

TANZANIA / JUDGMENT

richard osia mwandemele vs lwitiko osia mwandemele 2021 tzhc 9482 2 december 2021

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TZHCDECIDED
2 December 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MBEYA DISTRICT REGISTRY AT
MBEYA MISCELLANEOUS LAND APPLICATION NO. 76 OF 2021 (Originating from Land Appeal
No. 43 of 2021 of the High Court of Tanzania at Mbeya) RICHARD OSIA
MWANDEMELE..... APPLICANT VERSUS LWITIKO OSIA
MWANDEMELE..... RESPONDENT

RULING

A.A. MBAGWA, J. This ruling is in respect of an application for extension of time within which to file application for leave to appeal. The matter stems from the decision of this Court in Land Appeal No. 43 of 2021 in which the applicant's appeal was dismissed. The application has been brought under section 11(1) of the Appellate Jurisdiction Act by way of chamber summons and it is supported by affidavits of Richard Osia Mwandemele and Kelvin Kuboja Gamba, the applicant's counsel. In rebuttal, the application was opposed by the respondent through counter affidavit. Page 1 of 7 When the matter was called on for hearing, the applicant enjoyed the service of Boniface Mwabukusi while respondent was ably represented by Sospeter Tyeah, both learned advocates. At the very outset, Mr. Mwabukusi adopted the contents of two affidavits along with the accompanying documents. Submitting in support of the application, the applicant's counsel said that the applicant timely and diligently requested for copies of judgment, proceedings and decree with the view to appeal to the Court of Appeal. The counsel further submitted that the applicant also issued a notice of appeal within prescribed time and the same was duly served to the respondent. The counsel clarified that on 23rd August, 2021 the applicant wrote a request letter for the necessary documents which was followed by a reminder on 1st October, 2021. The applicant's continued to submit that despite all these efforts, the applicant was not availed with the documents until on the 4th day of October, 2021 when he physically went to the court. The counsel remarked that the delay was not at the applicant's instance as such he has good cause to be granted extension of time. In contrast, Mr. Sospeter Tyeah, counsel for respondent strongly opposed the application. Initially, he adopted contents of the respondent's affidavits to form part of his submission. I •/ The respondent's counsel submitted that extension of time is granted upon

consideration of three aspects namely, length of the delay, reason for the delay and degree of prejudice that the respondent is likely to suffer. In support of his contention, Mr. Tyeah cited the case of Airtel Tanzania Limited vs Misterlight Electrical Installation Co. Ltd & Another, Civil Application No. 37/1 of 2020, CAT at Dar es Salaam. Page 2 of 7 With regard to length of delay, the respondent's counsel submitted that the applicant delayed almost forty five (45) days in that the judgment and decree were ready in early September, 2021. He further submitted that the applicant had not shown a good reason for delay because the requested record was in respect of Land Appeal No. 17 of 2021 instead of Land Appeal No. 43 of 2021. Mr. Tyeah added that even the attached notice of appeal shows that the applicant is intending to appeal against Land Appeal No. 17 of 2021. The counsel argued that the respondent has never been a party to Land Appeal No. 17 of 2021 hence the notice of appeal is defective for indicating wrong case number. To buttress his argument on the defective notice of appeal, the respondent counsel cited the case of CRDB Bank Pic (Formerly CRDB 1996) Ltd vs George Mathew Kilindu, Civil Appeal No. 110 of 2017, CAT at Dar es Salaam to support his argument. In addition, Mr. Tyeah submitted that parties are bound by their pleadings. He expounded that the appellant requested record in respect of Land Appeal No. 17 of 2021 as such, he could not be supplied with record pertaining to Land Appeal NO. 43 of 2021. On this point, the counsel relied on the case of Jackson Sifael Mtares & 3 Others vs the DPP, Civil Appeal No. 180 of 2019, CAT at Dar es Salaam. Regarding the aspect of prejudice, the respondent's counsel told the court that the respondent will be prejudiced as he has been in court since 2016 and has failed to develop the land. He concluded by submitting that requesting copies of judgment and decree for Land Appeal No. 17 of 2021 was not a clerical error rather a fatal anomaly which exhibits the applicant's negligence. In a short rejoinder, Mr. Mwabukusi said that citing a wrong case number in the request letters as well as notice of appeal was a mere clerical error which did not occasion any injustice to the respondent. He told the court that the same can be cured by applying overriding objective principles in terms of section 3A (1) of Civil Procedure Code. He was thus opined that the respondent was not prejudiced in any how by citation of a wrong case number as such, the defect was not fatal and therefore curable via overriding objective principle I •) Having strenuously canvassed the rival submissions by the parties and upon scrutiny of the accompanying documents, it is my considered views that determination of this application is predicated on two issues namely, whether the applicant as shown good cause warranting this court to exercise its discretion of granting extension of time, and whether wrong citation of case number in the correspondences and notice of appeal relating to this application is fatal. To start with the 1st issue on good cause, the applicant has amply explained the reasons which led to the delay in filing the instant application. It is common cause in the applicant's affidavit that he was waiting for copies of judgment, proceedings and decree. Further it is exhibited through the dispatch that the applicant was supplied with the necessary documents on 4th day of October, 2021. According to the record, no sooner was the applicant served with the documents than he filed the present application. The application documents reveal that it was filed on 5th day of October, 2021. Thus, from the applicant's affidavit, it is clear that the applicant was vigilant to obtain the necessary documents but he could not be availed the same until on 4th day of October, 2021. It is a settled law that where a person makes a written » •/ request to the court to be supplied with copies of document he owes no . z . Page 4 of 7 obligation to make

frequent reminder and follow up. See Tanzania . China Friendship Textile Co. Ltd versus Charles Kabweza & Others, Civil Application No. 62 of 2015, CAT at Dar es Salaam. In this application it is exhibited through the annexures to the applicant's affidavit that he wrote the first letter on 23rd August, 2021 and thereafter wrote a reminder on 1st day of October, 2021. Thus, the applicant was diligent enough on his part and therefore he cannot be blamed for the delay in obtaining the necessary documents. The respondent's counsel argued that the applicant was requesting documents in respect of a different case that is why he was not served with the same. With due respect to the respondent's counsel, his argument cannot be entertained for he is not a court employee to depose on this fact. As such, his contention was based on speculation. > • It is now a settled position that in determining an application for extension of time the court has to take into account various factors including length of delay involved, reasons for delay, the degree of prejudice if any that each party is likely to suffer, the conduct of the parties and the need to balance the interests of a party who has a decision in his favour against the interests of a party who has a constitutionally underpinned right of appeal. See Jaliya Felix Rutihwa vs Kalokola Bweshwa & Another, Civil Application No. 392/01 of 2020, CAT at Dar es Salaam Having considered all the factors above, I am of the unfeigned views that the applicant has shown a good cause for delay hence he deserves to be granted extension of time. Reverting to the second issue, Mr. Tyeah argued that notice of appeal refers to Land Appeal No. 17 of 2021 to which the respondent was not a Page 5 of 7 party. The counsel further submitted that the applicant was requesting for documents in relation to necessary Land Appeal no. 17 of 2021 instead of Land Appeal No. 43 of 2021. According to Mr. Tyeah, wrong citation of the case number from which this application emanates renders the application incompetent. In rebuttal, Mr. Mwabukusi submitted that wrong citation was mere a clerical error which did not occasion any injustice to the respondent. Mr. Mwabukusi prayed the court to apply the overriding objective principle in terms of section 3A (1) of the Civil Procedure Code and find the error inconsequential. I entirely agree with the applicant's counsel that wrong citation of the case was a mere clerical error which cannot be used to defeat the applicant's substantive justice. Further, upon a thorough canvassing of the record, I could not see any prejudice occasioned by wrong citation on the part of the respondent. I therefore hold that the wrong citation of the case number is inconsequential in this application and therefore curable under overriding objective principle. '• In the upshot, I find this application meritorious and consequently grant extension of time for the applicant to file an application for leave to appeal. The applicant is thus given fourteen (14) days from the date of this ruling to file the application. Each party to bear its own costs. It is so ordered. Right of appeal fully explained. A.A. Mbagwa Judge 02/12/2021 Page 6 of 7 Ruling has been delivered in the presence of the applicant and Mr. Mwabukusi, counsel for the applicant on the one side and other other side Mr. Tyeah, learned counsel for the respondent this 2nd day of December, 2021. cl CfA- A.A. Mbagwa Judge 02/12/2021 Page 7 of 7

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