

TANZANIA / JUDGMENT

martin nicas manya vs maiko musa 4 others 2022 tzhclandd 155 31 march 2022

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31 March 2022

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM MISC. LAND CASE
APPLICATION NO. 07 OF 2021 MARTIN NICAS MANYA.....

APPLICANT VERSUS MAIKO

MUSA.....1stRESPONDEN PATRICK
BROWN..... 2ndRESPONDEN YONA
MWANJA..... 3rdRESPONDEN VICTOR
MATANDIKA..... 4TMRESPONDEN SHABANI
SAID..... 5thRESPONDEN

RULING

Date of last Order: 28.03.2022 Date of Ruling: 31.03.2022 A.Z MGEYEKWA, J This is an application for setting aside the dismissal order made by this court made on 5th September, 2017 in Land Appeal No. 141 of 2015. The i application is brought under Order IX Rule 6 (1) and section 95 of the Civil Procedure Code Act, Cap.33 [R.E 2019]. The application is supported by an affidavit of Martin Nicas Manya, the applicant, and contested by a counter affidavit of the respondents' deponent by respondents. The respondents also lodged points preliminary objection as follows:-

1. That, this Application is filed out of time
2. That, the court is not properly moved since the applicant has cited a wrong provision of the law. When the matter was called for hearing before this court on 07th March, 2022, the 5th respondent urged this court to argue the preliminary objection by way of written submission. By the court consent, the respondents filed their submission in chief on 15th March, 2022 and the applicant filed his reply on 22nd March, 2020. As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the suit. That is the practice of the Court founded upon prudence which I could not overlook. Getting off the ground was the respondents, it was the respondents who started the ball rolling. On the first limb of the objection, they claimed 2 that the applicant has failed to move the court properly since the application before this court is time-barred. The respondents contended that the impugned order was delivered on 29th November, 2021 and the applicant lodged the instant application on 10th January, 2022. To support their

argumentation they referred this court to the Law of Limitation Act, Cap. 89 and claimed that the applicant ought to have filed the instant application within thirty days. The respondents went on to argue that in computing the time from 29th November, 2021 when the dismissal order was delivered up to 10th January, 2022 when the applicant cropped out from his slumber to file this application is almost a lapse of 42 days. To buttress their position they cited the case of Ndege Commercial Service v Omari Ibrahim, Civil Appeal No. 246 of 2003, HC at Dar es Salaam (unreported). Concerning the second limb of the objection, the court is not properly moved since the applicant has cited a wrong provision of the law. The respondents submitted that the applicant was supposed to cite a specific provision of law to move this court to determine his application. They added that the applicant has cited Order IX Rule 6 (1) and section 95 of the Civil Procedure Code Act, Cap. 33 which is a wrong citation of the law. They added that merely mentioning the number of sections cannot move this court to 3 determine his application. To buttress their contention they cited the cases of Zanzibar Telecom Co. v Haidary Y. Rashid t/a Narasia Enterprises, Civil Appeal No.2 of 2009 HC Commercial Division at Dar es Salaam and Bahandi Sharif Rashid and 2 others v Mansoursharif Rashid and another, Civil Application No. 177 of 2006 CAT at Dar es Salaam. On the strength of the above submission, the respondents beckoned upon this court to sustain the preliminary objections and dismiss the applicant's application for being hopeless time-barred. In rebuttal, on the first limb of the objection, the applicant submitted that the applicant lodged his application online through e- filling on 29th December, 2021 and the same was admitted by the Deputy Registrar. Thus, it was his view that the application was lodged within the prescribed time. He submitted that he understand that the law refers to the court's exchequer receipt which is dated 10th January, 2022. He added that in such circumstances, he seeks the wisdom of the court to forego the 12 number of days exceeded which included public holidays and weekends and determine the application on merit. With respect to the second limb, the applicant simply submitted that the application is brought under a correct provision of the law related to 4 the application to set aside a dismissal order in a suit where there is more than one defendant. He added that on the hearing date the applicant, 2nd and 3rd defendants were absent, hence the applicant has a right to move the court by citing Order IX Rule 6 (1) of the Civil Procedure Code Cap.33 [R.E 2019]. On the strength of the above submission, the applicant urged this court to dismiss the objections raised by the respondents and the court to proceed to determine the Misc. Land Application No. 571 of 2021 on merit. I have considered the respondents' and applicant's arguments for and against the preliminary objection. I have opted to address the first objection that this application is time-barred. The applicant in his submission tried to convince this court that he lodged the instant application online on 29th December, 2021. However, there is no any proof of the same. The mere words of the applicant cannot move this court to rely on his submission. The records reveal that the Misc. Application No. 571 of 2021 was dismissed for want of prosecution on 29th November, 2021 and the applicant lodged the instant application on 10th January, 2022. The limitation of time to file a dismissal order is stipulated under Item 4 of the 5 1st Schedule Part III of the Law of Limitation Act, Cap. 89 [R.E 2019] is 30 days. For ease of reference, I reproduce the above part hereunder: " For an

order under the Civil Procedure Code or the Magistrates' Court Act, to set aside a dismissal of a suit thirty days." Pursuant to the above provision of the law, the period of limitation started to run from the date when this court issued the dismissal order on 29th November, 2021. The time of limitation ended on 28th December,

2021. Instead, the applicant filed the instant application for restoration on 10th January, 2021 whereas counting the days of delay from 29th November, 2021 when this court dismissed the application to 10th January, 2022 when the applicant lodged the instant application 14 days lapsed. That means the applicant has filed the instant application after 14 days. The period provided under Item 4 of the First Schedule of the Law of Limitation Act Cap.89 [R.E 2029] ended on 28th December, 2021. Filing the current suit on 10th January, 2022 is beyond the period of limitation time and leaves the appellant unprotected. The records are silent that the appellant applied for an extension of time to file his appeal out of time, the same is certainly improper before this court. In the case of John Cornell v A. Grevo Tanzania Ltd, Civil Case No. 70 of 1998 High Court of Tanzania, held that:- 6 " However, unfortunate it may be for the plaintiff, the Law of Limitation, on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web.⁷⁷ Based on the above authority, the applicant's request for this court to exclude holidays from counting the days of delay. The limitation of time to file a dismissal order as stipulated under Item 4 of the 1st Schedule Part III of the Law of Limitation Act, Cap. 89 [R.E 2019] is 30 days. For ease of reference, I reproduce the above part hereunder: " For an order under the Civil Procedure Code or the Magistrates' Court Act, to set aside a dismissal of a suit thirty days.⁷⁷ Counting the days, the applicant was required to file the instant application on 28th December, 2021. In accordance with section 60 the computing of days applies when the date of filing the application or suit falls under holiday, Saturday or Sunday not otherwise. For ease of reference I reproduce section 60 (1) (c) of the Interpretation of Laws Act, Cap. 1 as follows:-

60. -(1) In computing time for the purposes of written law- 7

(a) where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the next day that is not an excluded day." Applying the above provision of the law, it is clear that the request of the applicant to exclude Saturdays, Sundays, and Holidays cannot hold water. For reasons canvassed above, I find the appeal before this court was filed out of the prescribed time and in terms of section 3 of the Law of Limitation Act, Cap. 89 [R.E 2019], the remedy is to dismiss the application. Thus, I proceed to dismiss this application. Each party to shoulder his own costs. Order accordingly. DATED at Dar es Salaam this 31st March, 2022.

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