

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOB A

CIVIL APPEAL NO. 09 OF 2020

(Arising from Civil Application No. 13 of 2018 at the High Court of Tanzania at Bukoba and Civil Appeal No. 15 of 1999 at Bukoba District court. Originating from Civil Case No. 25 of 1997 at Bukoba Urban Primary Court and Civil Case No. 410 and 411 of 1969 at Customary Land Tribunal in West Lake Region, Bukoba Urban and the Decision of the Minister for Land, Housing and Urban Development in 1977).

THEOTIMO ITANISA.....APPELLANT

VERSUS

**JOSEPHINE RUGOMORA (Administratrix of the estate of the late GODWIN
RUGOMORA).....RESPONDENT**

RULING

19/09/2022 & 28/10/2022
E. L. NGIGWANA, J.

This ruling is on the competency of this appeal. This matter has had a long chequered history. For a better understanding of the background of this matter, it is apposite to recapitulate its background with sufficient details. It has been in and out of the courts for 53 years because it started in 1969 before the Customary Land Tribunal in West Lake Region, Bukoba Urban whereas, in consolidated Civil Case No. 410 and 411 of 1969, one Helena Kokugonza Zahoro, the mother and next friend of the respondent Godwin Rugomora (who was then a minor) sued Nobert Lwiza and Pantaleo Kasabira, claiming ownership of farm commonly known as Gashani which she alleged that it was bequeathed to Godwin Rugomora in 1967 by his deceased father Omukama Rugomora who also inherited it from his deceased father Omukama Kishebuka who had also inherited it from his deceased father

Omukama Bwogi who lived therein until he met his death and was buried therein in 1891.

It is on records that, in accordance with the Haya customary and traditions, if the Omukama dies and buried in a farm the farm/shamba is called Gashani, meaning; Chief's cemetery.

After hearing the parties, the Customary Tribunal was satisfied that the complaint lodged by Helena Kokugonza was devoid of merit. In its judgment dated 08/06/1970, the Customary Tribunal had this to say;

"Sisi kwa pamoja tunatamka kuwa mlalamikaji Helena mamaye Godwini anashindwa. Hana kazi aliyoifanya humo. Mashamba ya Nobert, Panta na Fulgensi yanakuwa huria, ni nyarubanja ya Ghashani. Wanayachukua kwa Kifungu cha 5 cha Sheria ya 47 ya 1968.....Tunatamka hivi kwa kuwa ghashani ni ya nyarubanja ni ardhi huria kufuatana na Kifungu cha 4 cha Sheria ya 47 ya 1968. Kwa kuwa tumeridhika kuwa Nobert na Panta na Fulgensi ndiyo waliothibitika kama batwarwa wa ghashani hiyo, tunaamua kuwa wachukue ardhi hiyo kufuatana na mipaka yao kama inavyotakiwa na kifungu cha 5 cha sheria ya 47 ya 1968. Kwa kuwa Helena na jamaa yake hawana jasho yeyote humo, tumekatazwa na kifungu cha 7 sheria ya 47 ya 1968 kuwapa fidia yeyote kwa kuwa masharti ya fidia hayakutimizwa. Helena anashindwa, ana uhuru wa kurufani kwa Waziri wa Ardhi Nyumba na Maendeleo Mjini ndani ya siku 45."

Helena Kokugonza Zahoro was aggrieved by the said decision therefore, she appealed to the Minister for Land, Housing and Urban Development whereas the Minister in his decision dated 30/06/1977, maintained the position of the Customary Tribunal. Part of the Minister's decision reads;

"Nimechunguza maelezo yote ya Rufani hii. Mimi sioni sababu yeyote ya kutokubaliana na hukumu ya baraza la Ardhi la Bukoba na ninahukumu rufani hiii kushindwa. Shamba la daawa ni haki ya warufaniwa Norbert Rwiza na Pantaleo Kasabira. Mipaka iliyochorwa na Baraza la Ardhi katika Hukumu yake inaimarishwa."

Twenty years (20) after the decision of the Minister, Edwin Rugomora who is a son of the claimant Helana Kokugonza in Consolidated Civil case No. 410 and 411 of 1969 before the Customary Tribunal, West Lake Region, approached the doors of the Bukoba Urban Primary court on 27/02/1997 and registered Civil Case No. 25 of 1997 against four people namely; Pantaleo Kasabira, Salvatory Rwiza, Plashid Mbegu and Theotimo Itanisa for possession of farm land valued at Tshs. 200,000/=.

The evidence adduced in the primary court showed that the land belonged to the clan of **Abahinda** and Godwini inherited it from the deceased Omukama Rugomora in 1967 who inherited from the deceased Omukama Kishebuka who inherited it from the deceased Omukama Bwogi who was buried in the said land in 1891.

It was alleged in the primary court that the farm land had disputes in 1943 before Abakama Tribunal and 1969, before Nyarubanja Reconciliation Tribunal (Baraza la Usuluhishi la Nyarubanja) with different persons and in all decisions, Omukama Rugomora emerged a successful winner.

Plashid Mbegu and Theotimo Itanisa who were 3rd and 4th respondents in the primary court respectively, claimed to have inherited the suit land in 1968. They alleged that Kayombwe, who was working in the farm bequeathed it to Nobert Mbegu Rwiza and Pantaleo Rwiza and when Nobert Mbegu died, his

share was inherited by Florence Rwiza. It was further alleged that since 1983, two persons occupied the land, namely. Pantaleo and Florence who sometimes in 1997 had sold the land to Mr. Theotimo Itanisa (appellant herein) at **Tshs. 450,000/=** in which it was also alleged that Theotimo Itanisa bought the farm land in the presence of witnesses and was given the decision of the farm land in Civil Case No. 410 and 411 of 1969. According to the appellant, the farm land originally belonged to the deceased Kayombwe and it was owned by Bahinda Clan and not Abahinda Clan.

The primary court framed three issues for determination which were coached as follows:-

- 1. Je, shamba linalodaiwa ni la ukoo wa Abahinda au Bahinda.*
- 2. Je, waliouza shamba walikuwa na haki na shamba hilo kuliuza.*
- 3. Nani ana haki na shamba linalodaiwa, mdai au mdaiwa.*

After consideration of the facts and the evidences adduced before the trial court, the primary court decided in favour of the claimant Godwin Rugomora. At page 8 of its judgment, the primary court stated as follows;

- 1. Shamba linalodaiwa limethibitika kuwa ni la ukoo wa **Abahinda** na sio ukoo wa **Bahinda**.*
- 2. Wanaukoo wa Bahinda hawakuwa na haki ya kuuza shamba hilo.*
- 3. Mdai ana haki na shamba hilo.*

Aggrieved by the decision of the primary court, the Appellant herein (Theotimo Itanisa) and Plashid Mbegu appealed to the District Court of Bukoba vide Civil Appeal No. 15 of 1997 among other things that the primary court erred in law by entertaining a res-judicata matter as the Minister had already determined the matter to its finality as it arose from the Customary

Tribunal in West Lake Region in Civil Case No. 410 and 411 of 1969. In reply Godwin Rugomora (respondent herein) argued that the principle of res-judicata cannot apply and even it is applied, Mr. Pantaleo Kasabira and Theotimo Itanisa were barred in law of Limitation from claiming any right of over the farm land as they had no right to dispose of the said farm land in 1997.

The District Court heard the appeal and finally decided in favour of Godwin Rugomora. The District Court (**G.M.MUSSA- PDM**) further stated that, since the parties and issues were not the same, the question of res-judicata was not binding to the respondent's case. The District Court further held that, even if the Customary Tribunal and decision of the Minister could be presumed that they were binding, it is not known how they could be put into consideration because there was no execution application applied for an eviction order of the respondent (Godwin Rugomora) or whoever person was occupying the shamba during the time and therefore the defendants claims after the lapse of 20 years cannot be entertained as it is time barred under the law of Limitation.

Plasid Mbegu and Theotimo Itanisa (Appellants in the District Court) were aggrieved by the decision and reasoning of the District Court hence preferred a second appeal to the High Court vide **Civil Appeal No. 46 of 1999** but this court (**Luanda, J.**) found that the same was lodged out time therefore, it was dismissed with costs. The parties were advised that, if still interested to pursue their appeal, they have to lodge an application for leave to appeal out of time.

Upon such advice, Theotimo Itanisa (Current Appellant) preferred an application to wit; **Misc. Civil Application No. 02 of 2006**, and he did so

after expiration of five months, as a result, the application ended being struck out by this court (**K.M. Musa, J**) for being filed out of time.

Thereafter, Theotimo Itanisa lodged **Civil Application No. 7 of 2006** seeking for extension of time within which to file revision, but the same ended being dismissed before **J.M. Kibela, J.** on the ground that the court was not properly moved.

In 2013, Theotimo Itanisa and Pantaleo Kasabira knocked the doors of this court vide **Civil Application No. 2 of 2013 before Khaday, J** seeking for extension of time within which to file revision against the judgment of the District Court in Civil Appeal No. 15 of 1999, but the same ended being withdrawn by the applicants on 25/03/2014 on the ground that they had filed a Notice of Appeal to the Court of Appeal to complain against the decision of this court in Civil Application No. 07 of 2006.

On 23/04/2015 Theotimo Itanisa and Pantaleo Kasabira again, approached this court vide **Civil Application No.11 of 2015** seeking for extension of time within which to file and application for revision against the judgment of the District Court of Bukoba in Civil Appeal No. 15 of 1999. The application encountered a stumbling block by way of preliminary objection on two points of law; one, that; the application was res-judicata and two, that, the application was incompetent for improper citation of the enabling provision of the law. This court (**Matogoro, J,**) dismissed the P.O on the question of re-judicata but sustained the second limb of preliminary objection that there was improper citation of enabling provision, therefore, the same ended up being struck out on incompetency.

Theotimo Itanisa and Pantaleo Kasabira preferred another application to wit; **Misc. Application No. 2 of 2016** seeking for extension of time within to file revision. The application was also protested on the ground that an affidavit supporting the application was defective because it contained legal arguments but also the name of the drawer was not disclosed. Again this court (**Bongole, J,**) sustained the PO's and struck out the application for incompetency.

From the above, it is apparent that since 1999, the appellant had been knocking the doors of this court so as to be allowed to challenge the judgment and decree of the District Court of Bukoba in Civil Appeal No. 25 of 1997 handed down on 27/09/1999. He appeared before a total number of six Judges of this court as explained herein above, but his journey was not successful.

Finally, Theotimo Itanisa and Pantaleo Kasabira lodged Application No. 13 of 2018 seeking leave for extension of time to appeal out of time against the decision in Civil Application No. 15 of 1999 of the District Court. Lastly, this Court (**Mtulya, J.**) on 20/04/2020 granted the application whereby the applicant was given ten (10) days to be counted from 20/04/2020 within which to file an appeal before this court without any further delay. In that respect, ten (10) days were to lapse on Wednesday 29/04/2020.

After being granted extension of time within which to appeal out of time, the Appellant herein lodged this appeal raising two grounds of appeal;

1. That, the first appellate court erred in law when agreed that the trial court had jurisdiction to admit, proceed and determine civil case No.25 of 1997 as it was re-judicata.

2. That, the 1st appellate court misdirected itself for failure to recognize that the trial court had no jurisdiction to admit, proceed and determine the matter which was time barred.

Wherefore, the appellant is praying for this court to allow this appeal with costs, declare the Appellant as the bonafide purchaser of the disputed land, and order the respondent to give vacant possession of the disputed land.

Before the commencement of the hearing of this appeal, the respondent Godwin Rugomora passed away, therefore, he was replaced by Josephine Rugomora after being duly appointed as an Administratrix of estate of her deceased husband. When this matter came for hearing, the appellant was represented by Mr. Eliphaz Benges, learned advocate while Mr. Rugambwa, and learned advocate appeared for the respondent. The appeal was argued orally.

However, in the course of constructing the judgment, I re-visited the Ruling of the court in Misc. Application No.13 of 2018 and discovered that there is a crucial legal issue which touches the competency of this appeal. The issue arose from the fact that in Application 13 of 2018, the Applicant was given extension of ten days only from the date of the ruling to wit; 20/04/2020 within which to file the intended appeal, but it appears that this appeal was filed after the expiration of ten days.

In that circumstance, and being guided by the Court of Appeal of Tanzania in the cases; **Zaid Sozy Mziba versus Director of Broad casting, Radio Tanzania Dsm and Another**, Civil Appeal No.4 of 2001 and **Pan Construction Company and Another versus Chawe Transport Import**

and Export Co. Ltd, Civil reference No.20 of 2006 (Both unreported), I re-opened the proceedings by directing the parties to address me on this issue;

"Whether this appeal was filed within the time prescribed by this court in its ruling dated 20/04/2020."

In his submission, Mr. Benges rightly admitted that this appeal was filed out of the time prescribed in the court order dated 20/04/2020 because the present Appeal was filed electronically on 06/05/2020 and no enlargement of time was sought and obtained by the applicant before filing this appeal. As regards the remedy, he stated that an appeal which has been filed out of time has to be dismissed.

On his side, Mr. Rugambwa, learned advocate conceded to the submission made by Mr. Benges. He ended up urging the court to dismiss this appeal for being out of time.

Having heard submissions by both advocates, the issue for determination is whether this appeal was filed out of time or otherwise. As correctly submitted by Mr. Benges, the electronic case registration print out retrieved from JSDS showed that this appeal was filed by the Appellant through his advocate Mr. Eliphaz Benges on **06/05/2020 at 14:10:41**. The same was admitted by the Deputy Registrar on **06/05/2020 at 15:43:45** and was assigned control No. **99140020313123** and that, on **08/05/2020**, the payment was made **at 10:47:55**. The Petition of Appeal bore these words;

"PETITION OF APPEAL"

(Pursuant to this Honourable Court Order dated 20th April, 2020 in Civil Application No.13 of 2018).

There is no doubt that, as per Rule 21 (1) of the Judicature and Applications of Laws (Electronic Filing Rules, 2018 GN. No. 148 of 2018, the document is considered to have been filed on the date submitted on line. The same provides that;

"A document shall be considered to have been filed if it is submitted through the electric filing system before midnight. East African time, on the date it is submitted unless a specific time is set by the court or it is rejected."

Reading the order of this court in Civil Application No. 13 of 2018 dated 20/04/2020 where the court granted an application with strict leave that the intended appeal should be filed within ten (10) days from the date of the ruling to wit; 20/04/2020 without any further delay, it goes without saying that this appeal which was filed electronically on 06/05/2020 was filed out of the time prescribed by the court, therefore, it was definitely filed out of time. Whether, the delay was by design or otherwise is the issue which should not detain me.

I am alive that this case started 53 years ago without an end, and it has taken time and efforts of a total of eight judges of this Court but since it is trite law that the court cannot have jurisdiction to entertain an appeal which is time barred without extension of time or enlargement of time being sought and obtained, there is no way this court can close its eyes over such a requirement. So, however sympathetic this court may be to the parties who have been in and out of the court corridors for almost 53 years now, and also the time and resources spent by the parties and the court, the court is bound by the confines of the law because courts are not courts of sympathy but courts of law and procedures, and the principle of Overriding Objective cannot mitigate the issue of time limitation because it touches the question of

jurisdiction of the court to admit, hear and determine the matter. The appellant, has to blame himself for his failure to comply with the time prescribed by the court within which to file his appeal.

It is common understanding that, where an appeal is incompetent on account of either some defects or irregularities, it should be struck out for incompetency but where it is time barred, the consequences is to have it dismissed. Since the instant appeal is time barred, this court has no requisite jurisdiction to entertain it; therefore, it is hereby dismissed. Considering that the issue time limitation was raised by the court *suomotu*, I enter no order as to costs.

Dated at Bukoba this 28th day of October, 2022.



E. L. NGIGWANA

JUDGE

28/10/2022.

Ruling delivered this 28th day of October, 2022 in the presence of the Appellant and his advocate Mr. Eliphaz Benges, respondent and her advocate Mr. Abel Rugambwa, Hon. E. M. Kamaleki, Judges, Law Assistant and Ms. Sophia Fimbo, B/C.



E. L. NGIGWANA

JUDGE

28/10/2022