IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 182 OF 2018

(Arising from the decision of the District Land and Housing Tribunal for Temeke in Application No. 267 of 2015 (Hon. Kirumbi, Chairman)

MOHAMED SALEHE.....APPELLANT

VERSUS

FATUMA ALLY MOHAMED.....RESPONDENT

JUDGMENT

I. MAIGE, J

At the District Land and Housing Tribunal for Temeke ("the trial tribunal"), the respondent herein won a suit against the appellant for ownership of a one acre land located at Mjimwema Dar Es Salaam ("the suit property"). The trial chairperson agreed with the assessors who sat with him that the **suit property** belonged to the respondent. He declared so and nullified the letter of offer issued in respect of the **suit property** in the name of the appellant herein. The appellant is aggrieved by the decision. He is appealing against the same on the following grounds:-

1. *The Honourable Chairman of the Tribunal erred in law and facts by entertaining the Application which was time barred.*

2. *The Honourable Chairman of the Tribunal erred in law and facts by entertaining the Application which resjudicata.*

3. *The Honourable Chairman of the Tribunal erred in law and facts by finding and holding that the Appellant's ownership and survey documents are not genuine.*

4. *The Honourable Chairman of the Tribunal erred in law and facts by finding and holding that the respondent is the lawful owner of the suit land contrary to the evidence on the record.*

5. *The Honourable Chairman of the Tribunal erred in law and facts by nullifying the Appellant's letter of offer.*

6. *The Honourable Chairman of the Tribunal erred in law and facts by failure to properly evaluate the evidence on record.*

By the direction of the Court, the appeal was argued by way of written submissions. Mr. Njama filed the written submissions on behalf of the appellant whereas the respondent filed her written submissions in person. I have duly considered the rival submissions. For obvious reasons, I will determine the first two legal issues first.

The first issue is on time limitation. The factual basis is two folds. First, the defense evidence that, the appellant's predecessor in title one NOOR MOHAMED purchased the **suit property** in 1998 from ISSA MOHAMED MASSOUD. Two, a statement in the decision of the ward tribunal in exhibit **D5** which in the understand of the counsel for the appellant is suggestive that, the respondent had abandoned

the **suit property** since 1992. It is Mr. Njama's submissions therefore that, counting from 1998 to the date of lodging the complaint at the ward tribunal, the 12 years period of limitation had already expired. The suit at the **trial tribunal** ought to be dismissed for being time barred, submits the counsel.

In his rebuttal submissions on this issue, the respondent who filed his submissions in person differed with Mr. Njama on the date of the accrual of the cause of action. To him, the same accrued in 2015 when the respondent was informed of the trespass. In his view therefore, the suit was well within time.

On my part, I have fittingly examined the judgment and proceedings of the **trial tribunal** in line with the rival submissions. Reading from the pleadings and proceedings of the **trial tribunal**, I am in difficulty to decide whether the claim at the **trial tribunal** was within or outside the time limit. The basis of determination of such a question would have been from the respondent's pleadings. In accordance with the pleadings, the cause of action was based on trespass. Under order VII rule 1 (e) of the Civil Procedure Code, Cap. 33 R.E. 2019 ("the CPC"), the respondent should have pleaded when was the said trespass committed. That would have assisted the **trial tribunal** and even this Court to ascertain the date of the accrual of cause of action for the purpose of limitation. In this case, it would appear to me, the date when the alleged trespass was committed was not pleaded. Neither was it specifically testified upon in evidence. Instead, the

respondent only pleaded the date when he was informed of the alleged trespass.

On his part, the appellant who was the defendant at the **trial tribunal** did not specifically plead as to when did he come into occupation of the **suit property**. As a result, when was the alleged trespass committed was not framed into issue. Instead, the **trial tribunal** framed only an issue of ownership of the **suit property**. In the circumstance therefore, it would not be fair and just to determine such a fundamental issue of time limitation without there being factual foundation from the pleadings. The trial chairperson would have not easily determined the question unless the pleadings had been amended to clearly reflect the date of the accrual of cause of action. The trial chairperson would have not placed reliance on the decision in exhibit **D5** because the said proceeding was summarily determined for want of prosecution. In the circumstance therefore, I will decline to consider the issue of limitation for being premature.

This now takes me to the second issue as to whether or not the claim at issue was not *resjudicata* to the decision in exhibit **D5**. There was a heavy debate between the parties on whether or not the phrase *"kufitiwa madai"* used in exhibit **D5** in its context entails dismissal or striking out. I do not think that this issue should consume much of my time. The order in the respective decision was made in the absence of the respondent who was the claimant. Before giving the order, the ward tribunal observed as a fact that, the respondent had

abandoned his case. That would clearly suggest as rightly submitted for the appellant that, the suit was dismissed for want of prosecution. The use of striking out instead of dismissal to me would sound irrelevant. For, the Court of Appeal has held from time to time that, the use of the phrase "strike out" instead of "dismissal", does not render the decision inconclusive. For instance, in **Nguni Matengo Co-operative Marketing Union Ltd V. Ali Mohamed Osman (1959) EA. 577** where the High Court strake out a time barred proceeding instead of dismissing it, the Court of Appeal treated the word "strike out" to have the effect of "dismissal".

Perhaps, the issue which I have to consider is whether the subject matter in the said decision was similar with the one at hand. Again, the factual foundation for the determination of the issue must be based on pleadings. In the application initiating the claim, what constitutes the **suit property** is pleaded in paragraph 6(a) (ii) as follows:-

> (ii) *That in the year 1991 the Plaintiff bought a piece of unsurveyed land from one Bi Kejeli Saad, and followed all procedures as regard to the Village recognition.*

From the face of it, the factual allegation above does not sufficiently describe the **suit property**. There was also not clear description of the **suit property** in the prosecution evidence. Mr. Njama, learned advocate for the appellant, appears to be aware of this omission. This

is reflected at page 7 of his written submissions where he remarked as follows :-

> *The inadequacy of the prosecution evidence consists of the present respondent's failure to present evidence indicating (1) when the trespass occurred. Not one prosecution witness mentioned this fact. (2) The prosecution testimony is contradictory concerning size of the plot. It mentions ¼ acre (p. 19 of the proceedings), ½ acre; 1 acre (p. 19 of the proceedings) and 1½ acres (p.4 of the judgment).*

The counsel's remark above is rational. I would add however that, the cause of such inconsistencies is lack of clear and sufficient description of the **suit property** in the pleadings. The omission to clearly and sufficiently describe the **suit property** was violative of the mandatory requirement of order VII rule 3 of the Procedure Code, Cap. 33, R.E. 2019 which provides as follow:-

> *3. Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the Land Registration Act the plaint shall specify the title number.*

Given the foregoing discussion therefore, this Court cannot assume the risk of determining the issue of whether the subject matter in the two proceedings was similar. Therefore, just as it was for the issue of time limitation, I will decline to determine the issue of the suit at the **trial tribunal** being *resjudicata* for want of sufficient factual materials. Since the two issues go to the jurisdiction of the **trial**

tribunal, I find it inappropriate to proceed with the remaining grounds of appeal before the said issues are determined by the **trial tribunal** in an appropriate way.

I will in the circumstance exercise my revisional jurisdiction under section 43(1) of the Land Courts Disputes Act, Cap. 216, R.E., 2019 and fault the **trial tribunal** for determining a suit which was incompetent for want of description of the **suit property** and date of accrual of the cause of action. The said judgment is hereby set aside and the proceedings thereof quashed. The file is remitted to the tr**ial tribunal** for retrial before another chairperson with a new set of assessors. I further order that before conducting such a retrial, the application should be amended so as to comply with the requirement under order VII rule 1 (e) and 2 of the CPC. The trial tribunal should also satisfy itself if the suit is not time barred nor *resjudicata.* No order as to costs.

It is so ordered.

I. Maige

JUDGE

24/11/2020

Date: 24/11/2020

Coram: Hon. S.H. Simfukwe - DR

For the Appellant: Absent

For the Respondent: Mr. Sylvester Aligawesa, Advocate

RMA: Bukuku

COURT:

Judgment delivered this 24th day of November, 2020 in the presence of the Respondent and in the absence of the Appellant.

S.H. Simfukwe
DEPUTY REGISTRAR
24/11/2020