

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 26 OF 2001

1. JABIR BAKARI SHEMAZI)	PLAINTIFFS
2. ELIZABETH JUSTINE)		
Versus			
1. COMMISSIONER OF PRISONS)	DEFENDANTS
2. ATTORNEY GENERAL)		

J U D G E M E N T

KIMARO, J:

On 17/9/2001, this court dismissed the suit which was filed by Jabir Bakari Shembazi and Elizabeth Justine against the Commissioner of Prisons and the Attorney General on the ground that the suit was time barred.

The plaintiffs are now before this court with a memorandum of review in which they are seeking for a review of the whole ruling on four grounds:-

- (i) That the trial judge erred in law and fact for holding that the suit is founded on law of tort - trespass.
- (ii) The trial judge erred in law and fact in holding that the suit was time barred.
- (iii) That the trial judge failed to take into consideration the fact that paragraphs 4, 5, 6, 7, 8, 9 and 10 of the plaint disclose the fact that the suit is founded on land ownership and trespass or encroachment thereto.
- (iv) The trial judge erred in law and fact in holding that Part 1, First schedule item 6 of the Law of Limitation Act, 1971 was applicable.

The memorandum of review has been drawn by Mr. John Wallace Daffa, an advocate for the Legal and Human Rights Centre. Unfortunately, the provision under which it has been drawn has not been disclosed. When the suit was filed, the plaintiffs were granted legal aid by the Legal Aid Committee of the Faculty of Law of the University of Dar es Salaam. Mrs Zainabu Muruke, learned Advocate represented them.

I pause here to ask myself whether what is now before this court is a memorandum of review or a memorandum of appeal.

The enabling provisions for filing a review are contained in Section 78 of the Civil Procedure Code as well as Order XLII of the Civil Procedure Code. In terms of Order XLII rule I a review can be sought where there is a discovery of new and important matter or evidence which, after exercise of due diligence was not within knowledge or could not be produced at the time the decree was

passed or where there is a mistake or error which is apparent on the face of the record or for any other sufficient reason. The case of National Bank of Commerce V Cosmas Muhoji [1986] TLR 127 refers.

The question which has to be asked and answered is whether there is a discovery of new and important evidence, or an error or mistake apparent on the face of the record or any other sufficient reason.

The review was argued by written submissions. The applicants though they appeared in person were assisted by Mr. John Wallace Daffa, the Learned Advocate from the Legal and Human Rights Centre and the respondent were represented by Chidowo, Learned State Attorney although in the written submission the Learned State Attorney who draw the same has not disclosed his / her name. It is important for the author of any document which is filed in court to disclose his/her name rather than giving just a signature. I hope this remark will be taken care of in future for easy of court's reference.

In their submission the applicants referred to paras 4, 5, 6, 7, 8, 9 and 10 of the plaint and said that the suit is founded on ownership of the plot and not on tortious trespass and so the compensation which is prayed for is just a resultant of the encroachment. This point is emphasized through out the submission. They contended that given what was averred in the plaint, which established that the suit is founded on ownership of the land, the limitation period is 12 years and so the suit was filed within time. They prayed that the review be allowed. The case of Ramedhani Nkongole V Kasiam Paulo [1988] TLR 56 was cited to support the assertion that the right to sue for an encroachment does not arise however long land stays uncultivated until it is encroached upon.

In reply, the Learned State Attorney focused his attention on the provisions of the ~~law~~ dealing with a review. That is Section 78 and Order XLII. The Learned State Attorney prayed that the review be dismissed because none of the grounds which permit granting a review have been proved.

In reply, the applicants submitted that the reply by the State Attorney was filed out of time without leave of the court and so the same should be dismissed. They also reiterated their earlier submission that the suit is founded on the ownership of the land and not on the tort of trespass. On the grounds for granting an application for review, the applicants emphasized the ground on apparent error and other sufficient cause.

Let me pause here and ask whether on the submissions made by the parties to this review the grounds for granting the review have been established.

After having gone through the memorandum for review and the submissions I am satisfied that the grounds for granting a review have not been established.

Starting with the ground on a mistake or error which is apparent on the face of the record, I do not see any. If there is any problem, it might be associated with failure to grasp the facts pleaded and come out with what the applicant say should have been the decision of the court. In this respect, it is a question which is associated with competency but cannot be, associated with a mistake or error which is apparent on the face of the record. A mistake or error must be so reflected on the face of the record.

As regards discovery of new and important evidence which was not within the applicants knowledge, none has been shown in these review proceedings.

Is there any sufficient reason? I do not see any. It may also be of interest to point out that what the applicants have drawn and labelled a memorandum of review is not, strictly speaking, a memorandum of review. It is a memorandum of appeal which has been erroneously labelled a memorandum of review. The grounds given are purely grounds for an appeal and not grounds for review. The applicants have persued an appeal in a wrong forum. This court has no jurisdiction to entertain an appeal against its own decision. Changing the title of the document which was filed in court by labelling it a memorandum of Review while it is, strictly speaking, a memorandum of appeal, does not help the applicants.

The application for review has no merit. It is dismissed. No order for costs.



N.P. Kimaro

JUDGE

8/05/2002