appellant's WSD filed in the DLHT on 27th July 2022, it is plainly clear that, the appellant claimed to have purchased the suit land in the 1995 as depicted under paragraph 6 of the WSD as rightly submitted by the appellant's counsel. However, that alone cannot be the basis of the preliminary objection on the limitation of time since the respondents through their joint reply to the appellant's WSD seriously disputed such fact by stating that, the sale purporting agreement between

the appellant and Asha Khatibu Kidekwa dated 12th December 21995 was obtained through fraud or deceit.

In view of the above observations, it cannot therefore be safely said that, the point of law on a limitation of time raised by the appellant is a purely point of law, which does not need any further evidence or ascertainment of certain facts. In other words, the tribunal could not be in a safe position to certainly hold that, the application before it was hopelessly time barred whilst the parties' pleadings are contentious in that regard. Whenever the leadings of the parties are in controversy requiring proof or ascertainment of certain facts, in my considered view, that cannot be said to constitute a preliminary objection in the eye of the law. I subscribe to the famous case of **Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited** (1964) E. A 696 where it was stated that;

"A preliminary objection is in the nature of what used to be a demurrer. It raises pure point of law which when argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

In our instant matter since, the parties' pleadings plus annexures therein are contentious or argumentative, it follows that, the 1st limb of

objection before DLHT and now the 1st ground of appeal lacks merit. I thus proceed dismissing it.

Now, to the 2nd ground of appeal, it is elaborately clear from the impugned ruling of the DLHT that the learned trial chairperson stated that her disinclination to determine the 4th and 5th point of objection was the respondent's omission to argue the same. It is the submission of the appellant's version that, the same was not argued. That being the reality reflected by the ruling. Let me examine the parties' written submission especially the appellant's written in support of his 4th limb of objection. As reflected by page 9 of his submission, the 4th point was argued when he stated that the tribunal lacks jurisdiction on the ground of being time barred, being prematurely preferred and lacking of locus standi. Thus, in my considered view, it was wrong for the DLHT's Chairperson to hold that, the 4th point was not argued at all. According to the learned chairperson, it was thus deemed to have been abandoned, though it might not be necessary to be curtailed by such point after having determined the 1st and 2nd point of objection in affirmative. I would point out that, courts of law or quasi-judicial bodies lack jurisdiction in the following events but not limited;

1. When a matter is not legally entertainable by such court or quasi-judicial body as there other court or body established

by the statute for example a labour complaint cannot be preferred to ordinary court or any other specialized division of the High Court (T) except to the Labour Court established by the relevant statute.

2. When the matter is time barred by the law of Limitation or
3. When the matter is prematurely filed or preferred without adhering to mandatory procedures prior to an institution of the case. (See section 13 of the LDCA as amended by section 45 (4) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2021

The respondents in this appeal are seeking sympathy of the court issue an order remitting to DLHT for hearing of the matter on merit for the reason that, the courts should not be tied up by legal technicalities save to substantive justice. I do not buy this line of argument by the respondents since there is no cross-appeal in that regard. However, there are circumstances, which empower the DLHT or the court to cause an amendment of a plaint, or WSD for further or better statements or particulars as per Order VI Rule 5 and Rule 17 of the CPC provides and I quote for clarity

"5. A further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise as may be just."

“17. The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

In this matter, it is as complained by the appellant that, there are a lot to be desired including non-joinder of the Village Council and her Legal Advisor (Attorney General) if the suit land is as claimed by the respondents that it is an open space for the public use as market place. Equally, the respondents' application is observed to have been filed under representative suit while there was no court's leave permitting the respondents to file the dispute representing others (market place for the residents of Kazole sub village as reflected under paragraph 6 (v) and (ix) of the application.

Before typing off, I find it apposite to hold that had the respondents' application was not only defective for failure to verify some of paragraphs, whose an amendment would be caused. (See the decision in **DDL Invest International Limited vs. Tanzania Harbours Authority & Two others**, Civil Application No. 8 of 2001 (unreported-CAT) wherein the Court of Appeal has also observed that whether or not to allow a party to amend an affidavit with a defective verification is a matter in the discretion

of the court. However, in our case the same is not even signed by either the respondents or their advocates. Therefore, the complained omission renders the respondents' application to being fatally defective. I subscribe to **Bansons Enterprises Limited vs. Mire Artan**, Civil Appeal No. 26 of 2020 (unreported) where the Court of Appeal of Tanzania held and I quote;

"Where a plaint is not duly signed and verified in accordance with the law, there is no suit which the court can legally try. It is also out of place if we restate that the object of duly signing a plaint is not only to prevent fictitious suits but also prevent suit as to whether the suit was instituted with the plaintiff's knowledge and authority"

In the light of the above judicial decision, which binds this court and other legal defects in the application aforementioned, I unhesitatingly find that, the respondents' application was fatally defective subject for being struck out with or without an order as to costs as was correctly found by the DLHT.

Nonetheless, I am not in agreement with an order of the DLHT, which is to the effect that, the respondents' application was dismissed with costs. For easy of reference, the order of the DLHT is reproduced herein under;-

"Kuhusiana na pingamizi la kisheria namba 2, na 3 baraza linatupilia mbali shauri hili kwa gharama."

The dismissal order made by the DLHT's chairperson herein, in my considered opinion, is erroneous, barring the respondents from refiling their dispute. It is trite law that, the remedy for defective or incompetent appeal or plaint or application is an order striking out the matter and not dismissal order. The learned tribunal chairperson having found that the respondents' application before her was fatally defective, the proper order was to strike out the application and not to dismiss the same. Reason being that, the latter order (dismissal) implies that, the matter was disposed of on merit while the former (striking out) suggests that, the suit was improperly filed. I am fortified by the case of **Ngoni Matengo Cooperative Marketing Union Ltd vs. Alimahomed Osman** [1959] EA 577; the defunct Court of Appeal for Eastern Africa stated that:

"This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent; rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."

Consequently, the appeal is found lacking merit. The findings of the DLHT are upheld save to the dismissal order, which by virtue of section 43 of LDCA, I hereby quash and set it aside and substitute for an order striking out the respondents' application. In the circumstances of the case and nature of the court's findings, each party shall bear her or his costs of this appeal.

It is so ordered.

DATED at DAR ES SALAAM this 16th April 2024




MOHAMED R. GWAE
JUDGE