IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 386 OF 2019

VALERIE MCGIVERN ..... APPELLANT

VERSUS

SALIM FARKRUDIN BALAL ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Kalombola, J.)

dated the 10th day of July, 2014
in
Land Case No. 22 of 2011

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JUDGMENT OF THE COURT

31st May, & 7th June, 2021

KOROSSO, J.A.:

The appeal arises from the ruling of the High Court of Tanzania sitting at Tanga in Land Appeal No. 22 of 2011 which sustained the respondent's preliminary objection that the appeal was time barred and in consequence dismissed it. Aggrieved by the said decision, she has appealed to this Court.

A brief background to the appeal is that in March, 1994 the respondent, Salim Fakrudin Dalal (the applicant then) purchased 3 acres of land situated at Boza village within Pangani District (the suit property) from Andrea Mbaramila at a price of Tshs 200,000/-. A sale agreement was executed and the sale was witnessed by village leaders. The only improvements effected on the suit land were trees planted by Mussa

Waziri and Ramadhani Hamisi who had been hired by the respondent. In the year 1995, the respondent left for Canada to work for gain and the suit land was left in the care of his sister Arefa Dalal (AW1 at the trial). Sometimes in 2009, Mussa Waziri reported to AW1 that someone has invaded the suit land. AW1 visited the area and found a temporary building in the suit land she was unaware of and also met Franco Peter John (who was the 3rd respondent at the trial but not a party in the current appeal) who informed her that he co-owned the suit land with the appellant.

Subsequently, AW1 followed up on the claims and was informed that the respondent's son, one Abdulkarim Salim was the one who sold the suit land to the appellant and Franco Peter John. AW1 reported the matter to the Village leaders and later the matter was referred to the Ward Tribunal who advised her to take up the matter to the District Land and Housing Tribunal (DLHT).

The respondent then filed an application in the DLHT through AW1, his legal representative and sought the following reliefs: **one**, an order nullifying the sale and transfer of the suit property sold to the appellant, Valerie McGivern (then the 2nd respondent) and Franco J. Peter. **Two,** a declaration that the respondent was still the lawful owner of the suit property. **Three,** a permanent injunction order restraining the appellant and the two other respondents then (who are not parties in the current

appeal) and/or their agents, servants, workmen and any other person operating for them in any way from interfering with the suit property. **Four**, Orders compelling the appellant and the other respondents (then in the application), to jointly and severally pay Tshs. 20,000,000/= to the respondent as compensation for the suffering he underwent on learning of the sale of his property and damages occasioned to the suit property. **Five**, costs of the application and **six**, any other reliefs.

The appellant's defence was that she lawfully purchased the suit property in 2007 having been informed that the owner of the land who lived in Canada was interested in selling it. She stated that the sale transaction was concluded at the village government premises upon payment of Tshs. 22 million. After purchasing the suit land she ensured it was surveyed and she was later issued a letter of offer.

After a full trial, the DLHT entered judgment in favour of the respondent. The appellant was dissatisfied with the said decision and appealed to the High Court of Tanzania at Tanga. Before the appeal was heard on merits, the High Court heard a preliminary objection filed by the respondent. The gist of the preliminary objection raised was that the appeal was filed out of time. The first appellate court sustained the preliminary objection and dismissed the appeal. In its ruling the High Court took the view that time for appealing must be computed from the date the DLHT certified its judgment and decree and not from the date

the appellant obtained certified copies of the judgment and decree. It is against the said decision, hence the current appeal before this Court predicated on five grounds as follows:

1. *That, the appellate Judge erred in law, when she failed to observe that, the limitation period for appealing against the decision, and order, originating from District courts, or rather the Tribunals, starts to run from the date when the judgment and decree of the intended decision to be impugned, is delivered or supplied to an intending appellant, if the has requested or applied for it.*

2. *That, the appellate Judge erred in law, when she observed that, the appeal before the High Court of Tanzania, at Tanga, Appeal No. 22 of 2011 was time barred on ground that, the limitation period runs from the date when the judgment is certified.*

3. *That, the appellate Judge erred in law and fact when she failed to observe that, since the appellant applied for certified copy of judgment and decree, which are necessary documents for appeal purpose against the decision and order originating from District Land and Housing Tribunal, and the same were supplied on 19th July 2011, and the said appeal was lodged on the same day, then, the appeal was not time barred.*

When the appeal came before us for hearing, the appellant had the services of Mr. Stephen Leon Sangawe and Atranus Mkago Method both learned Advocates and the respondent was represented by Mr. Kichere Mwita Waisaka learned Advocate.

