

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

LAND CASE NO. 336 OF 2022

**LEON MUSSA MWAKITWANGE (Suing as an
Administrator of the Estate of the Late Eva Shungu).....PLAINTIFF**

VERSUS

MAGRETH MASSAWE.....DEFENDANT

RULING

26/07/2023 to 1/08/2023

E.B. LUVANDA, J

The Defendant named above raised two points of preliminary objections on point of law, thus: One, the Defendant has wrongly been sued in her personal capacity and accordingly she has no locus to be sued; Two, the suit is time barred.

Mr. Edward Peter Chuwa learned Counsel for the Defendant begin to argue the second point, submitted that in paragraph eight of the plaint, the Plaintiff allege that the land in dispute was trespassed in 2008, meaning that the cause of action for trespass to the land arose in 2008 which is now fifteen years. He submitted that under section 3 read together with Item 22 Part I of the Schedule to the Law of Limitation Act, Cap 89 R.E. 2019, the time to

institute a case for recovery of land is twelve years. He cited the case of **Sixmund Luambano vs Vodacom (T) Limited and Two Others**, Misc. Land Appeal No. 2 of 2020 H.C. Songea; **Lweru Enterprising Co. Ltd vs Mansoor Oil Industries Ltd & Three Others**, Land Case No. 2 of 2022 H.C. Mwanza; **Fortunatus Lwanyintika Masha & Another vs Claver Motors Limited**, Civil Appeal No. 144 of 2019 C.A.T. Mwanza, to support his proposition that the suit which is time barred should be dismissed.

On the second objection, the learned Counsel submitted that it is not disputed that the land in dispute is alleged to be occupied by one Justine M. Massawe who is dead and this fact is known to the Plaintiff, citing annexure PL-5 to the plaint depicting that documentation shows ownership of the Defendant's husband who is dead. He submitted that the Defendant is an administrator of the estate of the late Justine Massawe and therefore in law the Defendant has no locus standi to be sued in her own capacity with respect to the deceased's property. He cited the case of **Omary Yusuph (Legal representative of the Late Yusuph Haji) vs Albert Munuo**, Civil Appeal No. 12 of 2018 CAT; **Swalehe Juma Sangwe and Another vs Halima Swalehe Sangwe**, Civil Appeal No. 82 of 2021, also section 71 of the Probate and Administration of Estate Act, Cap. 352 R.E. 2002.

Ms. Sakina Yasin learned Counsel for Plaintiff submitted that historically the owner of the disputed plot was the Late Eva Shungu after her demise on 26/12/2000, her father one Deusdedit Shungu who is the grandfather of the Plaintiff herein, was appointed to administer her estate in 2002 via Probate Cause No. 210/2002 at Sinza Primary Court. However around 2008 Deusdedit Shungu discovered that the Defendant trespassed the disputed land and on 9/06/2009 Deusdedit passed away. She submitted that, the estate remained without administration for about seven years until on 14/12/2018 when the Plaintiff was appointed to administer the estate of the Late Eva Shungu.

The learned Counsel submitted that in 2018 the Plaintiff commenced his legal duty of collecting the estate of the deceased for the aim of distributing, it is when it came to his knowledge that the Defendant trespassed whereby he reported her to the Primary Court which ruled to have no jurisdiction.

The learned Counsel submitted that in computing limitation of time the issue of the death of the administrator had to be taken into account, as Deusdedit Shungu passed away one year after having knowledge of trespass. She submitted that, a dead person could not file a suit to claim deceased estate. She cited sections 21(1), 24(1) and (2), 25(1) and (2) Cap 89 (supra). She

submitted that the death of the first administrator Deuseddit Shungu in 2009 a year after the cause of action arose in 2008, therefore she was of the view that limitation of time ceases to account against him. She submitted that seven years is excluded from computation of time. The learned Counsel submitted that the appointment of the Plaintiff in 2028 marked the commencement of computation of limitation of time, therefore the Plaintiff is not out for more than fifteen years as alleged by the Defendant, but is within time limit because a case was filed on 22/12/2022 only four years after appointment of the Plaintiff as administrator of the estate of the late Eva Shungu.

On the second objection, the learned Counsel submitted that the Plaintiff was right to sue the Defendant as she was the one who trespassed and erected a wall surrounding the deceased foundation. She submitted that this issue needs to be proved by evidence therefore it does not fit the definition of what constitute a preliminary objection, citing **Thadeo Fukuda Rweyamba (Administrator of Estate of the Late George Thadei Rweyamba) vs Mary Kaijage**, Land Revision No. 57/2020 HC Land Division; **Dunia World Wide Trading Company Limited vs Consolidated Holding Corporation**, Civil Application No. 61/2008 CAT.

She submitted that nowhere the Plaintiff revealed to have known the status of the Defendant except after having been saved with the Defendant's defence embedded with the preliminary objection.

On rejoinder, Ms. Anna Lugendo learned Counsel for Defendant submitted that since the alleged trespass said to have taken place in 2008, the twelve years are set to expire in 2020. She submitted that the probate case that was in court could not have barred the pursuit of the suit of ownership of the disputed land in court of competent jurisdiction. She submitted that the cause of action arose in 2008 when the administrator was already appointed and all family members were aware.

