

TANZANIA / JUDGMENT

azili dalili vs shakur khalid 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: NDIKA, J.A.. RUMANYIKA, J.A.. And ISSA. J.A./I CIVIL APPEAL NO. 339 OF 2020

AZILIDALILI.....APPELLANT VERSUS SHAKUR

KHALID..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mwanza) (Mai.qe, J.) dated the 20th day of July, 2016 in Misc. Land Application No. 40 of 2016 JUDGMENT OF THE COURT 5th & 13th December, 2023 ISSA. J.A.: The dispute giving rise to this appeal originated from the decision of the District Land and Housing Tribunal (DLHT) for Mwanza in Application No. 66 of 2010. The respondent filed the said application claiming that, the appellant trespassed on 1.5 metres of his land and constructed his house. The DLHT decided in favour of the respondent on 29.3.2012, and the appellant was ordered to remove his house within 60 days or alternatively, the respondent to demolish the same. While the appellant was idle, the respondent initiated execution proceedings which saw the appellant being summoned to show cause on 25.7.2013. This was a wake up call for the appellant who started running in the court corridors with several applications to stay the execution of the DLHT decree. Further, being dissatisfied by the decision of DLHT, the appellant intended to appeal against that decision only to find himself out of time to lodge an appeal. He filed at the High Court Misc. Land Application No. 7 of 2014 (Makaramba, J.) for extension of time to appeal. The application was struck out on 11.2.2016 as the affidavit supporting the application was defective. Undaunted, he refreshed his application with Misc. Land Application No. 40 of 2016 (Maige, J. as he then was) which was dismissed on 20.7.2016 for lack of sufficient cause for the delay. The appellant was not amused, he lodged his appeal to this Court on 31.8.2020. The appeal is predicated on five grounds of appeal followed by written submission. The appellant withdrew two of the grounds and the remaining three are thus; One, that the learned judge employed double standard in the analysis of the case. Two, the learned judge failed to notice that the chairman of DLHT failed to record the opinion of assessors. Three, that the decision was against the law and evidence on record. The respondent, on the other hand, also filed his written submission. At the hearing of the appeal, Mr. Emmanuel John, learned advocate appeared to prosecute the appeal for the appellant whereas Mr. Twaha Issa Taslima, learned advocate appeared for the respondent. Mr. John addressed the Court by way of emphasis on the written submission lodged earlier on. With respect to the first and third grounds of appeal, which we feel

we should discuss together, Mr. John in his written submission faulted the learned judge for applying double standard in the determination of the case. He made reference to pages 149 and 150 of the record and submitted that, the learned judge applied the aid of proceedings when refuting the concept of illegality in favour of the respondent, but he could not do the same when determining other points raised by the appellant. With respect to the second ground of appeal, Mr. John argued that, there are illegalities in the proceedings before DLHT which conducted the hearing of the case with the aid of a single assessor without advancing any reason for the absence of the second assessor. Mr. Taslima, on the other hand, did not have much to say. He relied on the respondent's written submission filed earlier on and he urged us to dismiss this appeal for lack of merit. We shall now proceed to determine the first and third grounds of appeal together. If we go back to the affidavit filed in the High Court to support the application for extension of time within which to file the appeal, the appellant raised two issues. One, is the justification for the delay in lodging his appeal and Two, is the illegalities found on the proceedings and decision of the DLHT. Paragraphs 4, 5 and 8 of the affidavit of the appellant are relevant and they provide: "4. That the decision of the District Tribunal was given on the 2nd of March 2012, but immediately thereafter I became sick and since my said sickness could not be diagnosed; I resorted to treatment by traditional doctors and proceeded to my home village Buhingwe within Kasuu District for the said treatment

5. That I received treatment until early December 2013 and upon feeling better I returned to Mwanza and with the intention to appeal, I sought assistance from my local leaders who gave me a letter dated 2nd December 2013 annexed and marked 'A' "
8. ... that the proceedings and decision in trial tribunal are fraught with illegalities including the fact that the respondent had instituted the proceedings while he was not the owner and not having appointed the administrator of the estate of the deceased owner and that the proceedings as a whole were vitiated within illegalities." The ruling of the High Court determined both issues raised in the affidavit of the appellant. With respect to the issue of sickness which is the main cause of appellant's delay in filing his appeal, the learned judge wrote: "Neither in the affidavit nor in the written submissions is there any deposition disclosing the nature of the disease and the date when the applicant travelled to Kigoma for traditional treatment. In normal circumstances, the trip to Kigoma for treatment and the dates thereof could be easily be established by producing copies of the bus tickets to and from Kigoma. This has not been done... in the absence of supplementary affidavit of the said Balozi the letter in annexure "A" of the affidavit, if at all was relevant, which I do not think, is unworthy of being considered." The above explanation is sufficient to show that no sufficient cause of delay was established as the appellant failed to account for each day of the delay and there was no proof of those trips he claimed to have made during that period. In fact, the position of law with respect to extension of time is well settled. It has been stated in various decisions of this Court that the power of any court of justice to extend time is both broad and discretionary. The discretion is judicial and it must be exercised according to the rule of reason and justice and not according to private opinion or arbitrarily. See *Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Womens Christians*

Association of Tanzania, Civil Application No. 2 of 2010 (unreported). Further, the power is only exercisable if good cause is shown. Whereas there is no universal definition of what constitutes good cause, the Court is bound to consider the prevailing circumstances of the particular case and should also be guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. This position of law has been restated by the Court in a number of cases including; *The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia* [1992] T.L.R. 387 and *Lyamuya Construction Co. Ltd* (supra). Further, the Court in *Bushiri Hassan v. Latifa Lukio Mashayo*, Civil Application No. 3 of 2007 (unreported) stressed the point that the party applying for extension of time must account for each day of the delay. It said: "... Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken." Applying the above principles; the learned judge was justified in refusing to grant extension of time. The fact that, on page 3 of the ruling the learned judge referred to the affidavit of the applicant on the record of the DLHT to question the assertion that the appellant was in Kigoma between 29.3.2012 and December 2013 is just additional information. It did not add anything to his finding which was based on the records filed in the High Court. Turning to the first limb of illegality, we note that Mr. John while submitting before the High Court raised a claim that the respondent instituted the suit at the DLHT in his personal capacity while the suit property belonged to the deceased. This issue was answered by the learned judge in his ruling, but since this issue was not pursued in this appeal this Court will not waste its energy on it. All in all, we are of the view that the allegation of double standard is unfounded. The learned advocate for appellant has not placed material before us to determine otherwise. Hence, these two grounds of appeal are devoid of merit and are dismissed. With respect to the other limb of illegalities which was raised on this appeal as ground four that, the hearing before DLHT was conducted with the aid of one assessor. Mr. John submitted that the issue appeared on his submission he made before the High Court (page 124 to 127 of the record). He urged us to address this issue, as the learned judge omitted to address it. We acknowledge that the learned judge slipped into error by not considering and pronouncing on the issue of hearing of the case before DLHT with the aid of one assessor. As the point was canvassed by the appellant in his oral and written submission, the learned judge should have considered the matter. We feel obliged that, it is our duty to step in his shoes and determine the claim of illegality, which we will contentedly do shortly. The term 'illegality' is not a bottomless pit where every legal error can be dumped into. This Court in *Charles Richard Kombe v. Kinondoni Municipal Council*, Civil Reference No. 13 of 2019 and *Kabula Azaria Ng'ondi and 2 Others v. Maria Francis Zumba and Another*, Civil Appeal No. 174 of 2020 dealt with the issue of illegality. The Court quoted the definition of the term 'illegality' from the *Black's Law Dictionary 11th Edition*, page 815, which provides: "1. An act that is not authorised by law

2. The state of not being legally authorised." Further, the Court quoted the definition provided by Mulla's Code of Civil Procedure where the learned authors on page 1381 wrote: "It is settled law that where a court has jurisdiction to determine a question and it determines that question; it cannot be said that it acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law." Furthermore, the Court cited an Indian case of *Keshardeo Chamria v. Radha Kissen Chamria and Others*, AIR 1953 SC 23, 1953 SCR 136 where the Supreme Court of India wrote: "... the words 'Illegally' and 'material irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not errors of either law or fact after the formalities which the law proscribes have been complied with." In our decision in *Charles Richard Kombe* (supra) on page 8 we came to the conclusion thus: 10 "...for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred." Returning to the issue of assessors from the DLHT proceedings it is clear that the hearing of the case started with two assessors, Mrs. Juma and Mr. Lusato, as seen on page 25 of the proceedings. Again, on page 33 it is seen that, Mr. Lusato was still there, but Mrs. Juma was absent and she was not seen again in the proceedings. Finally, the learned chairman wrote the judgment of the Tribunal and the opinion of Mr. Lusato was taken on board as seen on page 4 of the judgment. Now, has the learned chairman of DLHT acted without jurisdiction, or violated any provision of the law? Section 23 of the Land Disputes Court Act, Cap. 216 R.E. 2019 deals with the composition of the Tribunal and touched the issue of assessors. It provides: "23 (1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.
- (2) The District and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the

judgment.

- (3) Notwithstanding the provisions of subsection
- (2) if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence. " Section 23 (3) above covered the situation at hand, the DLHT started the proceedings with two assessors, Mrs. Juma and Mr. Lusato. Somehow, for reasons not mentioned in the proceedings, Mrs. Juma could not complete the proceedings which were finalised by the Chairman and Mr. Lusato who gave his opinion in writing to the Chairman. We are of the considered view that, the Chairman acted within bounds of his jurisdiction and section 23 has not been violated. 12 In the upshot, we find no merit in the grounds of appeal raised and argued and this appeal is hereby dismissed with costs. DATED

at MWANZA this 12th day of December, 2023. G. A. M. NDIKA JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL A. A. ISSA JUSTICE OF APPEAL Judgment delivered this 13th day of December, 2023 in the presence of Mr. Emmanuel Michael John, learned counsel for the Appellant and Respondent appeared in person, is hereby certified as a true copy of the original. F.A. MTARANIA DEPUTY REGISTRAR COURT OF APPEAL 13

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