

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

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**LAND APPEAL NO. 2 OF 2022**

(From District Land and Housing Tribunal at Katavi in Land Application No. 25 of 2021)

**EGIDIUS CRONEL (ESTATE ADMINISTRATOR)  
FOR CRONEL RUGEIYAMU ..... APPELLANT**

**VERSUS**

**JOSEPH MATINDE ..... RESPONDENT**

**JUDGMENT**

**5/12/2022 & 20/03/2023**

**MWENEMPAZI J.**

The appellant is aggrieved the decision of the District Land and Housing Tribunal for Katavi at Mpanda (Hon. G.K. Rugalema – Chairman) dated 14<sup>th</sup> December, 2021. He initially filed twelve (12) grounds of appeal which met a preliminary objection for contravening the provisions of Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap 33 R.E 2022. The appeal document was missing a title 'Memorandum of Appeal'. That preliminary objection was overruled and an order for amendment was issued. Thus on the 19<sup>th</sup> August, 2022 the appellant filed a memorandum of appeal pursuant

to Order XXXIV Rule 1(1) of Civil Procedure Code, Cap 33 R.E 2022. This time the grounds of appeal were only four (4) as follows:

1. That, the Honourable trial tribunal erred in law and fact for failure to identify when the cause of action arose.
2. That, the Honourable tribunal grossly erred in law and in fact for met adjudicating the land dispute to its merit instituted by the applicant in Maombi Na. 25 of 2021.
3. That, the Honourable trial tribunal erred in law and in fact for failure to note that the disputed land is surveyed land and the principle of adverse possession does not apply thereto.
4. That, the Honourable trial tribunal grossly erred in law and in fact for not considering that the Appellant's awareness of the land disputed came after the death of his late brother one ALISTIDES BARONGO CORNEL who died on the 4<sup>th</sup> day of December, 2018.

It is in the facts of the case that the dispute house originally belonged to Cornel Rugaiyamu who died intestate on the 25<sup>th</sup> November, 1990. The house is located at Plot No. 156 Block P, Majengo B, Paradise street Mpanda. The deceased's sister, one Ms. Ahmida Tikyomwe, was appointed as the

administrator of the estate of the late Cornel Rugaiyamu. Before she could finish her duty as an Administratrix of the deceased's estate, she became sick, she therefore decided to handover the dispute house to the appellant's mother so that it can generate income for their daily needs. In fact, the record does not reveal if she was even appointed by any court to be an administratrix of the deceased's estate. But appointment used is that 'selection' by the clan meeting to apply for letters of administration of the estate.

The applicant's mother mentioned here is Leocadia Cornel. She however shifted to Muleba where the deceased had another house and left two children of the deceased, Alistides Barongo Cornel and Mwiza Cornel. The reality however the house was left under the supervision of Alistides Barongo Cornel.

According to the facts in the application as revealed in the trial tribunal, Alistedes Barongo Cornel passed away on the 4/12/2018. The applicant and other relatives knew of the facts that the house in dispute had already been sold to the respondent at the time when they came from Muleba to attend the funeral of Alistides Barongo Cornel. They thus made processes to claim

back the property of Cornel Rugaiyamu which had been sold to the respondent by Alistides Barongo Cornel to the Respondent hence this dispute. The record shows the applicant was, on 11/03/2021, appointed to be the administrator of the estate of the late Cornel Rugaiyamu in Probate Cause No. 02/2021. In the decision, it is recorded, the delay is due to ill health of the appointed administrator Ahmida Tikyomwe, she could not fulfil her duty. The appellant, having been vested with the estate administrative powers for the estate of the late Cornel Rugaiyamu, filed an application whose decision is the subject of this appeal.

In this appeal, the appellant is challenging the decision of the trial tribunal by Hon. G.K. Rugalema – Chairman, dated 14/12/2021 whereby the tribunal ruled that the claims by the applicant were time barred and therefore the application was dismissed.

As shown herein above the appellant has registered four grounds of appeal. At the hearing of the appeal the appellant was being represented by Mr. Emmanuel Richard Machibya, Advocate and the respondent was represented by Gaudence Kalobasho who was holding a power of Attorney from the respondent.

Mr. Emmanuel Learned Advocate submitted that the appeal emanated from the decision of tribunal, Hon. G.K. Rugalema, chairman in application No. 25 of 2021 dated 14/12/2021. The applicant filed a dispute in the District Land and Housing Tribunal using Form No. 1 in that form, the sixth item which is about the cause of action or facts constituting the cause of action. Paragraph 6(a) item (iv) is about the disputed house. The appellant discovered that the house is not under supervision of the children of the late Cornel Rugaiyamu in 2018 and that is when they worked to file an application. The counsel argued that the dispute arose in 2018 and not 2018 as stated in the impugned decision.

The counsel cited the case of ***Nabeel Abdulhakim Fuad and another Vs. Tausi Lufunga Ngoma and 7 Others***, Land Case No. 91 of 2021, High Court of Tanzania, Land Division at Dar es Salaam at page 13 where the Court made a finding that there was a cause of action of trespass though it is not direct. In this case the cause of action has been traced historically and shown to have arose in 2018. He prayed the appeal to be allowed.

On the second ground of appeal the counsel for appellant has argued relying on Article 107A(2)(a)-(e) of the Constitution of the United Republic

of Tanzania of 1977. That, the court in execution of its duties it has to comply with five factors; namely, impartiality, not to delay dispensation of justice without reasonable grounds, to award reasonable compensation to the victims of wrong doing according to the enacted laws a, to promote and enhance dispute resolution and reconciliation and to dispense justice without being tied up with technicalities.

The counsel submitted that if you look at the decision of Hon. G.K. Rugalema, it does not show the vision was to resolve the dispute. Because, the Honourable chairperson, went straight to entertain the objection raised which in his opinion, had no merit. The chairperson focused on the date of the appointment of the administrator of the estate. He cited the case of **Helena Mwaipasi Vs. Philip Mwambungu and two others**, Land Case No. 10 of 2012 (High Court of Tanzania at Mbeya (unreported)). According to the counsel, the chairman failed to resolve the dispute by insisting that the cause of action must be shown at paragraph 6(i) of the application form. Based on the argument the counsel prayed that this Court allows the appeal and quash the decision of the trial tribunal.

On the third ground of appeal, the appellant has argued that the land in dispute is owned under certificate of title. The principle of adverse possession cannot be applied he prayed to refer to the case of **Vicky Damas Mtefu Vs. Jovita Byera Njiwa**, Land Case No. 109 of 2021 High Court of Tanzania at Dar es Salaam. He argued that the cause of action starts to accrue on the date of possession. The respondent had not yet changed ownership of the property. Until now the property is in the name of the deceased.

Item 22 of the scheduled to the Law of Limitation Act, Cap. 89 R.E. 2019, stipulate time for recovery of land to be 12 years. The respondent started to apply for ownership in 2019. Thus the appellant is still within time stipulated by law, as the application was filed in 2021.

The counsel for the applicant prayed that the appeal be allowed and the decision of the chairman be quashed and the order be made that the application be heard by another competent chairman.

The respondent submitted in reply that the District Land and Housing Tribunal did not err. The respondent bought the house in 2002. It is unfortunate; however, he did not clarify further the statement for that the

District Land and Housing Tribunal was right. On the third ground of appeal, the respondent has argued that the house was sold in 2002 and Aristides Barongo Cornel passed away in 2018. For sixteen years, there was no any dispute. The dispute arose sixteen (16) years after sale. As of today, it is twenty-two (22) years.

The respondent argued also that the case for administration of the estate of Cornel Rugaiyamu and the owner of the property is Egidius Cornel. With this statement, he could not justify to verify the veracity of the same. The respondent argued that he has been paying the land rent all along since the time he bought the dispute land. The delay to transfer was due to instruction from the land office. He prayed that the appeal be dismissed with costs.

In rejoinder the appellant has argued that the appellant filed the case after the demise of Aristides Barongo because that is the time they knew of the fact of sale. That is somehow admitted by the respondent. Aristides Barongo Cornel was just a caretaker of the house when he sold the same. For the appellant, the transfer was not effected because Aristides Barongo



Cornel was not the owner. Due to the statement the appellant argues that the case was supposed to be heard and decided on merit.

I have read the record and I have the opinion that the question for determination is whether the application in the District Land and Housing Tribunal was time barred or not. In this judgment I have summarized the facts and put them in an historical perspective since the demise of the original owner of the dispute house, the late Cornel Rugaiyamu. The appellant in this appeal is the Administrators of the estate of the late Cornel Rugaiyamu, the office having been entrusted to him on the 11/03/2021 by Virtue of Probate Cause No. 02/2021 in Kashasha Primary Court.

The appellant has stated that the land in dispute was entrusted in the hands of Aristides Barongo Cornel as caretaker. When they heard the news of his demise they went to the dispute house for funeral proceedings only to find out that there is another person. They started to inquire and found that the deceased, Aristides Barongo Cornel, sold to the respondent. Immediately they started to work in order to recover the land. That according to the counsel for the appellant as he was submitting in this appeal.

In the decision of the District Land and Housing Tribunal it was decided the application in the District Land and Housing Tribunal, filed by the applicant (appellant herein) is time barred relying on the provisions of section 9(1) of the Law of Contract Act (LCA), Cap. 89 R.E. 2019. The same reads:

*"Where the person who institutes a suit to recover land of a deceased person, whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action shall be deemed to have accrued on the date of death".*

In the case of ***Mshamu Said (Administrator of the estate of SAID MBWANA) Vs. Kisarawe District Council and four (4) Others, Land Appeal No. 177 of 2018 High Court Land Division at Dar es Salaam*** it was held that "it relates to a situation where a dispute had not, at the time of the demise of the deceased, accrued". In this respect emphasis is placed on the words *'...in possession of land and was not the last person entitled to the land to be in possession of land'.*

In that case, the Honourable presiding Judge, Mr. Maige J(as he then was) citing the case of ***Shomari Omari Shomari(as Administrator of the estate of the late Seleman Ibrahim Maichila) vs. Mohamed Kikoko***, Land Appeal No. 171 of 2018, observed that for the purpose of determining the accrual of right of action, section 9(1) of the LLA should always be read together with section 33(1) so that , cause of action does not accrue on the date of the death of deceased until the defendant or his predecessor in title is in adverse possession of the suit property. We have a case of the registered property which the respondent allege to have bought from the deceased, Aristides Barongo Cornel. He was not the owner but a mere caretaker. The appellant( applicant in the trial Tribunal) found out about the alleged sale after the demise of Aristides Barongo Cornel sometime in 2018 as they were not living at Mpanda. They had shifted to Muleba where their late father had another house.

The appellant has argued that they believe that the application was filed in time given the fact they discovered that the dispute property has been sold when they went to attend the funeral of one Aristides Barongo Cornel, who had been entrusted with the duty to take care of the property by the family, their mother, Leocadia Cornel. That is being contested by the

respondent which brings in question 'when did the right of action accrue'.

In the case of ***Mshamu Said (Administrator of the estate of SAID MBWANA) Vs. Kisarawe District Council and four (4) Others, Land Appeal No. 177 of 2018 High Court Land Division at Dar es Salaam*** where it was held that:

*"It is equally significant to observe that, an action for recovery of land is technically based on tort of trespass to land which is nothing else other than unjustifiable intrusion by one person in land in possession of another. Therefore, for one to establish a claim for trespass on land, he must establish either actual or constructive possession soon before the alleged intrusion. Constructive possession can be established through holding legal title on the suit property..."*

In this case there are contentious issues which must be established with enough evidence. The appellant was not claiming ownership but only 'paper owner' by virtue of his office as the administrator of estate of the late Cornel Barongo. The respondent must prove his acquisition of title over the land which must be done by adducing evidence. The issues such as whether

indeed the ownership by the respondent was lawful and whether the appellants knew of the fact of the unlawful sale of the dispute property in 2018 after the demise of the caretaker of the property one Aristides Barongo Cornel must be resolved in the course of hearing. Tabling the issues for determination won't prejudice either party but justice will be done by giving both parties a chance to be heard.

Under the circumstances, dismissal of the dispute at the stage was premature. The appeal is allowed, decision of trial tribunal quashed, order set aside and the case is remitted back to the District Land and Housing Tribunal to be heard preferably by another chairperson and a new set of assessors. Costs to follow events.

Ordered accordingly.

Dated at Sumbawanga this 20<sup>th</sup> day of March, 2023.



  
**T.M. MWENEMPAZI**  
**JUDGE.**