IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 347 OF 2020

ABDALLAH MOHSEN MALICK ..... APPELLANT

VERSUS

KAZIMILI MLYACHUMA & 18 OTHERS.....RESPONDENTS

[Appeal from the decision of the High Court of Tanzania at Mwanza]

(Rumanyika, J.)

dated the 31st day of March, 2020

in

Land Case No. 08 of 2017

RULING OF THE COURT

05th & 13th February, 2024

MWAMPASHI, J.A:

The High Court of Tanzania, sitting at Mwanza (the High Court), in its judgment delivered on 31.03.2020 by Rumanyika, J. (as he then was), dismissed the appellant's suit in Land Case No. 08 of 2012. The dispute between the parties in that suit, involved Plot No. 153, Nyakato Industrial Area within Mwanza City (the suit plot). It was the appellant's case that, the suit plot which had been allocated to him in 1999 vide a letter of offer MZM/5776/1/CKT dated 27.01.1999 followed by a Certificate of Title No. 20839 issued to him on 11.04.2008, was

encroached by the respondents in 2008 whereby the respondents erected their respective residential houses upon it.

The appellant further claimed in his plaint that, his efforts to amicably settle the dispute with the respondents by complaining to the relevant local authorities including Mwanza City Council proved futile, hence the institution of his suit before the High Court claiming for, among other things, a declaration that he is the lawful owner of the suit plot and an order that the respondents vacate the suit plot.

In their joint written statement of defence, the respondents refuted the appellants claims levelled against them. It was their defence that they have been in ownership, possession and occupation of their respective plots within the suit plot, way back in 1980s as well as early 1990s. They maintained that while some few of them own their respective plots customarily, the rest had purchased the plots from original owners. The respondents did also claim that each of them had been dutifully paying relevant taxes and land rent to the City Council. The defendants, lastly, challenged the grant of the suit plot to the appellant and the survey of the same on account that it was against the Land Act No. 4 of 1999 as none of them was paid the required

compensation or involved in the survey exercise. They thus prayed for the dismissal of the suit with costs.

At the commencement of the trial, four issues were framed and recoded; **one**, whether the plaintiff (appellant) legally occupied the disputed land, **two**, if issue No.1 is answered in the affirmative, whether the defendants (respondents) occupied the disputed land customarily, **three,** if issue No. 2 is answered in the affirmative, whether the defendants (respondents) were paid compensation and **four**, what reliefs are the parties entitled to.

Having heard the evidence in support of the appellant's suit from the appellant and from his two witnesses Mr. Paulo Musanga (PW1) a land surveyor and Mr. Venance Pascal (PW2) a land officer, both from Mwanza City Council and also having heard evidence from the respondents with the exception of the 3rd, 5th, 7th and 16th respondents who did not testify, the High Court dismissed the appellant's suit on account that it was without merit.

In dismissing the suit, the High Court found that, though it was established that the suit plot was granted to the appellant in 1999 and while the encroachment was allegedly committed in 2008, the appellant did not sue the respondent till in 2017 after the lapse of 9 years. The

High Court further found that, though the prescribed limitation period of 12 years had not elapsed, the silence by the appellant was unexplainable and amounted to an acquiescence in favour of the respondents. The City Council was also blamed for, knowingly, continuing receiving land rent in respect of the respondents' houses which are within the suit plot that had been granted to the appellant. Also blamed, was the appellant for not developing the suit plot and leaving it in abeyance. It was also held by the High Court that, the respondents ought to have been compensated for unexhausted developments or for loss of future use.

Aggrieved by the decision and findings of the High Court, the appellant has preferred the instant appeal on the following four grounds of complaint:

1. *That the trial court erred in iaw and facts for ruling that six years of plaintiff acquiescence was sufficient to deny ownership of land in dispute.*
2. *That the trial court erred in law and fact in deciding in favour of the respondents without considering the time in which the respondents' documents were obtained.*
3. *That the trial court erred in iaw and fact in ignoring the strong evidence adduced by the appellant and thus arriving at erroneous decision.*

4. *That the trial court erred in law and fact in determining the matter in favour of the respondents despite the fact that the appellant had proved his case to the standard required by the law.*

Before the hearing of appeal could commence, Mr. Mashaka Fadhil Tuguta, learned advocate for the respondent, sought and was granted leave to raise and argue a preliminary objection based on two points; **one**, that the appeal is time barred and **two**, that the appeal is incompetent for omitting to list all 19 respondents by their names in the memorandum and record of appeal.

Submitting on the first point of objection in regard to the appeal being time barred, Mr. Tuguta argued that the appeal is time barred because a copy of the letter by the appellant to the Registrar of the High Court dated 23.04.2020, applying for a copy of the proceedings for appeal purposes, was not served on the respondents. He pointed out that under rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), an appeal to the Court must be filed within sixty (60) days of the date when the notice of appeal was lodged. He went on arguing that under the proviso to rule 90 (1) of the Rules, the period during which the appellant awaits to be supplied with a copy of the proceedings for the purpose of the intended appeal, is excluded

provided a request to be supplied with such a copy was made to the Registrar in writing within thirty (30) days of the date of the impugned decision and provided further that a copy of the said relevant letter was served on the respondent.

Mr. Tuguta further argued that since according to rule 90 (3) of the Rules, it is only an appellant who served on a respondent a copy of the letter applying for a copy of the proceedings, who can benefit to the exclusion of time and as in the instant case the appellant did not serve a copy of his letter on the respondents, then he cannot benefit from the exclusion of time. He contended that the appellant, for that case, was supposed to file his appeal within sixty (60) days as required by rule 90 (1) of the Rules. Mr. Tuguta did also argue that as the notice of appeal was lodged on 15.04.2020, then the appellant ought to have filed the appeal by 15.06.2020 and not as late as 29.07.2020. It was further contended that the certificate of delay issued by the Deputy Registrar to that effect, is invalid and cannot rescue the situation. Mr. Tuguta concluded by arguing that the appeal is thus, time barred and that it should be struck out with costs. To cement his argument Mr. Tuguta referred us to the decision of the Court in **Samwel Mwera**

Siyange v. District Executive Director, Tarime District Council & 3 Others, Civil Appeal No. 133 of 2020 (unreported).

Responding to the submissions made by Mr. Tuguta on the first point of objection, Mr. Ngassa Maduhu, learned advocate for the respondent, readily conceded that a copy of the appellant's letter to the Registrar applying for a copy of the proceedings for appeal purposes was not served on the respondents. He also agreed with Mr. Tuguta that the certificate of delay issued by the Registrar appearing at page 186 of the record of appeal, purporting to exclude 88 days from the period of time within which the appeal was supposed to be instituted, is thus invalid and that the appeal is, indeed, time barred. He, thus, urged us to strike out the appeal for being time barred but without costs.

In his brief rejoinder Mr. Tuguta reiterated his earlier prayer that taking into consideration that the respondents, through their advocate, have spent some considerable time and incurred costs in preparations for the hearing of the appeal, the appeal has to be struck out with costs.

At this very stage, we find it apt to state that, taking into consideration the submissions made by Mr. Tuguta on the first point of objection and bearing in mind that the point was conceded by Mr.

Maduhu that indeed, the appeal is time barred and should be struck out, then the fact that this point of objection sufficed to dispose the appeal, became obvious to us. That being the case, in disposing this matter, there arises no need for us to belabour in the second point of objection.

To begin with, it is trite law, as correctly argued by Mr. Tuguta, that, in terms of rule 90 (1) of the Rules, an appeal to this Court must be filed within sixty (60) days of the date when the relevant notice of appeal was lodged. However, where an appellant applies in writing to the Registrar for a copy of the proceedings for appeal purposes within thirty (30) days of the date of the impugned decision and provided that he serves the copy of such a letter on the respondent, the time required and spent for the preparation and delivery of the said copy of the proceedings, as may be certified by the Registrar, is excluded from the prescribed period of sixty (60) days which is the time within which the appeal is required to be instituted. See – **Richard Kwayu v. Robert Bulili,** Civil Appeal No. 9 of 2012 (unreported) and **District Executive Director Kilwa District Council v. Bogeta Engineering Limited** [2019] T.L.R. 271.

In the instant matter, it is common ground that after the delivery of the impugned decision on 31.03.2020, the appellant duly lodged the notice of appeal on 15.04.2020 and wrote a letter to the Registrar applying for a copy of the proceedings for appeal purposes on 21.04.2020. It is also not in dispute that a copy of the appellant's letter to the Registrar requesting for the copy of the proceedings was not served on the respondents. For that reason, in terms of rule 90 (3) of the Rules, the appellant is not entitled to rely and cannot benefit from the exclusion of time as provided under rule 90 (1) of the Rules. It is provided under rule 90 (3) of the Rules that:

> *"90 (3) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent."*

Since the appellant cannot rely on the exception provided under rule 90 (1) of the Rules, as we have alluded to above, he was then required to institute his appeal within sixty (60) days of the date he lodged the notice of appeal. That being the case, as the relevant notice of appeal was lodged on 15.04.2020, the period of sixty (60) days within which the appellant ought to have instituted a competent appeal, elapsed on 15.06.2020. By instituting his appeal on 29.07.2020, the

appellant was late for 44 days. In that event and as rightly argued by Mr. Tuguta and conceded by Mr. Maduhu, the appeal was filed beyond the prescribed period of sixty (60) days and it is thus time barred.

In the result, for the above stated reasons, we sustain the preliminary objection on the first point of objection and find the appeal incompetent for being time barred. Consequently, we accordingly strike out the appeal. The respondents shall have their costs.

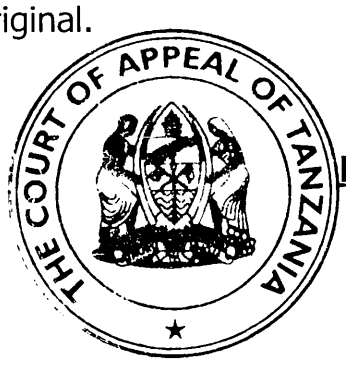
DATED at **MWANZA** this 12th day of February, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Ruling delivered this 13th day of February, 2024 in the presence of Mr. Venance Kibulika holding brief for Mr. Ngassa Maduhu, learned counsel for the appellant and Mr. Venance Kibulika, learned counsel for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL