

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

Misc. LAND APPEAL No. 117 OF 2021

*(Arising from the District Land and Housing Tribunal for Mara at Musoma
in Misc. Land Application No. 127 of 2021; Originating from Kenyamonta
Ward Tribunal in Land Case No. 26 of 2019)*

NYAMATEMO FRUGENCEAPPELLANT

Versus

HEKWE KITANG'ITARESPONDENT

JUDGMENT

13.09.2022 & 13.09.2022
Mtulya, J.:

On 22nd September 2021, the **District Land and Housing Tribunal for Mara at Musoma** (the district tribunal) in **Misc. Land Application No. 127 of 2021** (the application) determined a prayer registered by Hekwe Kitang'ita (the respondent) on enlargement of time to file an appeal out of statutory time in order to dispute the decision of **Kenyamonta Ward Tribunal** (the ward tribunal) in **Land Case No. 26 of 2019** (the case), and at page 3 of the decision, the district tribunal resolved that:

*Katika mazingira haya, naona kwamba mwenendo
na hukumu ya Baraza la Kata halikuwa sawa. Hivyo
inabatilishwa.*

Finally, on the same page, the district tribunal ordered that: *inaamuriwa kwamba shauri hili lianze upya kwa atakayetaka.* Both the decision and the order of the district tribunal aggrieved, Nyamatemo Frugence (the appellant) hence preferred **Land Appeal Case No. 117 of 2011** (the appeal) in this court complaining on four (4) issues, including the right to be heard and determination of the application in favour of enlargement of time without any sufficient reason for the delay.

However, today morning when the appeal was scheduled for hearing both parties in the appeal invited learned minds in Mr. Ostack Mligo for the respondent, on one hand and Mr. Daud Mahemba for the appellant, on the other. The dual learned minds had brief conversations and discussions, off record. After the conversations and discussions, Mr. Mligo raised up and briefly submitted that there is a fault in the record which this court may invite section 43 (1) (b) of **Land Disputes Courts Act** [Cap 216 R.E 2019] (the Act) and resolve the matter without any delay. When Mr. Mligo was given the floor of this court to explain the matter, he briefly submitted that the district tribunal had decided a matter which was not before it.

In order to substantiate his claim, Mr. Mligo stated that the district tribunal was called to determine an application for enlargement of time, but it jumped the matter brought before it

and proceeded further to determine the merit of the case without there being any materials on record and finally nullified both the decision and proceedings of the ward tribunal in the case. Finally, Mr. Mligo prayed the matter be brought back to the district tribunal for determination of the application without any orders to the costs.

This course was cherished by Mr. Mahemba for the appellant. However, Mr. Mahemba contested Mr. Mligo's view on costs arguing that Mr. Mligo had conceded appellant's first ground of appeal hence may be condemned for costs of the appeal. In ending his submission, Mr. Mahemba prayed this matter be brought back to the district tribunal for determination of time limitation by another learned Chairman.

Replying the issues of costs and another learned Chairman, Mr. Mligo submitted that costs is not necessary in the present appeal because: first, the appeal was resolved without any contest on his part; second, the wrong was committed by the district tribunal; and finally, the matter is yet to be resolved on merit at the district tribunal. With the prayer of another Chairman to deal with the application, Mr. Mligo stated that it would not be proper as: first, there is only one (1) learned Chairman at the district tribunal at moment hence ordering the matter to be heard by another learned Chairman will delay

justice to the parties; and second, the matter was not resolved to the finality after registration of materials for and against the application hence the same Chairman may be given an opportunity to determine the merit of the application.

In my considered opinion, I think the conversations and discussions of the learned minds, off record, were intended to resolve the matter without contests on obvious breach of the law hence saving time and costs of the parties and this court. It was a gentlemen move which is encouraged by this court and enactment in section 3A and 3B (2) of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code) and section 66 of the **Advocates Act** [Cap. 341 R.E. 2019] (the Advocates Act). Having said so and noting the fault was caused by the district tribunal and the dispute will be remitted to the district tribunal for determination, I order no costs.

Regarding the undetermined issue of enlargement of time which was lodged before the district tribunal, the practice has been that of remitting the matter back for determination. That has been the directives of the Court of Appeal in the precedent of **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi**, Civil Appeal No. 98 of 2018. The Court in the precedent stated that: *a matter which has not been decided by subordinate court cannot be determined by the higher court in judicial hierarchy.* The

reasoning on the subject is obvious that the jurisdiction of higher courts in judicial hierarchy on appeals is to consider and examine matters that have been considered and decided upon by the lower courts in judicial hierarchy.

The practice of the precedent in **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi** (supra) is now well-established and has been favored in a bunch of precedents of the same Court (see: **Alnoor Sharif Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 and **Celestine Maagi v. Tanzania Elimu Supplies (TES) & Another**, Civil Revision No. 2 of 2014). Similarly, this court too has been following the course in a multiple of decisions without placing reservations (see: **Victor Nzagi v. Josephina Magwala**, Misc. Land Appeal Case No. 29 of 2022; **Helena Mgini Kulimbi v. Revocatus Kuboja**, Misc. Land Appeal Case No. 20 of 2022; **Agripa Fares Nyakutonya v. Baraka Phares Nyakutonya**, Civil Appeal No. 40 of 2021; and **Hadija Athumani v. Viatory Ndege**, (PC) Matrimonial Appeal Case No. 21 of 2022).

Following the practice of the Court and cherishing consistency and certainty of decisions emanating from this court, I hereby invite section 43(1) (b) of the Act and nullify the decision of the district tribunal in the application delivered on 22nd September 2021 and direct the application be remitted to the district tribunal for determination on the issue of

enlargement of time from the materials already registered in the application. I further order the tribunal to hear, determine and deliver decision in the application within sixty (60) days from the date of this judgment.

It is so ordered.




F. H. Mtulya

Judge

13.09.2022

This judgment was pronounced in the presence of the appellant, Nyamatemo Frugence and his learned Counsel, Mr. Daud Mahemba and in the presence of learned counsel, Mr. Cosmas Tuthuru holding brief of Mr. Ostack Mligo, learned counsel for the respondent, Hekwe Kitang'ita.


F. H. Mtulya

Judge

13.09.2022