

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND CASE NO. 1 OF 2020

**LUHUMBO INVESTMENT LIMITED..... PLAINTIFF
VERSUS**

NATIONAL BANK OF COMMERCE LTD.....1ST DEFENDANT

BUNDAA OIL INDUSTRIES LTD.....2ND DEFENDANT

MOUNT MERU MILLERS LTD.....3RD DEFENDANT

RULING

Date of the last Order: -17/06/2020

Date of the Ruling: -10/8/2020

E. Y. MKWIZU, J.

On 2 /4/2020 the Plaintiff, LUHUMBO INVESTMENT LIMITED filed a land case against the defendants NATIONAL BANK OF COMMERCE LTD, BUNDAA OIL INDUSTRIES LIMITED & MOUNT MERU MILLERS LIMITED on the claims that:

- i. The purported sale agreement between Luhumbo Investment and Bundara Oil industries Limited signed on 5 July, 2006; and the Transfer under power of sale made by the first Defendant in favour of the second Defendant signed on 29 June, 2006 be nullified*

- ii. *The first Defendant compensate the Plaintiff the sum of Tsh. One billion six hundred and sixty-five hundred and sixty-five million eighty hundred and forty thousand (1,665,840) being the value of the suit property following the unlawful agreement between the plaintiff and the second Defendant and the Transfer under Power of Sale made by the first Defendant in favour of the second Defendant signed on 29 June 2006*
- iii. *The first Defendant pay special damages of five hundred million (5,000,000/=) shillings to the Plaintiff for the lose occasioned.*

Before the commencement of the hearing, the defendants raised a Preliminary Objection on a point of law that the matter is time barred pursuant to the Law of Limitation Act, Cap 89 R:E 2019 .

The court ordered the preliminary objection to be heard by way of written submissions, the Plaintiff enjoyed the services of Prof. Abdallah J. Safari senior advocate, 1st Defendant had the services of Mr. Godfrey Kange Advocate and the 2nd and the 3rd Defendants were represented by Mr. Pharles Focas Malengo, also learned advocate.

Arguing in support of the preliminary objection, Mr. Kange for the first defendant submitted that, the suit is time barred because the plaintiff is moving this court to nullify an agreement which was signed between the

Plaintiff and the second defendant on 05/07/2006. He relied on the provisions of Item 7 of part 1 of the schedule of the Law of Limitation Act [CAP 89 RE 2019] in which require a suit founded on a contract to be instituted within six years. He clarified that, counting from 05/07/2006 the day when the contract between the plaintiff and the second defendant was executed to the day when the instant suit was filed on 01/04/2020, the suit was filed after 14 years and therefore time barred. Mr. Kange prayed for the dismissal of the suit with costs under section 3 of the Law of Limitation Act. He cited the case of **The Registered Trustee of Mwanza Club V. Mwanza City Council & Another**, Land Case No. 02 of 2009 Mwanza (Unreported) where it was observed that:

"When the period from when the cause of action accrued that is, in February 2007, to when the current suit was lodge in court that is to say on the 12th February, 2009, by simple arithmetic, it is a period of bout twenty (24) months or so. Such period is by very far beyond the twelve months which has been prescribed by the law. The lodging of the suit was therefore, undoubtedly made in contravention of the provisions of item 1 part 1 of the Schedule to the Law of Limitation Act, and cannot elude the wrath that has

been stipulated under the provision of section 3 (1) of the same Act, that is, the law of Limitation of Time Act, Cap 89.....as was held by my learned Brother Kibela J in the Case of Chibundi Company Limited (Supra), once it has been established that, a case has been filed outside the period prescribed by the law, the only available remedy to the court is to dismiss it. I have no any other alternative other than following suit. "

Counsel for the 2nd and 3rd Defendant had a similar view that the suit is time barred except that his calculations of the time limitation started on 29th June, 2006 when the first defendant sold the suit property, Plot Number 168, Block KK Mhumbu Industrial Area, Shinyanga Municipality to the second defendant under power of sale at allegedly a low price and without due notice to the plaintiff.

Mr. Pharles thought that, since the cause of action arose on 29th June, 2006 then, under Part 1 Item 18 of the Column, sections 4 and 5 of the Law of Limitation Act , the plaintiff ought to have filed his claim within 12 years from June 2006. He cited the case **Yeromino Athanase V. Mukamulani**

Benedicto [1983] TLR 370 (HC) and **Malekela Mahita V Kabuwi Nzengwa** [1989] TLR 113 (HC) to support his line of argument.

He prayed the court to dismiss the suit for being time barred with costs.

In his reply, Prof. Safari narrated the historical background of the matter chronologically and he invited this court to take judicial notice of the existence of documents marked as A, B,C ,D and E namely, the plaint in Land case No .10 of 2009, Chamber summons titled land case No 10 of 200,Plaint in respect of Land Case No. 15 of 2015,Plaint in respect to Land Case No 6 of 2016 and Ruling by Mkeha J in Land case No 6 of 2016 dated 28/2/2020 respectively attached to the written submissions in terms of section 59 (1) (a) of the Law of Evidence Act Cap 6.

He said, the plaintiff instituted Land Case No. 10 of 2009 against the 1st and 2nd Defendants at the High Court of Tanzania, Tabora Registry in November 2009. Later in September 2014 the second defendant was withdrawn from the suit and on 21st September, 2015 the Plaintiff filed a Land Case 18 of 2015 again at Tabora High Court Registry against the 1st defendant where an objection was raised in respect of the jurisdiction of the High Court , Tabora Registry on the issue that the land in dispute is situated

in Shinyanga. Thereafter, Plaintiff filed at Shinyanga High Court Registry, Land Case No. 6 of 2016 against the 1st Defendant which was struck out on 28 February 2020 for non-joinder of a necessary party.

Prof. safari contended that, the sale Agreement referred to as Annexure B to the Plaint is based on land whose Limitation time is twelve (12) years and not six years as argued by the counsel for the 1st Defendant. He referred the court to **Item 19 of Part 1 of the Schedule of the Law of Limitation Act**. Relying on paragraph 9 of the Plaint, Prof. Safari went further explaining that , the suit involves a mortgage entered between the plaintiff and the first defendant and therefore time limitation is twelve years in terms of Item 17,18 and 19 of the Part 1 of the Schedule of the Law of Limitation of Time Act .Citing section 21 (1) of the Law of Limitation of time Act, Prof Safari said, the Plaintiff has been prosecuting his right in good faith, on the same subject matter against the 1st Defendant since 2009 and therefore the plaintiff is served by the provision of section 21 (1) of the law of Limitations Act. He also added that, Justice Mkeha clearly stated in his Ruling that the Plaintiff could file the matter afresh after joining the other defendants which he has now done.

While conceding to the facts narrated on the actions taken by the plaintiff since the year 2009, Mr. Pharles Malengo , for the 2nd and 3rd defendant rejoined that, plaintiff has been prosecuting his rights without diligence and therefore cannot seek refuge under Section 21 (1) of the Law of Limitation Act. He again reiterated his submission in chief.

Having heard both side submissions and having gone through the records, I think I have one issue to discuss, that is whether the Land Case No. 1 of 2020 is time barred or not. It is trite to point at the outset that in deliberating on the preliminary objection raised, I will be guided by the principle in **Mukisa Biscuit Manufacturing Co. Ltd Vs Westy End Distributors Ltd** [1969] EA 696 that objections should be raised on a pure point of law, and cannot be raised if any fact has to be ascertained. Further, that a preliminary objection is argued on assumption that all the facts pleaded by the other side are correct and which if argued as a preliminary point may dispose of the suit.

In paragraphs 9-12 of the plaint plaintiff stated as follows.

9. On the 19 September, 2005 the Plaintiff mortgaged their (sick) property on Plot No. 168 Block KK Mhumbulu Industrial Area, Shinyanga Municipality to secure an overdraft and loan facility from the first Defendant as shown by Annexure G to the plaint
10. Later on 5 July 2006 one of the directors of the plaintiff company was called at the second defendant's headquarters in Dar es salaam where he was told by the Bank Officials to sign a sale Agreement with the second Defendant for raising Four Hundred Million (400,000,000/=) Shillings on the Mortgaged property as shown by Annexure B to the plaint. This agreement was not properly authorized by the plaintiff company thus null and void.
11. At the time of signing the alleged sale agreement on 5 July, 2006, the plaintiff property had already been sold to the second Defendant a week earlier on 29th June, 2006 by way of transfer under power of Sale and Discharge of Mortgage Marked as Annexure H and I to the plaint. The said Transfer under power of sale was made by the 1st defendant without Due notice to the Plaintiff.

12. That the first defendant sold and transferred to the second defendant the suit property on Plot No. 168 Block KK, Mhumbu Industrial Area, Shinyanga Municipality at a very low Price and without actual valuation as to the true market value at the time of sale as demonstrated by Valuation Report and fire Cover Note Marked as Annexure F and J to the plaint.

Going by paragraph 11 of the plaint, there is no dispute that the cause of action in this case arose from the sale agreement dated 5th July 2006 between the Plaintiff and the 2nd Defendant which came after the sale of the said property by the 1st respondent to the 2nd respondent by way of transfer under power of Sale and Discharge of Mortgage without notice to the plaintiff.

It is also clear from the pleadings that, the agreement involves a mortgage of a landed property, Plot No. 168 Block KK, Mhumbu Industrial Area Shinyanga Municipality. It goes without a word therefore that the matter falls squarely under the provisions of **Item 17 and 18 of the Law of Limitation Act Cap 89 R.E.2019** which provides for 12 years limitation for suits to redeem land in possession of Mortgage

and recover Principal sum of money acquired by Mortgage on land or movable property or to recover proceeds of the sale of land .This is the position in the case cited by the counsel for 2nd and 3rd Defendants of **Malekela Mahita V Kabuwi Nzengwa [SUPRA)** where the court said:

"A suit to redeem land in possession of mortgage must be brought within twelve years as prescribed under the first schedule to the law of Limitation..."(emphasis is mine).

Now, the question is, was the present suit filed after the lapse of the twelve years limitation period? Defendants suggested that the suit was filed beyond time. On his party, Prof safari, counsel for the plaintiff, much as he concede that the matter was filed beyond the time prescribed by the law, he explained that plaintiff was not sitting idle, he has been pursuing his right since 2009 in Land case No.10 of 2009 against the 1st and 2nd defendants and Land case No 18 of 2015 at Tabora Registry followed by Land case No. 6 of 2016 in this registry which was struck out for non-joinder of a necessary party. He relied on section 21 of the law of limitations Act. Section 21(1) provides:

21 (1) - *"in computing the period of limitation prescribed for 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 proceedings 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."*

The section above is to the effect that the time during which the plaintiff was prosecuting a civil proceeding with due diligence, founded on the same cause of action provided that it was in good faith ought to be excluded. Surprisingly however, the explanation that the plaintiff was not sitting idle were not reflected in the plaintiffs' pleadings. It just emerged in the written submissions in response to the preliminary objection. It is a trite law in civil cases that, parties are bound by their pleadings. Submissions are normally confined to what is pleaded. In the case of **Yara Tanzania Limited V Charles Aloyce Msemwa t/a Msemwa Junior Agrovat & two others** Commercial Case No. 5 of 2013, Mwambegele J, (as he then

was)had this to say on the variance between what is pleaded and what is averred during the hearing:

*"... it is a cardinal principal of law of civil procedure founded upon prudence that parties are bound by their pleadings. .. .if I may be required to add another persuasive authority from Nigeria, I would add **Adetoun Oladeji (Nig) Ltd vs Nigeria Breweries PLC** (2007) LPELR-SC.91/2002(sourced through <http://nigerialaw.org/adetoun%20ladeji%28Nig%29%20Ltd%20Ltd%20Nigerian%20Breweries%20Plc.htm>); also cited as **Adetoun Oladeji (Nig) Ltd. Vs N.B. Plc**(2007) 5 NWLR {Pt.1027} 415] in which it was also categorically stated that it is settled law that parties are bound by their pleadings and that no party is allowed to present a case contrary to its pleadings. That is the position of the law in Nigeria as well as in this Jurisdiction - see **Peter Karanti and 48 others Vs Attorney General and 3 others**, Civil Appeal No. 3 of 1988 {Arusha unreported})"*

See also the case of **Arusha Tailoring v Pucci** [1967] HCD 424, **Antony Ngoo And Another v Kitinda Kimaro**, Civil Appeal No. 25

of 2014, CAT at Arusha, (unreported) to mention just a few of the many decisions on the question of pleadings.

It is a position of the law under section 3 (1) of the Law of Limitation Act Cap 89 R E 2019, that the court is duty bound to dismiss a claim as time-barred if it is brought beyond the period prescribed in the schedule; but limitation may be saved if the plaintiff can bring himself within one of the exceptions stipulated under the law of limitation Act. Rule 6 of Order VII of the Civil Procedure codes, Cap 33 RE 2019 provides:

"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."

The burden lies on the plaintiff to show that the case falls stringently within the scope of such exception. The rule, however is couched in a mandatory term, the permission for the plaintiff to claim exemption can only be given provided the plaintiff makes out a ground, upon which, exemption of law is claimed , meaning that Order 7 Rule 6 can be of help provided exemption claimed is duly pleaded in the plaintiff.

Discussing the provisions of Rule 6 of order VII of the Indian Code of Civil Procedure, 1908 which is in *pari materia* with rule 6 of order VII of our CPC, Mulla: The Code of Civil Procedure by Sir Dinshah Fairdunji Mulla. 19th Edition, 2017 has this to say at page 1870:

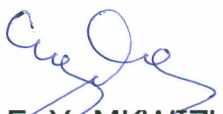
*"...The language of the rule is **mandatory and therefore whenever a plaintiff seeks exemption from the operation of the law of limitation, he must show the grounds on which he seeks such exemption.** If no ground of exemption is shown in the plaint, and the suit appears from the statement in the plaint to be barred by limitation, the plaint shall be rejected."* (Emphasis added).

I have carefully considered the pleadings. I am satisfied that grounds of limitation were not pleaded. No particulars of the exception of time by the law of limitation were pleaded in compliance to Order VII, rule 6 of the Civil Procedure. The Plaintiff in his own pleadings gave facts constituting the cause of action and time when the cause of action arose but nothing was said in relation to the exemption the plaintiffs' counsel is now bringing in his submissions in opposition of the preliminary objection particularly on his reliance to section 21 (1) of the Law of Limitation Act.

Apparently, it is in the plaint that, the cause of action arose on 5th July, 2006 and this suit was lodged on 1st April, 2020, therefore, it is obvious that, the right to sue had expired on the date when the suit was presented meaning .This being the position, I find no other remedy than dismissing the suit under section 3 (1) of the Law of limitation Act. Defendants to have their costs.

It so ordered.

DATED at SHINYANGA this 10th day of August, 2020.


E. Y. MKWIZU

JUDGE

10 /08/2020

Court: Right of appeal explained


E. Y. MKWIZU

JUDGE

10 /08/2020

