

IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 233 OF 2018

YUSUFU JUMA RISASI APPELLANT

VERSUS

ANDERSON JULIUS BICHA..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Tabora)

(Mallaba, J.)

dated the 6th day of December, 2016
in

(Misc. Land Application No. 51 of 2015

JUDGMENT OF THE COURT

30th March & 1st April, 2022

MWARIJA, J.A.:

The respondent, Anderson Julius Bicha was the applicant in the District Land and Housing Tribunal for Tabora (the DLHT). He instituted Land Application No. 68 of 2011 (the application) against the appellant, Yusuf Juma Risasi seeking for *inter alia*, an order declaring him the lawful owner of a piece of land, Plot No. 6 Block "M" situated at Salimini Street within Tabora Municipality (the dispute land). The appellant disputed the claim.

Having heard the application, the DLHT declared the respondent the lawful owner of the dispute land on account that the same was allocated to him by the Tabora Municipal Council after the area at which the dispute land is situated was surveyed and after demarcation of plots exercise was done. It found also that, prior to the survey of the area, the disputed land was being occupied by the appellant's family but after the survey plan, which was approved on 12/11/1992, the dispute land was allocated to Kanisa la Injili Africa. It found further that the said church transferred its right of occupancy to Evangelistic Church of Tanzania which also later on, transferred it to the respondent who was later on 11/3/2010, granted a certificate of title No. 26725.

Apart from declaring the respondent the lawful owner of the disputed land, the DLHT ordered him to pay compensation to the appellant for unexhausted improvements effected thereon at the time of his occupation. He was found to have developed the dispute land by planting trees and thus the respondent was ordered to compensate the appellant the value of the trees as would be assessed by a registered valuer.

The appellant was aggrieved by the decision of the DLHT and therefore, appealed to the High Court of Tanzania (Tabora District

Registry) vide Land Appeal No. 20 of 2013. He was however, unsuccessful. In its decision dated 3/6/2015, the High Court (Songoro, J) upheld the decision of the DLHT. The learned first appellate Judge observed that there was sufficient evidence including a certificate of title No. 26725, which proved that the respondent was the lawful owner of the dispute land, although it was previously occupied by the appellant's extended family.

On the issue of compensation, the learned first appellate Judge was of the view that, the appellant did not lead evidence establishing that he was the one who planted trees and not other member of his family, regard being had to his claim that the dispute land belong to his extended family. The learned Judge considered yet another matter, that the capacity under which the appellant appeared in the application before the DLHT; whether he appeared as a legal representative or an administrator of the estate of his father or grandfather, was not certain. He decided therefore, that with such an uncertainty of the appellant's capacity, it was wrong for the DLHT to award him compensation for unexhausted improvements. The learned Judge thus set aside that order.

Dissatisfied further with the decision of the High Court, the appellant intended to appeal to this Court and therefore, on 5/6/2015 he lodged a

notice of appeal. Since however, he intended to prefer a second appeal on 16/5/2015, he filed an application for leave to appeal, Misc. Land Application No. 51 of 2015. The application was made under *inter alia* s. 47 (1) of the Land Disputes Courts Act [Cap. 216 R.E. 2002]. He moved the High Court to grant him leave specifying the points which, according to him, were worth consideration by the Court. The points are:

"1. That, in the presence of long occupation and use by the appellant and his clan members of the disputed land prior and after [the alleged] survey, the survey which was carried out without [extinguishing] the appellant and his clan members' title over the said disputed land, then whether the learned judge did not error in law and in fact to uphold the trial tribunal decision that the respondent is the lawful owner of the disputed land.

2. That, the learned judge erred in law and in fact to hold that, as long as the respondent possess the certificate of Right of Occupancy over the disputed land, the same [having been] proved by the Tabora Municipal Council's Land Officer, then the

respondent has better title over that of the appellant.

3. That, the learned Judge erred in law to hold that the appellant had no locus standi in this dispute while he was the respondent before the trial tribunal having been sued by the respondent herein for [having allegedly trespassed into] the disputed land."

Having heard the application, the High Court (Mallaba, J) dismissed it for want of merit. He was of the view that the three grounds which were specified by the appellant, were intended to challenge the findings made by the learned first appellate court on matters of fact. He reasoned that, since those findings were concurrently arrived at by both the DLHT and the High Court, the three grounds which were relied upon by the appellant were not worth consideration by the Court of Appeal. He relied on the decision of the Court in the case of **Martine Anderson @ Mzilo v. Republic**, Criminal Appeal No. 410 'B' of 2013 (unreported).

The appellant was again, aggrieved by the decision of the High Court which refused to grant him leave to appeal hence this appeal. In his memorandum of appeal, the appellant contends that the learned High Court Judge erred in failing to find that the specified grounds were not worth consideration by the Court of Appeal.

At the hearing of the appeal, the appellant was represented by Mr. Musa Kassim while the respondent had the services of Mr. Mugaya Kaitila Mtaki, both learned advocates. The learned counsel had duly filed their respective written submissions in compliance with Rule 106 (1) and (7) of the Court of Appeal Rules, 2009 as amended.

Submitting in support of the application, Mr. Kassim started by adopting his written submission and proceeded to highlight some of the areas of it orally. The gravamen of his submission is that the grounds which were raised by the appellant in his application for leave to appeal are worth considering by the Court of Appeal. He went on to submit that the reasoning of the learned High Court Judge that, the grounds which were relied upon by the appellant raise issues of fact which the DLHT and the High Court had made concurrent findings on them, is not correct. Giving an example of the parallel findings of the DLHT and the High Court, the learned counsel submitted that, whereas the DLHT found that the dispute land belonged to the respondent's extended family, the High Court found that the appellant did not have *locus standi* in the proceedings, meaning that the same were instituted in the name of a wrong person.

Mr. Kassim submitted that, in any case, it was not proper for the learned High Court Judge to apply that principle, which was reiterated in

the case of **Martine Anderson @ Mzilo** (supra), to determine the application which was made in a civil matter.

Responding to the submission of the learned counsel for the appellant, Mr. Mtaki argued that the application for leave to appeal was properly refused by the learned High Court Judge. According to the learned counsel, despite misapplication by the learned Judge, of the principle stated in the case of **Martine Anderson**, (supra) the grounds which were relied upon by the appellant are not meriting consideration by the Court. On the ground relating to the finding by the High Court that the appellant did not have *locus standi*, Mr. Mtaki argued that, since that matter came about at the stage of determining the issues of compensation for unexhausted improvement, the same does not constitute a ground meriting consideration by the Court in the intended appeal.

We have considered the submissions of the learned counsel for the parties which essentially centred on whether or not the grounds which were relied upon by the appellant in his application merit consideration by the Court. We find it apposite to begin by stating that, the decision to grant or refuse to grant leave rests in the exercise by the court hearing the application, of its discretionary power. For that reason, a court of appeal should not disturb such finding unless such discretion was not

properly exercised. In the case of **Mbogo and Another v. Shah** [1968] EA 93 referred in the case of **Hamisi Mdida and Another v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018 (unreported), cited by Mr. Kassim, the erstwhile East Africa Court of Appeal stated that:

"a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

It is also trite principle that leave to appeal may only be given if the matters arising from the decision which is intended to be challenged merit consideration by the Court. See for example, the cases of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 and **Gaudensia Mzungu v. IDM Mzumbe**, Civil Application No. 94 of 1999 (both unreported) also referred in the case of **Hamis Mdida & Another** (supra), cited by the appellant's counsel. In the latter case, the Court stated as follows:

" . . . leave is not granted because there is an arguable appeal What is crucially important is whether there are prima facie grounds meriting an appeal to this Court."

From the foregoing, the only issue for our determination is whether the learned High Court Judge misdirected himself in his finding that the grounds which were relied upon by the appellant do not merit consideration by the Court. As both counsel for the parties agree, the learned High Court Judge erred in his decision that the three grounds raise matters of facts which the DLHT and the High Court had concurrently made findings on them. In our considered view, the learned Judge was not right; **first** by proceeding to consider the merits of those grounds and **secondly**, as submitted by Mr. Kassim by deciding that the DLHT and the High Court had arrived at concurrent findings.

That said, we hasten to answer the issue in the affirmative, that the learned Judge misdirected himself in considering the matters which he ought not to have considered in determining the application for leave to appeal. With respect therefore, we find that he strayed into an error. As a result, we reverse the decision refusing the appellant's application and hereby grant him leave to appeal to the Court of Appeal.

The appellant shall have his costs.

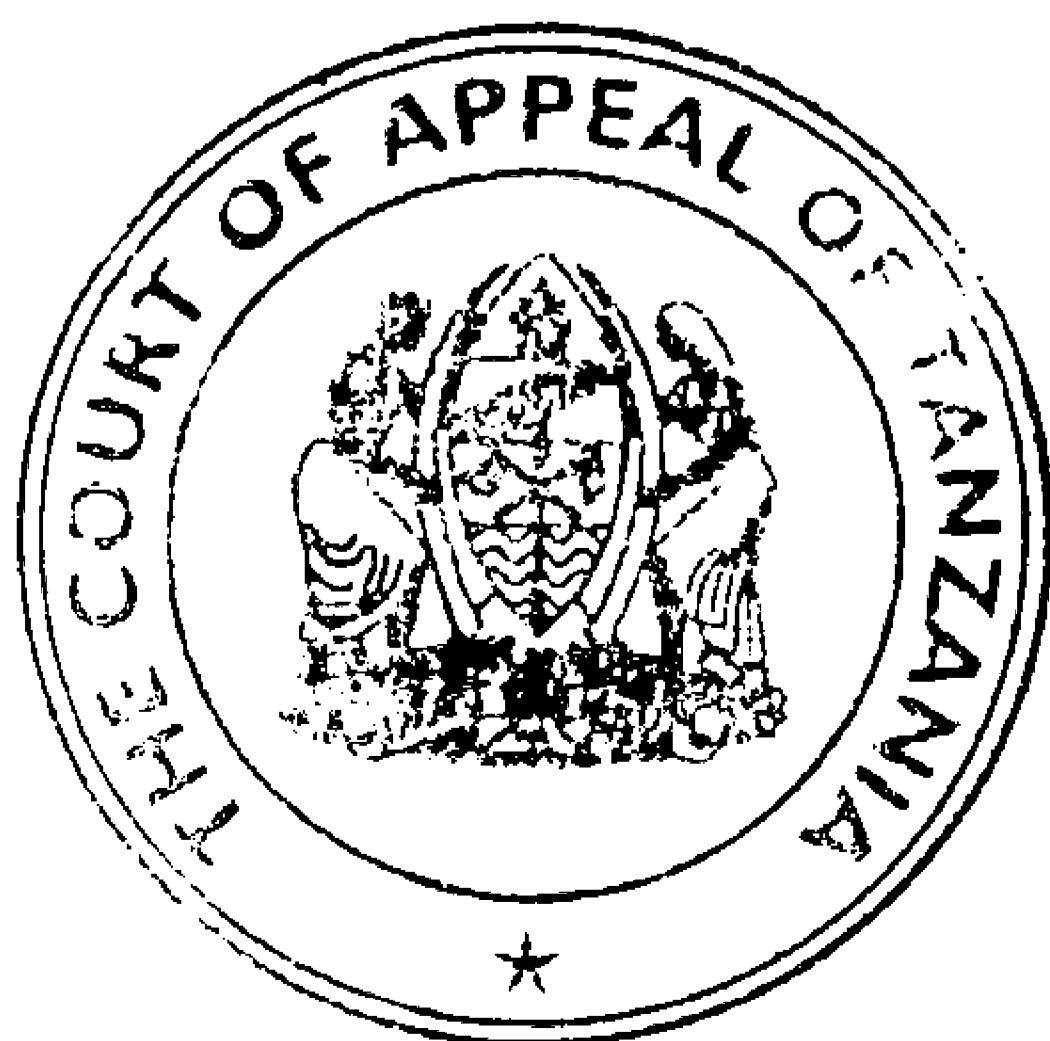
DATED at **TABORA** this 1st day of April, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of April, 2022 in the presence of Mr. Musa Kassim, counsel for the Appellant and Mr. Mugaya Mtaki, counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
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DEPUTY REGISTRAR
COURT OF APPEAL