IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 144 OF 2019

FORTUNATUS LWANYANTIKA MASHA.....1ST APPELLANT

JOHN WOSHI OBONGO.....2ND APPELLANT

VERSUS

CLAVER MOTORS LIMITED.....RESPONDENT

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

(Matupa, J.)

dated the 6th day of February, 2019
in
Civil Case No. 25 of 2017

RULING OF THE COURT

13th & 18th July, 2022.

KEREFU, J.A.:

The main issue of controversy between the parties to this appeal is the ownership of a parcel of land described as Plot No. 28/1, Block 'L' situated at Central area in Mwanza City with Certificate of Title No. 59613 (the suit property).

The material background and essential facts of the matter as obtained from the record of appeal indicate that, the first appellant was the previous owner of the suit property. However, on 13th October, 2004, he

sold the suit property to the respondent at a consideration of TZS 55,000,000.00 (the purchase price) which was to be paid by installments. Pursuant to clause 2 of the sale agreement, the first installment of TZS 25,000,000.00 was to be paid upon signing of the agreement and the last installment of TZS 30,000,000.00 was to be paid upon the first appellant handing over the relevant title deed or the certificate of occupancy of the suit property to the respondent. It is a common ground that the initial instalment of TZS 25,000,000.00 was paid to the first appellant as agreed in the agreement.

Then later, on 1st August, 2005, upon signing of a supplementary agreement the first appellant received another installment of TZS 12,000,000.00, thus making a total sum of TZS 37,000,000.00 as the purchase price paid by the respondent. It was the claim by the first appellant that, since the remaining balance of TZS 18,000,000.00 was not paid, the respondent had breached the terms of the agreement, hence, the sale agreement was rendered voidable.

Subsequently, on 13th December, 2016, the first appellant resorted to sell the suit property to the second appellant for a consideration of TZS 120,000,000.00. A sale agreement to that effect was signed between the

first and second appellants and the ownership of the suit property was transferred to the second appellant on 21st December, 2016. However, it became difficult for the first appellant to deliver vacant possession to the second appellant as the respondent who was already in occupation of the suit property, refused to give vacant possession claiming that he legally purchased it from the first appellant. Thereafter, on 28th April, 2017, the appellants instituted a suit in the High Court of Tanzania at Mwanza, Civil Case No. 25 of 2017 against the respondent claiming for the following reliefs; **one,** a declaration that the respondent is in illegal possession and occupation of the suit property and he should be ordered to handover vacant possession to the second appellant; **two,** that, the second appellant be declared a lawful owner of the suit property; **three,** the respondent be ordered to pay compensation to the second appellant for the loss suffered during the illegal occupation of the suit property from the date of transfer to the date of the vacant possession; and **four**, payment of general damages, interests and costs of the suit.

Upon being served with the plaint, the respondent, in his written statement of defence, apart from admitting that she purchased the suit property from the first appellant on 13th October, 2004 at the agreed price

of TZS 55,000,000.00 and that, a total sum of TZS 37,000,000.00 had already been paid, she disputed the appellants' claims. She contended that the purported sale agreement between the appellants was voidable, because at that time the first appellant did not have a good title to transfer to the second appellant. On that basis, the respondent filed a counter claim praying for the following reliefs; **one,** a declaration that the first appellant has breached the terms of the sale agreement and the supplementary agreement for failure to handover the title deed of the suit property; **two,** the first and second appellants be compelled to handover the title deed of the suit property to the respondent; **three,** a declaration that the alleged sale between the appellants was null and void *ab initio* and the transfer of the suit property to the second appellant was unlawful and of no legal effect; **four,** in the alternative, and without prejudice, if the first appellant fails to handover the title deed should refund the payment of TZS 37,000,000.00 being the principal sum received by him as a purchase price of the suit property; and **five,** payment of general damages, interests and costs of the suit.

At the trial, the controlling issues were: **One,** whether there was a valid sale agreement between the first appellant and the respondent; **two,**

whether the sale agreement was fully executed; and **three** whether the appellants are entitled to vacant possession of the suit property.

Having heard the evidence of the witnesses for both sides, the trial court was satisfied that the sale agreement between the first appellant and the respondent is still valid and thus, the suit was decided in favour of the respondent. Hence the appellants' suit was dismissed with costs.

The decision of the High Court prompted the appellants to lodge the current appeal to express their dissatisfaction. In the memorandum of appeal, the appellants have preferred four grounds of complaints. However, for reasons which will be apparently shortly, we do not deem it appropriate, for the purpose of this ruling, to reproduce them herein.

When the appeal was placed before us for hearing, the appellants were represented by Mr. Edwin Aaron, learned counsel whereas the respondent was represented by Mr. Renatus Lubango Shiduki, learned counsel. It is noteworthy that, pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009, the learned counsel for the parties had earlier on lodged their respective written submissions and reply written

submissions in support of and in opposition to the appeal, which they sought to adopt at the hearing to form part of their oral submissions.

However, before we could embark on hearing of the appeal, we wanted to satisfy ourselves on the propriety or otherwise of the suit before the High Court and the resultant judgement and ultimately the appeal before us. That was due to the fact that, the appellants' suit falls under Item 22 of Part I to the Schedule of the Law of Limitation Act, [Cap. 89 R.E. 2019] (the Act) read together with section 3 of same Act which prescribe the time limitation on suit for recovery of land to be twelve (12) years from the date when the cause of action accrued. We thus, invited the counsel for the parties to address us on that issue.

In his response, although, Mr. Aaron submitted that the sale agreement between the first appellant and the respondent was entered on 13th October, 2004 and the suit was lodged on 28th April, 2017 after lapse of twelve (12) years, he contended that the suit was not time barred as it was instituted upon a discovery by the first appellant that there was misrepresentation on the status of the respondent and thus a breach of the agreement. He added that, the parties exchanged a number of correspondences on the matter and finally, the first appellant demanded

for vacant possession but the respondent did not heed to the demand. Hence, the delay in instituting the suit.

Upon being probed by the Court as to whether the plaint has complied with the requirement of Order VII Rule 6 of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC) by containing a paragraph indicating a ground upon which an exemption from limitation could have been relied by the trial court to justify such delay, Mr. Aaron responded that the plain is silent on that aspect. He however, urged the Court to make a finding that the suit was not time barred and proceed to hear it on merit.

On his part, Mr. Shiduki submitted that the suit was indeed time barred in the light of the appellants' own pleadings. Elaborating, Mr. Shiduki referred us to paragraphs 10, 11 and 15 of the plaint together with items (a) and (c) in the relief section, He then argued that, the plaint clearly indicated that the suit property was sold to the respondent in 2004 and the suit was filed in 2017, after lapse of twelve (12) years prescribed by the law.

In response to the issues on whether the plaint has pleaded exemption under Order VII Rule 6 of the CPC, Mr. Shiduki contended that,

since there are no facts pleaded by the appellants in that plaint, they cannot rely on the alleged exemption as Mr. Aaron beseeched this Court to so determine. As such, he insisted that the suit before the High Court was time barred warranting an order for its dismissal under section 3 (1) of the Act. That, since that was not done, the proceedings before the High Court were irregular and should be nullified. On that basis, Mr. Shiduki invited the Court to invoke its revisional power under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) and nullify the entire proceedings before the High Court, quash the judgement and set aside the resultant decree which will also result in striking out the appeal for being incompetent.

In rejoinder, Mr. Aaron did not have much to submit as he decided to leave the matter into the wisdom of the Court.

On our part, having considered the submissions made by the parties in the light of the record of appeal before us, it is clear to us that both learned counsel for the parties are at one on the applicable limitation period for the institution of a suit to recover land prescribed under Item 22, Part I to the Schedule of the Act. Likewise, there was no dispute on the requirement under Order VII Rule 6 of the CPC that, for a suit which is

instituted out of the prescribed time, its plaint should contain a paragraph indicating a ground upon which an exemption from such delay is claimed.

We, respectfully, share similar views on both issues and we wish to emphasize that pursuant to Item 22 of Part I to the Schedule of the Act read together with section 3 (1) of same Act, the prescribed time on a suit for recovery of land is twelve (12) years from the date when the cause of action accrued.

In the case at hand, to ascertain the time when the cause of action accrued against the respondent, we have scrutinized the contents of the plaint and we agree with Mr. Shiduki that a look at paragraphs 10, 11 and 15 of the plaint together with item (a) and (c) in the relief section, the plaint bear testimony that the suit was filed out of the prescribed time. We shall let the said paragraphs from the plaint speak for themselves:

> *"10. That, there was a time when the 1st plaintiff intended to sell the property to the defendant and they signed a sale agreement dated November 13, 2004 where the purchase price was agreed at Tanzania Shillings Fifty-Five Million (TZS. 55,000,000.00) (the Agreement).*

11 (a) The defendant breached the terms of Agreement by defaulting in the payment of purchase price in full as he only paid Tanzania Shillings Thirty Million (TZS. 30,000,000.00) instead of the full purchase price as per the agreement;

(b) The agreement, 1st plaintiff discovered that the defendant was not a legal entity duly registered under the laws of Tanzania and did therefore not have the legal capacity to enter into the agreement let alone to own the property;

(c) The directors and or shareholders of the defendant were all foreign nationals and in particular Peter Clever Mpagazehe who signed the agreement on behalf of the defendant was not a Tanzanian citizen;

15. That, all efforts made by the 1st plaintiff for the defendant to surrender and or vacate the property have been rendered futile by the defendant's refusal and or recalcitrance to accept a refund of the money paid to the 1st plaintiff and also to vacate the property."

