IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MWARIJA, J.A., KENTE, J.A., And MASOUD, J.A.)

CIVIL APPEAL NO. 133 OF 2020

SAMWEL MWERA SIYANGE ..... APPELLANT

VERSUS

DISTRICT EXECUTIVE DIRECTOR,

TARIME DISTRICT COUNCIL ..... 1ST RESPONDENT

WARD EXECUTIVE OFFICER,

MURIBA WARD ..... 2ND RESPONDENT

THE VILLAGE EXECUTIVE OFFICER,

KOBORI VILLAGE ..... 3RD RESPONDENT

THE VILLAGE CHAIRMAN,

KOBORI VILLAGE ..... 4TH RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)
(Makaramba, J.)

dated the 22nd day of December, 2017
in
Land Case No. 41 of 2012
.....

RULING OF THE COURT

31st October & 6th November, 2023

MWARIJA, J.A.:

The appellant, Samwel Mwera Siyange was the plaintiff in the High Court of Tanzania at Mwanza. He instituted Land Case No. 41 of 2012 against the respondents, District Executive Director, Tarime District Council, Ward Executive Officer, Muriba Ward, the Village Executive Officer, Kobori Village and the Village Chairman, Kobori Village (the 1st,

2nd, 3rd and 4th respondents respectively). The appellant claimed to be the lawful owner of a piece of land measuring fifty (50) acres out of which, twenty eight (28) acres were surveyed and owned under Certificate of Title No. 10071 and twenty two (22) unsurveyed acres. It was the unsurveyed land measuring 22 acres which was the subject of the dispute (hereinafter "the suit land"). According to the appellant, the suit land was allocated to him by the Bungurere Village Government in 1985 and approved by the Ward Development Committee, the Councilors' General Meeting as well as the Land Department of the office of the 1st respondent.

It was the appellant's claim further that, on 30/5/2012, on the instructions of the 2nd respondent, the 3rd and 4th respondents issued a notice to the appellant requiring him to vacate the suit land on account that, the Village Council intended to construct a Vacational Training Centre. Subsequently thereafter, the office of the 1st respondent through its Solicitor, issued another notice requiring the appellant to demolish his buildings in the suit land and directed him not to carry out any further development thereon. The appellant contended further that, on 25/9/2012, at the instance of the respondents, a group of villagers demolished his buildings valued at TZS 150,000.00 and destroyed his maize grain valued at TZS 15,000,000.00.

As a result of what the appellant found to be the respondents' wrongful acts, he filed the suit seeking the following reliefs:

> *"(i) To declare that the plaintiff is the legal owner of the dispute land.*
>
> *(ii) To restore and confirm the judgment of the High Court.*
>
> *(iii) Mandatory injunction.*
>
> *(iv) General damages to the tune of Tshs. 500,000,000/=.*
>
> *(v) Compensation of Tshs. 500,000,000/= plus interest on decretal amount at the court's rate until payment in full.*
>
> *(vi) Cost of and incidental to the suit.*
>
> *(vii) Any other relief(s) that the honourable court may deem fit and just to grant."*

In their joint amended written statement of defence, the respondents disputed the appellant's claim that he was allocated a total of 50 acres of land. They contended that, apart from the 28 acres which were allocated and owned by him under Certificate of Title specified above, his claim over the 22 acres of land was false because, that land was part of the village forest reserve. They added that, the

appellant trespassed into the dispute land hence the action taken by them to evict him.

Having heard the appellant's evidence adduced through his four witnesses and the defence evidence which was also tendered by four witnesses, the High Court (Makaramba, J) was satisfied that, the appellant had failed to prove his case. The learned Judge agreed with the respondents that, the Bungurere Village Government did not allocate 50 acres of land to the appellant but 28 acres only and that therefore, the appellant's claim over the other 22 acres was unfounded. He found further that, the 22 acres' piece of land was part of the Village's forest reserve. He thus dismissed the suit with costs.

Aggrieved by the decision of the High Court, the appellant preferred this appeal which is predicated on four grounds. Upon the service on them of the record and memorandum of appeal, the respondents filed a preliminary objection consisting of the following three grounds:

> *"1. The appeal is incompetent for failure of the appellant to serve the respondents with a copy of the notice of intention to appeal contrary to rule 84 (1) of the Court of Appeal Rules....*

2. *The appeal is incompetent for failure of the appellant to serve the respondents with a copy of the memorandum of appeal and record of appeal in time contrary to rule 97 (1) of the Court of Appeal Rules....*

3. *The appeal is incompetent for the appellant's failure to serve the respondent with the letter requesting to be supplied with the copies of proceedings, judgment and decree thus contravening the mandatory provisions of rule 90 (3) of the Court of Appeal Rules...."*

When the appeal was called on for hearing on 31/10/2023, the appellant was represented by Dr. Chacha Murungu, assisted by Mr. Boniphace Saniro, both learned advocates while the respondents had the services of Mr. Erigh Rumisha assisted by Ms. Sabina Yongo and Mr. Goodluck Rukandiza, learned State Attorneys.

