

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 104 OF 2020

FRANK LIONEL MAREALLE APPELLANT

VERSUS

**JOSEPH FAUSTINE MAWALA (As Legal Representative of
JENNIFER P. LYIMO, Deceased) RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Moshi)**

(Sumari, J.)

**Dated 25th day of October, 2017
in
Land Appeal No. 23 of 2017**

JUDGMENT OF THE COURT

29th November & 3rd December, 2021

LEVIRA, J.A.:

The appellant, Frank Lionel Marealle was aggrieved by the decision of the High Court of Tanzania at Moshi (Sumari, J.) (which shall be referred herein as the first appellate court) in Land Appeal No. 23 of 2017 which overturned the decision of the District Land and Housing Tribunal for Moshi at Moshi (the DLHT) in Land Application No. 14 of 2014. In that Application, the appellant emerged victorious after being unsuccessfully sued by the respondent as legal representative of Jennifer P. Lyimo (the deceased) for illegal eviction of the

respondent and his relatives from a matrimonial house of the deceased. The said house is located at Plot No. 26 Block D, Himo Urban Area in Moshi Kilimanjaro (the land in dispute), which the appellant alleged to have legally purchased from the late father of the respondent. Aggrieved, the appellant has preferred the current appeal.

Briefly, as a background, this appeal traces its origin way back in 1987 when the appellant herein purchased the land in dispute from the late father of the respondent, one Faustine P. Lyimo (the seller) and proceeded to register it in his name under Land Office No. 93281, Himo Urban Area, Moshi, Kilimanjaro Region allegedly without the knowledge of the then wife of the seller (the deceased). Later, the appellant demanded vacant possession of the land in dispute by way of eviction after having won in a suit which he had instituted against the seller before the Kilimanjaro Regional Housing Tribunal (Application No. 47 of 1987). In the process of evicting the family of the seller from the land in dispute, that is when it came into the knowledge of the deceased that their matrimonial house had been sold to the appellant without her knowledge and consent. The deceased appealed against the decision of Kilimanjaro Regional Housing Tribunal vide Appeal No. 42 of 1988 and she won to the extent that, the order of the Regional Housing Tribunal evicting her from the land in dispute

was set aside. However, before completion of re-registration process of the land in dispute to the name of the original owners in the years 2000 and 2011 the spouses (Mrs & Mr. Faustine P. Lyimo) respectively, passed away.

Thereafter, the respondent applied for and was appointed by Himo Primary Court to be an administrator of the estate of the late Jennifer P. Lyimo in Probate No. 5 of 2012. In that capacity, the respondent sued vide Land Application No. 14 of 2014 against the appellant for a declaration that the land in dispute is part of the estate of the late Jennifer P. Lyimo; that the appellant was a trespasser on that property; that permanent injunction against the appellant and his agents from interfering and or doing any activities in the land in dispute be issued; general damages and costs of the suit. In its decision, the DLHT held that the said Faustine P. Lyimo sold the land in dispute to the appellant herein after acquiring consent of his late wife (the deceased). Therefore, the DLHT declared the appellant the rightful owner of the disputed land and dismissed the suit. The respondent was not satisfied by that decision and thus he successfully appealed to the High Court in Land Appeal No. 23 of 2017 as intimated above. Before us the appellant has presented the following grounds of appeal: -

- 1. That the High Court erred in law and fact in proceeding as if the purported marriage between Jennifer P. Lyimo (deceased) and the seller was proved in any shape or form.*
- 2. That the High Court erred in law and in fact as a Supervisory Court in failing to appreciate that the proceedings (i.e the Application filed and pursued by the respondent herein) in the DLHT were time barred.*
- 3. That the High Court erred in law and in fact in failing to appreciate that the respondent herein did not have the requisite locus standi to sue for want of consent by Jennifer P. Lyimo (deceased).*
- 4. That the High Court erred in law and fact as a supervisory Court in failing to appreciate that the proceedings in the Primary Court of Himo at Moshi which granted the respondent herein letters of administration which ultimately enabled the respondent to pursue Land Application No. 14 of 2014 in the DLHT were time-barred for having been pursued beyond 3 years after the death of Jennifer P. Lyimo.*
- 5. That the High Court erred in law and in fact in failing to appreciate that the respondent herein did not have the requisite locus standi to sue on a land different materially with those on exhibit P3.*

At the hearing of the appeal, the appellant was represented by Mr. Omary Msemo, learned advocate whereas, the respondent who was also present in Court was represented by Mr. Michael Lugaiya, also learned advocate.

Mr. Msemo prayed at the commencement of the hearing to abandon the 3rd ground of appeal. He clustered the 2nd, 4th and 5th grounds of appeal as he said, they all touch on the jurisdiction of the DLHT and the first appellate court in entertaining this matter. He went on submitting that, it is trite law that a question relating to the jurisdiction of the court in dealing with any matter can be raised at any time. Therefore, it is appropriate for him to raise it at this stage of the case.

Submitting on the first ground of appeal, he contended that the marriage between Faustine P. Lyimo and Jennifer P. Lyimo was not proved at any point in time. Therefore, he argued that it was wrong for the first appellate Judge to hold at page 163 of the record of appeal that the land in dispute was a matrimonial property which required the wife's (Jennifer) consent before its disposition. He argued further that the issue of consent and interest in the land in dispute was raised *suo mottu* by the Judge without according the parties their right to bring evidence to prove whether the marriage existed between

the two. In support of his argument, he cited the case of **Pili Ernest v. Moshi Musani**, Civil Appeal No. 39 of 2019 (unreported) in which the Court insisted on the right to be heard.

In respect of the second ground of appeal, Mr. Msemo faulted the first appellate Judge for failure to appreciate that the matter before the DLHT in Land Application No. 14 of 2014 was time-barred taking into consideration that, the late Jennifer P. Lyimo passed away in 2000. His argument was based on Item 22 to the 1st Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019 (the Law of Limitation) that the time limit for an action to recover land is 12 years so the application was late for at least two years. He went on to state that the respondent was aware of the dispute over his mother's property, but he waited until 2014 when he instituted the case at the DLHT while time to do so had already lapsed. Therefore, he argued, the DLHT had no jurisdiction to entertain that matter. In addition, he contended that in terms of section 42 (1) (a) of Land Disputes Courts Act, Cap. 216 R.E. 2019 (the Land Disputes Act), the High Court had supervisory jurisdiction so, it ought to have invoked that power on the issue of time bar to the DLHT but it did not do so despite it being raised by the counsel for the appellant. Therefore, it was Mr. Msemo's submission that under the circumstances, the first appellate court could not proceed to

entertain that appeal. He backed up his argument with the decision of the Court in **Aloyce James Kasawe** (*the Administrator of the estate of the late James Mwita Kisawa (deceased)*) v. **William Mufungo Mwanga** (*the Administrator of the estate of the late Juliana M. Musiba (deceased)*), Civil Reference No. 5 of 2018 (unreported), where it was stated that a jurisdictional issue can be raised at any time. He thus urged us to find that, since the trial tribunal had no jurisdiction, the proceedings in the first appellate court was a nullity.

Regarding the fourth ground of appeal, Mr. Msemo submitted that the Primary Court of Himo at Moshi had no jurisdiction in terms of Rule 31 of the Probate Rules made under Section 9 of the Probate and Administration of Estates Act Cap 33 R.E. 2002 (the Probate and Administration Act) to grant the respondent letters of administration in Probate No. 5 of 2012 after lapse of three years from when the deceased (Jennifer P. Lyimo) passed away in 2000. He submitted further that since the Primary Court of Himo did not furnish reasons for issuing such letters after the prescribed time, the respondent lacks *locus standi*.

Mr. Msemu argued in support of the fifth ground of appeal to the effect that, the first appellate court erred in law and fact for failing to appreciate that the respondent had no *locus standi* to sue on a matter which he failed to exhibit an interest in it. He cited the case of **Omary Yusuph (legal representative of the late Yusuph Haji) v. Albert Munuo**, Civil Appeal No. 12 of 2018 (unreported). It was Mr. Msemu's further argument that the respondent derived powers to sue as a legal representative from the decision of Himo Primary Court in Probate No. 5 of 2012 (exhibit P3), in which decision, properties of the deceased were mentioned. However, he said, the land in dispute is not one of the properties mentioned therein. Therefore, according to him, the DLHT had no jurisdiction to deal with the property which is not part of exhibit P3.

Finally, based on his submission, Mr. Msemu urged us to allow the appeal.

Replying for the respondent, Mr. Lugaiya submitted on the first ground of appeal that the marriage between Jennifer P. Lyimo (deceased) and the seller of the land in dispute (Faustine P. Lyimo) was proved and that is why through Appeal No. 42 of 1988 to the Housing Appeals Tribunal at Moshi the sale of the

land in dispute was nullified as per the Decree (exhibit P5), found at page 73 of the record of appeal. He went on to submit that the appellant did not appeal against that decision and he did not prove that he legally bought the land in dispute from the seller.

The learned counsel argued further that having won the appeal against the appellant, the deceased sought and the directives were issued from the Prime Minister's Office for revocation of the Certificate of Occupancy of the land in dispute issued to the appellant as it can be seen at page 64 of the record of appeal. According to Mr. Lugaiya, it was wrong for the appellant to wait for the death of Jennifer (deceased) on 5th May, 2000 and sue the husband in the DLHT vide Application No. 114 of 2007 filed on 11th September, 2007 without making any reference to the Appeal No. 42 of 1988 which he had lost. He presented his claim before the DLHT as a new case between him and the seller. The learned counsel submitted further that it was so unfortunate that Mr. Lyimo filed his defence (written reply to the application), but the DLHT recorded it as a consent judgment at page 20 of the record of appeal. However, he insisted, that the decision was based on wrong facts.

It was Mr. Lugaiya's further submission that after the decision of the DLHT in Application No. 114 of 2007, the respondent and one Martin Faustine Mawala (not a party to this appeal) filed Application No. 82 of 2012 before the DLHT seeking among other orders, a declaration that the land in dispute is the property of the applicant (the respondent herein) but their application was struck out. Consequently, they were evicted from the land in dispute. Hence, the respondent filed Application No. 14 of 2014 for a declaration that the land in dispute is part of the estate of the deceased and that the appellant is a trespasser thereon as intimated above. However, he said, based on a wrong assessor's opinion that the deceased consented to the sale of the land in dispute to the appellant without any proof, the DLHT dismissed the application. As a result, the respondent challenged the decree of the DLHT and the fact that the appellant ignored the decision of the Housing Appeals Tribunal at Moshi in Application No. 42 of 1988 and processed the Certificate of Occupancy which does not show how he became the first owner of the land in dispute, as the certificate does not show any transfer. Therefore, it was Mr. Lugaiya's view that the said certificate might have been obtained by fraud.

Submitting on the 2nd and 4th grounds of appeal, Mr. Lugaiya stated that the appellant was playing delaying tactics because he started with the mother

of the respondent until when she died, then sued the husband of the deceased and now is challenging the respondent's representation. According to the learned counsel, the respondent did not need to have power of attorney to represent his late mother. He is a legal representative and since his representation was not challenged all along up to the first appellate court, the doctrine of estoppel comes into play as it is stated in **Issa Athuman Tojo v. Republic**, Criminal Appeal No. 54 of 1996 (unreported).

In respect of the fifth ground of appeal, Mr. Lugaiya submitted that, the land in dispute was identified by documents and it is the same land the appellant went to register after the death of Jennifer and is the same land the respondent sued to recover for the family. Therefore, the doctrine of estoppel applies and in his view the appellant came to the Court as an afterthought. To support his argument, he cited the following cases: **Dar es Salaam Water and Sewerage Authority v. Didas Kameka & 17 Others**, Civil Appeal No. 233 of 2019; **Galus Kitanya v. Republic**, Criminal Appeal No. 196 of 2015 and **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (all unreported).

It was his conclusion that the first appellate Judge covered very well all the issues raised before her. She stated at page 163 of the record of appeal that consent was not obtained before the execution of sale. Besides, he said, the issue of marital status of the deceased and the seller was not raised. However, the marriage between the two was proved to the satisfaction of the court.

Mr. Msemu made a brief rejoinder starting with the letter found at page 63 of the record of appeal that the same was not admitted as exhibit as the respondent presented a copy as it can be seen at page 92 of the record of appeal.

Regarding Application No. 114 of 2012 Mr. Msemu said, the appellant won the case and that was the essence of eviction of the respondent from the land in dispute. The said decision was not appealed against by the respondent or anyone else to date.

As to the argument by Mr. Lugaiya that the Certificate of Occupancy was probably obtained by fraud, Mr. Msemu argued that the same was never raised previously, before the DLHT or the first appellate court; therefore, he urged us to accord it no weight.

According to the learned counsel, the case of **Issa Athuman Tojo** (supra) cited by the counsel for the respondent is distinguishable because the submission in the current appeal based on the issue of jurisdiction which can be raised at any time. Likewise, he said, all decisions cited by Mr. Lugaiya on the issue of estoppel are distinguishable. Therefore, he urged us to consider his submission and allow the appeal.

We have dispassionately considered the rival submissions by the counsel for the parties and have gone thoroughly through the grounds and record of appeal. Issues for our consideration are as follows; one, whether the marriage between the deceased and the seller of the land in dispute had been an issue in dispute all along; two, whether the application filed and pursued by the respondent against the appellant at the DLHT was time-barred; three; whether the proceedings before the Primary Court of Himo at Moshi in Probate No. 5 of 2012 which granted the respondent letters of administration were time-barred and four; whether the respondent had locus standi to sue in respect of a land different from the one which was mentioned in exhibit P3 (the decision of Himo Primary Court in Probate No. 5 of 2012 which granted the respondent letters of administration).

Starting with the first issue as to whether the marriage between the deceased and the seller of the land in dispute had been an issue in dispute all along, we wish to state at the outset that the issue of marriage between the two did not feature in any proceedings before the lower courts. However, the question as regards the form of their marriage which the appellant invites us to determine, is a matter of fact which in our view, is misconceived. The little we can gather from the record is that the appellant had sued and won the case against the deceased over the land in dispute claiming ownership of the same before Kilimanjaro Housing Tribunal in Application No. 47 of 1987. However, the decision in that application was overturned by the decision of Housing Appeals Tribunal at Moshi vide Appeal No. 42 of 1988 which was filed by the deceased wherein, the appellant was restrained from evicting the deceased recognizing it as matrimonial property, the decision that stands to date as the same has never been contested in any court of law.

Furthermore, it is noted from parties' pleadings in Application No. 14 of 2014 at pages 50 and 59 respectively, that the respondent at paragraph iii of the application pleaded that the seller unlawfully and or without consent of the deceased sold the disputed property to the appellant. In reply, in his Written Statement of Defence (the WSD) at the third paragraph, the appellant only

claimed that he lawfully bought the said land from the seller. The issue of marital status was not pleaded and therefore it cannot be raised now. It is settled position that parties are bound by their pleadings; see - **Charles Richard Kombe t/a Building v. Evarani Mtungi**, Civil Appeal No. 38 of 2021; **Barclays Bank (T) LTD v. Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported). In the former case the Court stated: -

"It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings."

In the circumstances, the issues as regards to the existence or form of marriage between the deceased and the seller of the land in dispute should not hold us anymore. It fails.

We now turn to the second issue as to whether the application filed and pursued by the respondent against the appellant before the DLHT was time-barred. The appellant's counsel argument in this ground is based on Item 22 to the First Schedule of the Law of Limitation Act which provides that the period of limitation for instituting proceedings for suit to recover land is 12 years. We find the appellant's claim in this ground unfounded. The law is very clear that

computation of time (12 years) accrues from the date on which the cause of action arose in terms of section 5 of the Law of Limitation. As it has been ably demonstrated above, the cause of action which the appellant challenges against the respondent arose when the appellant evicted the respondent from the disputed land. It is our observation that the appellant treats the respondent separate from the deceased's estate. The dispute between the appellant and the deceased traces its background way back in 1987. Therefore, in our view, since the appellant's claim of ownership of the dispute land is based on the purported sale between him and the seller, the question of adverse possession does not arise, see – **Registered Trustees of Holy Spirits Sisters Tanzania v. January Kamili Shayo and 136 Others**, Civil Appeal No 193 of 2016; and **The Hon. Attorney General v. Mwahezi Mohamed** (*As Administartor of the Estate of the late Dolly Maria Eustance*) **& 3 Others**, Civil Appeal No. 391 of 2019 (both unreported).

It should be noted, the fact that a party claims adverse possession does not oust jurisdiction of the court to entertain the matter. Instead, time bar which limits court's jurisdiction is when a suit is time-barred. In the present case, there is no point in time it can be said that there was delay in taking action by the current respondent or his late parents to deserve application of

Item 22 to the First Schedule of the Law of Limitation Act as the appellant would wish. The appellant's argument that the DLHT had no jurisdiction to entertain Application No. 14 of 2014 is unfounded and lacking in merit.

We understand that the appellant's counsel argued the second ground of appeal together with fourth ground. His aim was also to challenge *locus standi* of the respondent. Without consuming a lot of our energy, this ground is as well misconceived. The issue regarding letters of administration was not raised before the High Court sitting as a land court. Certainly, it could not be raised because that was not the proper forum. Under the circumstances, the High Court cannot be blamed for not deciding as to whether the proceedings before the Primary Court of Himo at Moshi in Probate No. 5 of 2012 which granted the respondent letters of administration were time-barred.

Our response to the fourth issue as to whether the respondent had *locus standi* to sue in respect of a land different from the one which was mentioned in exhibit P3 (the decision of Himo Primary Court in Probate No. 5 of 2012 which granted the respondent letters of administration) is straight forward. Item 5 to the Fifth Schedule of the Magistrates' Court Act Cap 11 RE 2019 (the MCA) provides for powers and duties of administrators appointed by Primary Courts (as the respondent herein), thus: -

"An administrator appointed by a primary court shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts and costs of the administration and shall thereafter distribute the estate of the deceased to the persons or for the purposes entitled thereto and, in carrying out his duties, shall give effect to the directions of the primary court."

Item 6 to that schedule provides that: -

"An administrator may bring and defend proceedings on behalf of the estate."

In the light of the above provisions, the powers of the respondent as the administrator of the deceased's estate are not confirmed on what is mentioned in exhibit P3 as argued by the appellant but extend to the whole estate of the deceased – see **Joseph Shumbusho v. Mary Grace Tigerwa & 2 Others**, Civil Appeal No. 183 of 2016 (unreported). Apart from that, for the sake of argument, it is not true that the land in dispute is not mentioned in the said exhibit as alleged by the appellant. According to exhibit P3, the land in dispute is identified as *"nyumba ya marehemu Himo, Kitalu D. Namba 26"* the same was also pleaded by the appellant in Application No. 114 of 2007 as *"Location and address of the suit premises/Land: Plot No. 26 Block D. Himo Urban."*

Therefore, we agree with Mr. Lugaiya that the land in dispute remained the same throughout and even if it would have been different, so long as the respondent sued in his capacity as a legal representative his *locus standi* cannot be challenged. This ground was raised out of context and it must fail.

For the reasons stated above, we find the appeal is without merit. As a result, we dismiss it in its entirety with costs.



DATED at **ARUSHA** this 3rd day of December, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of Mr. Gwakisa sambo, holding brief for Mr. Peter Kibatata, learned counsel for the Appellant and Mr. Michael Lugaiya, learned counsel for the Respondent, is hereby certified as true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL