

TANZANIA / JUDGMENT

raymond obed kitilya vs the commissioner for lands ministry of lands housing human settlement 2 others 2023 tzhclandd 4 24 january 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPLICATION NO.646 OF 2022 (Arising from the Judgment and Decree of the High Court of Tanzania Land Division at Dar es Salaam in Land Case No.69 of 2009) RAYMOND OBED KITILYA..... APPLICANT VERSUS THE COMMISSIONER FOR LANDS MINISTRY OF LANDS, HOUSING & HUMAN SETTLEMENT 1st RESPONDENT THE ATTORNEY GENERAL 2ND RESPONDENT KHALID KHAMIS 3rd RESPONDENT

RULING

Date of Order: 23.01.2023 Date of the Ruling: 24.01.2023 A.Z. MGEYEKWA, J In this application, the Court is called upon to grant an extension of time to lodge a Notice of Appeal to the Court of Appeal of Tanzania against the decision of this Court in Land Case No. 69 of 2009. The application is brought 1 under section 11(1) of the Appellate Jurisdiction Act, Cap 141 [R.E.2019], The application is supported by an affidavit deposed by Raymond Obed Kitilya, the applicant. The applicant has set out the grounds on which an extension of time is sought. The respondent has stoutly opposed the application by filing a joint counter-affidavit deposed by Lucy Kimaryo, State Attorney. When the matter was called for hearing 16th December, 2022 Mr. Bernard Massimba, counsel appeared for the applicant, the respondents were absent. By the court order, the application was argued by way of written submission whereas, the applicant filed his submission in chief on 21st December, 2021. However, nothing has been filed by the respondents, to date. The respondent filed a counter affidavit but never appeared in Court to defend their case. The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter. Where the inability is on the part of the respondent, the consequence is to order that the matter be heard ex-parte. This position is consistent with the Court of Appeal of Tanzania holding in the case of National Insurance Corporation of (T) Ltd & Another v Shengena Ltd, Civil Application No. 20 of 2007 at DSM (unreported), it was held that: 2 "The applicant did not file submission on the due date as

ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act... it is trite law that failure to file submission n(s) is tantamount to failure to prosecute one's case." The 3rd respondent was duly been summoned to appear through Mwananchi Newspaper dated 21st November, 2022 but he opted not to appear in court. In consequence of the foregoing, it is ordered that the matters be determined ex-parte against the respondents, by considering the application based on the submission filed by the applicant and The applicant's counsel in his written submission submitted in length, I am going to summarize his submission as follows; Mr. Massimba stated that after the delivery of the impugned Judgment the applicant on 10th September, 2015 filed a Notice of Appeal and a letter requesting for copies of Judgment and proceedings within time and served the respondents. The counsel for the applicant went on to submit that the applicant's appeal was struck out by the Court of Appeal for being hopelessly time-barred and the applicant is not precluded from filing a fresh appeal nor does it bar this Court from exercising its jurisdiction in granting an extension of me for the applicant to file a fresh appeal as long as the applicants account for the days of delay. 3 The applicant's counsel submitted that the applicant in paragraphs 7, 8, and 9 of this affidavit stated that he traveled to Mbeya for the welfare of his son and the urgency of UWATA Primary Schools, Officials to complete the forms from prospective secondary schools and the National Exams for Std Seven was due for completion on 6th October, 2022. The counsel for the applicant went on to submit that on 7th October the applicant and his son were on the Sauli bus to Dar es Salaam and 8th October, 2022 was Saturday, the applicant took his son to Bagamoyo to seats for his exams and on 9th October, 2022 was Sunday. Mr. Massimba continued to submit that on 10th October, the applicant to hired an advocate and they lodged the instant application on 12th October, 2022, less than 30 days from the date of the Ruling. Mr. Massimba went on to submit that the applicant in paragraph 10 (a) of his affidavit made a prima facie claim that Hon. Kalombola, J commenced the suit and he wrote what transpired on 26th July, 2012 and there is nowhere on the record the Hon. Judge gave the parties an option to proceed with hearing with or without assessors and no reason was given why assessors were not involved. In his view, the Judge's act was violating Rule 5F (1) and (2) of GN.63 of 2001 and GN 364 of 2005 of the High Court Registries (Amendments) Rule 2005. 4 Fortifying his submission, Mr. Massimba cited the case of Exaud Gabriel MMari v Yona Seti Akyo & another, Civil Appeal No 91 of 2019, M/S Georged Center Ltd v The Honourable Attorney General & Tanzania National Road Agency, Civil Appeal No. 29 of 2016 and Mariam Samboro v Masoud Mohamed Joshi & another, Civil Appeal No 109 of 2016 The applicant's counsel went on to argue that the Deputy Registrar delivered the Judgment in Chamber No. 17 that never certified the said copy of the Judgment as a true copy of the original and the applicant was not informed of his right to appeal. He stated that in accordance with Order XX Rule (1) of the Civil Procedure Code Cap. 33 it is mandatory that the Court shall pronounce the Judgment in open Court not in the Chamber room and not by Deputy Registrar. To support his submission he cited the cases of Mashishanga Dalum Mashishanga v CRDB Bank & another, Civil Appeal No. 335 of 2019, and Tropical Africa Bam Ltd v Horace Were Muhwana, Civil Application No. 3 of 2012. The applicant also complained that the right of occupancy has never been terminated or revoked and approved by Hon. President. On the strength of the above submission, he beckoned upon this court to extend time to file a Notice of Appeal out of time. 5 I have heard the applicant's counsel

submission and the issue for determination is whether the application is meritorious. From these rival submissions, the Court is called upon to pronounce itself on whether a case has been made out to warrant the exercise of its discretion and grant of an extension of time to file a Notice of Appeal out of time. It is worthy of note, that grant of an application for an extension of time is at the discretion of the Court, however, such discretion is exercised upon the applicant satisfying the Court by presenting a credible case. It also requires that the applicant should act in a manner that upholds equity. To fortify this position, the Supreme Court of Kenya came up with a persuasive position in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Sup Ct Application 16 of 2014. It was elucidated as follows: "Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]." 6 The Court of Appeal of Tanzania has set guidelines to be considered before granting an application for an extension as enumerated in the case of *Ngao Godwin Lusero v Julius Mwarabu*, Civil Application No. 10 of 2015, CAT at Dar es Salaam. The said guidelines are:-

- (i) The applicant must account for all the periods of delay (ii) The delay should be inordinate. (Hi) The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intends to take. (iv) If the court feels that their other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged. Also see the famous case of *Lyamuya Construction Company Limited v Board of Trustees of YWCA*, CAT-Civil Application No. 2 of 2010 (unreported). Deducing from the applicant's sworn depositions, it is clear that the contention revolves around grounds that the applicant considers as sufficient cause for the delay in lodging the Notice of Appeal and accounting for the days of delay. Riding on the wisdom from the cited decisions, I find that the applicant has shown good reasons for her delay to file the Notice of Appeal within time. I 7 am saying so because the applicant in paragraphs 3, 4, 5, 6, 7, 8, and 9 has narrated the sequence of events which hindered him to lodge the Notice of Appeal. In my considered view, the applicant was caught in a situation where he was required to prepare his son for school exams. I have also considered the fact that the application for lodging the Notice of Appeal to the Court of Appeal resulted after the appeal being strike out by the Court of Appeal of Tanzania on 15th September, 2022, and the applicant promptly on 13th October, 2022 lodged the instant application which was less than a month. For the aforesaid reasons, I find it prudent for this court to exercise its discretionary power to grant an extension of time to the applicant to file a Notice of Appeal out of time within 30 days from today. Order accordingly. Dated at Dar es Salaam this date 24th January, 2023. //&/ ...; TvA A.Z.MGEYEKWA fflf)z JUDGE 24.01.2023 Ruling delivered on 24th January, 2023 in the presence of Mr. Bernard Massimba, learned counsel for the applicant. 8 9

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