

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU
CIVIL CASE NO 26 OF 2023**

ALI MOHAMMED ABDALLA	1ST PLAINTIFF
SHIFAA MOHAMMED ABDALLA	2ND PLAINTIFF
NASRA MOHAMMED ABDALLA	3RD PLAINTIFF
VS		
AIRTEL TANZANIA LIMITED	DEFENDANT

RULING OF THE COURT

24/04/24 & 19/06/2024

KAZI, J.:

The plaintiffs in this suit, whose names are listed herein above, sue the Defendant, Airtel Tanzania Limited, for trespassing on their land by erecting the telecommunication tower without their consent.

According to the plaint, the plaintiffs, who are siblings, claimed to own a house No. 477, located at Plot No. 0316, in Sokomuhogo Street, Zanzibar, after purchasing it from one Mohammed Abdallah Ubatani on 13th December 2005. They pleaded further that, about 2005, the Defendant, without their consent, entered upon the said property, took possession of part of it, and erected a communication tower. Having noticed the trespass, in 2013 the plaintiffs took the initiative of reporting the matter to Stone Town Conservation and Development Authority and the Land Commission, but their efforts were in vain; thus, they decided to institute this suit and prayed for the judgment on the following orders; -

- a) *Possession of house No. 477 located at Sokomuhogo Street, Mkunazini area in the Stone Town Municipality of Zanzibar.*
- b) *Damages for trespass at the rate of Three Million per month from 2005 until possession is delivered up.*
- c) *That the Defendant to pay the total sum of Tanzania shillings Three million (Tsh. 3,000,000/-) per month as a rent of the Plaintiff's house from the month of 2005 to the date of handing over of the house which makes a total of six Hundred and Twelve Million Tanzania Shillings. (Tsh. 612,000,000/-)*
- d) *That, the Defendant to pay not less than One Hundred and Fifty Million Tanzania Shillings (Tsh. 150,000,000/-) as a general damages for the inconveniences, great anguish, mental and psychological torture suffered by the Plaintiffs, costs incurred by the 1st, 2nd and 3rd Plaintiff for the whole period the Plaintiffs have been fighting for their rights.*
- e) *That, the Defendant to pay the costs of and incidental to the suit.*
- f) *Any other remedy that this Honourable Court deem just and equitable.*

The Defendant opposed the claim through its written statement of defence, which was preceded by the preliminary objection on the point of law that: *'To the extent that the Plaintiff's claim against the Defendant is based on trespass since 2005, and to the extent that this suit was filed on 09/5/2023, in terms of item 29 of part IV of the schedule to the Limitation Decree (Cap 12) this suit is time barred.'*

The hearing of the preliminary objection was through written submission of the parties. The Defendant's submissions were prepared and filed in Court by Mr. Karume Mrisho, learned advocate. In opposition, Mr. Nassor Khamis Mohamed, a learned advocate, prepared and filed the Plaintiff's submission.

Mr. Karume commenced his submission by laying a foundation concerning the objection on account of the limitation of time. Citing the authority in **Moto Matiko Mabanga vs Ophir Energy Plc & Others** (Civil Appeal No. 199 of 2021) [2021] TZCA 599 (22 October 2021), the learned advocate stated that the objection on the time limit is based on pure point of law that touches on the jurisdiction of the Court and its determination does not require ascertainment of facts or evidence but only the review of the plaint and its annexures. He further relied on **Momella Sawmill Company Limited v. Hon. Minister for Natural Resources and Tourism and Others**, Civil Appeal No. 31 of 2017, where the Court of Appeal stated that the nature of a suit may be determined by looking at the statement of facts constituting the cause of action as contained in the plaint as well as the annexures and the relief sought and that it is from the nature of the suit that the period of limitation may be determined.

Thus, Mr. Karume argued, in this matter, according to the plaint, the alleged cause of action is based on trespass, whereas according to item 29 of Part IV of the **Law of Limitation Decree**, Cap 12 (hereinafter the Limitation Decree), claims relating to compensation for trespass upon an immovable property are to be brought within three years of the occurrence of the wrong complained of that is the date of trespass. He

added, under the 3rd column of item 29 of part IV of the schedule of the Limitation Decree, that the period of limitation commences on the date on which the right of action accrues, and that is on the date of trespass. In his view, the right to institute a suit begins to run when the wrong complained occurs. Directing his mind to the instant matter, Mr. Karume argued that, as pleaded under paragraph 7 of the plaint, the wrong occurred in 2005 when the Defendants allegedly entered upon the suit property and erected a telecommunication tower without permission or consent as alleged. Moreover, he averred that the Plaintiff, in their relief number two, prayed for compensation for trespass at the rate of three million per month from 2005 until possession is delivered. It was his submission, therefore, that the accrual of a right of action for a suit founded on compensation for trespass commences from the date when the complained act was committed, which, according to paragraph 7 of the plaint and its relief number two, the wrong complained arose in 2005 when the Defendant constructed a telecommunication tower. Therefore, he maintained that this suit was time-barred.

Finally, Mr. Karume urged the Court to dismiss this suit in terms of Section 3 of the Limitation Decree since, as it was stated in **Mbezi Mgaza Mkomwa vs Permanent Secretary, Prime Minister's Office & Another** (Civil Appeal 27 of 2017) [2020] TZCA 372 (5 August 2020), that under s. 3 of the Law of Limitation Act, when a suit is filed out of the prescribed time of limitation, the Court does not have an option but to dismiss such suit.

In the reply, Mr. Mohammed submitted that the pleading shows that the Plaintiff bought the land from their late father, and after that, the land was demarcated correctly, and boundaries were defined. He argued that the Plaintiffs could not have claimed any proprietary right over the land from the Defendant as they did not have title over the land, considering the fact that their father was the actual owner by then. He maintained that the disputed property was transferred to the Plaintiffs by way of sale on 13th December 2005 with a lot of uncertainties as far as the boundaries of the said land are concerned, the uncertainties which were cleared by the Government on 26th October 2021 when the Government issued to them "Hati ya haki ya matumizi ya ardhi" which defined the boundaries. Mr. Mohammed then argued that the Plaintiffs realized that part of the telephone tower fell on their land at this period.

In his submission, Mr. Mohammed cited the case of **Ibrahim Abdalla (the Administrator of the Estate of the late Hamisi Mwalimu) v. Sleimani Hamis (the administrator the estate of the late Hamisi Abdallah)** which was quoted on **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) E.A. 696, that:

"It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judiciary discretion...."

He then submitted that the limitation on time to sue is based on the rise of the cause of action. Therefore, the cause of action for the plaintiffs to sue arose immediately after the land was demarcated and the boundaries were defined. He maintained that this happened in the year 2021, which situates the Plaintiffs in a position within the limitation of time to sue.

Mr. Mohammed also referred to the case of **Sleimani Hamis (the administrator the estate of the late Hamisi Abdallah)**, (supra) where it was stated that:

"In view of what we have endeavoured to discuss, the question of when the twelve - year limitation period began to run against the Appellant on claim over the disputed house, still requires proof as it cannot be determined at the stage of deciding a preliminary objection as a pure point of law..... "

It was his view, therefore, that the preliminary point of objection raised is of mixed facts and law, and it cannot be categorized as a preliminary point of objection on a pure point of law since the question as to when the time of limitation starts running depends on when the cause of action arose.

In rejoinder, Mr Karume contended that the Plaintiffs did not dispute the principles set forth in **Ophir Energy & Others** and **Hon. Minister for Natural Resources and Tourism and Others**. Then, he argued that in determining whether the suit is time-barred or not, the Court has to look at the plaint as a whole and rely on its information to determine the cause of action and limitation. He cited **Babito Limited vs Freight Africa NV-Belgium & Others** (Civil Appeal No.355 of 2020) [2023] TZCA 17586 (1 September 2023), to support his viewpoint. He, therefore, contended that there is nowhere in the Plaintiff's plaint that indicated uncertainties over the boundaries of the suit property; he claimed that this is an afterthought argument which has now been raised in the submissions. He contended that it is apparent in

the plaintiff that the former owner and Plaintiff knew when Defendant entered the suit property that is 2005, the time when they allegedly purchased the suit property.

As regards the case of **Sleimani Hamis (the administrator the estate of the late Hamisi Abdallah)** cited by the Plaintiff, Mr. Karume submitted that it is distinguishable from the facts of the instant matter because; **One**, the cited case related to the ownership of land while the case at hand based on compensation for trespass, **Two**, the error complained from the cited case arose from the written statement of defence and written submissions. In contrast, in the present matter, everything is apparent from the plaint as to the cause of action when it occurred, and **Three**, the question of when the period of 12 years began was unknown in the cited case, while in this matter, the period of three years is known when it began to run as pleaded in paragraph 6 and 7 of the plaint.

It was Mr. Karume's view that since the Plaintiff was late in instituting this suit for about 18 years, they are out of prescribed time. Therefore, he urged the Court to dismiss it with costs.

Having read both side submissions and carefully gone through the plaint and its annexures, I am in a good position to resolve the contested issue of whether this suit is time barred. At the earliest, I wish to state that I am fully subscribed to the cases of **Ophir Energy PLC & Others** and **Hon. Minister for Natural Resources and Tourism and Others** cited by Mr. Karume, that indeed an objection on account of time limit based on pure point of law which touches on the

jurisdiction of the Court and whose determination does require a review of facts or evidence by reviewing the contents of the plaint and its annexures.

I have also considered the authority cited by the Plaintiffs of **Sleimani Hamis (the administrator the estate of the late Hamisi Abdallah)** and their submission that there were uncertainties on the boundaries of the disputed land and that the Defendant's preliminary point of law raised, have mixed facts and law. Hence, it cannot be categorized as a preliminary point of objection.

Much as I appreciate the authority referred by the Plaintiffs, the same, as correctly argued by Mr. Karume, is distinguished from the case at hand. My perusal of the plaint and its annexure did not detect any of what was claimed by Mr. Mohammed regarding the uncertainty of the boundaries. Apparently, under paragraph 7 of the plaint, the plaintiffs contended that the Defendant trespassed on the part of their land in 2005 by erecting a telecommunication tower. Then, according to paragraph 14 of the plaint, in 2007, the plaintiffs, through their mother, started to follow up on the matter, whereby then, as per paragraph 15 to 21 of the plaint, in 2013, the 1st Plaintiff reported the matter to Stone Town Conservation and Development Authority, and the Land Commission, the follow up which was made by the 1st Plaintiff to the said institution until the year 2022, when the plaintiffs realized that their efforts in pursuing their matter to the authorities mentioned above were fruitless.

It is apparent, therefore, that the plaintiffs spent years, from 2005, when they were aware of the allegedly trespass, pursuing their rights through administrative avenues. Under the circumstances, I would narrate the settled principle pronounced in **Menjeja Mkuu Shirika La Umeme Zanzibar vs Juma Simai Mkumbini & Others** (Civil Appeal 41 of 2010) 2011 TZCA 127 (12 December 2011) that the time spent by a party in pursuing his right(s) through other avenues is not counted in the computation of time.

Back to the issue of whether this suit is time-barred. There is no dispute that the instant matter is based on trespass. The Limitation Decree have set a limit for claims on compensation for trespass upon the immovable property. Thus, item 29 of Part IV of the schedule to the Limitation Decree provides the time from which the period begins to run for a claim of this nature. It is three years from the date of the trespass.

Going by paragraph 6, and the prayer under items (b) and (c) of the plaint, it is clear that the cause of action in this suit arose in 2005 when the plaintiffs claimed that the Defendant constructed a telecommunication tower on their property without their consent.

A follow-up question is, was the instant suit filed after the lapse of the three-year limitation period? The answer is palpable! This suit was instituted on 09th May 2023, 18 years from the time the cause of action arose. The suit was, therefore, filed way beyond the time prescribed by the Limitation Decree.

From the above finding, it is of no doubt that this Court is not clothed with jurisdiction to entertain this matter. It is a position of the law, as submitted by Mr. Karume, that under section 3 (1) of the Limitation Decree, every suit instituted after the period of limitation prescribed in the schedule shall be dismissed. This position of the law impelled me to dismiss this suit with costs.

It is so ordered.

Dated at Tunguu, Zanzibar this 19th day of June, 2024.



G. J. KAZI
JUDGE
19/06/2024