

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 521/2018

(Arising from Land Appeal No. 32 of 2017)

ADAMSON MKONDYA FIRST APPLICANT

AWADHI KOMBA SECOND APPLICANT

VERSUS

ANGELIKA KOKUTONA WANGA (As an Administratrix of the

Estate of the late STEPHEN ANGELO RUMANYIKA).... RESPONDENT

JUDGMENT IN REVIEW

Date of Last Order: 02/09/2019

Date of Ruling: 06/09/2019

MALLABA, J

On 20/07/2018, this court (Hon. Mgonya, J) gave a ruling on a Preliminary Objection (PO) on a point of law that: ***The appeal that was before the court was incompetent for being time barred.*** The court sustained the PO and consequently struck-out the appeal for being time barred.

In coming to that decision, the court had heard the PO by way of written submissions. In its ruling, among other things, the court observed that, the appellants had failed to comply with the order of filing written submissions as ordered by the court. Thus, the court considered only the respondent's submissions.

The appellants in the appeal that was struck-out, who are applicants herein, have now filed a Memorandum of Review, seeking this court to review its ruling on the ground that there is a manifest error in the court's finding that the appellant failed to file written submissions while in-fact the same were duly filed in court on 29/06/2018 and the respondent's advocate was duly served with the submissions on 02/07/2018. Copy of their written submissions were annexed to the Memorandum of Review.

When the matter came for hearing, the respondent's learned counsel, Evona Mwendapole stated that, she had not filed any reply to the Memorandum of Review because the respondent did not intend to oppose the Review being sought. In other words, they do not dispute the applicants' position that, this court was not right in finding that the appellants failed to file written

submissions. She is agreeable that the appellants did file their written submissions.

The Memorandum of Review annexed copy of the written submissions that the applicants filed in court. This court has also looked at the respective file and finds there is a copy of the appellants' written submissions on the PO. According to the original exchequer receipt in the file, the written submissions were filed on 29/06/2018. The applicants were to file the written submissions by 02/07/2018. This means that, the applicants filed their written submissions about 4 days before the due date. In the circumstances, the applicants filed their written submissions in time. As such, this court agrees with the applicants and the respondent, that, indeed this court was not right in finding that the applicants failed to file written submissions.

In the case of **Transport Equipment Ltd Vs. Devram P. Valambia**, Civil Application No. 18 of 1993, the full Bench of the Court of Appeal considered the court's power to review its own decision and stated as follows:

"The court has the inherent jurisdiction to review its decisions and it will do so in any of the following circumstances to wit,

where there is a manifest error on the face of the record which resulted in miscarriage of justice, or where the decision was attained by fraud; or where a party was wrongly deprived of the opportunity to be heard”.

In the present matter, by the court’s failure to consider the applicants’ case on the PO before it, was tantamount to the applicants being denied the right to be heard. As such, the applicants herein were wrongly deprived of the opportunity to be heard. Their submissions were not considered by the court in reaching to its decision. In the circumstances, this court is of the opinion that, the application for review should be granted. This court grants the same.

Before this court goes on to review the decision, it wishes to note the following: In terms of Order XLII Rule 2 of **the Civil Procedure Code** (Cap 33 R.E 2002), an application for review is supposed to be dealt with by the judge who gave the decision sought to be reviewed. In the present matter, the judge who gave the decision sought to be reviewed (Hon Mgonya, J) has since been transferred from this division. Generally, she is unavailable to deal with the application, hence the same being assigned to me. In those

circumstances, this court will review the decision by taking into consideration the applicants' written submissions which this court has found to have been filed in time as per the schedule that was given by the court.

In the appeal that was before the court, the respondents therein raised a PO that the said appeal was time barred. They submitted that, the judgment that was being appealed against, was delivered on 29/12/2016 and the appeal filed on 13/02/2017. The appeal was therefore preferred 47 days from the date of judgment delivery, hence contravening the provisions of Section 41(2) of **the Land Disputes Courts Act** (Cap 216 RE 2002), which requires such appeal to be preferred within 45 days. The respondent sought for the appeal to be dismissed in terms of section 3(1) of **the Law of Limitation Act** (Cap 89 RE 2002).

In their written submissions, the appellants before the court submitted that, they presented the Memorandum of Appeal for filing on 09/02/2017. The court's stamp was affixed on the Memorandum of Appeal on 09/02/2017. He sought to rely on the case of **Halfan Sudi Vs. Abieza Chichili** (1998) TLR 527; in which the Court of Appeal stated that:

"A court record is a serious document; it should not be lightly impeached There is always a presumption that a Court record accurately represents what happened".

He restated that, the appeal was therefore filed within the prescribed 45 days. This court will now turn to consider the PO on time limitation, on the basis of the submissions by the two sides.

According to the submissions by the parties on both sides, there is no dispute that, the appeal that was before the court, ought to be filed within 45 days from the date of delivery of the judgment intended to be appealed against. This is in terms of Section 41 (2) **of the Land Disputes Court Act** as amended by **the Written Laws (Miscellaneous Amendments) Act (No.2) of 2016**. It was also not disputed that, the judgment intended to be appealed against, was delivered on 29/12/2016. The only disputed aspect was on the date when the appeal was filed in court.

The respondents submitted that, the appellants filed their appeal on 13/2/2017. The reason to back their position is that, that is the date when the appellant made the requisite payment of filing fees for the appeal. On the other hand, the appellants submitted that, they filed their appeal in court on 09/02/2017. Their basis for saying so is because that is the date on which their Memorandum of Appeal was stamped as the date of filing in court. The Memorandum bears that date in the court's stamp.

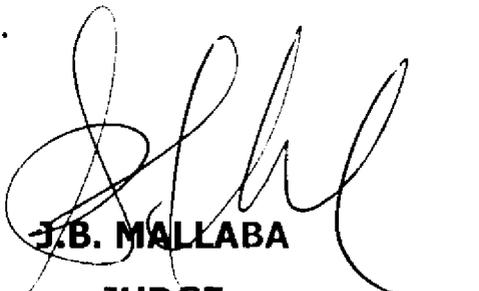
It is a cardinal principle that, as long as court fees are paid, the date of the court stamp indicating as to when it was presented for filing may conveniently be taken as the date of filing. However, that is not the case if that date is earlier than the date of payment of court fees. If the date of filing is earlier than the date of payment of court fees, then the date of payment of court fees has to be taken as the date of filing. A matter may be taken to have been properly filed in court only after court fees are paid. The date of presentation of the application for filing cannot be treated as the date of filing the appeal because the Court of Appeal has held from time to time that, it is the date of payment of filing fees and not of lodging a document, which

amount to the date of filing an action. One such case is the case of **John Chuwa Vs. Anthony Ciza** (1992) TLR 233. In the present matter, there appears to be no dispute, and also there is an exchequer receipt No. 13592973 showing that, court fees for filing the appeal was paid on 13/02/2017. The appellants' contention that they filed their appeal on 09/02/2017 would only be tenable if they had paid the respective court fees by that date. Presenting a matter in court before paying the requisite court fees cannot be taken to be filing of such matter. In the circumstances, this court finds that, the appellants' appeal was filed in court on 13/02/2017 because that is the earliest date it could have been filed. Counting from the date of judgment of the decision appealed against, it means the appeal was filed on the 46th day. It was thus filed outside the prescribed 45 days. The appellants ought to have applied for extension of time to appeal.

Because the appeal was filed out of time and without seeking and obtaining an extension of time, the PO is upheld. In terms of Section 3 (1) of **the Law of Limitation Act**, the appeal is dismissed with

costs. This decision, in effect, replaces the reviewed decision of this court dated 20/07/2018 and the same is set aside.

It is ordered accordingly.



J.B. MALLABA
JUDGE

06/09/2019