Again, in para (a) and (c) of the reliefs in the same plaint, the appellants prayed for a declaration that the respondent is in illegal

possession and occupation of the suit property and it should be ordered to handover vacant possession.

It is clear that the facts disclosed in the above paragraphs of the plaint, they mean nothing less than demonstrating that the appellants' claim or the cause of action against the respondent accrued in 2004 when the first appellant sold the suit property to the respondent and since that date the suit property was under the possession and occupation of the respondent. In the case of **The Registered Trustees of Roman Catholic Archdiocese of Dar es Salaam v. Sophia Kamani,** Civil Appeal No. 158 of 2015, the Court considered a similar issue on when the cause of action accrued on a claim based on the sale of a parcel of land, it stated that:

> *"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." [Emphasis added].*

In the case at hand, as indicated in the above paragraphs of the plaint and agreed by both learned counsel for the parties, the time started

to run immediately from 2004 when the suit property was allegedly sold to the respondent. It is on record that the appellants' suit was filed on 28th April, 2017 after lapse of twelve years of recovery of land prescribed by the Act. Therefore, to rescue their suit, the appellants were required to comply with the requirement of Order VII Rule 6 of the CPC which provides that:

> *"Where the suit is instituted after the expiration of the period prescribed by the law of limitation,* ***the plaint shall show the ground upon which exemption from such law is claimed."*** *[Emphasis added].*

The requirement imposed by the above provision of the law is not optional, because the word used therein is 'shall' which denote a mandatory compliance and not otherwise. We are mindful of the fact that, in his submission, Mr. Aaron, though he admitted that, the plaint is silent on a ground upon which an exemption from limitation could have been relied, he argued that the delay might have been caused by the exchange of correspondence between the first appellant and the respondent after the first appellant had discovered that there was a misrepresentation on the part of some of the respondent's directors which turned out to be abortive as the respondent refused to vacate the suit property.

With respect, we are unable to agree with Mr. Aaron on this point. It is settled that communications or negotiations between the parties is not a ground for stopping the running of the time. In **Consolidated Holding Corporation v. Rajan Industries Ltd & Another,** Civil Appeal No. 2 of 2003 (unreported) the Court stated clearly that the time taken in negotiations does not fall under the specified ground warranting exemption from limitation. The Court sought inspiration from the decision of the High Court at Dar es Salaam Registry in **Makamba Kigome & Another v. Ubungo Farm Implements Limited & PRSC,** Civil Case No. 109 of 2005 (unreported) where Kalegeya, J. (as he then was) made the following observations:

> *"Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time."*

It is our considered view that, even if we assume, for the sake of argument, that negotiation or correspondence fell within grounds for seeking exemption envisaged under Order VII Rule 6 of the CPC, still the appellants would not have succeeded on that aspect, because apart from narrating the historical and factual background on what transpired between 2004 to 2016, there is nothing in the plaint supporting Mr. Aaron's contention to justify the delay. This is so, because, the appellants have never considered themselves that they were time barred, so as to include a ground in the plaint to plead exemption from limitation. In **M/S P & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal No. 265 of 2020, the Court when considering the applicability of Order VII Rule 6 of the CPC stated that:

> *"To bring into play exemption under Order VII Rule 6 of the CPC, the plaintiff must state in the plaint that his suit is time barred and state facts showing the grounds upon which he relies to exempt him from limitation. With respect, the plaintiff has done neither." [Emphasis added].*

Likewise, in the current appeal, since the appellants did not bring their suit, which was time barred, within the ambit of Order VII Rule 6 of

the CPC, we agree with Mr. Shiduki that the suit should have been dismissed by the High Court under section 3 (1) of the Act for being time barred. In **Backlays Bank Tanzania Limited v. Phylisiah Hussein Mchemi,** Civil Appeal No. 19 of 2016 (unreported) the Court when considered the consequences brought by time limitation to institute a suit, it was inspired by unreported decision of the High Court Dar es Salaam Registry in **John Cornel v. A. Grevo (T) Limited,** Civil Case No. 70 of 1998 where it was stated that:

> *"However, unfortunate it may be for the plaintiff; the law of limitation is on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."*

It is therefore our settled view that, since the suit before the High Court was time barred, that court did not have the requisite jurisdiction to adjudicate on the matter and pronounce judgement from which an appeal could lie to this Court.

Consequently, we invoke revisional powers vested in this Court under section 4 (2) of the AJA and hereby nullify the entire proceedings before

the High Court in Civil Case No. 25 of 2017, quash the judgment and set aside the resultant decree.

In the event, the incompetent appeal is accordingly struck out. Since, the issue leading to the nullification of the High Court's proceedings was raised *suo motu* by the Court, we make no order as to costs.

DATED at **MWANZA** this 18th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 18th day of July, 2022 in the presence of Mr. Edwin Aaron, learned counsel for the Appellants and Mr. Renatus Lubango Shiduki, learned counsel for the respondent, is hereby certified as a true copy of the original.

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL