IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISCELLANEOUS LAND APPLICATION NO 29 OF 2020

JAMES GEKORA KITIGANI_____APPLICANT

VERSUS

TATU ZEGERA_____RESPONDENT

(Arising from the decision and orders of the High Court, Kahyoza J in land appeal no 06 of 2020 dated 28.05.2020)

RULING

Dates; 12th August & 25th September 2020

GALEBA J.

This is an application for leave to appeal to the Court of Appeal of Tanzania. Mr. Cosmas Tuthuru, learned advocate for the applicant stated that the judgment of this court in land appeal no 06 of 2020 has disturbing features citing the case of **Mantrac Tanzania Ltd Versus Rymond Costa,** Civil Application No 9 of 2010 (CA Unreported) where the Court held that leave to appeal need to be granted where there are ***disturbing features*** in the judgment sought to be impugned.

The points upon which the application was predicated were originally four (4) as enumerated at paragraph 5 of the affidavit of Mr. Tuthuru supporting the application. However when the

application came up for hearing Mr. Tuthuru argued only ground 5(iii) and one newly introduced ground. In this application I will determine the validity of the point argued and also comment on the new ground, which, although argued, but was not part of the application.

Point 5(iii) was the following;

> ***"(iii) Whether it was proper for the High Court to assert that the time of limitation would start to run when the owner (respondent) takes legal action against the applicant instead of looking at the evidence on record of a trial court."***

According to available records is that **MR. JAMES GEKORA KITIGANI (MR. KITIGANI)** occupied the disputed land in 2001, but **TATU ZEGERA (MS. ZEGERA)** complained of the trespass and confronted **MR. KITIGANI** in 2008 and asked him why he was trespassing on her land. **MS. ZEGERA** formally filed the case in 2018. Honorable Kahyoza J. decided that filing the case in 2018, **MS. ZEGERA** was in time because 12 years had not lapsed, counting from 2008.

Arguing the point quoted above Mr. Tuthuru submitted that, the holding of the judge was a ***disturbing feature*** in his judgment because he was supposed to hold that time started to run in 2001. According to counsel, that is the point that merits attention of the Court of Appeal. In reply **MS. ZEGERA,** who was not represented, submitted that she filed the matter in time from the village level but the resolution of the dispute was being delayed because **MR. KITIGANI** was a leader in the village government.

Before determining the above point raised by the appellant, I have to make a point or two in relation to the issue of leave to appeal to the Court of Appeal. The law and principles of justice administration are that when a party is aggrieved by a decision of a court or tribunal at a particular level or grade that party has a right to appeal to the court or tribunal at the next level or grade. However there is one caveat and that is, if there are procedures laid down by law to be followed before that right can be exercised, the procedures must be followed. That means, where there are procedures or some requirements to be fulfilled by an aggrieved party in order for him to vindicate his right of appeal then that right ceases to be automatic. This is the case in appeals where leave is a legal requirement. This was held in the case of **British Broadcasting Corporation Versus Eric Sikujua Ng'maryo** civil application no. 138 of 2004 at page 6-7 where the Court of Appeal held that;

> ***" ...leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however be judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal."***

There are many decisions on what to consider in order for leave to be granted including **Hamisi Mdida Versus the Registered Trustees of Islamic Foundation,** civil appeal no 232 of 2018 at page 11 the Court of Appeal held that;

> ***"...while the application for leave must state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed grounds***

of appeal merit an appeal, the court concerned should decide whether the said proposed grounds are prima facie worthy of the consideration of the Court of Appeal. The court will generally look at the judgment or ruling sought to be appealed against to assess whether there are arguable grounds meriting an appeal. Certainly, such a determination will be made at the end of the day after some deliberation but not an adjudication on the merits of the proposed grounds."

The above is what exactly this court will do in the context of the arguments advanced by Mr. Tuthuru in supporting his point 5(iii) in his affidavit. In law, time is renewed where one makes a complaint. For instance, in this case the alleged trespass by **MR. KITIGANI** in 2001 stopped when **MS. ZEGERA** confronted him and complained of the trespass in 2008, such that time started to run afresh from then onwards, so filing a case in 2018; **MS. ZEGERA** was quite in good time because 12 years had not lapsed. It is that simple. Surely this is not a point to line up for in queue waiting for the Court of Appeal to consider and resolve.

I indicated at some point that I would comment on the point raised during the hearing and argued although it was not part of the application. It is now opportune to turn to it. Mr. Tuthuru argued that the other disturbing feature was that the high court was wrong when it invoked the ***principle of adverse possession*** instead of invoking ***the principal of prescription***. This argument is legally unbecoming, with all due respect to Mr. Tuthuru, it was himself Mr. Tuthuru who moved the court to invoke the principle of adverse possession. In paragraph 1 at page 3 of the judgment, this is what the judge quotes from Mr. Tuthuru;

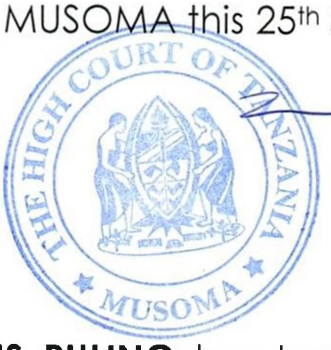
"He concluded that the appellant obtained the land by adverse possession. To buttress his submission, he referred to the case of Stephen s/o Sokoni v. Millioni s/o Sokoni (1967) HCD 46..."

In the high court Mr. Tuthuru was appearing for the appellant and moved the court to rule that his client **MR. KITIGANI** got the land by adverse possession, now he is condemning the court, for holding that the applicable principle was that of adverse possession. Mr. Tuthuru was blowing both hot and cold at the same time, that is one.

Second, I asked Mr. Tuthuru what was he actually meaning to complain that the court was supposed to apply the principle of prescription. I asked him what that principle was in land law. The reply I got was confusing not only to me but also to himself. It was incomprehensible otherwise it had no difference with adverse possession. The confusion aside; that principle cannot be taken to the Court of Appeal for three reasons; ***one,*** the appellant did not move the high court to decide on it and that the court refused. I mean that point was not submitted upon before Kahyoza J. for his consideration of it. ***Two*** that point was not part of the application for leave subject of this ruling. I heard of it the first time during the hearing of the application and ***three,*** the submissions made by Mr. Tuthuru in defending the point, did not bring out not any legal meaning.

Based on the above reasons, this application is dismissed with costs for want of merit and leave to appeal to the Court of Appeal is refused.

DATED at MUSOMA this 25th September 2020



Z. N. Galeba
JUDGE
25.09.2020

Court; THIS RULING has been delivered today the 25th September 2020 in the absence of parties but with leave not to enter appearance. If the applicant is still interested in appealing against the judgment of this court he is reminded to seek leave of the Court of Appeal in terms of **Rule 45(b) of the Court of Appeal Rules 2009, GN 368 of 2009.**

The signed ruling and the drawn order are both ready for collection free of charge from the court registry today 25th September 2020.

Z. N. Galeba
JUDGE
25.09.2020