

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 10 OF 2021

SAIMONI SUNG'ARE (As administrator of the Estate of the Late

NASERIAN LOISUJAKI SUNGARE).....PLAINTIFF

VERSUS

NGORBOB VILLAGE COUNCIL.....1ST DEFENDANT

THE EXECUTIVE DIRECTOR ARUSHA DISTRICT COUNCIL.....2ND DEFENDANT

ACHI BOARD TARAWIA.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

30/11/2021 & 18/03/2022

GWAE, J

I am compelled to compose this ruling following a preliminary objection raised by the counsel for the defendants Mr. Mkama Msalama on the following points of law;

1. That, the plaintiff has no locus standi to institute this suit.
2. That this suit is hopeless time barred.
3. That, the suit is bad and incompetent for being drawn and signed by unqualified person.

Initially, the plaintiff filed a suit against the defendants praying for judgment and decree against the defendants for the following orders;

1. Declaration that the suit land is lawfully property of the late Nesian Loisujak Sung'are.
2. Declaration that the defendants herein are trespassers.
3. That the plaintiff prays for an order of eviction from the suit land against the 3rd defendant.
4. Permanent injunction issued against the defendants' relatives, agents, or any other person acting under their instructions from interfering with the plaintiff's suit property.
5. General damages.
6. An order for payment of the cost of this suit.
7. Any other or further reliefs this Court shall deem fit to grant.

The preliminary objection had to be disposed of first and parties opted to argue it by way of written submission. The Plaintiff herein was represented by the learned counsel **Mr. Fadhili Nangawe** from Reds Attorneys whereas the defendants were represented by **Mr. Mkama Msalama**, State Attorney from the Office of Solicitor General.

Arguing in support of the preliminary points of objection Mr. Msalama abandoned points number 1 and 3 and remained with point number 2 which is to the effect that; *"the suit is hopelessly time barred."*

It is the submission of the counsel that the suit before this court is time barred on reasons that as per paragraph 10 of the plaintiff's plaint the cause of action is stated to have arise in the year 2002. The counsel went further to state that as per Item 22, part I to the schedule of the Law of Limitation Act Cap 89 R.E 2019 the time limit for suits to recover land is twelve (12) years. Now, since the plaintiff alleges the cause of action to arise on 2002 and this suit being filed on the 27th May 2021 then the suit appears to have been filed after the lapse of nineteen (19) years and therefore it is time barred.

Moreover, the counsel submitted that when the suit is instituted after the expiration of the prescribed time, order VII Rule 6 of the Civil Procedure Code (Cap 33 R.E 2019) requires that the plaintiff to plead in the plaint the ground upon which he seeks to rely on the exemption. However, it is the contention of the learned State Attorney that, the plaintiff herein has not pleaded to his plaint the grounds upon which he seeks to rely on exemption and therefore the suit is time barred. Cementing on this argument the

counsel cited the case of **M/S P & O International Ltd vs The trustees of Tanzania National Park**, Civil Appeal No. 265 of 2020 (Unreported).

In his conclusion, the counsel stated that the question of limitation of time is so fundamental which involves the jurisdiction of the court, therefore since this suit appears to have been filed out of time therefore it is his view that this court lacks jurisdiction to entertain, the same should be dismissed pursuant to section 3 (1) of the Law of Limitation Act.

Responding to the defendants' submission, Mr. Fadhili submitted that it is not true that the plaintiff has not invoked the requirement under Order VII Rule 6 of the CPC as contended by the defendants' counsel. According to him the plaintiff has fulfilled the requirements of order VII rule 6 vide paragraphs 12 and 13 of the plaint. Further to that, the learned counsel submitted that the objection raised by the defendants' counsel does not qualify being a preliminary objection under the principle laid down by the case of **Mukisa Biscuits manufacturing Company Limited vs West End Distributors Limited** (1969) EA 696. According to him to hold whether the suit is time barred or not is a factual issue and it will require proof of particulars of trespass.

In the short rejoinder, Mr. Mkama stressed on the requirement of Order VII Rule 6 of the CPC that in order the plaintiff to rely on exemption of time limitation, he must state in the plaint that his suit is time barred and then state facts showing the grounds upon which he relies to exempt him from limitation. According to him, the plaintiff in this suit has not stated that his suit is time barred instead gave explanation of the land suit that was filed in the District Land and Housing Tribunal in the year 2008 without praying to be exempted from time limitation. The counsel went further to state that, the suit brought before the DLHT is different from the present suit in the sense that in the application before the DLHT the plaintiff claimed for eight (8) acres whereas in the present suit, the plaintiff is claiming six (6) acres against the defendants.

The defendants therefore were of the view that the plaintiff cannot be exempted from limitation of time as he has not pleaded the same in his plaint.

Having considered the parties' submissions, laws and the cited cases, the main issue to be determined by this court is whether the suit before this court is time barred. From the plaint at paragraph 10, the plaintiff stated that in the year 2002 the 2nd defendant illegally entered into the suit land

and assigned the same to her employee (the 3rd defendant). It is from this paragraph where the court draws an inference that the cause of action in this suit arose in the year 2002. It is also alleged by the plaintiff under paragraph 12 of the plaint that sometime in the year 2008 the plaintiff filed a similar suit to the DLHT but the same was struck out. Moreover it is undisputed fact that the present suit has been filed in this court on 27/05/2021 which according to the defendants is about 19 years after the cause of action arose.

I have also noted that parties have invoked the provision of Order VII rule 6 of the CPC which requires that and I quote;

“Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.”

It is from this provision of the law that the defendants claim that the plaintiff's suit is time barred for being filed 19 years from the time the cause of action arose. It is their further contention that, the plaintiff has also not met the requirements of the above provision of the law by not clearly pleading such exemption in his plaint for such exemption as stipulated in the

case of **M/S P & O International Ltd vs The Trustees of Tanzania National Parks (TANAPA)**. The defendants have also differentiated the case that was filed by the plaintiff at the DLHT in the year 2008 stating that the same is different from the present suit basing on the size of the land claimed.

I have keenly gone through the provision of the law together with the cited decision of the Court of Appeal and I think this court has the following to say as far as to whether, this suit is time bad or not.

First and for most the provision of the law requires that where a part institute a case after the expiration of the time prescribed by the law of limitation, the plaintiff must show the ground upon which exemption by such law is claimed or is relied. Having grasped what the law requires the question that follows is whether the plaintiff at hand has demonstrated ground upon which exemption is legally relied.

The defendants' counsel has submitted that the plaintiff in this case has not pleaded the same in the plaint, the counsel went further to quote part of the decision in the case of **M/S P & O International Ltd** where the Court of Appeal of Tanzania stated as follows;

“.....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.”

From the plaint, it is evident that though there are no clear wordings of the plaintiff stating that his suit is time barred however this court has observed that at paragraph 12 of the plaint, the plaintiff has pleaded that he once brought the same suit to the DLHT in the year 2008 which was subsequently struck out and a copy of the ruling is attached to the plaint, by necessary implication the plaintiff has pleaded and sought exclusion of the period when the dispute was pending before the Tribunal however the same was eventually struck out for want of jurisdiction.

Next issue for consideration is whether what is pleaded at paragraph 12 amount into an exemption under the provision of Order VII rule 6. The answer to this question takes me to the provision of section 21 (1) of the Law of Limitation Act which reads as follows;

“ In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal,

against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it.”

From the above provision of the law, it follows that, the ground under paragraph 12 of the plaintiff’s plaint is permitted as an exemption under the Law of Limitation Act (supra).

However, Mr. Mkama appears to distinguish the suit before this court and the one filed at the DLHT. It is at this juncture that this court finds a need to call for records to ascertain as to whether the suit before this court is the same as the one filed at the DLHT. This being a preliminary objection the court is only confined to deal with pure points of law and not facts which need proof. In the case of **Mukisa Biscuits Manufacturing Company LTD vs. West End Distributors LTD** (1969) EA 696. At page 700 Law, J.A defined a preliminary objection as follows;

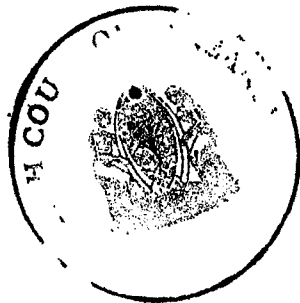
“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court,

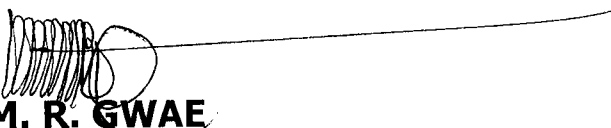
or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration.”

It follows therefore, a preliminary objection cannot be raised if any fact has to be ascertained. In the matter at hand, it is apparent that the question as to whether the plaintiff's suit is time barred is not self-proof as it is subject to proof by some other material facts such as whether the suit land is the same as the one in the former case filed in the District Land and Housing Tribunal vide Application No. 30 of 2008 or not

For the foregoing reasons, I accordingly dismiss the respondents' preliminary objection, the main suit to be heard on merit.

It is so ordered.




M. R. GWAE
JUDGE
18/03/2022