At the commencement of hearing, Mr. Sangawe prayed for the written submissions he had filed to be adopted and form part of his overall submissions. In confronting the 1st ground, he argued that under no circumstances can an appeal be filed in the High Court of Tanzania without the impugned judgment and the decree in terms of Order XXX1X Rule of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC), as they are necessary documents to accompany the memorandum of appeal filed. He contended that this being the legal position, the law has also provided the time requisite for the intended appellant to obtain such documents and when such time should start running against him or her. He argued that similarly, under section 19(2) of the Law of Limitation Act, Cap 89 R.E 2002 (the LLA), the requisite time to be excluded when obtaining copies of judgment and a decree for appeal purposes has been provided. To reinforce this point he referred us to the case of **Mohan Diary vs Rantilal Bhurabhai** [1966] E.A. 571.

The learned counsel faulted the holding of the first appellate Judge on the respondent's preliminary objection, that the time limit for filing an appeal started to run as from the date when the copy of the judgment and decree were certified. He argued that this was erroneous because Mr. Mramba, learned counsel who was representing the appellant in DLHT at the time did apply for the copy of judgment and decree for

appeal purpose on 19/5/2011, when the judgment was pronounced by the DLHT Chairman.

Mr. Sangawe contended further that the judgment and decree were furnished to the appellant on 19/7/2011 upon payment of appropriate fees for collection of the documents and the appeal was filed on the same day after obtaining the same. He argued that under the circumstances this being what transpired it was erroneous on the part of the first appellate court to find that the appeal was time barred and in essence contravening the express provision of the LLA governing appeals from the subordinate courts and Tribunals to the High Court. The learned counsel cited the case of **Registered Trustees of Marian Faith Healing Centre @Wanamaombi vs The Registered Trustees of the Catholic Church Sumbawanga Diocese**, Civil Appeal No. 64 of 2007 (unreported) to reinforce his arguments.

Mr. Sangawe's arguments on the 2nd ground of appeal were essentially to reiterate what was stated in arguing the 1st ground of appeal and to emphasize the fact that the first appellate Judge erred in holding that the time limit for the appeal to the High Court from the DLHT started to run from the date the judgment was certified. The other issue which the learned counsel had a bone to pick with the first appellate Judge was the fact that the appellant was blamed for not following up to obtain the impugned judgment and decree on time until

19/7/2011 when her erstwhile advocate obtained them. Counsel argued that this finding on the part of the High Court Judge was based on speculations and assumptions and not on the facts on the record, since the record showed that the appellant's counsel had requested for the said documents immediately after the judgment was pronounced and that was sufficient to prove that the appellant was not lethargic into taking action.

Mr. Sangawe proceeded to argue on the 3rd ground of appeal which, in effect addresses similar issues to what was argued in the 1st and 2nd grounds of appeal, that is, the date the appellant applied for judgment and decree for appeal purposes and the period of limitation. He concluded by imploring the Court to find that the appeal has merit and to allow it, quash the impugned ruling and order with costs and then order restoration of the appeal filed in the High Court so that it be heard on merit.

Mr. Waisaka vehemently resisted the appeal. He responded to all the three grounds of appeal generally. He advanced reasons for resisting the appeal as: **First**, that there is no law which states that upon filing a notice of appeal the aggrieved party should await to be informed/notified when the necessary documents to file an intended appeal are ready. He sought reliance on a similar stand advanced in the ruling in Misc. Land Case Application No. 50 of 2014 (Rugazia, J.) High Court of Tanzania,

Tanga when determining an application for leave to appeal. **Second**, he contended that the appellant sat on her rights because while the notice of appeal was filed on time, that is the day the impugned Judgment was delivered, she failed to file the appeal when the ruling was certified and was ready for collection on the 24/5/2011. He argued that the appellant's counsel wrongly interpreted the law in terms of time to be excluded in determining the time limit to file an appeal.

Reacting to the decisions cited by the appellant's counsel, the counsel for the respondent invited the Court to find them distinguishable and based on different circumstances and especially the case of **Registered Trustees of Marian Faith Healing Centre @Wanamaombi** (supra). He argued that the cited case does not support the appellant because in the instant case the appellant defaulted due to negligence caused by failure to diligently follow up the necessary documents for the intended appeal which led to filing the appeal out of time. Mr. Waisaka implored the Court to find the appeal lacking merit and dismiss it with costs.

The rejoinder by the appellant's counsel was mainly to reiterate what was stated in the submission in chief and categorically deny assertions that the appellant was negligent in pursuing the intended appeal as can be discerned from the record of appeal in terms of all the steps taken in pursuing the appeal. On the part of Mr. Atranus M.

Method, he echoed what had been stated saying that the steps taken by the appellant were in line with the law and that there was no evidence from the appellant having defaulted in her quest to appeal to the High Court.

We have scrutinized the grounds of appeal, and we think this appeal hinges on the following issues: **One**, time limitation period for lodging an appeal to the High Court from a decision originating from the DLHT (original jurisdiction), **two**, whether or not the appellant's appeal in the High Court was out of time.

In dealing with issue number one, we start by looking at the reasons considered by the High Court Judge in sustaining the preliminary objection raised and dismissing the appeal. At page 160 of the record of appeal she stated:

> "... *I am settled that this appeal has been filed out of time and without court leave. I am saying so because the record clearly show judgment was delivered on 19/5/2011, copies of judgment and decree were certified on 24/5/2011. It means the said were ready for collection on 24/5/2011, the respondent obtained on 6/6/2011 while the appellant collected on 19/7/2011. In the circumstances, the appellant if he though these were necessary documents, to attach to his appeal, he could have consider (sic) time limit and make follow up early. There is nothing in record showing that the appellant made effort to follow them until*

on19/7/2011, when he collected, while the same were ready since 24/5/2011. In the premises, time limit started to run as from 24/5/2011 the date when the copy of judgment and decree were certified. Counting 45 days from 24/5/2011, the appellant ought to have filed his appeal on or before 9/7/2011, but filing his appeal on 19/7/2011 he was late for more than 10 days..."

Essentially, the appeal before the High Court was from the DLHT in its original jurisdiction. At the time the DLHT decision was delivered in May 2011, the relevant provision guiding such appeals to the High Court was section 41 of the Lands Disputes Courts Act, Cap 216 R.E 2002 (the LDCA). That section did not provide for specific time for filing an appeal to the High Court. Accordingly, this meant the most plausible action was to resort to other governing laws to ascertain the time limitation for appeal to the High Court from DLHT in line with section 52 (2) of the LDCA, which makes the LLA applicable to the DLHT and High Court in the exercise of their respective jurisdictions.

The First Schedule part II paragraph 2 of the LLA prescribes the time limitation for an appeal to be forty-five (45) days from the time the decision is delivered. Additionally, section 19(2) of the LLA provides that:

"In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time

requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded."

In the case of **Registered Trustees of the Marian Faith Healing Center @ Wanamaombi** (supra), it was held:

"... the period between 2/5/2003 and 15/12/2003 when the appellants eventually obtained a copy of the decree ought to have been excluded in computing time."

Suffice to say, section 19(2) of LLA and the holding in the decision cited above reinforce the principle that computation of the period of limitation prescribed for an appeal, is reckoned from the day on which the impugned judgment is pronounced the appellant obtains a copy of the decree or order appealed by excluding the time spent in obtaining such decree or order. However, it must be understood that section 19(2) of LLA can only apply if the intended appellant made a written request for the supply of the requisite copies for the purpose of an appeal.

The respondent's counsel invited us to find that the appellant should not benefit from the provisions of section 19(2) of the LLA contending that she was negligent and did not exercise any diligence to follow-up on the essential documents to file the appeal in time. Our perusal of the record before us disproves this assertion.

Guided by the case of the **Registered Trustees of the Marian Faith Healing Center @ Wanamaombi** (supra), in law an appellant

had no obligation to frequently follow up on the necessary documents for appeal although it is practical and the realistic thing to do. It was held:

> *"That the Registry concerned ought to have acted reasonable and diligently well without necessarily being reminded over and over against that the appellants were availed with copies of the documents."*

In the instant case, there is evidence that the appellant through his counsel duly filed a notice of appeal and requested for proceedings, judgment and decree in writing on the same day the judgment was delivered. It is on record that the DLHT judgment was delivered on the 19/5/2011 (found at page 99 of the record) and on the same day a Notice of Intention to Appeal was filed by the learned counsel for the appellant then (see page 102 of the record of appeal).

It is on record that the Memorandum of Appeal was filed on 19/7/2011 and the same appellant was supplied with the judgment and decree. We find no reason to doubt the fact that the appellant obtained the documents to support his appeal on the 19/7/2011 in the absence of any evidence on record to controvert this fact. It will be venturing on speculations to rely on assumption that because the judgment was certified on the 24/5/2011, then failure of the appellant to obtain requisite documents on that date or sooner than when she obtained them is evidence of negligence especially where there is no evidence

that there were efforts from the Registry to inform the appellant on the availability of the certified judgment.

For the foregoing reasons, we agree with the learned counsel for the appellant that the appeal was filed within time.

In the end, we allow the appeal and quash the impugned ruling. The record is remitted back to the High Court for it to proceed with hearing the appeal before it on the merits. The appellant is awarded costs of this appeal.

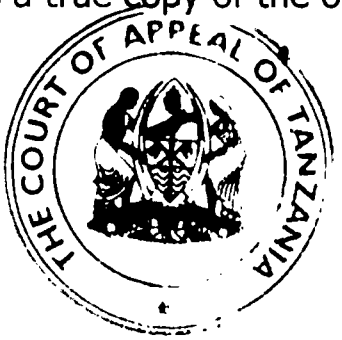
DATED at **TANGA** this 5th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 7th day of June, 2021 in the presence of Mr. Stephen Sangawe, learned counsel for the appellant and Mr. Mwita Waisaka, learned counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL