IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 9 OF 2021

(Originating from Application No. 89 of 2020 in the District Land and Housing Tribunal of Arusha at Arusha)

HERMAN ALPHAYO KISILA (Suing as an administrator

of the estate of the late RUTH ALPHAYO.....APPELLANT

VERSUS

GEORGE JONAS.....RESPONDENT

JUDGMENT

31/05/2023 & 30/08/2023

GWAE, J

The deceased one Ruth Alphayo filed an application at the District Land and Housing Tribunal for Arusha at Arusha (to be referred as the DLHT henceforth). Among others, the said Ruth Alphayo sought the following reliefs; that the tribunal to declare her as the lawful owner of the suit land measuring 22 x 21 paces and an order for permanent injunction restraining the respondent from demolishing her properties in the suit land.

In her application, the appellant claimed to have bought the suit land in the year 1950's and that she was being living in the said land

peacefully until sometimes in the year 1999 when the respondent started claiming ownership over the suit land. Since then, the respondent kept on suing the late Ruth Alphayo and at a time, the respondent sued Herman Alphayo Kissila who is now the administrator of the estate of the late Ruth Alphayo who passed away on 31st April 2021. The said Herman Alphayo and the late Ruth Alphayo are son and mother respectively. The administrator, Herman was duly granted letters of administration of the estate of his late mother on 31st March 2023. It is also clear from the parties' pleadings that the respondent's late father (Lounieki Kichau) was the young brother to the late Ruth.

The record of the DLHT establishes that the appellant's suit suffered from a legal technicality to wit; limitation of time as it was found to have been filed after the lapse twelve (12) years since the respondent allegedly trespassed the suit land in 1999. Aggrieved by the tribunal's order sustaining the preliminary objection canvassed by the respondent's counsel, the appellant has knocked the doors of the court armed with four grounds of appeal namely;

1. That, the learned tribunal chairperson erred in law and fact by his failing to give correct interpretation of what constitutes "Cause of action" hence arriving at erroneous decision

2. That, the learned tribunal chairperson erred in law and fact by failing to determine when the cause of action arose, hence making a wrong decision
3. That, the learned tribunal chairperson erred in law and fact by making decision without consideration the time when the respondent was instituting the suit against the appellant as per section 21 of the Law of Limitation Act, Cap 89, Revised Edition, 2019
4. That, the learned tribunal chairperson erred in law and fact by his failing b failing to consider the case. hence, arriving at a decision that will not solve the dispute between the appellant and respondent

Intended hearing of the appeal did not commence as earlier expected because the appellant, Ruth Alphayo passed away on 31st April 2021. Thus, hearing was stayed pending appointment of an administrator of her estate. Mr. Emmanuel Sood and Mr. Kennedy respectively represented the appellant and respondent before this court. Eventually, the hearing of the appeal was ordered to proceed by way of written submission. Parties' written submissions subsequently filed in this court as per the order.

Submitting for the appellant jointly argued ground 1st and 2nd ground as well as 3rd and 4th ground. Expounding the 1st and 2nd ground, the appellant's counsel argued that it was wrong for the learned

chairperson to hold that Paragraph 6 A (i) and (iv) of the appellant's application is all about evidential facts thus cannot be considered as foundation of the claim. The counsel for the appellant further argued that the chairperson of the DLHT ought to have not only looked at Paragraph 6A but also Para. 6 B of the application so that he would conveniently determine the appellant's cause of action. He thus urged the court to refer to **MIC (T) Limited vs. TTCL**, Commercial Case Mo. 146 of 2002 (unreported) where it was held that the question whether a plaint discloses a cause of action must be determined through perusal of both the plaint and anything attached thereto. He then equated a suit and an application instituted before the District Land and Housing Tribunal.

Regarding the 3rd and 4th ground of appeal, the appellant's counsel submitted that, it was wrong for the DLHT to hold that the application was hopelessly time barred since the dispute in question is rescued under section 21 of the Law of Limitation, Cap 89, Revised Edition, 2019 (LLA). He thus argued that a party is entitled to exclusion of period during which he or she was engaged in taking steps for invoking the aid of the court if he was pursuing the proceedings in good faith and for defects of jurisdiction or other causes of the like nature. Bolstering his argument, Mr. Sood cited the case of **Charles Kimambo vs. Clement Leonard**

Kusudya, Civil Application No. 44 of 2016 9 (unreported-H.C). He also referred to the decision of the Court of Appeal in **Salum Lakhani and two others vs. Ishafque Shabir Yusufali**, Civil Appeal No. 237 of 2019 (unreported), where section 21 of LLA was interpreted and the Court of Appeal had these to say;

> *"....it is clear that, before the respondent can press into service the applicability of the said provision, he has to satisfy the following the conditions among others:- **One,** the earlier proceedings from which the respondent is seeking to exempt the time spent prosecuting the same was rejected for want of jurisdiction or other cause of a like nature. **Two,** that, the earlier proceedings and the latter proceedings are founded upon the same cause of action or matters at issue, and **three,** he was prosecuting High Court Civil Revision No. 105 of 2002 with due diligence."*

Basing on the jurisprudence quoted above and section 21 of the Act, the learned counsel for the appellant prayed this appeal be allowed and ruling of the DLHT be quashed and set aside.

In his response to the appellant's submission, Mr. Mapima argued that this appeal is devoid of any merit and urged this court to have it dismissed as the appellant's application was time barred. Firstly, that the appellant's application showed when the cause of action arouse, therefore

it was not in controversy since the cause of action was indicated to in 1999.

Subscribing to the decision of the DLHT, the learned counsel for the respondent argued that, the provisions of section 21 of the Act were inapplicable in the situation where a party has not been able to specifically indicate state grounds for exemption from limitation in any a paragraph of his application. He then referred this court to the decision of the Court of Appeal of Tanzania in the case of **Ulimwengu Rashid t/a Ujiji Mark Foundation**, Civil Appeal No. 222 of 2020 (unreported) where an exemption from such delay is claimed pursuant to provisions of Order VII Rule 6 of CPC. The Court of Appeal construed the said Order as follows;

> *" The requirement imposed by the above provision of the law is not optional, because the word used therein is 'shall' which denotes a mandatory compliance and not otherwise. We are mindful of the fact that, in his submission, the respondent, though, he admitted that, the plaint is silent on a ground upon which an exemption from limitation could have been relied upon, he urged us to find that the suit was lodge within time as the delay was caused by series of exchange of correspondences and negotiations between the parties that turned to be abortive as the appellant refused to pay the said compensation."*

The respondent's advocate further attacked the appellant's submission in that the documents attached to the appellant's application are not useful, to wit; **one** Civil Case No. 33 of 2001 between the respondent and administrator and his late mother was dismissed. **Two**, that, Civil Application No.29 of 2009 between the respondent who stood as representative of the late Jonas Meitesheki and the late Ruth and the Administrator of the late Ruth that, was dismissed for being res-judicata. **Three**, Appeal No. 112 of 2017 whose parties were different from in the latter case. According to the respondent's counsel, the same do not meet the requisite conditions stipulated in the case of **Salum Lakhani and two others vs. Ishafque Shabir Yusufali**, (supra) cited by the appellant's counsel. Having submitted against the appeal as herein, the respondent's counsel prayed an order of the court dismissing it for lack of merit.

After I have briefly outlined the background of the parties' dispute and the parties' written submission herein, I am now obliged to determine the appellant's grounds of appeal as argued.

In the determining the **1st and 2nd ground**, it is settled law that any suit or application must disclose a cause of action as rightly held by DLHT and argued by the parties' counsel. Therefore, the plaint has to

disclose the cause of action. The Court of Appeal of Tanzania in **John M. Byombalirwa vs. Agency Maritime Internationale (T) Ltd** (1983) TLR 1 held that it is the plaint, which may be relied on in ascertaining whether or not there is a cause of action against the defendant/ respondent

However, it is my considered view that the cause of action alone was not the basis for the impugned ruling in respect of the respondent's PO as the respondent's advocate correctly argued. I am however of the settled view that, the learned tribunal chairperson might have caused an amendment for further and better particulars of the appellant's application especially the questioned relief on permanent injunction restraining the respondent from demolishing the appellant's properties as per Order VI Rule 6 of the Civil Procedure Code. Alternatively, such respondent's relief in Paragraph 7 (ii) of the application would be struck out for being not backed by the application.

Coming to the **3rd and 4th ground,** it is common ground that, once a suit or application is filed in the District Courts, DLHTs, RM's Courts or this court out of the prescribed period, a consequential order is to dismiss such suit or application as the case may be under section 3 (1) of the Law of Limitation Act (supra). Hence, if the appellant's application was

considered time barred, the proper order was to dismiss it under section 3 (1) of the Act as correctly done by DLHT.

Now as to whether the appellant's application was exempted from limitation under section 21 of the LLA or as per the appellant's pleading or whether the DLTHT was justified to hold that, the application was extremely time barred.

It is crystal clear that, in certain case a party is entitled to an exemption of limitation. It follows therefore; a party in judicial or quasi-judicial proceedings must plead such exemption in his or her plaint or application so that he may file the suit notwithstanding that the time for instituting has lapsed. This position is clearly provided for under Order VII Rule 6 of the Code, which provides;

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

The Court of Appeal of Tanzania underscored its interpretation of the quoted provision of the law in the case of **Fortunatus Masha and another vs. Claver Motors Limited,** Civil Appeal No. 144 of 2019 (unreported) where it was held inter alia that;

"Likewise, there was no dispute on the requirement under Order VII Rule 6 of the CPC, for a suit instituted out of the prescribed time, its plaint should contain a paragraph indicating a ground upon which an exemption from such delay is claimed.....the requirement imposed by the above law is not optional, because the word used therein is "shall" which denote a mandatory compliance and not otherwise..."

See also the decision in the case of **Salum Lakhani and two others** (supra) cited by the appellant's counsel

Keenly going through the appellant's application before the DLHT especially Paragraph 6 A (vi), I have undoubtedly noted that, the appellant vividly pleaded exemption by stating that, the respondent at various occasions attempted to claim ownership over suit land but in vain. She added that, the respondent's applications were never heard on merit. Hence, no court of law that, has declared either of the parties to the suit to be the lawful owner.

However, I have surprisingly noted that, despite the fact that, the respondent pleaded copies of judgment/rulings referred under Para. 6 A (vi) of the application and the parties' written submissions but none is appended therein. I am alive of the principle that, a plaint or application must be considered together with its attachments appended therein when

determining a preliminary objection raised by a party to a proceeding. This court in **Oilcom Tanzania LTD vs. Christopher Letson Mgaila,** Land Case No. 29 of 2015, (unreported) stated;

> *" The view is based on the fact that annextures form part of the pleading since they assist in elaborating the material facts pleaded in the pleadings. The broader meaning of the pleadings for the purpose of promoting the right of fair trial to parties therefore, should be that, annextures are part and parcel of pleadings".*

In the circumstances of this present case, the pleaded judgments / rulings, in my settled view, ought to have been attached to the application or to have been caused to be appended. As it is, I do not see if the tribunal chairperson would properly determine the preliminary objection on limitation of time at that initial stage.

Similarly, I have examined the appellant's application and observed that, the same indicates that, the late Ruth and his relatives started claiming ownership of the suit land since 1999 and that, both the respondent and appellant were raised and living in the suit land. That being the case, in my firm opinion, the learned chairperson could not be in a better position to know when, cause of action accrued and against who since both were/are said to be dwelling in the suit land. It must be borne in mind that, as alleged by the appellant through his application

filed before DLHT, it was the respondent who had been instituting the case against the respondent and or administrator or both. In these circumstances, it was quite not possible for appropriately ascertaining the preliminary objection since certain facts or evidence is required (see the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distribution Ltd** (1969) EA 696). In our instant matter, there is no fact or document establishing when either of the parties was in dispossession or discontinuance in the use of the suit land. Therefore, the matter would not be disposed by way of preliminary objection.

Having given the above deliberations, I find merit of the appeal. Consequently, the ruling of the District Land and Housing Tribunal is quashed and set aside. The parties' dispute be properly re-filed before the District Land and Housing Tribunal and be heard by another chairperson. Given the relationship of the parties and the appellant's omission to attach the necessary documents, I refrain from making an order as to costs of this appeal.

It is so ordered.

DATED and **DELIVERED** at **DSM** this 29th August, 2023

M. R. GWAE
JUDGE

Court: Judgment virtually delivered in presence of the parties and their advocates. Parties are at liberty to collect their copies of judgment at the IJC collection desk, effectively from today

SGD: M. R. GWAE
JUDGE
30/08/2023