IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MWARIJA, J.A. And MKUYE, J.A.)

CIVIL APPEAL NO. 158 OF 2015

THE REGISTERED TRUSTEES OF ROMAN CATHOLIC ARCHDIOCESE OF DAR ES SALAAM ..... APPELLANT

VERSUS

SOPHIA KAMANI ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam

(Kalombola, J.)

dated the 24th day of February, 2014
in
Land Appeal No. 68 of 2013
.....

JUDGMENT OF THE COURT

10th & 27th October, 2017

LUANDA, J.A.:

This is a second appeal. The dispute in this appeal centres on a piece of land known as Plot No. 128 Block A Manzese Area, Dar Es Salaam City.

The historical background giving rise to this appeal is this. In the District Land and Housing Tribunal of Kinondoni sitting at Mwananyamala (The Tribunal) SOPHIA KAMANI (henceforth Respondent) sued THE

REGISTERED TRUSTEES OF THE ARCHDIOCESE OF DAR ES SALAAM (henceforth the Appellant) for recovery of that piece of land. The respondent sued as administratrix of the estate of the Late MARIA KAMANI who allegedly died intestate in Dar Es Salaam in 1976. In their reply to the application lodged by the respondent, the appellant, *inter alia*, raised a preliminary objection on a point of law to the effect that the claim was time barred. It was contended that since going by the respondents pleadings, the cause of action arose in 1978 when the husband of the deceased one Petro Muswa allegedly sold the plot to the appellant and the respondent filed the application in the Tribunal in 2005, a period of more than 25 years; and since a period for a suit to recover land is 12 years by virtue of Part I, item 22 of the schedule to the Law of Limitation Act, Cap. 89 R.E. 2002 (the Act), the claim for recovery of that piece of land is time barred. The Tribunal was satisfied that the point of law raised had merit. The learned trial Chairman struck out the application with no order as to costs.

Both parties were dissatisfied with the decision of the Tribunal. On the part of the respondent she was not satisfied that her claim was time barred. On the other hand, the appellant was not satisfied with the order of striking out the suit on the ground that it was time barred. The same

ought to be dismissed. Further, since the appellant was the winner they were entitled to be awarded costs.

The High Court (Land Division) overturned the decision of the Tribunal. The learned judge (Kalombola, J.) reasoned out that because the husband of the deceased one Petro Muswa sold the property which is the subject of the estate of the deceased and before administration proceedings were conducted, then the husband of the deceased had no authority to do so. She said there was fraud. She went on to say, once it is shown the transaction was vitiated by fraud, the law of limitation does not come in. To put it differently, that the time of 25 years which had lapsed does not bar the respondent from filing a claim for recovery of the suit land. She did not cite any section to that effect.

Be that as it may, as to the cross-appeal lodged by the appellant in respect of dismissal of the claim in lieu of striking out and the awarding of costs, the learned judge said she found no reason to discuss them. She allowed the appeal of the respondent. She set aside the decision of the Tribunal and ordered the matter to be heard on merits before another Chairman.

Aggrieved by the decision of the High Court (Land Division), the appellant has come to this Court by way of on appeal. The appellant has raised the following four grounds of appeal, namely:-

1. *That the Honourable Judge of the High Court of Tanzania (Land Division) erred in law and in fact in considering the issue of fraud which was never pleaded in the Respondent's Application before the District Land and Housing Tribunal for Kinondoni District. It will be contended at the hearing of the appeal that there was no evidence on the face of the record to show that the Appellant acquired the landed property by fraud.*
2. *That the Honourable Judge of the High Court of Tanzania (Land Division) erred in law by failing to hold that the respondent's Application was time barred.*
3. *That the Honourable High Court (Land Division) erred in law and in fact in failing to consider the cross-Appeal preferred by the Appellant herein.*
4. *The decision of the High Court (Land Division) is otherwise faulty and wrong in law.*

In this appeal, the appellant was represented by Mr. Senen Mponda, learned advocate; whereas Mr. Deiniol Msemwa, learned counsel

represented the respondent. The parties in this appeal filed their written submissions through their advocates. On the day of hearing of the appeal, the advocates highlighted the contents of their submissions.

