

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 85 OF 2017

**MARY AGNES MPELUMBE (As the administratrix of the estate of
ISAYA S. MPELUMBE, deceased).....APPELLANT**

VERSUS

SHEKHA NASSER HAMAD.....RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania,
Land Division, at Dar es Salaam)**

(Nchimbi, J.)

dated the 18th day of October , 2013

in

Land Case No. 89 of 2008

.....

RULING OF THE COURT

1st & 2nd June, 2020

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam (Nchimbi, J. as he then was) in Land Case No. 89 of 2008 (hereinafter "the suit"). In that court, the appellant, Isaya S. Mpelumbe (now deceased) instituted the suit against the present respondent, Shekha Nasser Hamad seeking to be declared the lawful owner of a parcel of land, Plot No. 224, Block

"D" situated at Tegeta area within the city of Dar es Salaam (the disputed land).

The appellant contended that he was the legal occupier of the disputed land by virtue of a right of occupancy granted vide a certificate of occupancy No. 44083 issued to him on 8/12/1994. At the trial, the appellant who testified as PW1, tendered the stated certificate of occupancy and the same was admitted in evidence as exhibit P.1. His evidence was supported by three witnesses including Suzan Mallya (PW3) who was at the material time a legal officer in the then Ministry of Land, Water, Housing and Urban Settlement (the Ministry). She testified that the appellant was initially allocated the disputed land vide a letter of offer Ref. No. LD/118716/1/RTC of 10/5/1986 and was later on issued with exhibit P.1.

The respondent denied the claim contending that the disputed Land was allocated to him by the same authority vide a letter of offer dated 1/4/1986. The letter was tendered and admitted in evidence as exhibit D1. His evidence was supported by one Ndemi Festo Ulomi (DW2) who was at the material time an official of the Ministry in the Land Administration Department. He testified that his department

dealt with the dispute between the parties over ownership of the disputed land. It was his evidence further that, after having inspected the file which related to the allocation of the disputed land, he found out that there was double allocation which was perpetuated through a forgery whereby the folios in the relevant file were tempered with for the purpose of attempting to show that the appellant was the first to be allocated the disputed land. It was also his evidence that the Ministry intended to resolve the dispute by among other things, allocating to the appellant another plot of land No. 1370 Block "G" in Tegeta area, but he refused to accept the offer.

Having considered the evidence, the learned trial Judge found that the respondent was the lawful owner of the disputed land on account that he was the first to be allocated the plot. Relying on the Court's decision in the case of **Frank Safari Mchuma v. Shaibu Ally Shemdolwa** [1998] TLR 278, the learned Judge held that, although the appellant had in his possession a certificate of occupancy, the document was not superior to the letter of offer issued to the respondent prior to the date on which the certificate of occupancy was

issued to the appellant. The High Court thus dismissed the suit with costs.

The appellant was aggrieved by the decision of the High Court hence this appeal which is predicated on the following six grounds of appeal:-

- "1. That the court erred in law and fact in treating the offer by Shekha Hamud Nasser as a genuine document while it was disputed by the Ministry officials who were issuing and signing Offers and Certificates of Title.*
- 2. The court erred in law and fact by treating Isaya Simon Mpelumbe as a subsequent grantee of Plot No. 224 Block D, Tegeta area while in fact it was not formally allocated to any other person.*
- 3. That the court erred in law and fact in treating [the] matter as double allocation while the documentary evidence adduced indicates clearly that there was no double allocation.*
- 4. The court erred in fact by treating Shekha Nasser as a Government*

employee entitled for the allocation of land in Block D, Tegeta area while she was not a Government employee and therefore not qualified for plot allocation in Block D, Tegeta area.

5. *The court erred in law and fact by considering the purported grant to Shekha Nasser as proper while in 1986 when the purported Offer was issued the Respondent was a minor not qualified for the grant and no record exists to show that the land was held in trust for her.*
6. *The court erred in law and fact by presuming that Shekha Nasser made the application for the grant of Right of Occupancy before the grant as per the law which was not the case."*

At the hearing of the appeal, the appellant was represented by Mr. Edwin Shibuda, learned counsel while the respondent had the services of Mr. Gaspar Nyika, also learned counsel. Mr. Shibuda informed the Court that the appellant passed away on 4/4/2019 and following his demise, his wife, Mary Agnes Mpelumbe was appointed

by the Primary Court of Kinondoni at Kimara to be the administratrix of his estate. She was appointed on 5/9/2019 in Probate and Administration Cause No. 164 of 2019. The learned counsel prayed for an order substituting her as the appellant in the place of the deceased. The prayer was not objected to by the respondent's counsel. Given the circumstances and on the basis of the letters of administration granted to the appellant's wife, we granted the prayer under Rule 105 (1) of the Tanzania Court of Appeal Rules, 2009 as amended. We thus ordered substitution of the administratrix of the deceased's estate Mary Agnes Mpelumbe as the appellant in the place of the deceased.

Having done, so, we proceeded to hear the parties' advocates on the preliminary objection which had been raised by the learned counsel for the respondent through a notice which was filed on 14/7/2017. In the preliminary objection, the respondent contended that the appeal is incompetent:

"(i) For being filed out of time, as the Appellant is not entitled to the exception

under Rule 91(1) (sic) of the Court of Appeal Rules, 2009.

- (ii) For failure to attach the letter requesting for copies of proceedings, judgment and decree of the High Court and therefore in violation of Rule 96 (1) (k) of the Court of Appeal Rules, 2009.*
- (iii) For containing a defective Notice of Appeal.*
- (iv) For the Appellant's failure to serve the Record of Appeal to the Respondent on time contrary to Rule 97 (2) of the Court of Appeal Rules, 2009.*
- (v) The Judgment included in the record of appeal is defective contrary to Order XX rule 7 of the Civil Procedure Code, Cap. 33 R.E 2002.*
- (vi) The leave upon which the appeal is filed was granted under the wrong provisions of the law contrary to the Court of Appeal decision in Civil Appeal No. 97 of 2013, **Mabad Ying v. Mbeya City Council.**"*

In his submission however, Mr. Nyika abandoned grounds (iv), (v) and (vi) of the preliminary objection. Upon being prompted by the Court, he also conceded that the defect which he relied upon in ground (iii) is curable and thus found no need of pursuing that ground.

Submitting on grounds (i) and (ii), the learned counsel argued that since from the record, the impugned decision was handed down on 18/10/2013 and the appeal was filed on 29/3/2017 while the notice of appeal was lodged on 3/12/2013, the appeal is time barred as the same was filed after the period of 60 days of the notice of appeal contrary to Rule 90 (1) of the Rules.

According to the learned counsel, the appellant is not entitled to benefit from the exception stated under the proviso to Rule 90 (1) of the Rules because; first, the record does not contain a letter of the appellant showing that he applied for certified copies of the proceedings, judgment and the decree. Secondly, he went on to argue that even if there was such a letter, the same was not served on the respondent in compliance with Rule 90 (3) of the Rules. Relying on the decisions of the Court in *inter alia*, the cases of **Zathocodawu Members Represented by General Secretary of Zathocodawu**

v. Managing Director C. R. J. E. Zanzibar, Civil Appeal No. 26 of 2014 and **Joseph Mhina Msumari v. Mkurugenzi Mtendaji, One Stop Co. Ltd**, Civil Appeal No. 12 of 2008 (both unreported), Mr. Nyika urged us to strike out the appeal for having been filed out of time.

In reply to the submission made by the respondent's counsel, Mr. Shibuda conceded that indeed, there is no evidence that the appellant applied for certified copies of the proceedings, judgment and decree and also, that service of a copy of such letter was not effected on the respondent. It was his argument however, that the letter may be found in the original record of the trial court. He implored upon us to ascertain that fact from the original record and find that, although the letter is not included in the record of appeal, the same does exist and that in the circumstances, the appeal does not offend the provisions of Rule 90 (1) of the Rules.

In a short rejoinder, Mr. Nyika reiterated his argument that, even if it could be established that the letter is in the original record, still the record of appeal does not show that a copy of that letter was served on the respondent as required by Rule 90 (3) of the Rules.

As shown above, ground (i) of the preliminary objection is based on the provisions of Rule 90 (1) which provides as follows:-

"90 - (1) Subject to the provisions of rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with-

(a) a memorandum of appeal in quintuplicate;

(b) the record of appeal in quintuplicate;

(c) security for the costs of the appeal,

save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."

It is common ground that in this appeal, although the appellant has contended that he wrote a letter to the Registrar of the High Court

requesting for certified copies of proceedings, judgment and the decree the letter is not included in the record of appeal. In the absence of that letter therefore, the appellant cannot benefit from the exception provided under Rule 90 (1) of the Rules because there would be no basis for excluding the period of delay from the date of expiry of 60 days of the notice of appeal to the date of institution of the present appeal. Even if we would have been minded to invoke the overriding objective principle and proceed to ascertain existence of the letter from the original record (which was not readily available), with a view of granting leave to the appellant under Rule 96 (7) of the Rules to file a supplementary record containing the letter, the appeal would still be time barred for offending the provisions of sub-rule (3) of Rule 90 of the Rules. That provisions states as follows:-

"90 – (1)

(2)

(3) *An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent."*

There is no gainsaying therefore that, since it is clear from the record that the appellant did not comply with the provisions of Rule 90(3) of the Rules, the omission renders the appeal time barred. For that reason, we find the appeal incompetent. In the event, the same is hereby struck out with costs.

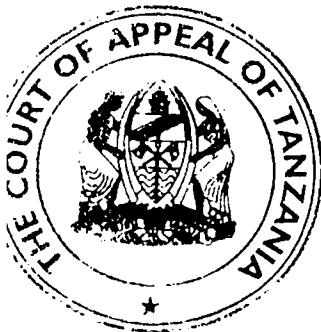
DATED at DAR ES SALAAM this 18th day of June, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 23rd day of June, 2020 in the presence of Mr. Edwin Sribuda, learned counsel for the Appellant and Mr. Silas Shija, learned counsel for the Respondent is hereby certified as a true copy of the original.




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL