

TANZANIA / JUDGMENT

ak mutungi vs aak sykes another another 2023 tzhclandd 17247 19 december 2023

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19 December 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM MISC LAND APPLICATION NO. 517 OF 2023 (Originating from Land Case No. 140 of 2017) A.K. MUTUNGI..... APPLICANT VERSUS A.A.K. SYKES.....1st RESPONDENT KINONDONI MUNICIPAL COUNCIL..... 2nd RESPONDENT . q RULING 08th to 2frh December, 2023

E.B. LUVANDA, J The Applicant is seeking for extension of time within which to file an application to set aside the ex-parte judgment of this Court in Land Case No. 140/2017 dated 17/09/2021, where the Respondent was declared lawful owner of the suit Plot No. 449 Mbezi Beach. In the affidavit in support of the application, the Applicant deposed that he was never served with summons to appear in that suit neither served with summons informing him of the date of judgment. The Applicant asserted to have become aware of the suit after being served with a letter or notice of intention to rectify the land register of the suit plot, served to him on 17/08/2023, informing him of existence of the impugned ex-parte judgment. The Applicant grounded that i the impugned judgment is tainted with illegality and contradiction, arguing that in the judgment it was ruled that no certificate of title was issued against the land in dispute, while the same was issued to the Applicant in 2010 in respect of Plot No. 449 Block "K" which was allocated to the Applicant in 1982 via a letter of offer. In the counter affidavit, the Respondent asserted that the case proceeded ex- parte after the Applicant failure to file his written statement of defence and attend the case despite substituted service effected through Uhuru Newspaper dated 04/07/2017. He asserted that personal service failed, that is why resorted to substituted service. He asserted that the impugned judgment is free from illegalities and is not contradictory. He asserted that the Commissioner for Lands never ordered to execute any decree. He averred that there is in ordinate delay from the date of the decision to the date when this application was filed, have not been accounted for, nor is there any illegality pointed out by the Applicant. In a reply to a counter affidavit, the Applicant insisted that he was never served with any summons to appear and defend his case nor served with any summons for the pronouncement of judgment. He stated that a judgment is tainted with illegalities and the Applicant has accounted for the period of delay. Mr. Stephen Mosha learned Counsel for Applicant submitted that the impugned judgment is tainted with irregularities as the case being heard ex-parte, the Applicant was entitled to be notified on the date of delivery of judgment, arguing no summons was issued. He

cited the case of Chausiku Athumani vs. Atuganile Mwaitege, Civil Appeal No. 122/2007 HC Dar es Salaam. He submitted that the Applicant was never served with any summons for hearing despite the First Respondent having knowledge of the Applicant's whereabouts. He submitted that after receiving a letter from the Commissioner for Lands on 17/08/2023, seven days later on 23/08/2023 filed this application, arguing being not sloppy or negligence in pursuing his right. In reply, Mr. F.A. M. Mgare Learned Counsel for First Respondent submitted that the Applicant was dully served with summons to file the written statement of defence and appear, which were dully issued through publication in Uhuru Newspaper dated 04/07/2017, cited Order V rule 16(1) of the Civil Procedure Code, Cap 33 R.E. 2019. He submitted that the substituted service by publication was reported to after the First Respondent efforts to effect personal service failure. He submitted that the Applicant failed to account for delay from 17/08/2021 to 24/08/2023 when the present case was filed, and or from 10/08/2023 to 24/08/2023 or from 10/08/2023 to 17/08/2023. The main complaint and ground for delay was stated in the affidavit in support to be non-service with summons for hearing of the suit or notifying the Applicant on the date of pronouncement of judgment. In the counter affidavit, the // Respondent asserted that the Applicant was served at once via substituted service by publication in Uhuru Newspaper dated 04/07/2017, alleged after efforts to effect personal service proved futile. The First Respondent made no comment to a complaint that the Applicant was not informed on the date of delivery of judgment. Above all, in the counter affidavit, the First Respondent did not attach any piece of the alleged Uhuru Newspaper, to substantiate the alleged publication on 04/07/2017. In other words, the First Respondent was merely alleging without any proof. In view of that, the argument by the Applicant that he become aware of the impugned judgment on 17/08/2023 after receiving a letter from the Commissioner for Lands as per annexure Mutungi-2, dated 16/05/2023 depicting it was send to the Applicant by registered mail, is taken as a valid argument. This is because in annexure Mutungi-2, depict Land Case No. 140/2017, Land Division, before Honorable Msafiri, J declared the First Respondent was the lawful owner of Plot No. 449 Mbezi Beach. And as much this application was filed on 25/08/2023 being eight days counting from 17/08/2023 when the Applicant become aware of the impugned judgment. It is taken that the Applicant has successful accounted for delay and adduced sufficient cause for delay. 4 Therefore, the Applicant is granted extension of fourteen days to present his intended application to set aside the ex-parte judgment mentioned above. The application is granted. No order for costs. 5

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