

TANZANIA / JUDGMENT

maliya sirili 2 others vs rajabu a makulo

2023 tzhc 22026 23 october 2023

COURT
TZHCDECIDED
23 October 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MOROGORO SUB-REGISTRY)
AT MOROGORO LAND APPEAL NO. 77 OF 2023 (Arising from the Judgment and Decree of the
District Land and Housing Tribunal for Morogoro, at Morogoro in Land Appeal Case No. 25 of
2022; Originating from Diongoya Ward Tribunal in Land Case No. 110 of 2021) MALIYA SIRILI
APPELLANT ENYASI SIRILI 2nd APPELLANT HAMISI JUNANNE 3rd RESPONDENT VERSUS
RAJABU A. NAKULO RESPONDENT

RULING

16th August & 23rd October, 2023 CHABA, J. The appellants herein, Maliya Sirili, Enyasi Sirili and Hamisi Jumanne with the legal assistance of Mr. Prof. Ussy Charugamba, learned advocate, jointly filed a Memorandum of Appeal before this Court containing four (4) grounds of appeal. Basically, the appellants are challenging the Judgment of the District Land and Housing Tribunal for Morogoro, at Morogoro in Land Appeal Case No. 25 of 2022 delivered by Hon. E. Mogasa, Chairperson on 12th April, 2023. The appellants' joint appeal was filed and registered in this Court on 4th day of July, 2023. Page 1 of 13 A When the respondent, Rajabu Maluko was duly served with the appellants' memorandum of appeal, he immediately instructed Mr. Bartolomew L. Tarimo, learned advocate to react on his behalf. On 25th July, 2023, Mr. Tarimo filed a reply to the said memorandum of appeal accompanied with a Notice of Preliminary Objections (PO) on two points of law. But during the hearing, Mr. Tarimo prayed to drop and abandon the second point of objection and opted only to argue on the first preliminary objection which read as follows:

1. That, this appeal against the respondent is incompetent in law as it is time barred and being filed without the leave of this Honourable High Court. As a matter of prudence and practice, it is trite law that once a preliminary objection on a point(s) of law is raised, the same should be determined first before dealing with the case be it an appeal, main suit or application before proceeding with the respective case or matter at hand. Before going into details of the submissions advanced by both parties, I find it vital to briefly narrate the historical background of the matter at hand. As gleaned from the Court record, it goes like this: On the 2nd day of December, 2021, the respondent herein registered a land complaint. Land Case No. 110 of 2021 before Diongoya Ward Tribunal against the 1st, 2nd and 3rd appellants

herein. His claim was to the effect that, the appellants trespassed over his farm by cultivating on, beyond their everundisturbed permanent boundaries. The suit land was located at Matembo Komsingi - Mkuyuni in Lusanga Village within Morogoro District in Morogoro Page 2 of 13 Region. The trial Ward Tribunal entertained the matter and heard the parties on merit and finally on February, 2022 delivered its unanimous or majority judgment that the respondent was the one who trespassed over his neighbors' land by exceeding the boundaries. The Ward Tribunal further ordered that, the said previous boundaries should be respected and protected by both parties. It appears that, the respondent was dissatisfied with the decision, and therefore he immediately appealed to the District Land and Flousing Tribunal for Morogbro, at Morogoro (the DLFIT) in Land Appeal Case No. 25 of 2022 intending to challenge the decision of the trial Ward Tribunal. Being the first Appellate Tribunal, the DLHT had an opportunity to hear both sides. At the culmination of hearing of the appeal, on 12th April, 2023, the first Appellate DLHT delivered its judgment where it reversed the decision of the trial Ward Tribunal. It is from this background, the appellants also were unhappy, hence this second appeal. This brief background of the matter aims to demonstrate clearly the root of disputes that commenced from the trial Ward Tribunal in order to link with the raised preliminary objection under discussion. I now turn to the parties' submissions in support of the preliminary objection and against the same. At the hearing of the PO, parties agreed to argue and dispose of the same by way of written submissions. Both parties complied with the Court's scheduling order. Page 3 of 13 Submitting in support of the PO, that this appeal against the respondent is incompetent in law as it is time barred and being filed without the leave of this Honourable Court, Mr. Bartalomew L. Tarimo, Counsel for the respondent contended that, the appellants' appeal was filed on 4th July, 2023 which is twenty-two (22) days late against the DLHT's judgment which was delivered on 12th April, 2023. He submitted that, appeals of matters originating from Ward Tribunals to this Court must be filed within sixty (60) days from the day/date of judgment as provided under section 38 (1) of The Land Disputes Courts Act [CAP. 216 R. E. 2019]. Mr. Tarimo argued that, counting from the day/date of the judgment, on 12/04/2023 to the filing date on this Court, on 04/07/2023, is, almost 82 days. He stated further that, taking 82, days minus 60 days, it means that the appellants delayed to file their memorandum of appeal for clear 22 days without advancing reasonable cause. To bolster his arguments, Mr. Tarimo cited a number of authorities from this Court and the Apex Court of our land expressing the effect of failure to file the appeal or applications within the prescribed period of time and failure to apply for an extension of-time. These authorities include but not limited to: *f^{atibna} Bank of Commerce Vs. Sadrudin Meghji* [1998] TLR. 503 (CAT), *John Chuwa Vs. Anthony Ciza* [1992] TLR 233, and *Bushiri Hasan Vs. Latifa Lukio Mashayo*, Civil Appeal No. 3 of 2007 (unreported) just to mention, a few. . . Page 4 of 13 0\ In the end, Mr. Tarimo prayed the Court to dismiss the appeal in its entirety with costs for being time barred and for being filed without leave of this Court. In reply, the appellants through the learned advocate Prof. Mr. Ussy Charugamba submitted that, the judgment and decree of the DLHT was delivered on 12/04/2023, and this appeal was filed on 04/07/2023, hence filed within 32 days from the date of filing, thus competent in this Court. He went on highlighting that,

having noted that the instant appeal was filed within the statutory time, it was useless to consume the precious time of this Court by filing an application for extension of time while the appeal was properly lodged within time. Mr. Ussy also annexed to his submission's annexures A-1, A-2 and A-3 as exhibits. Annexure exhibit A-1 is a copy of judgment of the DLHT, and annexure exhibit A-2 is the copy of the letter written by the appellants dated 25/04/2023 requesting the Hon. Chairperson to supply him with the copy of the Judgment, Decree and Order of the DLHT while annexure exhibit A-3 is letter directed to the Deputy Registrar of the High Court (T), Morogoro Sub-Registry informing her that the present appeal was filed within time and it is not time barred. Finally, Mr. Ussy Charugamba submitted that, without having annexed a copy of judgment and decree on appeal the registry office would have not accepted the appellants petition of appeal. For precision, the version of the appellants' Counsel is hereunder quoted in verbatim as shown at page 3 of his written submission in reply to the respondent's submission in chief: - Page 5 of 13 Mostly certainly. The Registry may not receive Petition of Appeal that does not annexed with Judgment and Decree The respondents counsel raised this point before this High Court for wasting the parties in this case and Courts time." [Emphasize added]. In the end, Mr. Ussy Charugamba amazingly concluded that, I quote: "We do hereby vehemently deny the said Preliminary . Objection above and we pray this Honourable Court for costs, because it is totally incompetent, frivolous and vicious and made me and my clients' harassment and unnecessary Costs considering the fact that all details with regards to the said case is dear from the said tribunal." [Emphasize added]. I have gone through the rival submissions advanced by both parties in support and opposition of the above raised preliminary objection. Further, I had ample time to read and examine as well, the record of appeal, proceedings and Judgment of the lower Tribunals. The issue calling for my consideration and determination is whether or not the PO raised by the Counsel for the respondent has merit or otherwise. On reviewing the record of the lower Tribunals and upon a careful scrutiny of the Judgment of the first Appellate DLHT for Morogoro, it is apparent that the same was delivered on 12/04/2023 by the Honorable E. Mogasa, Esq. Page 6 of 13 Chairperson. According to the record, this original judgment was duly stamped and sealed by the first Appellate Tribunal. It was signed and stamped on the bottom left of each page by the presiding Chairperson. The Judgment is typed with the heading "Hukumu" dated 12/04/2023 and it is short and clear by physical looking, written in Swahili with a maximum of five (5) pages. My perusal revealed that, the record of the first Appellate DLHT and the entire record had nothing so called "Decree" Reverting to the appellants' submission, they averred that although the said judgment was delivered on 12/04/2023 but a such document was not availed to them within time. In the circumstance, they were obliged to apply for a copy of judgment before starting preparing their appeal to this Court. As hinted above, the appellants have annexed copies of the said letter requesting for a copy of the judgment In their submissions those annexures were named as exhibits A-1, A-2 and A-3. I have gone through these documents, but before to disclose what exactly transpires therein, I wish to point out that, it is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, excerpt /

extracts of judicial decisions or textbooks have been regarded as evidence of facts and, where there are such annexures to written submission, they should be expunged from submission and totally disregarded.. See the case of Tanzania Union of industrial and Commercial Workers (TUICO) Vs. Mbeya Cement Company Ltd and Another [2005] TLR 41. Page 7 of 13 I have stated earlier on that, I will disclose what exactly transpires in the purported annexures to the appellants' submission. Before I disregard these annexures, my close examination on these documents discovered and revealed that, the same have been cropped, edited and forced to be changed by copying the DLHT's stamp, and signatures of the first Appellate Chairperson. Having gone through the record of the DLHT, I found no copy of the said letter indicating that the appellants sometimes in between applied to be supplied with a certified copy of the judgment. That being the position in the record of the DLHT, it remains undisputed fact that the instant appeal was filed in this Court on 04/07/2023 - against the judgment of the first Appellate Tribunal, which was delivered on 12/04/2023 - thus proving that the same was filed beyond 60 days, hence contravened the guiding provision of section 38.(1) of the Land Disputes Courts Act, [CAP. 216 R.E, 2019], which articulates that: - 'Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court Provided that, the High Court may for good and sufficient cause extend the time for filing an appeal either before or after such period of sixty days has expired'. [Emphasis Added]. Page 8 of 13 As correctly submitted by the Counsel for the respondent, the appellants delayed to file their appeal for 22 days and without any justifiable reasons. If the appellants aimed to lodge their appeal in accordance with the law, it was better for them to seek and apply first in this Court for an extension of time as suggested by the Counsel for the respondent. As I have noted above, the Counsel for the appellants submitted that, the Hon. Deputy Registrar, High Court (T), Morogoro Sub- Registry, would have not received the memorandum of appeal if the same would have not attached with the copy of judgment and decree of the DLHT. In my considered opinion, the Counsel for the appellants fumbled on this facet because it is not the duty of the registry office. Mr. Ussy Charugamba, would have been correct, if he would have backed up his contention with the provision of the law. It is the principle of law that, appeals of matters originating from Ward Tribunal are guided by the provision of section 38 (1) of the Land Disputes Courts Act [CAP. 216 R. E. 2019]. The law provides that, any party who is aggrieved by a decision or order of the DLHT in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court. Section 38 (2) and (3) of the LDCA (supra) articulates that; every appeal to the High Court shall be by way of petition and shall be, filed in the DLHT from the decision, or order of which the appeal is brought.. Upon receipt of a petition under this section, the DLHT shall within fourteen days dispatch the petition together with the record of the proceedings in the Ward Tribunal and the DLHT to the High Court. ■■■''' Page 9 of 13 ''' As gleaned from the Court records, this appeal stemmed from BARAZA LA KATA - biNGGOYA where the respondent herein unsuccessfully sued the appellants. On appeal to the DLHT, the matter was decided in his favour and the appellants became unhappy, hence

the present appeal. Now applying the above provision of the law, it is settled that the instant appeal was supposed to be filed before the DLHT and not:direct to this Court. As per record, this appeal was-filed in this Court on 04/07/2023. Despite the fact that, it was filed out of the .statutory time as discussed above, but the truth is that the same was wrongly filed before this Court, hence incompetent before this Court. Before I pen off, I wish to take note and state though by passing that, all lawyers have big role to play in the administration of justice especially when advising their clients and handling their cases. Lawyers should always portray their competence and integrity not only to the Court but also to their respective Client(s) and the community at large. While perusing the Court records, I was shocked with the written submission prepared and made by the learned Counsel for the appellants,. Prof. Ussy Charugamba of-Ussy Production. Even the purported memorandum of.appeal drawn and filed in this Court by Prof. Ussy Charugamba. had no legal test as.if the same was drawn and filed in this Court by layperson. The worst thing is that, the purported forged documents were without a shame annexed,to the appellants written submission. A close look of the letter to the Hon, DR of the High Court (T), Morogoro Sub-Registry shows that it was drafted by the. Counsel fpr the appellants. Prof. Ussy Charugamba Page 10 of 13 himself. However,, our . registry offlGe does not reveal such copies of letters either. It should be noted that, legal profession is considered to be one of the noble professions of the society. The nobility of any profession sprang from its foundation of education. The standards of legal profession in our Jurisdiction are controlled by the Tanganyika Law Society which is currently governed by the Tanganyika Law Society Act, [CAP. 307 R. E. 2002], and the Advocates Act [CAP. 341 R.E. 2019] is the foundation on the basis of which the TLS claimed its authority to control and supervise the legal profession. Tam afraid that, if this noble profession will be taken for granted even by Professors who are usually experts in their field and teachers of the highest rank and the persons who are expected to be highly delivering their expertise in the administration of justice in the country, I see the future of practice of law in our jurisdiction will be at stake. Rule 21 (1) and (2) of The Advocates (Professional Conduct and. Etiquette) Regulations, 2018, GN. No. 118 published on 9'^^March, 2018 which ■provides: "Rule 21 (1) When advising the client, the advocate shaii not knowingly assist in or encourage any dishonesty, fraud, crime or iiiegai conduct and never to instruct the client on how to violate the iaw and avoidpunishment

- 2) The advocate has a duty to be on guard against becoming the tooi or dupe of an unscrupulous client or of Page 11 of 13 persons associated with the ciient who have an interest in the ciient's matter or its outcome and against engaging in unethicai conduct It is important to note that, these regulations have been made for the purpose of maintaining the proper and efficient administration of justice and thus set out the, principles and standards to be observed by all advocates in Mainland Tanzania. In my considered view, going against these regulations by any lawyer, is tantamount to interpolations of what is not stated by the regulations. ,

- For the reasons stated herein above, I find the appeal is incompetent before this Court for being filed in the wrong registry. Consequently; I proceed to dismiss it with costs. Order accordingly. DATED at O this day of October, 2023. CQ 0/c Uj X vv> V- M. J. haba JUDGE 23/10/2023 Page 12 of 13 Court: Ruling delivered under my hand and the Seal of the Court in Chambers this 23rd day of October, 2023 in the presence of Ms. Sophia Omary, learned advocate for the Respondent and in the absence of the Appellants. L. B. JL[^]Rinana Uj X V-mg. DEPUTY REGISTRAR 23/10/2023 Court: Right of the parties to appeal to the CAT fully explained. CO[^]O o L. B. nana mI Uj X y DEPUTY REGISTRAR 23/10/2023 Page 13 of 13

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