We start with the first ground of appeal. Basically Mr. Mponda submitted that the parties are bound by their pleadings and that they cannot be allowed to raise a different or fresh case altogether. In this case, he said, the issue of fraud was not pleaded at all in the pleadings. The learned High Court Judge raised it on first appeal following the submission made by the respondent's advocate and proceeded to dispose of the appeal relying on that new issue altogether. He said that the approach taken by the learned High Court judge was wrong. In actual fact there is no fraud in this case, he concluded.

Responding, Mr. Msemwa said though it is not specifically pleaded that fraud was committed, the acts done by the appellant as stated in paragraph 7 (ii) in the application of the respondent and in particular as the appellant was aware that the property belonged to MARIA KAMANI (the deceased) who passed away in 1976 and the sale transaction took place in 1978 the vendor being PETRO MUSWA, that amounted to fraud. It

is his submission that the learned judge was right to decide the way she did, he charged.

In order to appreciate the nature of the claim of the respondent as stated in the application and lodged in the Tribunal we find it appropriate to reproduce core paragraphs and reply of the appellant thereof. The relevant paragraphs are 3 and 7 which provide as follows:-

> *3. That the Applicant claim against the Respondent is for vacant possession regarding Plot No. 128 Block "A" Manzese Kinondoni District, permanent injunction orders against any person whatsoever and a declaratory order that the said Plot belongs to the late Maria Kamani whose estate are now being administered by the Applicant.*
>
> *7. (i) The suit premises was personally acquired by the deceased who happened to have no children and had the property in her physical occupation even before marriage.*
>
> *(ii) That after the death of the deceased the respondent in collaboration with the deceased husband one PETRO MUSWA executed a sale agreement whereby the said*

property which was not surveyed by then was sold to the respondent in 1978, the Vendor having no legal powers and authority to dispose of the said property.

(iii) That after sale was concluded the respondent illegally and without colour of right conducted a survey on the piece of land purchased and obtained a letter of Offer and later on the certificate of Occupancy No. 37985 in the name of THE REGISTERED TRUSTEES OF ARCHIDIOCESE OF DAR ES SALAAM of P. O. Box 20142 Dar es Salaam/ This was on 28th March, 1988.

(iv) The respondent is now alleging to be the owner of the said piece of land which has never in the real and legal sense been sold by the deceased or deceased lawful representative to the respondent ever. All documents of title over the suit premises are in the hands of the Respondent.

The reply of the appellant to those paragraphs are contained in paragraphs 2, 6, 7 and 8 which are to this effect:-

2. *That the contents of paragraph 3 of the emended application are vehemently denied and the Applicant is put to strict proof thereof. The Respondents state that they are the lawfully owners of the Plot No. 128 Block "A" Manzese registered under a certificate of occupancy, Title Deed No. 37985. The Respondents further contend that the previous owner of the said piece of land disposed it to them as an un-surveyed land way back in 1973. That after the said disposition the Respondents then applied for and obtained a certificate of title from the Commissioner for Lands with effect from 1st January, 1988. Copies of the Title Deed No. 37985 and Land Official Search Report dated 12th November, 2002 are annexed hereto and collectively marked Annexture "AD-1" in relation to which the Respondents crave for leave of this Honourable Tribunal to refer to it as forming part of the Reply to the Amended Application.*

6. *That the contents of paragraph 7 (i) of the amended application are denied and the Applicant is put to strict*

proof thereof. The Respondents contend that at all material time the Applicant did not and does not have any legitimate interest in respect of Plot No. 128 Block A Manzese registered under a certificate of Occupancy, Title Deed no. 37985.

7. *The contents of paragraph 7 (ii) and (iii) of the amended application are denied and the Applicant is put to strict proof and Respondents repeat the averments made in paragraph 6 above.*

8. *The contents of paragraph 7 (iv) of the amended application are denied and the Applicant is put to strict proof thereof. At the hearing of the application the Respondent shall contend and prove that it was indeed the late Maria Kamani herself who sold the land to the Respondents.*

In her judgment, the learned judge said, *inter alia*, we quote:-

> *"It is their submission that the tribunal while striking out the application did not consider and decide on*

the issue of fraud raised by appellant in the submission at the tribunal."

Indeed the Tribunal did not entertain it because it was not pleaded. The Tribunal was correct to do so. This is because it is trite principle of law that parties are bound by their pleadings. In civil litigation, it is through pleadings where parties establish their cases they intended to prove. So, it is the duty of the parties to the case to clearly and categorically establish their cases before adjudication. In that context therefore, pleadings are road map so to say to any given civil litigation which should show the destination the parties to the case intended to reach (*Terminus a quo, terminus ad quem*). The Supreme Court of Nigeria in **Adetoun Oladeji (NIG) V Nigeria Breweries PLS** S/CI/2002, a case provided by Mr. Mponda, when dealing with a similar issue said as follows:-

"...it is now a very trite principle of law that parties are bound by the pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the

pleadings goes to no issue and must be disregarded."

We fully subscribe to the holding of that case. Further, according to **Mogha's Law of Pleading in India**, 10th Edition at page 25, the learned author said:-

"The Court cannot make out a new case altogether and grant relief neither prayed for in the plaint nor flows naturally from the grounds of claim stated in the plaint." (See **Antony Ngoo & Another V Kitinda Kimaro**, CAT Civil Appeal No. 25 of 2014 (unreported))

Mulla, The Code of Civil Procedure 17th Edition stated at page 267 as follows:-

"...the normal rule is that the parties should adhere to the allegations and grounds set out in their pleadings unless an amendment permissible on certain established ground is allowed by the Court."

As to the reason why the parties should not go beyond or outside their pleadings, **Mulla** (*supra*) on page 267 – 268 said, we quote:-

> *"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. To attain this end, the plaintiff should state in his plaint all the facts which constitute his cause of action. No amount of proof can substitute pleadings which are the foundation of claim of a litigating party."*

It is in the record that when Mr. Msemwa addressed the Court, he said that the issue of fraud was not specifically pleaded in the application. Indeed, the issue of fraud was not pleaded at all. The issue of fraud was raised in the Tribunal at the time of submission. Submissions are arguments presented to support or oppose the matter in dispute; they are not part of the pleadings. It is clear, therefore, that the learned judge was wrong when she considered the issue of fraud which was not pleaded. Her finding that the appellant acquired the said property fraudulently cannot stand. In any case that was a mere assertion; it was not evidence.

We entirely agree with Mr. Mponda that the approach taken by the learned judge is not proper. In actual fact the learned judge took upon herself to amend the basis of the cause of action without application from the respondent. In our legal system it is the responsibility of the parties and not anyone else to set the agenda for the trial by their pleadings. In **Jones v. National Coal Board** (1957) 2 QB5, again it was Mr. Mponda who cited the case, Lord Denning made the following observation, we quote:-

> *"In the system of trial which we have evolved in this country, the judge sits* ***to hear and determine the issues raised by the parties****, not to conduct an investigation or examination on behalf of society at large, as happens, we believe in some foreign countries."*
> [Emphasis supplied]

That is for the first ground of appeal. We now move to the second ground of appeal as to whether at the time of filing the claim in the Tribunal, the matter was time barred. Indeed this is the point of law raised as a preliminary objection by the appellant.

Arguing in support of the finding of the Tribunal, Mr. Mponda said the finding of the Tribunal was correct that the application was filed outside the time of 12 years for recovery of land prescribed by the Act. Elaborating, he said according to the application of the respondent, the appellant bought the piece of land in 1978. The respondent is contesting the appellant's ownership in 2005 that is 27 years later. And the period began to run immediately after the suit property was allegedly sold to the appellant in 1978. Since the time for recovery of land is 12 years as provided by the Act, the application was filed outside the said time. The

finding of the High Court (Land Division) overturning that decision was not correct, he charged.

Responding, Mr. Msemwa said the preliminary point raised was not a pure point of law. He said all matters that were pleaded in paragraphs 7(ii) and 7 (iii) of the application were disputed by the appellant. In particular he said the appellant averred that the land in dispute was sold to them by MARIA KAMANI (the deceased) in 1973. He went on to say that the respondent became aware of the transaction during the application for letters of administration in 2002. The matter was not time barred, he submitted.

Having carefully read the submissions of the parties we think the crux of matter in this appeal depend on the correct interpretation as to what amounted to a cause of action and when it arose and further what is a preliminary objection. So, then what is a cause of action?

According to **Black's Law Dictionary**, Ninth Edition it defines the terms thus:-

> *"A group of operative facts giving rise to one or more bases for suing; a factual situation that*

entitles one person to obtain a remedy in court from another person."

In **John M. Byombalirwa V Agency Maritime International (Tanzania) Ltd** (1983) TLR 1 the Court stated thus:-

"Rule 1(e) of 0.7 of the Civil Procedure Code, Cap. 33 RE 282 says that the plaint shall contain, inter alia, the facts constituting the cause of action. The expression "cause of action" is not defined under the Code but it may be taken to mean essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit."

Upon reading the facts of the case as pleaded, which is the basis of the respondent's case, it is clear that her case is based on the facts that in 1978 Peter Muswa, sold the plot of land to the appellant without colour of right. The respondent wanted to recover that piece of land. However, she filed her claim after she was appointed as an administratrix of the estate of MARIA KAMANI (the deceased) in 2005. The question is when did the cause of action arise?

In view of the explanation we have given, it is clear that the cause of action arose at the time when the purported sale took place. According to the respondent's pleadings and not of the appellant, it took place in 1978. So, time started to run from 1978.

It is the submission of the appellant that from 1978 to 2005 is a period of more than 25 years. Since the period of 12 years for the recovery of land had lapsed, the claim is time barred. The appellant raised it as a preliminary point of law and the Tribunal sustained it. Is the preliminary point raised not a pure point of law as contended by Mr. Msemwa? What is a preliminary point of law?

In a celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd** (1969) EA 696 the then Court of Appeal of East Africa, speaking through Law, JA said:-

> *"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."*

In overturning the decision of the Tribunal, the High Court (Land Division) said:-

> " *Having gone through the records and pleadings, I am of the considered view that the District Land and Housing Tribunal erred in dismissing (sic) the application for reason that it is time barred. Why am I saying so, I am saying so because the house (sic) in dispute is one which falls in the estate of late Maria Kamani which was sold in 1978 two years after her death which death occurred in 1976."*

Now if the disputed land was sold in 1978 by the husband of MARIA KAMANI (the deceased), then the cause of action acrued from that date and so, that is the period when time started to run as provided under S.5 of the Act. It reads:-

> *5. Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises.*

From above, it is clear that the case of the respondent for recovery of land was lodged beyond the time limit of 12 years. The point raised was a

pure point of law and thus falls within the ambit of preliminary point of law. The suit of the respondent was time barred.

Because of the line of reasoning she took, the learned judge did not consider the cross – appeal in dismissing the suit and awarding of costs to the appellant.

As for dismissal of the suit which is time barred, S.3 (1) of the Act speaks it all. The Section reads:-

> *"3-(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefor opposite thereto in the second column,* ***shall be dismissed*** *whether or not limitation has been set up as a defence."* [Emphasis ours]

In view of the above cited section, which is couched in mandatory terms, the suit ought to have been dismissed.

Finally the order for costs. It is a well known principle that a winner is entitled to costs unless there are exceptional circumstances in not doing so.

In this case, there are no exceptional circumstances which were shown to have existed. So, the appellant is entitled to costs.

All in all, we allow the appeal. We set aside the finding of the High Court. The claim of the respondent was filed beyond the prescribed time of 12 years. We restore the finding of the Tribunal, save the order of striking out and costs. The appellant is to have their costs in the lower courts as well as in this Court.

It is so ordered.

DATED at **DAR ES SALAAM** this 26th day of October, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL