IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 138 OF 2016

MS. SAFIA AHMED OKASH (As Administratrix of the Estate of the Late AHMED OKASH) ..... APPELLANT

VERSUS

MS. SIKUDHANI AMIRI & 82 OTHERS ..... RESPONDENTS

(Appeal from the Ruling and Order of the High Court of Tanzania at Arusha)

(Massengi, J.)

dated 3rd day of June, 2013
in
Land Case No. 35 of 2012

JUDGMENT OF THE COURT

11th July & 21st August, 2018

NDIKA, J.A.:

This appeal arises from the ruling of the High Court at Arusha in Land Case No. 35 of 2012 dated 3rd June, 2013 sustaining the respondents' preliminary objection that the appellant's action for ownership and possession of a parcel of land measuring 2,436.05 acres located at Malula Village, King'ori Ward, King'ori Division in Arumeru District was time-barred.

When the appeal came up for hearing on 11th July, 2018, we noted that the respondents had lodged, through their learned counsel, Mr. Eliufoo Loomu Ojare, a notice of preliminary objection on 31st of August, 2016 as follows:

> *"That the Appellant's appeal is incompetent in law, for being based on an invalid Notice of Appeal filed on 13/5/2015 pursuant to the order of the High Court of Tanzania at Arusha in Misc. Civil Application No. 36 of 2015 dated 11/5/2015; whereas the High Court was functus officio after having granted a similar order vide Misc. Civil Application No. 133 of 2014 dated 6/2/2015."*

As is ordinarily the practice of the Court, once a preliminary objection is raised, the Court would shelve the hearing of the substantive matter to allow the disposal of the preliminary objection first. In this matter, however, we directed Mr. Elvaison Maro and Mr. Eliufoo Loomu Ojare, learned counsel for the appellant and the respondents respectively, to argue the preliminary objection first and then address us on the merits of the appeal. That course was meant to expedite the proceedings and disposal of the matter. It was

agreed that if the Court is to uphold the preliminary objection, it would then proceed to dismiss the appeal and that would be the end of the matter. However, if the said preliminary objection fails, then the Court will go ahead to consider and determine the appeal on the merits. As directed, both learned counsel took turns to address us on the preliminary objection and thereafter on the merits of the appeal. As a result of that approach, we start to determine the preliminary objection.

In support of the preliminary objection, Mr. Ojare submitted, quite spiritedly, that the appeal was incompetent and liable to be struck out. Elaborating, he stated that as shown at pages 446 to 449 of the record of appeal, the appeal was filed upon a notice of appeal lodged on 13th May, 2015 pursuant to the order of the High Court made on 11th May, 2015 in Miscellaneous Civil Application No. 36 of 2015 (hereinafter referred to as the 2015 application) granting seven days extension to lodge a notice of appeal. He contended that the aforesaid notice was invalid and improper because the High Court was *functus officio* to hear and determine the said application because it had already granted a fourteen days extension of time to

file notice of appeal on 6th February, 2015 in Miscellaneous Civil Application No. 133 of 2014 (hereinafter referred to as the 2014 application) as shown at pages 401 through 411 of the record.

It was Mr. Ojare's view that since the High Court had already granted extension of time pursuant to the provisions of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 (AJA) in the 2014 application, it was *functus officio* to hear and determine a similar application (that is, the 2015 application). If the appellant had failed to lodge a notice of appeal after she was granted the first extension, she ought to have approached the Court of Appeal for an extension of time under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules) instead of seeking a second extension in the High Court. Counsel submitted that the purported order of extension issued by the High Court in the subsequent application was manifestly a nullity.

Mr. Ojare relied on three decisions to establish what the principle of *functus officio* entails. These are: the decision of the erstwhile East African Court of Appeal in **Kamundi v. Republic** [1973] EA 540 at 545 for the proposition that a court becomes

functus officio once it has made an order finally disposing of the matter; **Zee Hotel Management Group and Others v. Minister of Finance and Others** [1997] TLR 265 for the holding that a judge is *functus officio* once he has given his original order and in the absence of an application for a review of his earlier decision he has no authority to review it; and finally **Tanzania Telecommunications Company Limited and Others v. Tri-Telecommunications Tanzania Limited** [2006] EA 393 wherein this Court held that that it was *functus officio* to entertain a revision on the proceedings of the High Court after it had examined the same proceedings in a previous revision.

While the learned counsel was forthright to admit that he consented to the order in the second application being made when the matter came up for hearing on 11th May, 2015, he was quick to put a rider that parties cannot, by mutual consent, give jurisdiction to a court which it does not have. On this submission, he cited three cases: **Allarakhia v. Aga Khan** [1969] EA 613 at 614; **Mvita Construction Company v. Tanzania Harbours Authority** [2006] TLR 22 at 38 F; and **Mathias Eusebi Soka (as personal**

representative of the late Eusebi M. Soka) v. The Registered Trustees of Mama Clementina Foundation and Two Others, Civil Appeal No. 40 of 2001 (unreported).

In conclusion, Mr. Ojare submitted that the appeal was incompetent for being predicated upon an invalid notice of appeal. He thus urged that the appeal be struck out with costs.

Replying, Mr. Maro submitted, rather strenuously, that the appeal was founded on a valid notice of appeal as the High Court was not *functus officio* when it granted extension in the 2015 application upon the consent of both parties. He said that where there was a change of circumstances, as was the case in **East African Development Bank v. Blueline Enterprises Ltd.**, Civil Appeal No. 2009 (unreported), the doctrine of *res judicata* would not apply and thus a party can go back to the same court for the same relief. Elaborating, he said that after the appellant had to re-approach the High Court through the 2015 application because the extension granted under the 2014 application expired without the knowledge of the appellant as the ruling of the High Court was delivered in the absence of the appellant and her advocate. Counsel placed reliance

on two decisions of this Court: first, **Tanzania Electric Supply Co. Limited v. Mfungo Leonard Majura and 14 Others**, Civil Application No. 94 of 2016; and secondly, **Guardian Limited and Another v. Justin Nyari**, Civil Application No. 2 of 2015 (both unreported). In both these cases, this Court interpreted that under Rule 10 of the Rules the Court had powers to grant another extension of time after the first one had been granted and not utilized. It was his view that section 11 (1) of the AJA contains broad powers that would include the power to grant a further extension of time.

Reacting to the authorities relied upon the respondent, Mr. Maro agreed with the principles contained therein but was of the view that the said authorities were irrelevant to this matter insisting that the change of circumstances in the matter at hand displaced the application of *res judicata* or *functus officio*. In conclusion, he urged that the preliminary objection be dismissed.

In a brief rejoinder, Mr. Ojare disagreed that there was any change of circumstances. He submitted that if, indeed, there was a change of circumstances after the first extension was granted then

the appellant ought to have applied for a review of the decision by the High Court. He sought to distinguish **East African Development Bank** (supra), **Tanzania Electric Supply Co. Limited** (supra) and **Guardian Limited and Another** (supra) on the ground that they all concerned the grant of extension of time under Rule 10 of the Rules. Expounding, the learned counsel stated that the wording of Rule 10 contains a reference to "time so extended" meaning that the Court can also extend time that it had extended earlier. As regards section 11 (1) of the AJA, he was of the view that it only allowed extension by the High Court of time limitation specified by the law, not time extended earlier by the High Court.

We have considered the learned submissions raised by both counsel and the authorities cited in so far as the preliminary objection is concerned. We think that the answer to the contested issue before us hinges on the construction of the powers of the High Court under section 11 (1) of the AJA and the context of their application. For easy reference, we reproduce the above provisions hereunder:

> *"11 (1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned,* ***may extend the time for giving notice of intention to appeal*** *from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal,* ***notwithstanding that the time for giving the notice or making the application has already expired.***"
> [Emphasis added]

As indicated earlier, Mr. Ojare viewed the above provisions to be empowering the High Court to extend **the time prescribed by the law** for giving notice of intention or for applying for leave or for a certificate that the intended appeal involves a point of law. In his opinion, once the High Court has extended time under that section it cannot extend the time it had extended earlier. Mr. Maro holds the contrary view; that under section 11 (1) of the AJA the High Court is vested with broad powers of extension of time, before or after the expiration of the prescribed period. That the Court could extend the

period it had extended earlier under that subsection. With respect, we are inclined to agree with Mr. Maro's submission as we reject Mr. Ojare's position. We do not think it would be proper to restrict the phrase **"extend the time"** to extension of time prescribed by the law only. In its explicit and literal meaning, that phrase, broadly speaking, means that the High Court can extend the time, **prescribed by the law or extended by it previously**, for giving notice of appeal or applying for leave or certificate that a point of law is involved in the intended appeal.

