

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

(APPELLATE JURISDICTION)

MISC. LAND APPLICATION NO. 42 OF 2021

(Arising from Land Appeal No. 5 of 2021 in the High Court of Tanzania at Kigoma, Land Application No. 43/2019 of the District Land and Housing Tribunal at Kigoma before Hon. F. Chinuku)

NICODEM LUSAMBO (The administrator of the estate of the late JULIUS LUSAMBO) **APPLICANT**

VERSUS

GERADA ZACHARIA (The administrator of the estate of the late ZAKARIA LUSAMBO) **RESPONDENT**

RULING

26/10/2021 & 12/11/2021

L.M. MLACHA, J.

The applicant, Nicodemus Lusambo (The Administrator of the estate of the late Julius Lusambo) was the respondent in Land Appeal No. 5 of 2021. The appeal was decided in favour of the respondent, Gerada Zacharia (The Administratrix of the estate of the late Zakaria Lusambo) by my brother, Matuma J on 30/7/2021. He was aggrieved by the decision and filed the application seeking leave to appeal to the Court of Appeal. The application is made under section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 R.E. 2019, Rule 45 (a) of the Court of Appeal

Rules 2009 as amended by rule 6 of the Tanzania Court of Appeal (Amendment) Rules 2017 read together with section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019. It is supported by the affidavit of Eliutha Kiviyiro, learned counsel stating the grounds upon which leave is sought. The respondent filed a counter affidavit in opposition.

The appellant desire to obtain leave to enable the Court of Appeal to consider the following grounds;

- i. Whether pursuant to the Applicant's evidence on record of the District Land and Housing Tribunal the Applicant and his family have been in occupation of the suit land since 1978.*
- ii. Whether, on account of evidence at the locus in quo, the decision of this honourable Court that the Respondent's right (now the Applicant) is over the adjacent land which was being used by Maria Noela of which in fact the said land was not part of the dispute.*
- iii. Whether, the honourable court after knowing that the area owned by one Maria Noela was not part of the land in dispute was correct to order and decree that that area is among two and half acres which were complained by the Applicant.*

Mr. Eliutha Kiviyiro argued the grounds one after the other. Submitting on ground one, in reference to the judgment of this court, counsel said that pages 6 – 7 show that the appellant had been in the area from 1978 to 2019 the year when the respondent came in. He argued that it was not correct, on the strength of this finding, to declare the respondent the

lawful owner of the land because he met the appellant at on the land. In ground two, counsel refereed the court to page 34 of the proceedings of the DLHT which shows that the Land of Maria Noela is not part of the disputed land. He wondered why it was found to belong to the applicant. In ground three counsel submitted that the judge erred in making the land of Maria Noela 2.5 acres, part of the disputed land.

Counsel proceeded to say that in an application for leave, one can use grounds of facts or law. He referred the court to **Hamisi Mdida & another v. Registered Trustees of Islamic Foundation**, Civil Appeal No. 233 of 2018 pages 10 – 12 and 16 – 17 as his authority adding that the grounds are worthy for consideration by the Court of Appeal.

Submitting in reply, while thanking God who allowed him to appear before me, the respondent said why the application should not be granted. she said that all what the applicant wants to take to the Court of Appeal have already been discussed and ruled out by this court. She went on to say that the applicant never made reference to any legal provision making his submission useless. She objected the submission that the applicant has been in the suit premises since 1978. She argued that the applicant spoke differently at the lower courts. The year 1978 is not the year when he started to occupy the suit land but is the year when his father died, he

submitted. She went on to say that the applicant's land is the land which was used by Noela, 2 ½ acres and not the suit land. She questioned the reason as to why the applicant is not attending leaving everything to his lawyer.

Submitting in rejoinder, counsel for the applicant said that the suit land is different from the land of Noela. Responding to the submission on the absence of the applicant, counsel for the applicant said that the applicant gave evidence as PW1 during trial but he is currently sick, attending treatments at Muhimbili hospital Dar es Salaam.

The grounds upon which leave is sought are contained in paragraph 5 of the affidavit. The first ground is whether the applicant has been in occupation of the suit land since 1978. The second ground is whether on the strength of the evidence on record, it was correct to hold that the applicant's right is over the adjacent land which was being used by Maria Noela and whether it was correct to order that the land of Maria Noela is the 2 ½ acres which are complained by the applicant. My reading of the judgment and submissions have lead me to find that there is a controversy on whether the respondent had been in the suit land since 1978 or not and whether the applicant's land is that which was owned by Maria Noela or not. There is also a controversy on whether it was correct to give the

applicant right to the land which was formerly owned by Maria Noela who was not a party.

Having considered the matter carefully, I have formed the opinion that the applicant has managed to establish a good base upon which leave can be granted. Leave is accordingly granted to the applicant to appeal to the Court of Appeal against the decision of this court made in Land Appeal No. 5 of 2021.

It is ordered so. No order for costs.




L.M. Mlacha

JUDGE

12/11/2021

Court: Delivered in the presence of Ms. Victoria Nyambea for the applicant and the respondent in person.

Right of appeal explained.




L.M. Mlacha

JUDGE

12/11/2021