IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 27 OF 2019

(Appeal from the judgment and decree of the District Court of Magu in Civil Case No. 63 of 2018 Dated 2nd of August, 2019)

MARTHA MICHAEL DOGANI ..... APPELLANT

VERSUS

PETER MICHAEL DOGANI ..... RESPONDENT

JUDGMENT

18th May, & 20th July, 2020

ISMAIL, J.

This is an appeal arising from the decision of the District Court of Magu, in respect of Civil Appeal No. 63 of 2019, which quashed and set aside the conviction and sentence imposed on the appellant. The Primary Court's decision, against which the District Court passed the verdict, convicted the respondent of cheating. It was alleged that the respondent fraudulently sold a four-acre piece of land and a house located at Bugabu village in Magu district. The property sold allegedly belonged to appellant's parents who have since died and the respondent did that

while he was neither a beneficiary nor an administrator of the deceased's estate. On conviction he was sentenced to a conditional discharge for three months.

The trial court's decision aggrieved the respondent who chose to challenge it in the District Court (first appellate court). His three-ground appeal was allowed after the court had ordered the trial court to take additional evidence on issues that were considered to be of decisive importance. Having evaluated the evidence of the trial court, the first appellate court was convinced that the respondent was duly appointed as an administrator of the estate of their deceased father, the late Michael Dogani Ng'walimi. The first appellate court held, as well, that this being a land matter, the appellant ought to have instituted the dispute in a forum that is vested with jurisdiction to deal with land matters. This connoted that the trial court did not have the jurisdiction to deal with the matter. It is this finding that has bred the present appeal whose grounds of appeal are as follows:

1. *That the appellate court erred in law and fact for entertaining the matter which was filed out of time.*

2. *That the appellate magistrate grossly misdirected his mind in law and in fact by basing his decision on the respondent that ought to be contrary to law and procedure.*

When the matter was called for hearing on 18th May, 2020, it was ordered that disposal of the appeal should be by way of written submissions, to be preferred in accordance with a schedule drawn by the Court. This schedule was duly complied with by the parties.

Kicking off the discussion was the appellant. In respect of the first ground of appeal, he contended that the appeal to the first appellate court was instituted belatedly and contrary to the provisions of section 20 (3) of the Magistrates' Court's Act, Cap. 11 R.E. 2002, which is to the effect that appeals from primary courts are preferable within thirty days. She contended that the appeal by the respondent, filed on 7th December, 2012 (sic) came from a decision which was delivered on 8th March, 2018. She submited that the said appeal ought to have been filed on 7th April, 2018. In the absence of any order extending time within which to file an appeal, the appeal was time-barred, meriting no attention by the first appellate court.

With respect to the second ground of appeal, the contention by the appellant is that there was no evidence that the trial magistrate ever

expressed, orally or in writing, reasons for taking additional evidence herself as required by section 21 (1) (a) of the Magistrates' Court (supra). The appellant further contended that an opportunity was not accorded to the appellant to cross-examine on the additional evidence which was adduced in the trial court. The appellant contended that the first appellate court relied on the probate proceedings in a criminal case oblivious to the fact that the standard of proof is higher than the standard applied in the probate matter.

The respondent's rebuttal submission was equally terse. He defended the decision of the 1st appellate court which held that the matter was a land dispute which ought to have been instituted in a forum, in this case, the land tribunal, in terms of sections 3 (1) and 167 of the Land Act, Cap. 133 R.E. 2019; and section 62 of the Village Land Act, Cap. 114 R.E. 2019. The respondent further contended that in this case, the trial court was not vested with jurisdiction to entertain the matter which was a land dispute without first having it determined by a land tribunal.

Submitting on the time bar, the respondent was of the view that, whereas he filed an application for enlargement of time, filed on 31st May, 2019, the 1st appellate court took it upon itself and heard and quashed the

decision of the trial court on the ground that the said court did not have jurisdiction to entertain a matter which involves ownership of land. He was of the view that the appellant's contention lacks the basis. He prayed that the appeal be dismissed.

Having reviewed the parties' contending submissions, the profound and decisive question that calls for resolution is whether the appeal was preferred belatedly and, if so, whether the 1st appellate court was right to entertain it.

The record of the trial proceedings reveals that the decision of the trial court was delivered on 8th March, 2018. The appeal to the 1st appellate court was filed on 7th December, 2018. This means that the appeal was filed nine months after delivery of the trial Court's judgment, and eight months beyond the time prescription set out by the provisions of section 20 (3) of the Magistrates' Courts Act, Cap. 11 R.E. 2019 which provides as hereunder:

> *"Every appeal to a district court shall be by way of petition and shall be filed in the district court within thirty days after the date of the decision or order against which the appeal is brought."*

The 1st appellate court did not cast its eye on this fact when it dealt with the matter, though the matter skipped the appellant's attention as

well. The contention put forward by the respondent is that he lodged an application for extension of time but, in its wisdom, the 1st appellate court chose not to address it, choosing instead to call for additional evidence which was taken by the trial court. The respondent's contention compelled me to review the record of proceedings of the trial and district court. The said application was not located, casting a serious doubt on whether the same was indeed filed as contended by the respondent. But even assuming that the said application was filed as contended by the respondent, what is clear is that the said application was not attended to, and no extension of time was granted to allow the respondent file his appeal which was determined by the 1st appellate court. Instead, the 1st appellate court jumped into a matter that was not placed before her for determination. She did this without letting the parties submit on the question of jurisdiction that she raised *suo motu*. Such conduct was tantamount to denying the parties the right to be heard on the raised issue. It is a conduct which has been roundly abhorred by courts in numerous of their decisions.

In ***Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy***, CAT-Civil Application No. 133 of 2002 (DSM-unreported), the Court of Appeal had the following observation:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice."*

The foregoing decision borrowed a leaf from the reasoning in ***General Medical Council v. Spackman*** [1943] A.C. 627 in which it was held as hereunder:

> *"If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be a no decision."*

See: ***Hypolito Cassiano De Souza v. Chairman and Members of The Tanga Town Council*** [1961] E.A. 377; and ***D.P.P. v. I. Tesha and Another*** [1993] TLR 237 (CA).

The appellate court's decision, yet again, to assume jurisdiction or waive limitation on a matter whose filing was procrastinated was a horrendous infraction which threw the appeal proceedings into a serious

legitimacy crisis. It is an abhorrent conduct. In ***Tanga Cement Co. Ltd v. Christopherson Co. Ltd***, CAT-Civil Appeal No. 133 of 2006 (unreported), wherein it was held:

> *"The court does not have the authority to waive limitation except as provided under section 14 (1) of the Limitation Act, 1971. The powers of extension are limited to institution of appeals and the filing of applications and they do not extend to the filing of suits."*

This decision is consistent with an earlier decision of this Court in ***Tanzania Diaries Ltd v. Chairman, Arusha Conciliation Board and Isaack Kirangi*** [1994] TLR 33 (HC). It was held:

> *"Once the law puts a time limit to a cause of action, that limit cannot be waived even if the opposite party desists from raising the issue of limitation."*

The consequence of having an action which has been preferred belatedly has been stated in many a decision of this Court and the Court of Appeal. In ***Mrs. Kamiz Abdullah M.D. Kermal v. The Registrar of Buildings*** [1988] TLR 199, wherein it was held as follows:

> *"An appeal to the Court of Appeal must be instituted within 60 days of the date when the notice of appeal was lodged. Under Rule 83, now 90 of the Court of Appeal Rules, failure to institute an appeal within the prescribed 60 days renders the appeal incompetent and furthermore, the appellant is deemed to have withdrawn his appeal".*

See also: ***Amina Aden Ally v. Garta Mohamed***, Civil Application No. 4/2009 (unreported).

Subscribing to the position held by the appellant, I hold that the 1st appellate proceedings were conducted in disregard of the law, and it follows that the same are a nullity and so is the decision that emanated therefrom. I allow the appeal and direct that the matter be remitted back for determination of an application for extension of time to appeal allegedly filed by respondent. I make no order as to costs.

It is so ordered.

DATED **at MWANZA** this 20th day of July, 2020.

M.K. ISMAIL

JUDGE

Date: 20/07/2020

Coram: Hon. M. J. Karayemaha, DR

Appellant: Mr. Majula Jackson Kiboga holding brief for

Mr. Stephen Kilale, Advocate

Respondent: Present

B/C: B. France

Mr. Majula:

The matter is coming for judgment. I am ready to receive it.

Respondent:

I am ready for the judgment.

Court:

1. Judgment delivered under my hand and Seal of the Court this 20th July, 2020 in the presence of both parties as shown in the Coram above.
2. Right of Appeal dully explained.

M. J. Karayemaha

DEPUTY REGISTRAR

At Mwanza

20th July, 2020