

**IN THE HIGH COURT ZANZIBAR
HELD AT VUGA
CIVIL APPEAL No. 37 of 2011
From original Decree Civil No. 47 of 2010
Of the Land Tribunal at Vuga.**

- 1. SALUM HAFIDH**
- 2. SHAURI ALI VUAI**
- 3. RAMADHANI KASSIM.....APPELLANT.**

VERSUS

- 1. NAWAWI KIZZA VUAI**
- 2. HAKIM HASSAN SIMAI**
- 3. MTUMWA HAJI VUAI.....RESPONDENT.**

JUDGMENT.

MWAMPASHI J.

This is an appeal filed by Salmin Hafidh Ameir Kassim Rashid, Vuai Hassan Vuai and Ibrahim Vuai Thabit, the appellants and original plaintiffs in the Land Tribunal (Vuga/Majestic) Civil Suit No. 47/2010. The respondents/defendants are Nawawi Kizza Vuai, Hakim Hassan Silima and Mtumwa Haji Viau alias Kitoto. The appeal arises from the ruling made by the Tribunal dated 24/08/2012 wherein a preliminary objection on point of law raised by the respondents/defendants was upheld and the appellants suit was accordingly dismissed. In that suit the plaintiffs/appellants had sued the defendants/respondents for trespass alleging that sometimes in February, 2010 the respondents/defendants did invade and did also attempt to sell to a third party a shamba situated at Bwejuu Dongwe which belongs to them that is the appellants/plaintiffs. The respondents/defendants raised two points of objection that the suit was time

barred and that there was a nonjoinder of defendants. The Tribunal dismissed the appellants/plaintiffs' suit on a ground that the suit was time barred hence this appeal before this court.

According to the Tribunal's records when the suit was called for the hearing of the raised preliminary objection it was argued by the respondent/defendants that the suit was time barred because the disputed shamba had been in possession and use by their uncle for more than 50 years. The respondents/defendants did also wonder why it is only them who had been sued while the shamba in dispute belongs to their whole family comprising 23 members including them. Mr. Mbwana learned advocate who appeared for the appellants/plaintiffs asked the Tribunal to dismiss the objection because the suit was not time barred as the alleged possession by the respondents'/defendants' uncle Mzee Haji Mambo had been under licence till when he died in 2000. Mr. Mbwana did also argue that the appellants/plaintiffs have sued the three defendants because they are the ones who have invaded and who have attempted to sell the disputed shamba.

Before making its ruling on that preliminary objection, the Tribunal made a visit of the shamba in dispute and in its ruling dated 10/08/2011 the Tribunal observed among other things thus, '.....ni kweli kabisa baada ya kufa mzee wa wadaiwa (Haji Mambo) ndipo mzozo huu wa ardhi ulipojitokeza na sio kabla ya

hapo kulikoni? And in the final analysis, as it has been pointed above, the Tribunal dismissed the suit on the ground that the suit was time barred.

According to the memorandum of appeal filed by the appellants six grounds have been raised in support of the appeal but looking at the points of objection which were raised before the Tribunal as well as the ground on which the Tribunal dismissed the suit it is a considered view of this court that only three grounds are relevant in this appeal. The said three grounds are:-

1. That the Hon. Chairman of the Land Tribunal did err in law in failing to know the time from which the period of limitation began to run as against the plaintiffs.
2. That the Hon. Chairman of the Land Tribunal did err in law in failing to understand that whether the defendants had been in possession and use of the disputed shamba for 50 years was an issue of evidence.
3. That the Hon. Chairman of the Land Tribunal did err in law in not observing the provisions under S. 37 of the Land tribunal Act, 1994.

At the hearing of this appeal it has been argued by Mr. Mbwana learned advocate for the appellants that according to the pleading it was not until 2000 after the death of the respondent's uncle when a dispute over the disputed shamba arose. He has also submitted that before 2000 the shamba in dispute had been in possession of the respondent's uncle under licence. Mr. Mbwana has therefore insisted that the limitation period of 12 years began to run in 2000 and for that case the suit filed in 2010 could not be time barred.

It has also been argued by Mr. Mbwana that the allegations by the defendants that they have been in undisputed possession and use of the shamba for 50 years needed to be supported by evidence and could not be decided before the suit is fully tried. As on the ground in regard to non adherence of S. 37 of the Land Tribunal Act, 1994 it has been submitted by Mr Mbwana that the Chairman of the Tribunal did not involve the two assessors in making his decision to dismiss the suit. For these reasons Mr. Mbwana has asked the court to allow the appeal.

Dr. Iddi Abdalla Hussein learned advocate for the respondent has opposed the appeal arguing that the Tribunal did not err in finding that the suit is time barred because the respondent's uncle had been in possession of the disputed shamba for more than 50 years and no one had ever disputed his possession. As on S. 37 of the Land Tribunal Act it has been Dr. Hussein's argument that the assessors

were involved in deciding whether the suit was time barred or not and that even if they were not involved still the Chairman was empowered not to involve them because the decision was on a matter of law, i.e limitation. He has therefore asked the court to dismiss the appeal with costs.

The first ground of the appeal that the period of limitation i.e 12 years was not properly calculated by the Tribunal as well as the second ground that the issue of the defendants being in possession of the shamba in dispute for 50 years was an issue of evidence are going to be dealt together. It can be observed from paragraph 7 of the amended plaint filed by the appellants/plaintiffs on 22/06/2010 that it was in February 2010 when the respondents/defendants attempted to sell the shamba in dispute. To the appellants/plaintiffs the cause of action did therefore arise in February 2010. To the respondents/defendants that could not be the case because for more that 50 years the shamba in dispute had been in possession and use of their uncle.

This argument by the respondent/defendants was however raised for the first time as the first point of the preliminary objection and not in the main part of the defendants' written defence. That being the case therefore, the appellants/plaintiffs could not have responded to it in any other way but during when the objection was being heard. So when it was argued by the appellants/plaintiffs that the 50 years possession alleged by the

respondents/defendants was under licence the Tribunal ought to have realized that there was an issue being raised that needed evidence and that could not be decided at that stage but till when the suit is heard on its merits.

This court therefore agrees with Mr. Mbwana the learned advocate for the appellants that the issue of whether the suit was time barred or not, from the circumstances of the suit in question, could not be properly decided at that stage before a full trial of the suit is conducted. The issue needed evidence to be properly decided. The Tribunal needed evidence on whether the defendant's uncle had really been in possession and use of the shamba in dispute for more than 50 years or not and also on whether the possession was under the plaintiffs' licence or not. The issue of limitation could not even be decided by the Tribunal visiting the shamba in dispute.

According to item 133 of the Schedule to the Limitation Decree, cap 12 the period of limitation for possession of immovable property or any interest therein is 12 years and time begins to run when there is an adverse possession. Now because the plaintiffs' allegation was that it was in February 2010 when the defendants attempted to adversely possess the shamba in dispute then the period of limitation was supposed to be computed from that date and not otherwise. Simple calculations do therefore show that by 12/05/2010 when the plaintiffs filed the suit in question the suit was well within time. Even if the period

of limitation is computed from when the defendants' uncle is said to have died i.e in 2000 still by 12/05/2010 the suit was still within the prescribed period of limitation. In its ruling the Tribunal clearly found that the dispute between the parties over the shamba in dispute arose after the death of the defendant's uncle if that was the case how could the suit be time barred?

As on the contravention of S. 37 of the Land Tribunal Act, 1994 it is provided under that section that;-

*'All decision of the tribunal, whether the final
Judgment or interim matter, shall be made by
Majority vote of the three members of the panel
the Chairman and two Assessors.
However, the Chairman shall have a deciding
Vote in all questions of law'.*

S. 37 of the Land Tribunal Act, 1994 makes it mandatory for all decisions by the Tribunal to be made by majority vote. It is only when the decision to be made by the Tribunal is on a question of law that the Chairman is given a deciding vote. It must however be insisted here that a deciding vote does not mean that in matters of law decisions have to be made by the Chairman alone without involving the two assessors. The law requires that the two assessors have to be

involved in all decisions made by the Tribunal including decisions on question of law. All decisions must be made by voting. Chairman will have a deciding vote in use only where his views a decision based on a question of law are opposed by the two assessors. What the Chairman need to do when there is a decision to be made basing on a question of law is to explain to the assessors what the law is and then let the assessors give their respective opinion on what should be the decision basing on how they think the law should be applied to the relevant case.

Because as pointed out above the law requires that all decisions made by the Tribunal shall be by majority voting and therefore that the three members must vote in all decisions made by the Tribunal it goes without saying that the proceedings of the Tribunal must clearly show that the members did vote. It must be shown that the exercise of voting was conducted and that each member did express his/her view on the decision to be made. It has been insisted by this court time and time again that the proceedings must show that all the members were involved in making decisions and that where the decision is on a question of law and the Chairman has exercised his deciding vote then that must be clearly shown in the Tribunal's proceedings. Any decision made by the Tribunal in contravention of the mandatory requirement of S. 37 of the Land tribunal Act, 1994 is invalid and must be quashed.

I have passed through the Tribunal proceedings and the ruling subject to this appeal and observed that although it is shown that two assessors were present when the objection was heard as well as when the Tribunal visited the shamba in dispute there is nowhere it is shown that the said assessors did participate in the process. There is nowhere it is shown that the assessors were involved in any way in the hearing process and ultimately in decision making. The decision (Ruling) was made by the Chairman alone and even on the date the ruling was delivered the assessors were not present. There was no voting and the decision was therefore not made by the majority vote. I do understand that the decision was on limitation which is a question of law but as I have pointed above still the assessors needed to be involved in making the decision. The three members needed to vote on the decision whether the suit was time barred or not and it is only if the two assessors would have been of a different view with that of the Chairman that the Chairman would have exercised his deciding vote.

Before I conclude I would wish to point out that the Tribunal did not deal with the second point of objection as raised by the defendants in regard to the nonjoinder of defendants. It suffices to shortly observe here that the plaintiffs could not be forced to join as defendants persons who to them have not done anything injurious to them. The plaintiffs have sued those who they allege have trespassed over their shamba. They could not be forced to join as defendants persons they do not know and who have done nothing wrong to them.

For the above given reasons and observations this appeal succeeds. The order by the Tribunal dismissing the appellant's suit is hereby quashed as it could not be properly decided if the suit was time barred or not at that earlier stage before the suit is fully tried. It is also directed that the Tribunal should hear and determine the suit on its merits and according to law. An order is also made that the panel to hear the suit be chaired by another magistrate of competent jurisdiction.

Appeal allowed with costs.

Sdg: Abraham Mwampashi J.

16/04/2012

Delivered in court this 16/04/2012 in the presence of the appellants with their advocate Mr. Mbwana and in the presence of the respondents with their advocate Dr. Iddi Abdalla Hussein.

Sdg: Abraham Mwampashi J.

16/04/2012

I CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL

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REGISTRAR

HIGH COURT

ZANZIBAR

Mbs/