

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HC. MISC. CIVIL APPL. NO. 106 OF 2005

*(Arising HC. Civ. Appeal No. 194/04 from Musoma District Court Civ.
Appeal No. 21/03. Originated from Tarime Urban Primary Court. Civ.
Case No. 32/02)*

**1.MWIKWABE MARWA
2. NDEGE MATIKO**

}
.....**APPLICANT**
Versus

MATIKO WANSERESPONDENT

RULING

G. K. RWAKIBARILA. J

This application is for leave to appeal to the Court of Appeal. It has been lodged u/s 5 (1) of **The Appellate Jurisdiction Act, 1979** and Rule 43 of **The Court of Appeal Rules, Act, No 15 of 1979**.

The applicants Mwikwabe Marwa and Ndege Matiko lost three times, i.e. in Tarime Urban Civil Case No. 32 of 2002, Tarime District Court Civil Appeal No. 21 of 2004 and Mwanza High Court Zone (PC) Civil Appeal No. 194 of 2004 (before Hon. Mchome, J). Therefore this time leave to appeal to the Court of Appeal could have constituted their third appeal.

The learned council for appellants Mr. Rugaimukamu advanced four grounds to support this application but for convenience purposes the first and third grounds are fit to be

consolidated because they relate to the omission by the trial urban primary court in Tarime to visit the disputed plot and draw a sketch map of the suit plot there. This learned council relied on several reported cases like **William Mukasa Vs Uganda (1964) E A 698** at page 700 where Sir Udo Udoma (Uganda Chief Justice – as he then was) propounded some sort of guidelines where courts need to visit the **locus in quo**.

But Mr. Magoigo the learned council for respondent Matiko Wanse strongly opposed the visit to the **locus in quo** in this matter and called upon this court to look into how circumstances in **William Mukasa Vs Uganda** were different from the case in issue from Tarime.

It is proper at this stage to disclose how respondent Matiko Wanse is a deceased and he was in this appeal represented by an administrator of his estate one Kitende Wanse.

So long as this matter started from the primary court, the applicants should have based on the question of law in order to secure leave to appeal to the Court of Appeal. What was presented in applicants' first and third grounds are not in the ambit of the question of law because it transpired in proceedings of the two lower courts how parties were contesting over ownership of part of an 80 x 90 paces strip of land in Tarime which was allocated to respondent in 1974. The respondent kept on planting permanent and seasonal plants there. In 2001 which

was ostensibly after a quarter of a century, applicants teamed up to try to oust respondent in their capacity as new generation local government leaders by seeking the assistance of the suit in the primary court up to this court but failed miserably throughout. All the contesting parties seemed aware of the strip of land measuring 80 x 90 paces with some permanent crops within it to wit, its appearance is the question of fact which the lower courts resolved well. In fact even in the case of **William Mukasa Vs Uganda**, Sir Udo Udoma explained, *inter alia*, how there was a need for the court to visit the **locus in quo** "*where necessary, and possible, to have such evidence accurately demonstrated.*"

In the material case where the respondent was in occupation of the material suit for more than a quarter of a century and planted therein permanent and seasonal crops, the court's visit was not necessary because contesting parties and the lower courts were aware of the size, location and appearance of the subject matter which was adjudicated upon. The first and third grounds which were advanced on behalf of applicants are therefore not sufficient to constitute a question of law to be certified for purposes of appeal to the Court of Appeal. Both grounds one and three are in fact collateral to facts which were satisfactorily resolved by the lower courts where applicants lost continuously miserably.

The other two grounds related on whether the trial primary court had jurisdiction to try this case (ground No. 2) and whether it was proper to sue the applicants in their own capacity instead of the village government (ground No. 4).

It transpired in records of the two lower courts how Nyaburongo Primary Court in the vicinity of where respondent's suit plot is situated was not functioning for several years. a situation like that did not bar primary court magistrates stationed at Tarime urban primary court to exercise their jurisdiction in any of the primary courts in Tarime District, subject to the administrative routines arranged by Tarime District Magistrate in- charge, the District Registrar for Mwanza High Court Zone or both. The fact that the appeals by applicants were channeled smoothly through the District Court there and later to the High Court is a display that the administrative ladder where this matter was channeled up to this court was proper until so far.

The fourth ground may be resolved by looking into actors who trumpeted this matter. In this era of the new generation in the local government leadership in the vicinity where respondent's plot is situated, it appears three village government leaders there were ring-leaders in a manœuvre of trying to dispossess respondent part of the plot which he developed and kept in his quiet enjoyment for more than a quarter of the century. One of the three ring-leaders namely David s/o Charles has

already disassociated himself with the struggle over that land. But the first applicant Mwikwabe Marwa and second applicant Ndege Matiko who are still trumpeting this litigation are not entitled to take cover under shelter of the village government because they featured pursuing this matter in their own capacities up to this stage.

It follows that what were resolved in the four grounds in this application suffice to show how applicants have failed to justify any ground on a point of law for leave to appeal to the Court of Appeal. This application for leave to appeal to the Court of Appeal is therefore dismissed with costs.

Sgd: G. K. Rwakibarila
JUDGE
07/08/2008

Date: 11/08/2008

Coram: Hon. G. K. Rwakibarila, J

For Applicants: Mr. Rugaimukamu Adv – Present

For Respondent: Mr. Magongo Adv – absent

B/C: Sekela.

Mr. Rugaimukamu:

I am representing my clients the applicants and at the same time holding brief for Mr. Magongo for respondent.

COURT:

Ruling has been delivered at Mwanza this 11th day of August, 2008 and right to appeal in time has been explained thoroughly.

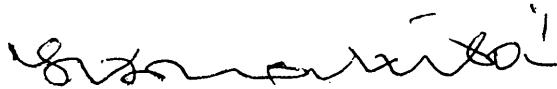


Sgd: G. K. Rwakibarila
JUDGE
11/08/2008

Mr. Rugaimukamu: Your Honour, I pray to express my desire to appeal to the Court of Appeal against this ruling.

COURT:

Mr. Rugaimukamu is informed that his desire to appeal to the Court of Appeal is, for the purpose of this ruling, registered but he should make sure appropriate procedures for lodging the same are complied with, subject to the limitation.



AT MWANZA
11/08/2008

G. K. RWAKIBARILA
JUDGE