As to the second point of objection, she submitted that annexure PL-5 to the plaint, shows that the Defendant is a mere administrator of the estate of the late Justine Massawe thus cannot be sued under her capacity.

Basically, this suit is defeated by time limitation available to sue for trespass and recovery of land. In paragraph eight of the plaint, the facts pleaded therein suggest vividly that the alleged trespass was discovered by the first administrator the late Deusdedit Shungu in 2008. Therefore, in law the cause of action to sue commenced to run from that date. A mere fact that the erstwhile administrator met his demise a year later in 2009, is immaterial.

Actually the provisions of the law cited by the learned Counsel for the Plaintiff are in applicable in the circumstances: for instance section 21 is on reference where the Plaintiff was diligently prosecuting other civil proceedings; section 24 cater for death before the right of action accrue, but herein at the time when the cause of action alleged to have arose in 2008 the administrator of the estate was in place; section 25 is on exclusion of time during the application for letters of administration is pending, herein this provision cannot assist the Plaintiff because his pleadings are silent as to when he petitioned to take over from the first administrator, only depict the date of his appointment on 14/02/2018. In other words the Plaintiff is inviting the court to speculate the date when he applied to substitute the late Deusdedit Shungu whose letters of administration were inoperative following his demise.

Above all, the argument of the Plaintiff's Counsel that the court when computing limitation of time, should take into account the issue of the death of the first administrator the late Deusdedit Shungu and the time when the Plaintiff was being appointed and prosecuting a cause for eviction before the primary court, is unentertainable. This is because, the Plaintiff did not plead in his plaint that he will rely on exemption of time limit as stipulated under

Order VII rule 6 of the Civil Procedure Code, Cap 33 R.E. 2019. In the case of **M/S P & O International Ltd vs The Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020, the apex Court had this to say, I quote,

'To bring into play exemption under Order VII Rule 6 of the CPC, the plaintiff must state in the plaint that his suit is time barred and state facts showing the grounds upon which he relies to exempt him from limitation. With respect, the plaintiff has done neither' [Emphasis added]

It is to be noted that while the Plaintiff suggest trespass to had occurred in 2008, the Defendant documentation suggest something like double allocation by virtue of the fact that she too annexed to her written statement of defence an offer for approval of a long term Right of Occupancy in respect of the same plot indicating it was issued on 12/9/1982 earlier that a letter of offer issued to the late Eva Shungu a year later, on 31/8/1983.

It was not disclosed as to why it took long for the late Eva Shungu from 1983 up to 1994 when she applied for a building permit. It is not known as to whether a building permit was issued or not. Also, it is not known as to why after the death of the late Eva shungu on 26/12/2000 and subsequently

appointment of the late Deusdedit Shungu to administer her estate in 2002, in fact did not administer it until after expiry of six years when he discovered trespass by anonymous person. Also it is not known as to why after the demise of the first administrator the late Deusdedit Shungu on 9/06/2009 and after discovery of trespassers to the land, it took nine years for the the Plaintiff to be appointed as second administrator (successor) on 14/02/2018. Also, there is no explanation as to why the second administrator who is also an heir, stayed for four years up to 8/12/2022 when he sued.

Be as it may, the effluxion of time to sue for recovery of land alleged trespassed in 2008, was in 2020. In **Barclays Bank Tanzania Limited vs Phylisiah Hussein Mchemi**, Civil Appeal No. 19 of 2016, the apex Court when considering the consequences brought by time limitation to institute a suit, cited with approval the decision of this Court in **John Cornel vs A. Grevo (T) Limited**, Civil Case No. 70 of 1998, HC Dar es Salaam, which ruled,

'However, unfortunate it may be for the plaintiff; the law of limitation is on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web'

On the second limb of objection, it was the contention of the learned Counsel for the Defendant that the Defendant is an administrator of the estate of Justine M. Massawe who is alleged to be the occupier of the disputed land, and that the Defendant cannot be sued under her capacity in respect of the deceased's property. On the other hand, the learned Counsel for Plaintiff dispelled knowledge regarding death of the alleged Justine M. Massawe and contended that the Defendant have been sued under personal capacity because is the one who trespassed the disputed land. Actually the statement by the learned Counsel for the Plaintiff is misleading. This is because a fact that the Defendant's husband is dead, were revealed to the Plaintiff, as per the annexure PL-5 pleaded in paragraph fifteen of the plaint. More importantly in annexure PL-5 the Defendant was introduced by the names Magreth Massawe @ Magreth Justine, herein she was named Magreth Massawe only. Worse still, in the Defendant's written statement of defence she attached letters of administration of estate of the late Justine Mark Massawe, annexure "A" indicating a totally different name of Mary Michael Chuwa as the one who was appointed on 17/8/2012 by Kinondoni Primary Court as an administratrix of the estate of the late Justine Mark Massawe. Therefore, the Plaintiff sued a wrong party.

The objections are sustained.

The suit is struck out with costs, on account that is time barred.



E.B. LUVANDA
JUDGE
1/08/2023