

TANZANIA / JUDGMENT

erick joshua vs peter kaliwame

2021 tzhc 5472 9 august 2021

COURT
TZHCDECIDED
9 August 2021

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THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF SHINYANGA AT SHINYANGA MISC. LAND APPLICATION No. 9 OF 2021 (Emanating from the decision of this Court in Land Appeal No. 02 of 2015 originated from Land application No. 71 of 2014 of the Shinyanga District Land and Housing Tribunsl) ERICK JOSHUA APPLICANT VERSUS PETER KALIWAME RESPONDENT

RULING

06 & 23/07/2021 MKWIZU, J: The applicant filed his application for extension to file Notice of Appeal and leave to appeal to the court of Appeal of Tanzania against the decision of this Court in Land Appeal No. 2 of 2015 dated 06/12/2019. The application was made under section 11 (1) of the Appellate Jurisdiction Act [Cap 141 RE 2019] supported by the affidavit sworn by the applicant. At the DLHT for Shinyanga, Land Application No. 71 of 2014, Applicant had sought against the respondent a declaratory order that he is a lawful owner of the suit land. He succeeded at the trial tribunal. His success however was overturned in an appeal to the High court by the respondent where this court found that, the original suit was time barred, therefore the 1 trial tribunal's judgment, decree and orders were set aside and the Land Appeal No.2 of 2015 was allowed. Applicant is aggrieved by that decision, but for the reason stated in his affidavit, he was unable to appeal to the Court of Appeal within time hence this application. When the application came for hearing on 6th July,202 Mr. Mackanjero Ishengoma learned Advocate represented the applicant while the respondent appeared in person (unrepresented). Stating the reasons for the delay, Mr. Ishengoma for the applicant submitted that, after the decision in Land Appeal No. 2 of 2015, the applicant filed an application No. 28 of 2020 for extension of time to file Review followed by an application for Review No. 14 of 2020, but he was advised thereafter by his advocate that he could not file Review, the only remedy available for him was to Appeal to the Court of Appeal. At that time, stated Mr. Ishengoma, time to appeal had already passed. Applicant decided to withdraw his application for Review on 15/10/2020 and filed this application for extension of time on 8/2/2021 after he had obtained a copy of the withdrawal order on 19/11/2020, and engaged an advocate for drafting the necessary documents. Another ground relied upon by the applicant is an on illegality of the decision sought to be appealed against as one of the reasons for extension of time. Mr. Ishengoma said, the appellate Judge in Land Appeal No. 2 of 2015

decided that the case at the trial court by the applicant was 2 time barred at its institution and therefore extension of time is necessary to allow rectification of the said illegality by the Court of Appeal. The case of Hamis Mohamed (Administrator of the estate of the late Risasi Ngawe) vs Mtumwa Moshi (as the Adminitratrix of the late Moshi Abdallah), Civil Appeal No. 407/17 of 2019 (unreported) was cited as an authority. Respondent submissions were very short. He submitted that the applicant has no sufficient reasons for the delay and therefore the application should be dismissed. I have curiously considered the affidavit in support and against the application and the parties' submissions. This being an application for extension of time, the guiding principle is whether there are exhibited sufficient grounds for the court to allow the prayer. The controlling factors are as enumerated in the case of Lyamuya construction Company Ltd V/s Board of Registered of Young Women's Christian of Tanzania, Civil application No. 2 of 2010 [unreported] CAT Arusha Registry in which the Court of said;

- (a) The applicant must account for all the period of delay.
 - (b) The delay should not be inordinate.
 - (c) The applicant must show diligence and not apathy' negligence or sloppiness in the prosecution of the action that he intends to take.
 - (d) That, if the court feels that there are other sufficient reasons, such as the illegality of the decision sought to be challenged. 3 Two reasons are apparent in the applicant's affidavit. Technical delay, this is the time spent by the applicant in pursuing an application for review, and illegality on the decision sought to be challenged. Illuminating on the above two reasons, applicant's affidavit particularly paragraphs 4-7 states: 4. That, being dissatisfied with the said decision I filled the Mise. Land Application No. 28/2020 before the High Court of United Republic of Tanzania, Shinyanga District Registry seeking for the leave to file the Application for Review on 21st May 2020 of which the Application was granted, hence the I filed the Application for Review at The Resident Magistrates Court of Shinyanga at Shinyanga (EXTENDED JURISDICTION) via his Mise. Land Application No. 14/2020 at the said court, of which in later on the Applicant withdraw the said Application on 1st October, 2020, before Hon. F.R Lukuna, SRM with Extended Jurisdiction.
5. That, after seeking further legal opinions from different legal counsel, I realized that, the proper channel to follow was to challenge the said Decision/Judgement by lodging an Appeal to the Court of Appeal instead of Review, hence being in that manner I found to be out of time even to lodge the 4 Notice of Appeal as the Courts of Appeal Rules states or requires/ hence this Application.
 6. that apart from all trends over this dispute/ the Applicant is still intending to appeal to the Court of Appeal due to the reasons that there are still many issues on the points of law, of which need an interventions by the court and should be addressed before the Court of Appeal.

7. That the judgment and Decree intended to be appeal against contain illegality on the face of record. I will begin with the first reason. It is evident that the decision by this court in Land appeal No 02 of 2015 was delivered on 6/12/2019. Applicant thereafter filed an application for extension of time to file Review No. 28/2020 and an application for review No 14 of 2020. It is also in his own affidavit that he on his own volition withdrew the review application on 15/10/2020. He did not however file an application for extension of time until 8/2/2021 the reason being that he was not supplied with the withdrawal order in time which according to his affidavit was availed to him on 19/11/2020. According to the Court of Appeal Rules, rule 83 (2), a notice of appeal is to be filed within 30 days from the date of the challenged decision. The Rule provides; 5 83 (2)- Every notice shall, subject to the provisions of rules 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal. The period from 6/12/2019, the date when the decision sought to be appealed against was delivered to 15/10/2020, the date of withdrawal of Application for Review No. 14 of 2020, qualifies a technical delay as described in the case of, Ally Ramadhani Kihioyo v. The Commissioner for Customs and the Commissioner General Tanzania Revenue Authority, Civil Application No. 29/01 of 2018 (unreported). The period from 15/10/2020 to 8/2/2021 is an actual delay in which according to the principles laid down in Lyamuya construction Company Ltd (Supra), each of these days has to be accounted for. In his affidavit as well as the advocates' oral submission, it was stated that though the review application was withdrawn on 15/10/2020, applicant was availed with the copy of the order on 19/11/2020. Nothing was explained as to why applicant had to wait for the withdrawal order to file an application for extension of time to file a notice of appeal. It is a common ground that such an order is of no assistance to the application for extension of time and therefore there was no need for such a long wait. Another period is between 19/11/2020 to 8/2/2021 when the applicant filed the present application. After having obtained the copy of the withdrawal order, it took the applicant another 50 days to file this application. Explaining what was going on in this particular period of time it was stated by his counsel that, applicant had to engage an advocate for preparation and filling of this application. Apart from the fact that this is a submission made from the bar, meaning that there was no such an averment in the applicant's affidavit, applicant's counsel failed to mention as to when the alleged engagement was done, living alone that he had explained to the court that applicant's withdrawal was facilitated by the advice he got from a lawyer meaning that he had a lawyer even before an order of withdrawal of his review application. In Bushiri Hassan v. latifa lukio, Mashayo, Civil Application No.3 of 2007 (unreported), the Court stated: Delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken. " Going by the sequence of events and the explanation the applicants counsel has offered, I am of the view that applicant has failed to account for the delay. To be more specific, the applicant has failed to account for the period from 15/10/2020 to 8/2/2021. I now move to the second reason of illegality. The applicant counsel submitted that the, decision intended to be challenged is tainted with illegality. It is a trite law that a complaint of illegality in the decision intended to be impugned suffices to move the court to grant extension of times so that, the alleged

illegality can be addressed by the Court. See the decision of the Court of appeal in Tanesco vs Mufungo leornard Majura and 15 Others, Civil Application No 94 of 2016, (Unreported), 7 However, it is also settled that to rely on an illegality as appoint for extension of time, the alleged illegality must be apparent on the face of the records. In Hamisi Mohamed (as the Administrator of the estate of the late Risasi Ngawe vs Mtumwa Moshi (as the Administratrix of the late Moshi Abdallah) (Supra) the court stated that, "It is follows then that an allegation of illegality by itself suffices for an extension of time. However, such an allegation of illegality "must be apparent on the face of the record, such as suggestion of jurisdiction; not one that would be discovered by long drawn argument or process" No illegality and/or irregularity on the face of record, was pointed out to the court. The ground of illegality mentioned by the applicant is not apparent on the face of the records sufficiently to be regarded as a good ground for extension of time. In the upshot, the application is dismissed for failure by the applicant to demonstrate reasons for the delay. Respondent is awarded costs. It is so ordered. DATED at SHINYANGA this za= day of JULY, 2021 8

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