

TANZANIA / JUDGMENT

sarafina mbinge vs salehe juma gadau 7 others 2023 tzhclandd 17227 12 december 2023

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12 December 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND REVIW NO. 511 OF 2023 SARAFINA MBINGE.....
APPLICANT VERSUS SALEHE JUMA GADAU.....u.1st RESPONDENT ELI NAM I WILSON
MOSHI..... 2nd RESPONDENT SAID MRUMA..... 3rd
RESPONDENT SIFA MWAKIBINGA..... 4thRESPONDENT JOHN
SANGA..... 5th RESPONDENT JOSEPH SECHEMI 6th RESPONDENT
PAULINA SEVELINE..... 7th RESPONDENT BOARD OF TRUSTEES OF PENTECOSTE
CHURCH.....8thRESPONDENT Date of last Order: 27/11/2022 Date
of Ruling: 12/12/2022

RULING

I. ARUFANI, J The applicant filed in this court the present application urging the court to review the ruling and order of the court dated 29th October, 2021 and 2nd November, 2021 delivered by Hon. F. H. Mtulya, J. After the respondents being served with the memorandum of review, they filed in the court their notice of preliminary objections on points of law which read as follows: -

1. That the application has been filed out of time. i
2. That no copy of judgment, ruling, decree or order has been attached to the application. The court ordered the above stated points of preliminary objections be argued by way of written submissions. While the submission of the respondents was drawn and filed in the court by Mr. Julius Ndanzi, learned advocate, the submission of the applicant was drawn and filed in the court by Ms. Conseta Boniphace, learned advocate and the rejoinder was drawn and filed in the court by Mr. Julius Ndanzi, learned advocate. The counsel for the respondents stated in his submission that, the ruling which the applicant is asking the court to review was delivered on 02nd November, 2021 in Land Case No. 123 of 2019 and the application at hand was filed in the court on 22nd August, 2023 which is after the elapse of two years. He argued that, according to item 3 of Part III of the Schedule to the Law of Limitation Act, Cap 89 R.E 201.9, the limit of time for filing in the court an application for review is thirty days only. He

submitted that, as the application at hand was filed in the court out of time and without leave of the court, then as provided under section 3 (1) of the Law of Limitation Act, the application is supposed to be dismissed with costs. He argued in relation to the second point of preliminary objection that, the form for an application for review is provided under Order XLII 2 Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019 which states the form for preferring appeal shall apply mutatis mutandis, to an application for review. He referred the court to the case of Mwanaisha Mohamed Ngochele V. Mohamed Salum & Others, Land Case Appeal No. 99 of 2011, HC at DSM (unreported) where it was stated that, an application for review must be accompanied by a copy of a decree, ruling or judgment intended to be reviewed. He submitted that, failure to attach the copy of the drawn order and ruling to the memorandum of review is fatal and prayed the application be dismissed with costs. In her response the counsel for the applicant stated that, after the applicant being dissatisfied by the decision of Hon. Mtulya, J dated 29th October, 2021 and 02nd November, 2021 she filed in the court the application for review No. 787 of 2022. She argued that, the stated application was withdrawn from the court with leave to refile without stating the time of refiling the application in the court. She stated that, soon after the application being withdrawn from the court on 22nd June, 2023, the applicant filed the instant application in the court. She submitted the counsel for the respondents has failed to understand the application the applicant is referring too. She stated the counsel for the respondents has mislead himself by considering Land Case No. 123 of 2019 instead of 3 Land Review No. 787 of 2022. At the end she prayed the first point of preliminary objection be dismissed with costs. She argued in relation to the second point of preliminary objection that, failure to annex copy of the ruling to the memorandum of review is not fatal and it is not a point of law. She submitted that, copy of the ruling, judgment or decree are the court's documents and once a person has failed or by mistake overlooked to attach it in the application cannot make the application incompetent or useless. She argued that, the stated error is curable and stated that, as held in the case of Mukisa Biscuits Manufacturing Company Limited V. West EEnd Distributors Limited, (1969) EA 696 preliminary objection is required to be on pure point of law. She prayed the court to see the application was properly filed in the court and also pray the court to see the ruling of the court in Land Review No. 787 of 2022 attached to the submission of the applicant. At the end she prayed the court to dismiss both preliminary objections raised by the respondents for having no merit rather than prolonging the case. In his rejoinder the counsel for the respondents reiterated what he argued in his submission in chief. He said he was surprised by the submission by the counsel for the applicant because although it is stated in the memorandum of review that the applicant was dissatisfied by the 4 decision dated 29th October, 2021 and 02nd November, 2021 but the counsel for the applicant stated in her submission the application is for reviewing the ruling made by the court in the Land Review No. 787 of

2022. He said the counsel for the applicant has blamed him for considering Land Case No. 123 of 2019 instead of Land Review No. 787 of 2022. He submitted that, since what is submitted on the side of the applicant is outside the application before the court, the applicant has

miserably failed to support the application, and such application ought to be dismissed with costs. He submitted that, the answer to the contention by the counsel for the applicant that the court did not specify the time within which to refile the application in the court can be found under item 3 of Part III of the Schedule to the Law of Limitation Act which provides that, limitation of time for filing in court an application for review is thirty days. He went on submitting that, if the court did not state the time for filing the application the applicant ought to follow the time provided under the law. He said counting from 22nd June, 2023 to 22nd August, 2023 you will get 62 days which is beyond 60 days provided under item 21 of Part III of the Schedule to the Law of Limitation Act. He stated in relation to the second preliminary objection that, attachment of copy of the ruling and order of Land Review No. 787 of 5 2022 in the submission of the applicant is fatal mistake. He argued the stated ruling was supposed to be attached in the memorandum of review and not in the submission. He argued that, to do so is to pre-empt the preliminary objection. He cited in his submission the case of the Standard Chartered Bank and Another V. VIP Engineering and Marketing Limited, Civil Application No. 222 of 2016 (unreported) where it was stated the practice of trying to pre-empt preliminary objection cannot be tolerated. Finally, he prayed the application be dismissed with costs. Having summarized the rival submissions from both sides it is now the duty of the court to determine whether the preliminary objections raised by the respondents deserve to be upheld. I will start with the first preliminary objection which states the application is time barred. The court has found the applicant is beseeching the court to review the decision of this court dated 29th October, 2021 and 02nd November, 2021 pronounced by Hon. Mtulya, J. The court has found the decision pronounced by Hon. Mtulya, J on the mentioned date was pronounced in Land Case No. 123 of 2019. That being the decision the applicant is beseeching the court to review, the question is whether the instant application which was filed in the court on 22nd August, 2023 is time barred or not. 6 The court has found that, as the application is made under section 78 (1) and (2) together with Order XL.II Rule 1 (a) and I (b) of the Civil Procedure Code, then as rightly stated by the counsel for the respondents, limitation of time for filing in the court an application of this nature is provided under item 3 of Part III of the Schedule to the Law of Limitation Act. The cited provision of the law states that, the application under the Civil Procedure Code for a review of a decree, judgment or order is supposed to be filed in the court within thirty days from the date of the decision. If the application was supposed to be filed in the court within the stated period of thirty days from when the decision or order sought to be reviewed was pronounced, it is crystal clear that counting from 02nd November, 2021 when the impugned decision was pronounced until 22nd August, 2023 when the application at hand was filed in the court you will find about one year and nine months had elapsed. The court has found the counsel for the applicant argued that, the limitation period for the applicant to lodge the present application in the court is supposed to be considered by looking into the decision of the court made on 22nd June, 2023 which withdrew Land review No. 787 of 2022 from the court. The court has been of the view that, as rightly argued by the counsel for the respondents in his rejoinder it is true that the applicant had filed ■■■ 7 another

application for review of the impugned decision of the court which was registered as Land Review No. 787 of 2022 and it was withdrawn from the court on 22nd June, 2023 with leave to refile. However, it is the view of this court that limitation of time for filing the present application in the court cannot be determined by considering or basing the order of withdrawing the stated application from the court alone. To the view of this court the stated decision is supposed to be considered together with the decision delivered by the court in Land Case No. 123 of 2019 because that is the decision the applicant is seeking to be reviewed by the court. Therefore, the fact that the applicant had filed in the court another application for review of the impugned decision of the court and the stated application was withdrawn with leave to refile does not waive the requirement of observing the time provided for filing the application of this nature in the court. The stated finding of the court moved the court to come to the view that, as the applicant was required to file the application for review of the impugned decision of the court delivered on 2nd November, 2021 within thirty days that means the application for review of the impugned decision ought to be filed in the court by 02nd December, 2021. The applicant did not file in the court the application for review within the stated period of time and to the contrary it is until 06th 8 December, 2022 when she filed in the court the application which was registered as Land Review No. 787 of 2022. The court has found it has not been stated anywhere in the affidavit or submission filed in the court by the applicant's counsel that the applicant was granted leave to file the stated application in the court out of time. The court has also found that, even if for the sake of argument, the court will accept the argument by the counsel for the applicant that in determine the application is time barred or not is required to consider the Land Review No. 787 of 2022 which was withdrawn from the court on 22nd June, 2023 with leave to refile, but the application at hand was filed in the court on 22nd August, 2023. That means the present application was filed in the court after the elapse of about sixty one days from when the applicant was granted leave to refile the application for review in the court. The court has found it is true that the court did not specify in the order made in Land Review No. 787 of 2022 the time within which the applicant was required to refile the application for review in the court. However, as rightly argued by the counsel for the respondents, the applicant was required to observe limitation of time provided for under the laws for filing in the court an application which its limitation of time is not provided for in any written law. The court has found as stated earlier 9 in this ruling the law governing filing of an application of this nature in the court is item 3 together with item 21 of Part III of the Schedule to the Law of Limitation Act. The court has found while item 3 requires the application for review to be filed in the court within thirty days, item 21 states the application which no specific time is provided for by the Act is supposed to be filed in the court within sixty days. Since the decision which the applicant is beseeching to be reviewed was delivered on 02nd November, 2021 and the application at hand was filed in the court after the elapse of about one year and nine months and there is no leave sought and obtained from the court for filing the application in the court out of time, the court has found in all intent the instant application is time barred. Having found the application is time barred the court has found as rightly argued

by the counsel for the respondents the only remedy available for the application filed in the court out of time as provided under section 3 (1) of the Law of Limitation Act is dismissal of the application. The above stated finding makes the court to come to the view that there is no need Of indulging into determination of the second point of preliminary objection because the first point of preliminary objection suffices to dispose of the application at hand. Consequently, the preliminary objections raised by the respondents are hereby upheld and io the application of the applicant is dismissed with costs for being filed in the court out of time and without leave of the court. It is so ordered. Dated at Dar es salaam this 12th December, 2023. I. Arufani. JUDGE Court: Ruling delivered today 12th day of December, 2023 in the presence of Ms. Conseta Boniphace, learned advocate for the applicant and in the presence of the fifth respondent in person, Mr. Edson Nsima, church leader for the Eighth respondent and in the absence of the rest of the respondents. Right of appeal to the Court of Appeal is fully explained. I. Arufani. JUDGE 12/12/2023 ii

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