

TANZANIA / JUDGMENT

LAND APPEAL NO

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IN THE HIGH COURT OF TANZANIA MUSOMA SUB - REGISTRY AT MUSOMA LAND APPEAL NO. 78 OF 2023 (Arising from the Decision of the District Land and Housing Tribunal for Tarime at Tarime in Misc. Land Application No. 62 of 2022, Originating from Application No. 5 of 2019 at Kitembe Ward Tribunal) ODHIAMBO ONGONG'A APPELLANT
VERSUS JENIFA JOHN OYUNGU RESPONDENT

JUDGMENT

25th & 30th April, 2024 M. L. KOMBA, J-: Background of the matter can be summarized as follows; respondent filed a Land Application at Kitembe Ward Tribunal where she claimed the appellant had overstayed into her land, the family land without permission. Appellant denied allegation but Ward tribunal proceeded and after full trial pronounced the disputed land belong to the family of the respondent. Appellant appealed in District Land and Housing Tribunal for Tarime at Tarime (the DLHT) in Appeal No. 71 of 2019 where it overturns the decision of the Ward Tribunal. Dissatisfied, Appellant appealed to High Page 1 of 13 Court, Land Appeal No. 126 of 2020 where nullified DLHT proceedings and nullified the decision in Appeal No. 71 of 2019. Respondent after noting he is out of time to appeal against Land Application No. 05 of 2019, he lodged Misc. Land Application No. 62 of 2022 so that DLHT can grant time. Contrary to appellant expectation, reason for extension of time was not reasonable hence the application was dismissed. Appellant decided to appear again at this court challenging dismissal of the application for extension of time with two grounds;

1. That the trial chairman erred in law and fact by reaching its decision that the appellant failed to adduce sufficient grounds for extension of time while it is clear from the record that the appellant adduced sufficient grounds.
2. That the trial chairman erred in law and fact by ignoring the appellant's application for extension of time without taking into account that Land Application No. 05/2019 before the Kitembe Ward Tribunal in which the said application emanates from, was tainted with illegalities for improper constitution of the Ward Tribunal and lack of Locus stand of the respondent which were apparent on the face of record. Page 2 of 13 When the appeal was ready for hearing, the appellant was represented by Mr. Onyango Otieno an Advocate while respondent had representation of Mr. Johanes Onyango. Mr. Onyango Otieno was the first to address this court that the DLHT on 10/04/2023 dismissed their application (did not grant)

and they come forward with two grounds which he prayed to combine both and submitted that in judgment of Kitembe Ward Tribunal in Land case No. 05 of 2019 there are illegalities which he finds necessary to be pointed. First, he submitted on the issue of locus stand of the respondent as picked from the judgment that the respondent herein holds family land without family consent. While clarifying this point he said, it was not revealed if the respondent had representation capacity neither the name of the family which the land belongs. It was his further submission, in brief that the size of the land was not defined and even boundaries of disputed land were not identified at the trial tribunal. Counsel Onyango did not end there he also complained of the coram, that number of members seat during hearing was not as per dictates of law as two (2) members resigned and only three (3) members completed hearing. To cement his submission, he cited the case of Tarime Page 3 of 13 District Council vs Josina Company Ltd Misc. Land Appeal No. 11/2023 High Court Musoma at page 7 Judge referred the case of Principle Secretary, Ministry of Defence and National Service, that if there is illegality the court may extend time to allow the alleged illegality to be handled. He insisted that he mentioned and submitted on shortcomings which are coram of members during hearing and delivery of judgment, boundaries of the disputed land, size of the disputed land and locus stand of the respondent; all these, according to him, shows there is illegality and DLHT mislead itself and denied the appellant time. It was his prayer that the appeal to be allowed, this court to grant time to the appellant so that he appeals against the decision of Kitembe Ward Tribunal. Responding to counsel for appellant's submission, representative Johanes submitted that appellant failed to appeal on time and that was the law as person is supposed to account for days of delay and appellant did not account. It was his position that since 02/12/2020 to time he files application No.15 of 2021 there was 49 days. Johanes went further and complained that the appellant did not appeal and he did not explain where he was on all those days. To him, this is abuse of court process as he has Page 4 of 13 no justifiable reason which made him to be late. In Interchick Co. Ltd vs Mwaitenda Haobokile Michael, Civil Application No. 218 of 2016 CAT was faced with similar situation and laws were digested and facts were analysed. About illegalities it was his submission that Ward Tribunal did what was supposed to be done and admitted that at Kitembe Ward Tribunal, all the time when the case was heard two (2) members had excuses and the matter was handled by five (5) members and they provided their opinion but just before judgment, two (2) members resigned but their opinion was recorded on 05/04/2019 and judgment was delivered on 30/04/2019. To him resignation of two members cannot affect Ward Tribunal decision because their opinion was recorded. About the issue of legal representation by the respondent he was of the submission that, that is not an issue as Ward Tribunal provide their service to citizens whom they know within that locality, they know parties and their family and nobody complained of the locus stand during trial. He argues me to read decision in Jacob Magoiga Gichere vs Peninah Yusuph, Civil Appeal No. 55 of 2017 CAT Mwanza where it was said the ward tribunal has its procedures, if there is nothing pressing there is no need to disturb the position. About the size of the Page 5 of 13 land, he submitted that by the time they were given the said land there was no measurements neither technology of square meter in villages so, the size of the disputed

land is unknown as occupier was just given the land by pointing with fingers. He prayed the appeal to be found with no merit as it just intends to delay justice. He did not press for costs. During rejoinder Mr. Onyango prayed this court to note that respondent conceded that the size of the disputed land is not known and were not specified. About the number of members at War tribunal he submitted that under S. 11 of the Land Dispute Courts Act, Cap 216 R.E 2019 (Cap 216) there is specific number of members required to attend during hearing and he maintained that the judgment was delivered by three (3) members. That's is illegality. So far as the claim is holding family land and the respondent was not a representative of family land, he was of the position that there might be a series of cases over the same plot from family members. He prayed the illegality admitted to be among the grounds for extension of time as was in the case Tarime (Supra). He submitted that Gichere case is about Overriding Objective and it is distinguishable while the case of Interchick is also distinguishable as Page 6 of 13 applicant was given time to file written submission but he did not (counting each day) and maintained his prayers in chief. Now, it is my duty to analyse whether the appeal is properly before this court. At the very beginning I wish to point those grounds submitted by appellant at this stage is different from those submitted at the DLHT for Tarime while he was applying for extension of time. DLHT noted that appellant failed to account days of delay and dismissed the application. I have read records and there was no illegality pointed when appellant filed his application. At this stage as quoted, one of the grounds of appeal is about illegality and in his submission, appellant has pointed three issues which fall on illegality while respondent insisted on counting of days of delay. It is trite law that whenever any part seeks for extension of time to file an application or appeal out of time must advance the sufficient reason (s) that the court can consider it before granting the same. In determining the good cause courts have been invariably taking into account various factors including length of delay, reasons for delay, the degree of prejudice if any that each party is likely to suffer and circumstances of the case. See Jaliya Felix Rutaihwa vs Kalokora Bwisha & Another, Civil Application No. Page 7 of 13 392/01 of 2020, CAT at Dar es Salaam. Another thing considered by court in extending time is illegality in expunged judgment. See Tryphone Elias @ Ryphone Elias vs Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017 and James Anthony Ifada vs Hamis Alawi, Civil Appeal No. 482/2014 of 2019. Starting with the number of members of the ward tribunal during hearing. Counsel for appellant complained that only 5 members participated in the hearing but when judgment was delivered there was only three members. Mr. Johanes agreed that there was five members and all of them participated during hearing and they provided their opinion on 05/4/2019 then they resigned before judgment was read to parties. Section 11 Cap 216 provides that;

11. Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act. I had a look into the trial Tribunal proceedings and found that when the trial begins on 05/03/2019 there were six (6) members. And record shows five members were always in attendance until they give their opinions and Page 8 of

13 compose judgment on 05th April, 2019. There after two members resigned and when judgment was read to parties on 30 April 2019 there was only three (3) members. Counsel Onyango complained that the coram was not as per law. I find during hearing and even by the time members aired their opinion they were five members, that is not less than four as section 11 provide. I Find the coram was correct during hearing and even at the time of decision. This first issue can be solved by principle in Jacob Magoiga Gishere vs Peninah Yusuph (supra). Second issue is locus stand of the respondent, Jenipher. Counsel Otieno submitted that respondent is claiming family land but she did not have representation capacity, he fear that might pave way to other suits over the same piece of land as the respondent insisted that the disputed land is family land. I have read proceedings and the judgment of the DLHT and find that name of the family in which the land belongs was not revealed. Further on 12/3/2019 respondent (then applicant) informed the tribunal that Onyango who was the father of the appellant was given the said land by respondent husband and the husband is still alive. However, at the Kitembe ward tribunal, respondent claimed for her land. The land does not belong to respondent who initiated the suit at ward tribunal and she failed Page 9 of 13 to prove that she is claiming on behalf of the family of the late person. This might cause series of suits as any family member might file a suit against appellant over the same piece of land. It must be remembered that parties are bound by their own pleading. See Barclays Bank (T) Ltd vs Jacob Muro Civil Appeal No. 357/2019. Judgment of Kitembe ward granted right of the land to the family without mention the name of the family while respondent claimed appellant has over stayed over her land. I find this is irregularity which if left in court record will attract endless litigation as we have the duty to make sure all lower courts and tribunals adhere to the law. See Marwa Mahende vs Republic [1998] T. L.R 249, Adinardi Iddi Salimu and Another vs The Republic, Criminal Appeal No. 298 of 2018 (unreported) and Adelina Koku Anifa and Another vs Byarugaba Alex, Civil Appeal No. 46 of 2019. In the latter case, Court of Appeal had this to say; where the tower court may have not observed the demands of any particular provision of law in a case, the court cannot justifiably dose its eyes on such glaring illegality because it has the duty to ensure proper application of the laws by the subordinate courts and or tribunals...' Page 10 of 13 The last one is the issue of the size of the disputed land. It has been said in a bundle of precedent that in determining land disputes, courts and or tribunals must assure with size, location and demarcation of the land is known. This is the requirement has. been interpreted by Court of Appeal and this court in several cerebrations to mention the few are Daniel D. Kaluga vs Masaka Ibeho & Four Others, Land Appeal No. 26 of 2015; Rev. Francis Paul vs Bukoba Municipal Director & 17 Others, Land Case No. 7 of 2014, Martin Fredrick Rajabu vs Ilemela Municipal Council and Another, Civil Appeal No. 197 of 2019, Aron Bimbona vs Alex Kamihanda, Wise. Land Case Appeal No. 63 of 2018, Hashim Mohamed Mnyalinia (Administrator of the Estate of the Late Mwamtumu Shehe Mashi) vs Mohamed Nzahi and 4 Others, Land Appeal No. 18 of 2020 and Robert Mnanka Robert Mnanka vs Semeni Samwel, Misc. Land Appeal No. 33 of 2022. From the record of Ward Tribunal when filing Land Application No. 05 of 2019, respondent herein did not explain any of the above-mentioned requirement. As members know the respondent stays in Kitembe village they

acted by assumption, that under section 45 may be retained. However, respondent did not disclose the size which is claiming to be the Page 11 of 13 family land on 12/3/2019 she informed the trial tribunal members she don't know the size of the land in dispute. Failure to adhere to this requirement and court directives is fatal, it need rectification. Importance of adhering to cited decided cases (Directives of the Court of Appeal) is to distinguish the disputed land form other land and to enable execution of the decree. Representative of the respondent was of the submission that the size of the land was and is not known as in villages there is no square meter technology. With due respect, villages used to measuring their land by footsteps. Several times litigants ascertained size of their land by footsteps. Granting ownership over piece of land with unknown size may cause chaos during execution. That is the position of this court and Court of Appeal in above cited precedents. I shall sail in the same position. Knowing the size of the disputed land was and is important to be known before issuing decree. This is illegality which need to be cured at appeal hence a reason to extend time for the appellate court to correct that illegality as it was said in James Anthony Ifada V. Hamis Alawi (supra) that; where there is allege illegality to the decision, extension of time need to be granted so that all alleged illegality can be addressed in the CAT to that appeal...' Page 12 of 13 So far as the appellant have two issues basing on illegality, size of the disputed land and locus stand of respondent, I find the analysis done is suffice to dispose the appeal at hand as there is illegality which has to be addressed. In the circumstances of the case at hand and for the aforesaid shortcomings, my mind is settled that the appeal has merit and is allowed. The decision in Misc. Land Application No. 62 of 2022 is hereby set aside and its proceedings are nullified. Appellant is given 30 days from the date of this judgment to appeal against the decision in Application No. 05 of 2019 from Kitembe Ward Tribunal. As per circumstances of this case, I make no order as to costs. M. L. KOMBA JUDGE 30th April, 2024 Judgment Deffv^red in chamber in the presence of parties who appears in person. Ur M. L. KOMBA JUDGE 30th April, 2024 Page 13 of 13

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