Our view above is fortified by the jurisprudential context in which the above powers have been utilised. Here we mean that the said powers have been applied in concurrence with those of this Court under Rule 10 of the Rules subject to the provisions of Rule 47 of the Rules. Rule 47 stipulates as follows:

> *"Whenever application may be made **either to the Court or to the High Court, it shall in the first instance be made to the High Court or tribunal as the case may be**, but in any criminal matter the Court may in its discretion, on application or of its own motion give leave to appeal or extend the time for*

the doing of any act, notwithstanding the fact that no application has been made to the High Court." [Emphasis added]

In the case of **Tanzania Revenue Authority v. Tango Transport Company Limited**, AR. Civil Application No. 5 of 2006 (unreported), the Court, interpreting Rule 44 of the revoked Rules; the Tanzania Court of Appeal Rules, 1979 which is similar to Rule 47 of the current Rules, that a party seeking extension would first have to apply for it from the High Court under section 11 (1) of the AJA and that if that:

> *"**party fails in his or her bid to obtain an extension of time,** then that party can try a second bite in this Court under Rule 8 [Rule 10 of the Rules] and thereafter can proceed by way of a reference under Rule 57 (1) [Rule 62 (1) of the Rules."* [Emphasis added]

We would emphasize that a recourse to a "second bite" only arises if the application for extension is rejected by the High Court. It seems to us that where an extension is granted by the High Court under section 11 (1) of the AJA and the successful applicant fails to utilize the time so extended by the High Court he would be barred to

seek a "second bite"; he would have to re-approach the High Court for a further extension as happened in the case at hand. In this sense, we would agree with Mr. Maro that in the circumstances of this matter, the High Court was not *functus officio* when it dealt with the 2015 application on the basis of changed facts. In the premises, we overrule the preliminary objection.

Having disposed of the preliminary objection, we are now enjoined to deal with the appeal. In essence, as we alluded to at the beginning of the judgment, the appeal faults the High Court's ruling of 3rd June, 2013 dismissing the appellant's suit with costs upon sustaining the respondent's preliminary objection that the suit was time-barred. The appeal is predicated upon two substantive grounds of appeal along with one additional ground in the alternative. The grounds are as follows:

> *"1. That on the state of the pleadings the High Court clearly erred in entertaining and determining the 'preliminary objection' which was based on mixed issues of fact and law without taking evidence.*
> *2. That the High Court erred in deciding the preliminary objection in reviewing the*

annexures which were yet to be produced in court as evidence and decided on their evidential value.

Alternatively:

3. That the High Court clearly erred in holding that the suit was time-barred."

Submitting on the appeal, Mr. Maro, at the outset, abandoned the third ground of appeal and proposed to argue the two remaining grounds conjointly and generally. He then adopted the written submissions in support of the appeal and argued that the question of limitation could not be fittingly determined by the Court on the face of the Plaint only without proof. He elicited that the relevant pleaded facts on this issue are contained Paragraphs 88 and 89 of the Plaint. He stated that briefly, Paragraph 88 asserted that the appellant's father originally owned the suit land but that the respondents, one after another, invaded that land between 1974 and 1976 and parceled it out among themselves upon a fraudulent misrepresentation that they were carrying into effect the countrywide villagisation drive known as *Operation Vijiji*. In Paragraph 89, he said, it was averred that in September, 2011 the appellant had no knowledge of fraudulent misrepresentation perpetrated by the

respondents in grabbing and parceling out the disputed land and that because the appellant had no knowledge of that fraud, her claim was not time-barred.

Mr. Maro particularly assailed the High Court's finding that fraud had not been demonstrated in the Plaint and thus exemption from the web of limitation could not be claimed by the appellant. Elaborating, he submitted that the above finding was legally unfounded because the pleaded exemption from limitation on the ground of fraud required proof and that all the annexures attached to the Plaint in reference to the alleged fraud were not evidence of fraud. To bolster his position, he referred us to four decisions as follows: first, for the proposition that annexures to pleadings are not evidence, he referred us to our decisions in **Sabry Hafidhi Khalfan v. Zanzibar Telecom**, Civil Appeal No. 47 of 2009; and **Godbless Jonathan Lema v. Mussa Hamisi Mkanga**, Civil Appeal No. 4 of 2012 (both unreported). Secondly, for the principle that a preliminary objection cannot be decided on a question of mixed facts and law, he cited the famous decision of the East African Court of Appeal in **Mukisa Biscuits Manufacturing Company Ltd. v. West End**

Distributors Ltd. [1969] EA 696. Finally, he relied upon this Court's decision in **Olais Loth (Suing as Administrator of the Estate of the Late Loth Kalama) v. Moshono Village Council,** Civil Appeal No. 95 of 2012 (unreported) for the holding that whether the twelve-year limitation period began to run against the appellant was a matter that required proof and that it could not be determined at the preliminary stage as a point of law.

