

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWAMBEGELE, J.A., KITUSI J.A., And KAIRO, J.A.)

CIVIL APPLICATION NO. 546/01 OF 2017

PHILIP TILYA.....APPLICANT

VERSUS

VEDASTINA BWOGI.....RESPONDENT

**(Arising from the ruling of the Court of Appeal of Tanzania,
at Dar es Salaam)**

(Juma, CJ, Mugasha, JA and Mwangesi, JA.)

dated the 7th day of November, 2017

in

Civil Appeal No. 88 of 2014

RULING OF THE COURT

30th June, & 28th July, 2021

KITUSI, J.A.:

The decision of this application for review hangs on a very thin thread, namely whether or not 27th June, 2017 was a public holiday. If it was a public holiday, as contended by the applicant, then there was an apparent error in our order dated 7th November, 2017. On the other hand, if it was not, then the present application has no merit.

The application before us has been made by a Notice of Motion drawn under Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by an affidavit of Mr. Anthony Mark, the applicant's counsel who also argued it in court.

The respondent filed an affidavit in reply taken by himself, resisting the application. Both parties also filed written submissions, which they adopted in their oral address when the matter was placed before us for hearing. The oral and written arguments narrowed on that main issue which we have just cited above. Was 27th of June, 2017 a public holiday? We shall first tell the brief background.

The respondent successfully sued the applicant before the District Land and Housing Tribunal of Kinondoni in Land Application No. 51 of 2007 at the conclusion of which he was declared the lawful owner of a piece of land described as Plot No. 82, Wazo Hill Industrial Area within Kinondoni district in Dar es Salaam, the subject of that case. The applicant's appeal to the High Court was unsuccessful, so he appealed again to the Court, vide Civil Appeal No. 88 of 2014.

When that appeal was placed before the Court for hearing on 19/9/2016, it was noted by the Court and conceded to by the applicant that the record was incomplete for omitting copies of certain documents. The Court directed the applicant to make a formal application for extension of time within which to lodge a supplementary record of appeal to cure the incompleteness. And he did.

Through Civil Application No. 448 of 2017, the applicant applied for and was granted extension of time to file a supplementary record of appeal within 21 days. We shall take the time to have run from 5th June, 2017 when the ruling in that application was delivered to the parties. This means that the supplementary record of appeal ought to have been filed by 26th June, 2017. However, subsequently when sitting in that appeal again on 1/11/2017, the Court noted that the supplementary record of appeal had been lodged on 28th June, 2017. Therefore, on 7th November, 2017 the Court proceeded to strike out the appeal, the applicant's advocate having conceded as earlier shown, that it was indeed filed outside the time.

In this application, Mr. Anthony Mark, learned advocate, who was appearing for the applicant together with Mr. Evans Ignas, also learned advocate, contended that he subsequently learnt that 26th and 27th June, 2017 were Eid, so he should not have conceded that the appeal had been filed out of the 21 days ordered in Civil Application No. 448 of 2017. He submitted that the Court should take judicial notice of public holidays, Eid included. He submitted therefore, that there was a manifest error that justifies us reviewing our order dated 1st November, 2017 that struck out the appeal.

Mr. Cleophas Manyangu, learned advocate, argued the application on behalf of the respondent and submitted that there is no proof that those two dates were public holidays. He further submitted that the Court cannot take judicial notice of public holidays like Eid, that depend on the sighting of the moon. The learned advocate drew our attention to a letter dated 27th June 2017 signed by the Registrar of the Court addressed to the applicant's lawyers. That letter was signed on 27th June 2017, and Mr. Manyangu submitted that that fact goes to disprove the contention that 27th of June was a public holiday.

In a short rejoinder, Mr. Mark reiterated his earlier submissions. Of the Registrar's letter signed on 27th June 2017, Mr. Mark submitted that the Court cannot act on it in disregard of the fact that 27th June 2017 was a public holiday.

It is true as submitted by Mr. Manyangu that the applicant has not placed before us any material on which to decide the issue. However, section 59 (1) (g) of the Evidence Act [Cap 6 R.E. 2002] stipulates: -

"59 (1) A court shall take judicial notice of the following facts-

- (a) not relevant*
- (b) not relevant*
- (c) not relevant*

(d) not relevant

(e) not relevant

(f) not relevant

(g) the division of time, the geographical divisions of the world and public festivals, feasts and holidays notified in the Gazette”.

That is the only basis for us to determine this application. However, before we proceed, we wish to remind the parties that the general rule of evidence is that he who alleges existence of a fact has a duty to prove such existence. That is what section 110 (1) of the Evidence Act [Cap 6 R.E 2002] provides: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

See also the case of **Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (unreported), cited in our other decision in **Geita Gold Mining Ltd & Another v. Ignas Athanas**, Civil Appeal No. 227 of 2017 (also unreported). However, as already shown, the applicant decided to sit back and left us to go by section 59 of the Evidence Act, reproduced but a while ago.

First, we managed to get a copy of Press Release issued by the Muslim National Council, popularly known by its Swahili acronym, BAKWATA, dated 19th June 2017, declaring that Eid prayers for that year would be celebrated in Kilimanjaro on 25th or 26th of June 2017. As the communication shows, the date for the prayers depended on the sighting of the moon, and as it occurred, the moon was not sighted on the anticipated date. Instead, Eid was celebrated on 26th and 27th of June 2017 according to IPP Media website; <https://www.ippmedia.com/en/news/tanzania-muslims-mark-eid-el-fitr> which we visited on 14th July 2021.

On the basis of the above information, which we take judicial notice of, 27th of June 2017 was a public holiday and the applicant could not have lodged the supplementary record of appeal on that date. So, the letter by the Registrar dated 27th June, 2017, as submitted by Mr. Manyangu, cannot be a basis for us concluding that it was a working day. In the upshot, the supplementary record of appeal filed by the applicant on 28th June 2017 was within time as it could not have been filed on 27th June, 2017. It is therefore, our conclusion that it was an apparent error to strike out Civil Appeal No. 88 of 2014 for bearing an incomplete record while the supplementary record filed on 28th June 2017 to cure the incompleteness of that record was filed within time.

In fine, we allow this application and review our proceedings and resultant ruling dated 7th November 2017. We vacate our order striking out Civil Appeal No. 88 of 2014 and order the same to proceed for hearing on a date to be fixed by the Registrar.

For the reason that the applicant merely raised the issue but did not provide us with the necessary proof that 27th June 2017 was a public holiday, we make no order as to costs.

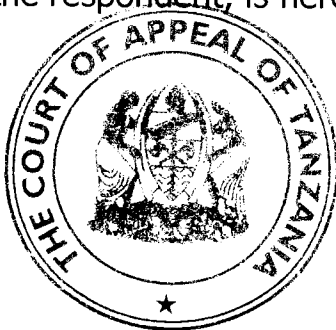
DATED at **DAR ES SALAAM** this 26th day of July, 2021.


J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 28th day of July, 2021 in the presence of Ms. Oliva Mark, learned counsel for the applicant and in the absence of the respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL