IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

LAND CASE APPEAL NO. 15 OF 2019

PENDA MACHEKO MAKONGWA	**.....**	**1ST APPELLANT**
FADHILI KINYAMAGOHA	**.....**	**2ND APPELLANT**
THOBIAS NJARO	**.....**	**3RD APPELLANT**
NAITED MTEGO	**.....**	**4TH APPELLANT**
SAMWEL LUKINGINILE	**.....**	**5TH APPELLANT**
MERINA MKEMWA	**.....**	**6TH APPELLANT**
BATHLOMEO KAYWANGA	**.....**	**7TH APPELLANT**

VERSUS

NATHAN EDWARD MNYAWAMI	**.....**	**RESPONDENT**

10/3 & 14/5/2020

JUDGMENT

MATOGOLO, J.

This is an appeal filed by the appellants, namely Pendamacheko Makongwa, Fadhili Kinyamagoha, Thobias Njaro, Naited Mtego Samwel Lukiginile, Melina Mkemwa and Batholomeo Kaywanga, challenging the decision of the District Land and Housing Tribunal of Iringa in Land application No.2 of 2012.

The respondent, one Nathan Edward Mnyawami sued the appellants in the District land and housing Tribunal of Iringa claiming for a registered farm located at Ipalamwa Village, the Land is measuring 200 hectares. The Tribunal decided in favour of the respondent, the appellants were aggrieved with that decision and filled this appeal where they presented a total of four grounds of appeal as follows;

(1) *The judgment of trial tribunal is incurably defective as it contravenes the mandatory provisions of Regulation 20(1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2002.*

(2) *The judgment of the trial tribunal is defective since the chairman in his judgment has introduced matters which are not available on record (proceedings).*

(3) *The chairman of the trial Tribunal erred in law and fact by pronouncing a judgment in favour of the respondent (original applicant) whose evidence was not proved on the balance of probabilities and thereby throwing over board the evidence of the appellants (original respondents) which was proved on the balance of probabilities of which was also squarely supported by the appellants final written submissions. For easy of reference a copy of the final written submissions is annexed hereto and marked with a letter "A" and leave is crave for the same to form part of the memorandum of appeal.*

(4) *The judgment was delivered on 18/6/2019 and on the same date the counsel for the appellants by his letter with reference No.MSCN/ADV /C.I/VOL.II/39 which was admitted on 20/6/2019 requested to be supplied with a copy of judgment and decree for the purpose of appealing to this court and the requested judgment was certified as a true copy of the original on 3/7/2019, hence this appeal is within time and the same has an overwhelming chances of success. For easy of reference a copy of judgment and the counsel for the appellants letter are annexed hereto and collectively marked with the letter "B" forming part of the memorandum of appeal.*

This appeal was argued by way of written submissions.

At the hearing the appellants enjoyed the service of Mr. Mwamgiga Jessy, learned Advocate while the respondent was represented by Mr. Alfred Kingwe the learned Advocate.

Mr. Mwamgiga submitted that Regulation 20(1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002 provide for the contents of judgment to mean need to be consisted of brief statement of Facts, findings on the issues, decision and reasons for the decision. The decision of the Trial Tribunal is in contravention to the mandatory set provision because prior to the hearing four issues were framed but only one issue was discussed. Mr. Mwamgiga went on submitting that the presiding chairman is obliged to decide on each and every framed issues and failure to do so constituted a serious breach of

procedure, to support his argument he referred the court the case of ***Sosthenes Bruno and Another versus Flora Shauri,*** Civil Appeal No. 81 of 2016 (unreported) C.A at Dar es Salaam, and the case of ***Kukal Properties Development Limited versus Maloo and others (1990 – 1994) E.A 281,*** in which it was held that;

> *"A judge is obliged to decide on each and every issue framed, failure to do so constituted a serious breach of procedure".*

Mr. Mwamgiga submitted further that it is a settled principle that Court of law when adjudicating a matter need to confine themselves to issues framed in the pleadings , to support his argument the learned counsel referred this court to the case of ***Frank M. Marealle versus Kyauka Njau [1982]TLR 32***. It is the submission by Mr. Mwamgiga that the trial chairman failure to decide on the 3 issues framed in the trial tribunal constitutes serious procedural irregularity.

Regarding the 2nd ground of appeal Mr. Mwamgiga submitted that the judgment of the trial tribunal is not a judgment at all because it has introduced new matters without according parties an opportunity to be heard. Mr. Mwamgiga went on that the trial chairman introduced *suo motto* a new issue as that there was no application for representative suit which was ever filed by the respondents. The issue was raised without according the parties with an opportunity to argue it if really there was an application filed for representative suit or not. Mr. Mwamgiga submitted further that failure to accord parties with an opportunity to argue on an issue raised by

court on its own motion amounts to serious procedural regularity, to cement his argument Mr. Mwamgiga referred the court to the case of ***Kalunga and Company Advocates versus National Bank of Commerce Limited [2006] TLR 235*** in which it was said inter alia that;

> *"Raising issue suo motto and making a decision without the parties concerned being heard upon it amounts to illegality"*

With regard to ground no 3, it is the submission by Mr. Mwamgiga that the chairman of the tribunal erred in law and fact by pronouncing a judgment in favour of the respondent or applicant whose evidence was not proved on the balance of probabilities because the applicant or respondent alleged to have bought the suit land from PW2 one Idd Adam Luhwago being an administrator of the estate of the late Adam Luhwago, but during trial no letters of administration was produced as exhibits to prove the validity of the sale between him and buyer, in absence of the said documents to have been tendered it proves that the sale between Idd Adam Luhwago and the respondent was *void ab initio*.

Mr. Mwamgiga further submitted that the relied upon offer of right of occupancy which is said to be issued to Adam Luhwago to be satisfactory evidence to conclude that the PW2 had a good title to pass it to the respondent is wrong because it was alleged by the respondents that the said offer is a manufactured one on the ground that Adam Luhwago (the deceased) had no good title and he was expelled from Ipalamwa village within which the suit land is situated for obtaining false offer of a right of

occupancy of land measuring 200 hectares, and this fact was never controverted by the respondent. Mr. Mwamgiga went on stating that failure by the respondent to controvert that alleged facts means that he agreed to all what was all said, to support his argument he referred this court the case of ***Maganga Lushinde versus The Republic***, Criminal Appeal No.6 of 2019(unreported), whereby it was held that;

> *"That a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter".*

Mr. Mwamgiga submitted further that the appellants proved their case on balance of probabilities because DW1 testified that the suit land was a property of his late grandfather which he occupied since 1932 by clearing a virgin land when villages were yet to be established.

Regarding ground No. 4, he submitted that this appeal has been filed within time because the judgment subject of this appeal was delivered on 18/6/2019 and on 3/7/2019 was certified as a true copy of original preceded by a letter for request to be supplied with the same which was admitted on 20/6/2019. Therefore the appellants pray before this court that this appeal be allowed and the trial tribunal decision be dismissed with costs.

In reply Mr. Kingwe submitted that as long as justice requires, the Court of Appeal in the case of ***Tanzania China Friendship Ltd Versus Our Lady of Usambara [2006] TLR 70***, had made clear that the aspect of that the court lacks jurisdiction can be raised at any time. It is the

submission by Mr. Kingwe that this appeal has no legs to stand on and devoid of any merit; hence it deserves to be dismissed in its entirety with costs for being filed out of time.

Mr. Kingwe submitted further that it is always been the position of the higher courts that where the matter is time barred, the court has no jurisdiction to entertain such a matter. Mr. Kingwe argued further that the judgment of the Tribunal was rendered on 18/6/2019 and the present appeal was filed on 09/08/2019, after a lapse of 52 days. He further submitted that the period of appeal from the District Land and Housing Tribunal to the High Court is forty five days (45) as per section 41 (2) of the Land Disputes Courts Act, as amended by the written laws (Miscellaneous amendment (No.2) Act of 2016.For this effect makes this appeal being time barred and no legs to stand on and baseless hence it deserves to be dismissed in its entirely with costs.

Regarding ground No.1, Mr. Kingwe submitted that as it was submitted by the counsel for the appellants that the judgment of the trial tribunal is incurably defective as it contravenes the mandatory provisions of regulation 20(1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2002. Mr. Kingwe submitted further that the judgment of the tribunal was complied with the regulation 20(1), the records of the trial tribunal especially Pages 1,2 and 3 of the typed judgment shows clearly, how the trial tribunal complied with regulation 20(1) (supra) by containing brief statement of fact, findings of the issues , a decision and reason for the decision.

It is the submission by Mr. Kingwe that the respondent proved his ownership of the said disputed land located at Ipalamwa Village in which parties herein are in dispute. Mr. Kingwe further submitted that the respondent testimony was heavier than that of the appellants and supported his argument he referred by the case of ***Hemed Said versus Mohamed Mbilu [1984]TLR 113***, where it was held that;

> *"The person whose evidence is heavier than that of the other is the one who must win"*

Mr. Kingwe went on submitting that the appellants did not prove their case on balance of probability. And what the counsel for the appellants is trying to submit is totally misleading arguments because it is not true that the chairman of the trial tribunal confined himself to the first issue only, which is sale agreement, but the second issue of ownership of land and the third issue were revealed when the applicant (PW1) proved his ownership of land by tendering the offer of the right of occupancy and official search , collectively admitted as exhibits P1, the facts of which were not objected by the appellants during the trial proceedings as shown at page 3 and 4 of the trial judgment .

With regard to the 2nd ground of appeal, it is the submission by Mr. Kingwe that there was no new matter introduced by the trial chairman during the trial, rather than the findings on the issues framed by the parties. He went on saying that the chairman of the tribunal found that the defence case has failed to prove the ownership of the suit land and even the document titled Batholomeo to appear on behalf of others was filed in

court on 05/12/2018 when the respondent already closed his case. The tribunal findings that there was no such procedure within the ambit of our laws especially in civil procedure code, and the allegation made by the counsel for the appellants is not true and is totally misleading argument to this honourable court.

With regard to ground No.3 it is the submission by Mr.Kingwe that, the allegation that the respondent has not proved his case on balance of probabilities and the said offer is manufactured one on the ground that Adam Luhwago had no good title does not make sense simply because the issue of manufacturing of right of occupancy could not be raised at this stage. It is the duty of the party to a case to call all material witnesses, failure to do so the court may draw adverse inference that if the witness was called would have testified contrary to the party's interest. To support his argument Mr.Kingwe referred this court the case of ***Hemed Said Versus Mohamed Mbilu*** (supra) whereby Sisya J, had this to say;

> *"Where for undisclosed reason a party fails to call material witness on his side the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party's interest".*

Mr.Kingwe submitted that Registrar of Titles and documents are the material witness on the issue of manufacture of the said document that ought to have been called before the trial tribunal, but without any reason the Registrar of Titles was not called at the trial tribunal by the appellants.

He invited this court to draw adverse inference that exhibit P1 collectively is not a manufactured one because the appellants failed to prove against during the trial and it is one which were found in the office of the Registrar of Titles and documents of which were tendered by the appellants as exhibit D1 collectively. He further submitted that the Offer under Right of Occupancy in the name of Adam Luhwago was issued on 27/10/1986 under the Land Ordinance [Cap. 113] and the Registration of Documents Ordinance and registered under his name as Title Deed No.959 DLR and remained in his possession undisturbed. He further contended that in 1989 the late Adam Luhwago obtained a loan from the National Bank of Commerce which was secured by the same property in dispute under the Mortgage Deed filed at the Registrar of Titles Mbeya as FD1533. That on 14/9/2010 the said property was transferred to Nathan Edward Mnyawami. Mr. Kingwe learned advocate concluded his submission by stating that all documents pertaining to the history of the property were adduced in court. he therefore prays for this court to dismiss this appeal with costs.

In rejoinder Mr. Mwamgiga reiterated what he submitted in his submission in chief and with regard to the preliminary objection raised by the counsel for the respondent he said the law is very clear under section 41(2)of the Land Disputes Courts Act(Cap 216) R.E 2019) as amended by the written Laws (Miscellaneous amendments) Act No. 2 of 2016 that appeals emanating from the District Land and Housing Tribunal shall be filed to the High Court hence the High court has jurisdiction to try land appeals. He went on submitting that the argument that this court lacks jurisdiction to entertain this appeal is wrong and is a total misdirection.

Regarding an objection on time barred, Mr. Mwamgiga submitted that it is purposely confused with jurisdiction as a shield with a view to raise it maliciously at this stage taking an advantage that the issue of jurisdiction can be raised at any stage of court proceedings. He submitted further that if the counsel for the respondent was of the opinion that this appeal is time barred he was supposed to raise it at the earliest stage of the case, hence this point of objection lacks merit and the same be overruled with costs.

Mr. Mwamgiga submitted that this appeal has been filed within time because the judgment subject of this appeal was certified as a true copy of the original on 03rd July 2019 and this appeal was filed on 09th August 2019 which is within time just after 37 days from when the judgment was certified as a true copy of the original.

He submitted further that computation of limitation of time within which to file an appeal accrues from when a judgment has been certified as the true copy of the original because it becomes ready for collection.

Mr. Mwamgiga submitted further that The Law of Limitation Act [Cap 89 R.E 2019] under section 19(2) and (5) allows court to exclude such period of time spent to obtain requisite copies of decree and judgment which is to be appealed. To support his argument he referred this court the case of ***Mary Kimaro versus Khalfani Mohamed [1995] TLR 202.*** Hence he insisted that this appeal be allowed and the tribunal decision be quashed.

Having read the respective submissions by the learned counsel and having passed through the court records, there is only one issue for determination, that whether the preliminary objection was properly raised.

Before going to the merit of the case as the practice dictates the question of the preliminary objection on time limitation raised by the counsel for the respondent is to be resolved first as it also imports jurisdiction issue.

It was correctly submitted by Mr. Kingwe that since it is the issue of jurisdiction it can be raised at any stage of the proceedings as it was held in the case *of* ***Tanzania China Friendship versus Our Lady of Usambara*** (supra). Understandably there is a requirement of serving a notice to the adverse party when a party intends to raise an objection as it was emphasized in the case of ***M/s Majembe Auction Mart versus Charles Kaberuka,*** Civil Appeal No. 110 of 2005 Court of Appeal of Tanzania (unreported**.** The rationale behind of serving reasonable notice of the preliminary objection is to avoid the other parties not be taken by surprise. But where objection relates to court jurisdiction, it can be raised at any time even by the court suo motto as was the case in ***A/s Noremco Construction (NOREMCO) versus Dar es Salaam Water Sewage Authority***, Commercial case No. 47 of 2009 (HC) at Dar es Salaam (unreported), where Makaramba J. as he then was held that;

> *"There is more than one mode in which preliminary objection on point of law can be raised in civil proceedings; objections can be*

raised either in written statement of defence or separately by a notice or even suo motto by the court itself and particularly where they relate to jurisdiction or the limitation period"

In the case of **Richard Julius Rukambura Versus Isaack Ntwa Mwakajila and TRC (CA) Civil Appeal No.40 of 2001** (unreported) the court held that;

"It is now settled that, a preliminary objection on point of law especially on jurisdiction and limitation of time can be raised at any stage in the proceedings"

In the instant case the counsel for the respondent in the course of making submission he raised the said preliminary objection and the counsel for the appellants was afforded an opportunity to defend in his rejoinder submission, for that case parties were able to address on the said preliminary objection raised.

Basing on the above decided cases and because the preliminary objection raised relates to jurisdiction and time limitation it was therefore properly raised. If that is the case it is a duty of this court now to decide on the same whether it has merit or not.

It was correctly submitted by the counsel for the respondent that this appeal is time barred as the same was filed after 52 days to lapse.

Mr. Kingwe submitted that the period of appeal from the District Land and Housing Tribunal to the High Court is forty five days (45) as per section 41(2) of the Land Disputes Courts Act, as amended by written Laws (miscellaneous amendment Act)(no.2)Act of 2016.

Mr. Mwamgiga submitted that the appeal filed within time because the judgment subject to this appeal was certified on 03rd July 2019 and this appeal was filed on 09th August 2019 which is within time just after 37 days from when the judgment was certified as a true copy of the original. Mr. Mwamgiga went on stating that the Law of Limitation Act (Cap 89 R.E 2019) under section 19(2) and (5) allows the court to exclude such period of time spent to obtain requisite copies of decree and judgment which is to be annexed to the appeal.

There is no dispute that section 41(2) of the Land Disputes Courts Act, [Cap 216 R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 is the specific governing law in determining the time limitation in any appeal originating from the District Land and Housing Tribunal. The law is clear that an appeal to High Court against the decision of the District Land and Housing Tribunal when exercising original jurisdiction is forty five days (45) after the decision or order.

In the case at hand records reveal that the tribunal judgment was delivered on 18/06/2019 and the present appeal was filed on 09/08/2019 almost 52 days lapsed.

There is no dispute as submitted by Mr. Mwamgiga that the time one spent for procuring a copy of judgment and decree may be excluded by court in computing the limitation period, but the same cannot be automatically assumed by the parties unless one can lodge an application to seek enlargement and avail reasonable or sufficient cause of delay, the same as it was held in the case of ***Augustino Elias Mdachi and Others Versus Ramadhani Omary Ngaleba***, Civil Appeal No. 270 of 2017(unreported)

To my opinion the appellants if they were delayed to be issued with copies of judgment and decree by the trial tribunal, they were required under the law to apply for extension of time so as they can appeal out of time and such delay by the trial tribunal as a cause.

From the above reasons it is my considered opinion that the preliminary objection raised has merit, the same is sustained and this appeal is struck out with costs as is incompetent before this court for being filed after expiration of forty five days (45) provided by law without leave of the court.

DATED at **IRINGA** this 14th day of May, 2020

F.N. MATOGOLO

JUDGE

14/5/2020.

COURT:

Judgment delivered this 14th day of May, 2020, in the absence of the appellants but in the presence of the respondent and Mr. Kingwe learned advocate for the respondent who was also holding brief for Mr. Mwamgiga Jessy learned advocate for the appellants.

F.N. MATOGOLO

JUDGE

14/5/2020.