In conclusion, the learned counsel submitted that the High Court erred in dismissing the suit while the issue of limitation could not be determined as a preliminary point of objection without proof. He thus beseeched the Court to allow the appeal with costs.

Mr. Ojare was very brief in his response. He, at first, acknowledged that as held in **Sabry Hafidhi Khalfan** (supra), **Godbless Jonathan Lema** (supra) and **Olais Loth (Suing as Administrator of the Estate of the Late Loth Kalama)** (supra) annexures were not evidential proof. However, he was of the view that the learned Judge was right in upholding the preliminary objection and that her reliance on the annexures was only additional.

He rested his case having implored the Court to dismiss the appeal with costs.

Rejoining, Mr. Maro maintained that fraud was alleged in both paragraphs (Paras. 88 and 89) and that the learned Judge wrongly looked at the annexures and dismissed the suit on faulty reasoning that fraud had not been demonstrated.

Having heard the competing learned submissions of the parties and examined the record, we think that the main issue before us is whether the High Court was justified in dismissing the appellant's suit upon the respondents' preliminary objection that the suit was time-barred.

We think it is convenient to begin our discussion on the issue at hand by reproducing the kernel of the appellant's claim of title to the suit property as pleaded in Paragraphs 88 and 89 to which both counsel made reference:

> *"88. That from 1962 the Plaintiff's late father possessed and continued to possess and cultivate the said two thousand acres of land afore-described up to and including the years 1974, 1975 and 1976 when the defendants*

each and every one of them invaded the said farm, parceled it out portions of land as detailed hereunder, trespassed unto the said parcels while fraudulently misrepresenting that, they were executing Operation Vijiji. That the defendants have continued to use such parcels of land for cultivation of seasonal crops to date. That the defendants purported to allocate themselves the following parcels of land which they occupy to date ... [the details of parceled out pieces of land omitted]

89. That sometime in the month of September, 2011 the Plaintiff came to realize that the defendants had fraudulently misrepresented and continued to actively misrepresent that the various parcels of land pleaded in Paragraph 19 (sic) hereof were allocated to them by the authorities during Operation Vijiji. At the same time the Plaintiff also came to learn that Malula Village was not covered by Operation Vijiji (Villagisation), the Plaintiff's land was not designated for Operation Vijiji or at all. Particulars of fraudulent misrepresentation:-

(i) That in the year 1974/1975/1976 the defendants produced a document titled block allocation purporting to show that the Plaintiff's farm was covered by Operation Vijiji while in fact it wasn't. A copy of the said document is attached hereto and marked SA-4.

(ii) That on or about the 23rd day of October, 1985 the defendants procured the fourteenth defendant Chairman to write and seek assistance from the District Authorities to perfect the alleged block allocation carried out in 1974/1975/1976. A copy of the letter is attached hereto and marked SA-5.

On account of the facts pleaded hereinabove the Plaintiff as well as the previous administrators mistakenly believed the defendants' imposition and this prevented them from knowing of their rights, ***the Plaintiff's claim is not time-barred.***"

[Emphasis added]

The respondents, on their part, denied the above claims through their joint written statement of defence thus:

*"8. **THAT** the Defendants vehemently denies (sic) and disputes (sic) the allegations of trespass by all those defendants who have been referred to in Paragraph 88 of the Plaint ....*

*9. **THAT** the Defendants in further answer to Paragraphs 87 and 88 of the Plaint, state that the alleged claim by the Plaintiff that he acquired the land in dispute by clearing village land, and possessed the same and cultivated thereon is just a mere ruse and bare assertion .... The Defendants aver that the land in dispute was never at any point in time allocated to a single person; rather the land in dispute was allocated in blocks to individual groups. Copy of letter Ref. No. F.1014 dated 13/11/2012 is hereby attached and marked as Annexure 'D3.'*

*10. **THAT** the Defendants vehemently denies (sic) and disputes (sic) the spurious contents of Paragraph 89 of the Plaint and put the Plaintiff to the strictest proof of all her allegations thereon."*

The question that we ask ourselves is whether the High Court was justified in sustaining the preliminary objection on the basis of the above averments.

At this point, we deem it necessary to remark that this Court has had many occasions in which it considered the nature of a preliminary objection and endorsed the long standing position stated in **Mukisa Biscuits** (supra) – see, for example, the decisions in **National Insurance Corporation of (T) Limited & Another v. Shengena Limited**, Civil Application No. 20 of 2007; and **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (both unreported). In **Mukisa Biscuits** (supra) at page 700, Law, J.A, observed that:

> *"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 pleadings, and which, if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission*

that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Concurring, Sir Charles Newbold, P., added, at page 701, that:

"A preliminary objection is in the nature of what used to be a demurrer. ***It raises a pure point of iaw which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained*** *or if what is sought is the exercise of judicial discretion."*[Emphasis added]

We have made bold the text above to emphasize that a preliminary objection may only be raised on a pure question of law. To discern and determine that point, the court must be satisfied that there is no proper contest as to the facts on the point. The facts pleaded by the party against whom the objection has been raised must be assumed to be correct and agreed as they are *prima facie* presented in the pleadings on record. In this regard, we made it clear in **Mohamed Enterprises (T) Limited** (supra) that:

> *"... where a preliminary objection raised contains more than a point of law, say law and facts it must fail (see* ***OTTU and Another vs Iddi Simba, Minister for Industries and Trade and Others*** *[2000] TLR 88). For, factual issues will require proof, be it by affidavit or oral evidence."*

As already indicated, the point of law raised before the High Court was that the Plaintiff's claim for ownership and possession of the disputed land was time-barred. The Court sustained the objection on the basis of the following reasoning:

> *"Going through Para. 89 and the attached documents does not demonstrate any fraud as alleged to be committed by the defendants as the document 'SA4' does not show who prepared them and for what purpose and was addressed to who. Also document 'SA5' is about land dispute in Malula village. Therefore,* ***there is no fraud demonstrated in the pleadings and therefore section 26 of the Law of Limitation Act cannot rescue the situation at hand.***" [Emphasis added]

We think that the reasoning by the High Court was manifestly faulty. The appellant did not have to demonstrate or prove fraud in her Plaint. What she needed to do at the pleading stage was stating facts on which her claim was founded, which in this matter included an allegation of fraud. We agree with Mr. Maro and seemingly conceded by Mr. Ojare that the learned Judge slipped up by looking at annexures SA-4 and SA-5 as "proof" of the alleged fraud. Had the learned Judge considered the preliminary objection by assuming that the facts pleaded by the appellant in Paragraphs 88 and 89 were correct, she would not have sustained that objection. In our view, the pleaded facts in the two paragraphs were to the effect that although the respondents invaded and parceled out the disputed property between 1974 and 1976, the appellant's claim of ownership and possession was not time-barred because it was only in September, 2011 that she became aware of the fraud perpetuated by the respondents in acquiring the disputed land. It is plain that on the basis of these facts she pleaded exemption from the web of the twelve years' limitation on the ground of fraud in consonance with

section 26 of the Law of Limitation Act, Cap. 89 RE 2002. We pause here to reproduce the aforesaid provisions of section 26 thus:

> *"Where in the case of any proceeding for which a period of limitation is prescribed-*
> *(a)* ***the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent****, or of any person through whom such party or agent claims; or*
> *(b) the right of action is concealed by the fraud of any such person as aforesaid; or*
> *(c) the proceeding is for relief from the consequences of a mistake,* ***the period of limitation shall not begin to run until the plaintiff has discovered the fraud*** *or the mistake, or could, with reasonable diligence, have discovered it."* [Emphasis added]

Whether or not the appellant's claim of exemption from limitation was justifiable was disputed by the respondents in their joint written statement of defence. On that basis, the facts on the point of preliminary objection were subject to a contest, and so the High Court could not determine the point at the preliminary stage. We are thus minded to find the allegations contained in Paragraphs

88 and 89 as facts calling for proof at the trial. Accordingly, we find merit in the two grounds of appeal, which we uphold.

In the upshot, we allow the appeal and remit the record to the High Court for it to proceed with the suit on the merits before another Judge. Costs shall abide by the outcome in that suit.

DATED at **ARUSHA** this 25th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. M. KULITA
DEPUTY REGISTRAR
COURT OF APPEAL