

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: MUGASHA, J.A., FIKIRINI, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 378 OF 2021

CLEOPHACE KAIZA.....APPELLANT

VERSUS

POTENCE MUGUMILA.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Kilekamajenga, J.)

dated the 12th March, 2021

in

Land Appeal Case No. 38 of 2019

JUDGMENT OF THE COURT

30th November & 2nd December, 2022.

FIKIRINI, J.A.:

The genesis of this appeal over a piece of land claimed to belong to "Abahinda" clan, has a checkered history which can be traced far back to Rubafu Ward Tribunal where initially, there was a case filed by one John Muchunguzi against the present appellant, Cleoplace Kaiza. John Muchunguzi lost and preferred an appeal to the District Land and Housing

Tribunal of Bukoba at Bukoba in Land Appeal No. 15 of 2007 where he again lost. Potence Mugumila, the present respondent surfaced after he petitioned to be appointed an administrator of the estate of his late father Clemence Mugumila, he being a son. He was granted the letters of administration on 22nd November, 2016. After the appointment, and as administrator of the deceased's estate, he lodged a complaint at Rubafu Ward Tribunal in Civil Case No. 21 of 2016, against the present appellant Cleoplace Kaiza. The case was later transferred to the District Land and Housing Tribunal at Bukoba and registered as Land Application No. 04 of 2017 in which the present appellant Cleoplace Kaiza featured as the applicant and Potence Mugumila as the respondent. The respondent lost and preferred an appeal to the High Court in Land Case Appeal No. 38 of 2019, which he won.

Aggrieved by the decision the appellant preferred this appeal armed with six (6) grounds of appeal. However, for the apparent reason, we shall not reproduce all the grounds.

On 30th November, 2022 when this appeal was called on for hearing Mr. James Kabakama and Mr. Mathias Rweyemamu, learned advocates

appeared for the appellant, whereas the respondent, Potence Mugumila appeared in person fending for himself. Before the hearing commenced the Court raised *suo motu* an issue of the propriety or otherwise of the proceedings before the District Land and Housing Tribunal regarding the involvement of assessors and invited the parties to address us.

Taking the floor to address the Court, Mr. Rweyemamu admitted that the proceedings were irregular. He contended, that at page 151 of the record of proceedings indicated that Muyaga and Fortunata as assessors were present when Cleophas Kaiza (PW1) testified. These two assessors could not show up on 25th February, 2019 when PW2 was about to be cross-examined. The Chairperson opted to do away with them by invoking section 23 (3) of the Land Disputes Court Act, Cap. 216 R.E. 2002 (the Land Disputes Act) and continued with hearing of the case until the applicant's case was closed. The defence proceeded without the aid of assessors.

In the Tribunal's composed judgment, the Chairperson observed that there would be no assessors' opinion as the two assessors namely Mr. Bwahama and Anamery Mutajwaa their tenure had expired before the

composure of the judgment. Probed by us to look at page 425 of the record of appeal, on what would be his comment looking at the first ground of appeal preferred by the respondent, questioning appropriateness of the proceedings for not having assessors' opinion, Mr. Rweyemamu admitted that there was variance of reasoning between the Chairperson and the High Court Judge. Whereas the Chairperson opted to proceed without assessors Muyaga and Fortunata, at the end of the day he gave a different reason, that the assessors who were not involved in the proceedings had retired, the reason the High Court Judge banked on in upholding the appeal.

Again, we asked as to whether there was involvement of the assessors as envisioned by the law before the District Land and Housing Tribunal, Mr. Rweyemamu was candid enough to admit that there was no proper involvement of assessors and therefore the Tribunal's decision could not stand. He, urged us to nullify the Tribunal decision, resultant of which the High Court decision could not be spared nullification.

On the way forward, Mr. Rweyemamu opined that the record be placed before another Chairperson who should compose another judgment

based on the evidence on record. When we inquired if the two assessors Muyaga and Fortunata can still be involved to give their opinion, Mr. Rweyemamu opposed the idea arguing that the fate of those two has already been determined when the Chairperson invoked section 23 (3) of Land Disputes Act to proceed in their absence. He however, changed his mind and contended that for the interest of justice, the whole proceedings be nullified and the matter to start afresh before a different Chairperson and set of assessors possibly those whose tenure would not end before the hearing is completed. Upon further reflection, he reverted to his earlier position that a different Chairperson be assigned to compose a judgment.

The respondent while admitting there was chaos but disagreed on the suggestion put forward by Mr. Rweyemamu on the manner the irregularity should be handled. He was instead of the view that the High Court judgment should be left to stand, the position equally opposed by the appellant's counsel.

In rejoinder, Mr. Rweyemamu challenged the validity of the High Court judgment as it germinated from null proceedings, hence also subject to nullification.

We have considered the contending arguments by Mr. Rweyemamu on one side and that of respondent, Potence Mugumila on the other. Without mincing words, we acknowledge that the proceedings before the District Land and Housing Tribunal were irregular resulting into vitiating the proceedings. We shall shortly demonstrate our reasons: **one**, it is a legal requirement under section 23 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019 (the Land Disputes Act) which has been fortified by our decisions that the assessors who sat at the commencement of the proceedings should be the same throughout till the end. The provision also requires mandatorily for the assessors to give their opinion, which should be read before the parties and reflected in the Tribunal decision regardless of whether their opinion has been considered positively or negatively.

For the purposes of this judgment, we shall focus on changes which occurred when the hearing had commenced. And this is when PW1 testified. When the hearing commenced on 13th September, 2018 E. Mogasa was a Chairperson sitting with H. Muyaga and Fortunata Rutabanzibwa, who should have continued to the end. This was not the case, as on 14th September, 2018 when the hearing continued, the

Chairperson proceeded in the absence of the two assessors, yet on 20th September, 2018 he continued with Muyaga only as a sit in assessor. From 1-3rd October, 2018 both Muyaga and Fortunata sat in as assessors, whilst the proceedings were already irregular. The Chairperson was either to adjourn the hearing on 14th September, 2018 as none of the assessors were present. He could have continued without assessors throughout or if he was to continue on 20th September, 2018 with Muyaga alone, then he should have maintained that and not as opted. After a long inconsistent attendance finally on 25th February, 2019, the Chairperson seemed bothered yet, with another absence of assessors Muyaga and Fortunata. This prompted the Chairperson to order for hearing to proceed under section 23 (3) of the Land Disputes Act. Ever since the order was made no assessors is recorded to have sat in. However, by then the proceedings were already flawed.

In the circumstances, can we say the assessors were involved in the hearing as envisaged by the law and so as to be in a position to give valuable opinions? We do not think so. This is because the provision of section 23 (2) and (3) of the Land Disputes Act, governing participation of

assessors is clear and does not provide for such mode of operation or avenue. For ease of reference the subsections (2) and (3) are reproduced below:-

"(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any may continue and conclude the proceedings notwithstanding such absence." [Emphasis added]

After they had missed a session, the Chairperson could have opted to invoke section 23 (3) of the Land Disputes Act, the option which we advise should rarely be applied, to avoid occasioning injustice and unfair hearing.

Two, without prejudice, even assuming the Chairperson was correct in how the proceedings were conducted, what appeared at page 439 - 440 of the record of appeal, leaves a lot to be desired. In its judgment the Chairperson indicated the reasons for not having the assessors' opinion was that their tenure had expired before the case was completed. However, the assessors mentioned were Mr. Bwahama and Annamery Mutajwaa, who did not feature anywhere in the proceedings subject of this appeal. In the appeal before us and especially at page 191 of the record of appeal the Chairperson's reason was different from the one reflected in the judgment. For better appreciation of the facts let the record speak itself:-

Tribunal: *PW2 is warned that he is still on oath, the assessors H. Muyaga and F. Rutabanzibwa are absent with no notice. The case shall proceed under section 23 (3) of Cap 216 R.E. 2002, hearing continues."*

The coming into picture of the two mentioned assessors that is Mr. Bwahama and Anamery, had its roots from Land Application No. 4 of 2017 before the District Land and Housing Tribunal, whereby the Tribunal had

sustained a preliminary objection that the appellant had no locus standi because he was not the administrator of the late Clemence Sylivester or Maria Herman. The decision was however, reversed by the High Court in the Land Appeal No. 13 of 2017 and the record was remitted for re-trial to enable parties to be heard interparties, before a different Chairperson and set of assessors. The two mentioned assessors were with certainty not involved in the proceedings subject of this appeal. It was thus incorrect referring them in the said judgment.

In view of what transpired, it is not certain which set of assessors sat at the trial before the Tribunal, subject of this appeal. This is tantamount to non-involvement of assessors considering what transpired before the Tribunal. As such, we strongly opine that the irregularity is undoubtedly fatal which vitiated the proceedings. Guided by our previous decisions in **Awiniel Mtui and 3 Others v. Stanley Ephata Kimambo and Another**, Civil Appeal No. 97 of 2015 and **Samson Njarai and Another v. Jacob Mesoviro**, Civil Appeal No. 98 of 2015 in which the Court underlined the effect of unclear involvement of assessors when it stated:-

"The consequences of unclear involvement of assessors in the trial renders such trial a nullity."

We think, the situation in the present appeal cannot be labeled otherwise. It is settled law that once trial commences with a certain set of assessors, no changes are allowed or even abandonment of those who were in the conduct of the trial. The noted irregularity is fatal and has rendered the proceedings before the Tribunal a nullity and consequently is the judgment of the High Court.

We thus invoke revisional powers under section 4 (2) of AJA to nullify the proceedings of the District Land and Housing Tribunal, quash the decision and set aside the orders therefrom, as well as the proceedings, judgment and order of the High Court which stemmed from nullity proceedings.

As for the way forward although both parties were uncomfortable with trial *de novo* order, we on our part aside from the fact that the proceedings were irregular, nevertheless, for the interest of justice, we find it prudent to order trial *de novo*. This being a dispute relating to a sensitive landed property owned under the customary right, aid of

assessors is thus crucial in determining the matter. In that regard, we are compelled and hereby order that the record be remitted back to the trial Tribunal for rehearing of the matter before another Chairperson and a new set of assessors.

DATED at BUKOBA this 2nd day of December, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2022 in the presence of the Appellant, Mr. James Kabakama, learned counsel for the Appellant and the Respondent present in person unrepresented is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL