

**IN THE HIGH COURT OF TANZANIA**

**TABORA DISTRICT REGISTRY**

**AT TABORA**

**MISC. LAND CASE APPLICATION NO. 22 OF 2021**

*[Originating from Misc. Land Application No. 12 of 2020 of the High Court of Tabora]*

**SEBASTIAN GABRIEL .....APPLICANT**

**VERSUS**

**NESTORY RAZALO ..... RESPONDENT**

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**RULING**  
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*Date of Last Order: 22/08/2022*

*Date of Delivery: 22/08/2022*

**AMOUR S. KHAMIS, J:**

Sebastian Gabriel and Nestory Lazaro are first cousins. In 1992 both acquired neighbouring pieces of land at Igagala No. 5 Village, Kaliua District, Tabora Region.

Each of them assumed effective occupation of his parcel of land until the dispute arose within family circles in the year 2013 and subsequently landed in the Igagala Ward Tribunal in the year 2015.

The first filed complaint in the Ward Tribunal did not reach far for lack of prosecution. In 2018, Nestory Lazaro filed a fresh Land Dispute No. 6/2018 in the Igagala Ward Tribunal against his cousin brother.

On 19 February 2018, the trial tribunal declared Nestory Lazaro as lawful owner of the disputed parcel of land.

On appeal to the District Land and Housing Tribunal for Tabora, the ward tribunal's decision was revised and Sebastian Gabriel declared owner of the disputed land.

Aggrieved by the ward tribunal's decision, Nestory Lazaro appealed to the High Court vide Misc. Land Appeal No. 12 of 2020.

Upon hearing, the High Court (A. B. Salema, J) allowed the appeal and nullified judgement of the District Land and Housing Tribunal for Tabora.

In so doing, the ward tribunal's decision was upheld and Nestory Lazaro was declared lawful owner of the land in dispute.

Still aggrieved, Sebastian Gabriel filed the present application for leave to appeal to the Court of Appeal of Tanzania.

The application was made by Chamber Summons under Section 47(2) of the Land Disputes Courts Act, Cap. 216, R.E. 2019.

The affidavit of Samwel Ndanga, learned advocate, supported the application.

Nestory Lazaro filed a counter affidavit in which he generally challenged the applicant's averments.

At the time of hearing, Ms. Joyce Nkwabi, learned advocate, appeared for the applicant while the respondent, Nestory Lazaro, defended for himself.

I have considered the rival submissions made by Ms. Nkwabi and the respondent herein.

The issue is whether the applicant has shown sufficient cause for granting of leave to appeal to the Court of Appeal.

Section 47 (2) of the **LAND DISPUTES COURTS ACT, CAP 216, R.E. 2019** provides that a person aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal.

In **M/S ISABILA INDUSTRIES LTD V TANZANIA INVESTMENT BANK & ANOTHER, CIVIL APPLICATION NO. 179 OF 2004** (Unreported), the Court of Appeal addressed the criteria for granting or withholding leave to appeal by referring to its earlier decision in **WAMBELE MTUMWA SHAMTE V ASHA JUMA, CIVIL APPLICATION NO. 45 OF 1999** (unreported) wherein it was held that:

*“Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave to appeal to this Court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal”.*

The same issue was addressed in **GAUDENSIA MZUNGU V THE IDM MZUMBE, CIVIL APPLICATION NO. 94 OF 1999** wherein **CIVIL APPLICATION NO. 94 OF 1999** wherein the Court of Appeal held that:

*“.....Again, leave is not granted because there is an arguable appeal. There is always an arguable appeal. What*

*is crucially important is whether there are prima facie grounds meriting an appeal to this court.....”*

In the affidavit of Samwel Lucas Ndanga in support of the application, it was averred that the intended appeal is premised on three (3) grounds, namely:

*“i) Whether it was proper to sue over the suit land after the expiration of 12 years.*

*ii) Whether the doctrine of a adverse passion is nut a pure point of law.*

*iii) Whether the law allowed to disturb a person who occupied land for over 12 years”.*

In the counter affidavit sworn by Nestory Lazaro, the allegations were responded thus:

*“4. That .....the respondent further respond to the contents of paragraph 4(i) – (iii) that there is no colour of adverse possession as alleged as the High Court properly held that the doctrine of adverse possession was wrongly invoked as the case from the original trial at tribunal was a boundary dispute which arose in 2015 and before the encroachment made by the applicant in that year (2015) parties were living amicably bearing in mind that they are relative cousins. That even this point of adverse possession was not an issue at the trial tribunal thus it is improper the same to be raised at appellate stage after defeat thus technically the same indeed is an afterthought.”*



Upon examination of the records found in the trial Igagala Ward Tribunal, the District Land and Housing Tribunal for Tabora and the in this Court, I found that throughout previous proceedings, parties contestation rested on a boundary dispute.

This is reflected in page 1 of the trial tribunal's judgement where in it was observed that:

*“.....ushahid wa mdai ulitolewa na Ndugu Alex Tambwe (63) wasema mdai ni jirani wa mdaiwa shambani kwamba mdaiwa Bw. Sebastian Gabriel (40) ameingilia Shamba la mdai kwa kuvuka mpaka.....”*

In page 2 to 3 of the typed judgement, the appellate chairman referred to the evidence on record showing that Sebastian Gabriel encroached onto Nestory Lazaro's parcel of land for about five (5) years prior to the filing of the dispute.

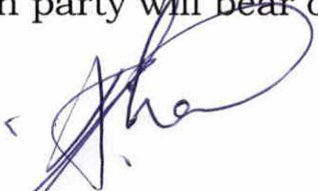
Based on that evidence on record, in my view, the appellate judge properly held that the appellate chairman wrongly imported the issue of adverse possession.

Records further show that the issue of limitation of time is irrelevant because both parties occupied and utilised their respective parcels of land uninterruptedly from 1992 until a boundary issue arose in 2013 and the feud reaching corridors of the ward tribunal in 2015.

Therefore, I am not persuaded that there is a triable issue worth attention of the Court of Appeal.

As such, the application is hereby dismissed. On account of the parties' relationship, each party will bear own costs.

It is so ordered.



**AMOUR S. KHAMIS**

**JUDGE**

**24/8/2022**

**ORDER**

Ruling delivered in chamber in presence of Ms. Joyce Nkwabi, advocate for the applicant and the respondent in person.

Right of Appeal Explained.



**AMOUR S. KHAMIS**

**JUDGE**

**24/8/2022**