

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA**

**MISC. LAND APPLICATION NO.164 OF 2022**

*( C/f Land Appeal No.3 of 2022 at the High Court of Tanzania Arusha District Registry, Originating from Land Application No.30 of 2017 in the District Land and Housing Tribunal for Karatu)*

**DAUDI JOHN.....APPLICANT**

**Vs**

**ISRAEL JOHN.....RESPONDENT**

**RULING**

*Date of last order: 24-4-2023*

*Date of Ruling: 7-6-2023*

**B.K.PHILLIP,J**

This application is made under Rule 45(a) of the Tanzania Court of Appeal Rules and section 5(1) ( c) of the Appellate Jurisdiction Act , Cap 141 R.E 2009 and section 47 (2) of the land Dispute courts Act , Cap 216 R.E. 2019). The applicant's prayers are reproduced verbatim hereunder;

- i) That this Honourable court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania and certify that there are points of law involved.*
- ii) Any other relief that this Honourable court deem fit and just to grant.*

The application is supported by an affidavit sworn by the applicant in which the applicant raised four points for certification by this court that are worthy the consideration of the Court of Appeal. The same are reproduced verbatim hereunder;

- i) *That the High Court erred in law for its failure to find that the applicant had been using the land in dispute for more than 12 years simultaneously , consecutively and peaceful without any disturbance by any one until the respondent herein invaded the same.*
- ii) *That the decision of the High Court is a nullity for its failure to find that the decision of the trial tribunal was reached while tribunal was not properly composed by the chairman and assessors to whom their opinion was not recorded in the proceedings hence their involvement throughout the trial was not certain.*
- iii) *That the decision of the High court is bad in law by declairing that AW2 has good title to transfer the land in dispute than any other person while AW2 did not tell the tribunal the mode of her acquisition before villagization in 1974 while the applicant is in possession of the suit land for almost 34 years to date.*
- iv) *That the decision of the High Court is bad for failure to find that the application before the trial tribunal was time barred hence in breach of the law of limitation Act , Cap 89 R.E 2019.*
- v) *That the decision of the High Court is bad in law for finding that "AW2" has a good title to pas the suit land by way of gift to the respondent since it was alleged that the suit land is the land occupied by the deceased John Lulu and AW2 ( surviving Widow) while the Probate and Administration Cause No.22 of 2019 regarding estate of the late John Lulu was pending before the*

*Primary Court of Karatu and therefore it is not certain how the title was transferred to AW2 as it was reached by the High Court.*

The respondent filed a counter affidavit in opposition to the application. A brief background to this application is that the parties in this application are siblings. The dispute between them is over ownership of land located in Karatu District. The respondent herein sued the applicant at the District Land and Housing Tribunal (Henceforth "DLHT") for Karatu at Karatu seeking to be declared the rightful owner of the disputed land. He alleged that the same was given to him by his mother, Mary Gaalu Yamet. On the other hand the respondent alleged that he was allocated the disputed land by the Village Land Allocation Committee. Upon receiving evidence from both sides, the DLHT decided the case in favour of the applicant and declared him as the lawful owner of the disputed land. Aggrieved by the judgment of the DLHT, the respondent herein lodge his appeal before this court vide Land Appeal No.03 of 2022 on the following grounds;

The appeal was heard on merit and was allowed. The judgment of the DLHT was set aside. The respondent herein was declared the lawful owner of the disputed land. Aggrieved by the judgment of this court (Hon, Malata ,J) the appellant lodged the instant application in order to obtain leave to appeal to the Court of Appeal of Tanzania.

Both parties appeared in person, unrepresented. The application was disposed of by way of written submission and the applicant's written submission was prepared by the learned advocate Nixon John Tenges who was retained for purpose of preparing the written submission only whereas

the respondent retained the learned advocate Kizito Thomas for the preparing of his submission in opposition to the application.

Submitting for the 1<sup>st</sup> point, Mr. Tenges argued that during the hearing of the case the applicant proved that he had been in occupation of the disputed land since 1988 to date which is a period of 35 years. He pointed out the time limit for claims involving landed property / land is 12 years only. He was of the view that this court misdirected itself by not putting into consideration that the respondent lodged his claims out of time. To cement his argument he cited the case of **Bhoke Kitang'ita Mahemba, Civil Appeal No.22 of 2017** (unreported), **Mbira Vs Gachuchi(2002)1 EA 137 ( HCK)** and The law of Limitation Act. Moreover, Mr. Tenges contended that this court misdirected itself for failure to observe that the AW2 who is alleged that he gave the disputed land to the respondent did not establish how he acquired the disputed land whereas the applicant did give clear elaboration how he acquired the disputed land.

On the 2<sup>nd</sup> point, Mr. Tenges submitted that the decision of this court is erroneous for failure to observe that the DLHT was not properly composed. He contended that as per the court's records no assessors were involved during the hearing of the case as provided in section 23(2) of the Land Dispute Courts Act ( Cap 216. R.E.2019) and Regulation 19 (2) of the Land Disputes Courts ( the District Land an Housing Tribunal) Regulations 2003. Expounding his argument, he submitted that the acknowledgment of the assessor's opinion in the proceedings did not mean that the assessors were fully engaged at the trial. He insisted that the proceedings of the DLHT are nullity. He cited the case of **Hosea Andrea Mushongi Vs**



**Charles Gabagambi, Land Case Appeal No.66 of 2021** ( unreported)  
to cement his arguments.

With regard to the 3<sup>rd</sup> point, Mr. Tenges submitted that High Court erred to hold that AW2 had a good title over the disputed property to pass to the respondent herein in disregard of the fact AW2 failed to establish in court how she acquired the disputed property before the beginning of operation Vijiji in 1974. The court's findings was based on assumption, contended Mr. Tenges.

With regard to the 5<sup>th</sup> point, Mr. Tenges argued that the High court Judge misdirected himself and made contradictory opinion that the disputed land was jointly owned by the late John Lulu and AW2 ( surviving widow) while Probate and Administration Cause No. 22 of 2019 regarding the estate of the late John Lulu is pending before the Primary Court of Karatu. He contended that it is not certain how the title was transferred to AW2. He went on submitting that when there is a dispute over the deceased estate only the Probate and Administration Court handling the matter can decide on the ownership of the property which forms part of the deceased estate. To cement his arguments he cited the case of **Julius Joseph Mihayo Vs Abel Ngeleja , land Appeal No.21 of 2021**, (unreported).

Mr. Tenges did not submit for the 4<sup>th</sup> Point. In conclusion of his submission Mr. Tenges beseeched this court to grant this application.

In rebuttal, submitting against the 1<sup>st</sup> point, Mr. Kizito argued that the judge analyzed very well his findings on the application of the principle of adverse possession and his opinion that the same is not applicable in the

circumstances by pointing out that the suit land was not abandoned but the appellant was entrusted to keep and take care of it. The appellant failed to substantiate his claim for adverse possession.

With regard to the 2<sup>nd</sup> point Mr. Kizito submitted that the same is an afterthought since it was not raised in appeal. Expounding on this point he pointed out that when the respondent was submitting for the 5<sup>th</sup> ground of appeal he conceded that the assessors' opinion were recorded and read before the court, and were considered by the DLHT in its decision.

Moreover, Mr. Kizito submitted that the court's records show that assessors' were fully involved throughout the hearing of the case. After all, Regulation 19(2) of the Land Disputes (The District Land and housing Tribunal) Regulation 2003 does not require the chairman to reproduce the opinion of assessors in the proceedings, contended Mr. Kizito. Also, he contended that section 45 of the Land Disputes' Court Act, Cap 216, R.E.2019, provides that a judgment of the DLHT cannot be reversed on appeal on a mere ground of error, omission or irregularity in the proceedings before or during the hearing unless the alleged improper admission or rejection of evidence occasioned failure of justice. He contended that in this matter the applicant did not explain any miscarriage of justice caused by the alleged irregularity if at all it was there.

On the 3<sup>rd</sup> point, Mr. Kizito made a brief submission to the effect that he was in agreement with the findings made by the Judge that the disputed land belonged to AW2 and her husband the late John Lulu whom acquired

the disputed land jointly before the establishment of Ujamaa Villages in 1974.

With regard to the 5<sup>th</sup> point, Mr. Kizito submitted that this issue is new. It was not raised at the DLHT and before this court during the hearing of the appeal. He was of the view the same cannot be entertained at this stage.

In rejoinder, Mr. Tenges contended that Mr. Kizito misdirected himself in his submission on the ground that the holdings the Judge in the impugned decision cannot be taken as an authority in arguing this application since the same are subject of the intended appeal. He reiterated his submission in chief. He insisted the points he has raised in this application are points of law worth the attention of the Court of Appeal. He was emphatic that since applicant has been in possession of the disputed land for 35 year a fact which was not disputed by the respondent, then the issue on the application of the principle of adverse possession worth to be determined the Court of Appeal.

I have perused the Court's records as well as read the impugned judgment. First of all, I wish to point out that the position of the law is that leave to appeal to the Court of Appeal is within the discretionary powers of this court. The criteria for granting or refusing to grant leave to appeal are the ones established in the case of **British Broadcasting Corporation Vs Eric Sikujua Ng'imaryo, Civil Application No. 133 of 2004**, (unreported) in which this court said the following;

*" Needless to say 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 on the materials before the Court . As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law or where the grounds show a prima facie or arguable point of law or where the grounds show prima facie or arguable appeal.... Where the grounds of appeal are frivolous , vexatious or useless or hypothetical , no leave will be granted .."*

I have critical analyzed the rival arguments made by the parties herein as well perused the impugned judgment. As correctly argued by the applicant, the impugned decision is based on the finding that under the circumstances of this case the principle of adverse possession cannot be applicable despite the fact the there was no dispute that the applicant has been in possession of the disputed land for 35 years. The period within which the applicant has been in occupation of the disputed land ( 35 years) brings on board the issue on whether or not the case was filed out of time since it is a land matter.

From the foregoing, in my considered opinion the two points I have pointed out herein above; to wit; whether or not the principle on adverse possession is applicable in this case and whether or not the case was filed at DLHT out of time are worthy the determination of the Court of Appeal. Thus, I hereby grant the applicant the leave to appeal to the Court of Appeal. Costs will be in course.

Dated this 7<sup>th</sup> day of June 2023

  
**B.K.PHILLIP**

**JUDGE**