Guided by the established practice that, when a preliminary objection has been raised against an appeal or application, the same has to be determined first, we proceeded to hear the learned counsel for the parties on the raised objection.

Before he commenced his submissions, Mr. Rumisha informed the Court that, he had decided to abandon the 1st and 2nd grounds and as a result, would only argue the 3rd ground of the preliminary objection. In

his brief submissions on that ground, the learned State Attorney argued that, the appellant had failed to serve the respondents with a copy of the letter by which the former applied for copies of the proceedings and judgment of the High Court (the letter) as required by rule 90 (3) of the Rules.

Making reference to page 383 of the record of appeal, Mr. Rumisha contended that, although a copy of the letter has been included in the record, the same was not served on the respondents. Citing the case of **Mayira B. Mayira and 4 Others v. Kapunga Rice Project**, Civil Appeal No. 359 of 2019 (unreported), the learned State Attorney argued that, the omission renders the certificate of delay issued to the appellant invalid, thus having the effect of making the appeal time barred. He prayed that the appeal be struck out for having been filed out of time.

The learned counsel for the appellant responded to the arguments made by the learned State Attorney by contending, **first**, that the point raised by the respondents does not qualify as a pure point of law. **Secondly**, and in the alternative, he opposed the contention that the respondents were not served with the letter.

On the first aspect of his submissions, Dr. Murungu submitted that, the contention by the respondents that they were not served with the letter requires to be substantiated by evidence because, on the part of the appellant his contention was that a copy of the letter was served to them. As a result, the appellant's counsel argued, since the parties are at issue as to whether or not the respondents were served with a copy of the letter, the point raised by them should not have been brought as a preliminary objection. To bolster his argument, the learned counsel cited the cases of **Karori Chogoro v. Waitihache Merengo**, Civil Appeal No. 164 of 2018**, Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017 and **Charles Chama and 2 Others v. The Regional Manager (TRA) and 3 Others**, Civil Appeal No. 224 of 2018 (all unreported).

On the second aspect of his submissions, Dr. Murungu argued that, the respondents were served with a copy of the letter together with other documents in one bundle, including the notice of appeal, the memorandum and the record of appeal which were signed by the respondents in acknowledgement of service. Relying on the case of **Sebastian Rukiza Kinyondo v. Dr. Medard Mutalemwa Mutungi** [199] T.L.R 479, the learned counsel argued that, since the respondents

disputed that they were served, they are the ones on whom the burden lies to prove that the appellant did not serve them.

Submitting further on that line of his argument, the appellant's counsel contended that, because it is evident from the record that the respondents had received a copy of the letter because it is included therein, going by the purpose of service of a document as stated in the case of **Ivan Makobrad v. Miroslav Katic, Vesna Paladin and Igra** [1999] T.L.R 448, they were sufficiently served. In that case, the Court considered the issue whether in an application for reference, which is one of the types of informal applications, the respondent must be served with reference documents as is the case in a formal application made by way of a notice of motion. The Court held that:

> *"It is our considered opinion that in this latter type of informal application [application for reference], there is a need to serve copies of documents and also the grounds for the reference to the respondent. The whole purpose of service is to enable the other party to prepare and that he should not be taken by surprise."*

He also cited the case of **Ahmed Abdi Farrah Guled v. Cooperative and Rural Development Bank** [1999] T.L.R 83 in which, the Court

considered the effect of late service of a notice of appeal on the respondent. Having considered that situation, it held that:

> *"Since the respondent received the copy of the Notice of Appeal despite the inordinate delay, then they could be taken to have connived in the delay."*

On these arguments, the learned counsel urged us to overrule the preliminary objection.

From the submissions of the learned counsel for the parties, two issues arise for our determination. **Firstly,** whether or not the argued ground of the preliminary objection raises a pure point of law. **Secondly**, whether or not the respondents were served with a copy of the letter. The argument by Dr. Murungu is that, the contention by the respondents that they were not served with a copy of the letter requires evidence to be ascertained because, on the other hand, the appellant contended that the said document was served on them. With respect to the appellant's counsel, we hasten to state that, his argument lacks merit. It is plain from the record, at page 383 that a copy of the letter which shows that it was intended to be served on each of the respondents is not endorsed by any of them to signify acknowledgement of service. Furthermore, the appellant did not include in the record, any

document like an affidavit, as evidence that, service was effected on the respondents.

The learned counsel for the appellant cited the cases of **Charles Chama, Gasper Peter** and **Karori Chogoro** (supra) to support his argument that the argued ground of the preliminary objection does not raise a pure point of law. In response, Mr. Rumisha argued that, the cases are distinguishable. We respectfully agree with him. In all the three cases, the dispute was not on whether or not service was effected. It was on the date on which the service of the relevant documents was effected. In the case of **Charles Chacha**, whereas the respondents contended that the memorandum and record of appeal were served on them on 7/5/2018, the appellant said that they served on 17/1/2018. Likewise, in **Karori Chogoro** case, while conceding that he was served with a copy of the memorandum of appeal, the respondent contended that he was served out of time but did not state the date on which that document was served on him. A similar point was raised in the case of **Gasper Peter** that, service of copies of the notice of appeal, memorandum and the record of appeal were made out of time but the respondent did not state the date on which each of those documents was served on it. Certainly, under such a situation, evidence was required to ascertain the dates of service and for that reason, in all the

three cases, the Court held that, the preliminary objections did not raise pure points of law. The first issue is thus answered in the affirmative that, in this case, the preliminary objection is based on a pure point of law.

With regard to the second issue, we start with the argument that, since the respondents disputed that they were served, they had the burden of proving that contention. That argument is, in our view, untenable. Given the fact that, the respondents' contention is that they were not served and because the copy of the letter which was intended for that purpose does not show to the contrary, it is obvious that, the appellant has the burden of proving that he served it. The respondents would not, in the circumstances, have the burden of proving what was not done to them. In that respect, the case of **Sebastian Rukiza Kinyondo** (supra) cited by the appellant's counsel is distinguishable. In that case, like in the other cases discussed above, the dispute was on the date on which the respondent was served, having contended that he was served out of time.

It was argued further by the appellant's counsel that, although a copy of the letter is not endorsed by the respondents to acknowledge service, but because the same was served together with documents which were in a bundle as evidenced by endorsement on some of them,

then service should be taken to have been effected. We are again, with respect, unable to agree with the learned counsel. As submitted by the learned State Attorney, service of each of the documents ought to have been proved separately. This is more so because, there are timelines and stages in serving them. In the case of **Moshi Municipal Council v. J.S Khambaita Limited and Another**, Civil Appeal No. 193 of 2020 (unreported) in which a similar argument was made, that although the letter requesting for copies of the proceedings, judgment and decree contained in the record was not endorsed, since a copy thereof was attached to the copy of the notice of appeal, endorsed by the respondent, then the copy of the letter should be taken to have also been served. The Court dismissed that argument, stating that:

> *"It should be understood that, the Rules governing service of notice of appeal and the letter to the Registrar are different. As intimated above, it is clear that the copy of the letter to the Registrar requesting for copies of proceedings, judgment and decree for appeal purposes included in the record of appeal and the one shown to the Court by Mr. Nyoni were not signed by the first respondent to signify acknowledgment of receipt of the same."*

On the second aspect of Dr. Murungu's submission that, since the record of appeal served on the respondents contains a copy of the letter, the subject matter of the preliminary objection, it should be taken that they were duly served with that document. We also find that argument devoid of merit.

Rule 90 (1) and (3) of the Rules 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.

(2) .... N/A

(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."***

[Emphasis added]

The purpose of serving a copy of the letter to the respondent is not only to enable him to prepare himself for the case. It is also relevant in the computation of the period of limitation for filing an appeal. In the circumstances, the cases of **Ivan Makobrand** and **Ahmed Abdi Farrah Guled** (supra) cited by the appellant's counsel are clearly distinguishable. In the former case, as shown above, the issue was whether or not, in an informal application, the applicant is bound to serve copies of it on the respondent. As for the latter case, unlike in the case at hand, whereby service was not effected, in that case, the respondent was served with a notice of appeal but contended that he was served out of time. Furthermore, in the two cases cited by the learned counsel to support his argument, the date of service of the

documents was not a criterion for computation of the time limit for filing an appeal.

That said, we answer the second issue in the negative, that the respondents were not served with a copy of the letter. The omission makes the certificate of delay invalid and therefore, there is no gainsaying that, the appeal was filed out of time. The effect is to strike it out as we hereby do. The respondents shall have their costs.

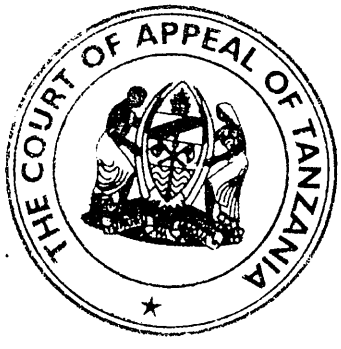
DATED at **MWANZA** this 6th day of November, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 6th day of November, 2023 in the presence of Mr. Joseph Mange holding brief of Mr. Boniphace Saniro and Dr. Chacha Murungu, both learned advocates for the appellant, Ms. Sabina Yongo and Mr. Allen Mbuya, both learned State Attorneys for the Respondents; is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL