IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTY OF MUSOMA

AT MUSOMA

MISC. LAND APPEAL NO. 49 OF 2019

(Arising from the Judgement of the District Land and Housing Tribunal for Tarime at Tarime in Appeal No. 18 of 2016)

GENYA WANYANCHA .....APPELLANT

VERSUS

MGANGA NDEGE .....RESPONDENT

JUDGEMENT

Date of Last Order: 22/04/2020
Date of Judgment: 19/05/2020

KISANYA, J.:

Before the Nyamunga Ward Tribunal, the appellant, **Genya Wanyancha** successfully sued the respondent, **Mganga Ndege** on the claim for ownership of a piece of land (disputed land). The respondent appealed to the District Land and Housing Tribunal for Tarime at Tarime (the appellate Tribunal) to challenge the decision of the Ward Tribunal. Upon hearing the parties, the appellate Tribunal nullified the proceedings and quashed the decision of the Ward Tribunal on the ground that the respondent had no *locus standi* to defend the case.

Dissatisfied with the said decision, the appellant has come to this Court by way of appeal. His petition of appeal is tailored on the following grounds of appeal.

1. *That, the learned appellate chairman erred in law for abdicating her powers to determine the appeal on its merits while it is the respondent who defied the order of*

the High Court of Tanzania dated 15/10/2013 for more than (4) years without obtaining the letter of probate.

2. *That, the appellate court erred in law and facts for failure to declare the appellant the legal owner of the disputed land, while the evidence on record shows that the respondent is the legal owner of the suitland and the respondent is the trespasser to the suit land.*
3. *That, the learned appellate Chairman misdirected herself on points of law when the court held that the respondent had no locus standi, while it is the respondent who trespassed into the disputed land.*
4. *That, the respondent still persists in his trespass to the suit land, an act which threatens a breach of peace.*

It is on record that before the case which gave rise to the present appeal, the appellant had successfully sued the respondent before the Nyamunga Ward Tribunal. The said case reached this Court (Mwanza District Registry) as a second appeal. The Court (Hon. B.R. Mutungi, J.) nullified the lower tribunals' judgements and orders. Parties were advised to institute probate proceedings in a court of competent jurisdiction before pursuing their relevant claims. Following that decision, the appellant filed Probate Adm. Cause No. 8 of 2013 in the Nyaburongo Primary Court. He was issued with the letter of administration of the late **Wanyancha Ndoro** (his father). Thereafter, he instituted the suit which led to the appeal at hand.

When the appeal came up for hearing, the appellant had the legal services of Mr. Daudi Mahemba, learned advocates. On the other hand, the respondent's legal representation was taken care by Mr. Thomas Makongo, learned advocate. In addition to the above grounds of appeal, the Court *suo motu*, asked the parties to address on whether the opinion of assessors were given in accordance with the

law.

In his submission in chief, Mr. Mahemba, decided to drop the fourth ground of appeal. On the first ground, the learned counsel submitted that the appellate Tribunal failed to note that it is the respondent who had not complied with the order of this Court (Hon. B.R. Mutungi, J.) by failing to institute the probate proceedings. He submitted further that, the appellant instituted the case against the respondent because he is the one who encroached the disputed land and not his farther. The learned counsel was of the considered view that, the appellate Tribunal erred to quash to proceedings of the Ward Tribunal merely because the respondent had not obtained the letters of administration.

On the second ground of appeal, counsel Mahemba argued that the evidence of PW2 and PW3 (before the Ward Tribunal) proved on the balance of probabilities that, the appellant was the lawful owner of the disputed land. Upon being probed by the Court, the learned counsel conceded that, it appears the case before the Ward Tribunal was instituted by the appellant in his own capacity and not as administrator of the estates of his late farther.

On the issue of opinion of assessor, Mr. Mahemba submitted the District Land and Housing Tribunal is properly constituted if the Chairman sits with not less than two assessors who are required to give their opinion before the Chairman delivers the judgement. He cited section 23 of the Land Disputes Courts, 2002 and regulation 19(2) of the Land Disputes Courts (District and Housing Tribunal), 2003 to support his argument. The learned counsel submitted that, the opinion of assessors is stated in the judgement but the same is not in record. He was of the view that, the omission to take the opinion of assessors in accordance with the law vitiated the proceedings before the District Land and

Housing Tribunal. For that reasons, Counsel Mahemba advised me to revise the proceedings of the Ward Tribunal and the District Land and Housing Tribunal and the decisions arising thereto.

In response, Mr. Thomas Makongo pointed out irregularities in the proceedings of the Ward Tribunal and the appellate Tribunal. He argued that the application before the Ward Tribunal was filed by the appellant in his personal capacity in lieu of the administrator of the estates of the deceased. On the other hand, Counsel Malongo contended that, the respondent could not comply with the order of the High Court because the land in dispute belongs to his mother who is still alive. Citing the case of **Jackson Nyansari vs Nyama Sagere Mansari,** (PC) Probate No. 6 of 2007, HCT at Mwanza, counsel Makongo argued that where the spouse dies, the entire estate remains in the hands of his wife. Therefore, the learned counsel was of the view that, the appellant mother became the lawful owner of the disputed upon the demise of his late husband.

Regarding the issue of opinion of assessors, counsel counsel Makongo submitted that the judgement and proceedings of the appellate Tribunal do not show whether the opinion of assessors was given. The learned counsel argued that, the said omission vitiated the proceedings before the District Land and Housing Tribunal. He amplified his argument by citing the decision of this Court in **Mkami Chacha vs Akibara Wambura**, Land Appeal No. 43 of 2015, HCT at Mwanza (unreported) and **Rocket Mahega vs Getita Chiwa**, Micl Land Appeal No. 40 of 2019, HCT at Musoma (unreported).

The learned counsel concluded his submission by stating that, the present appeal is a nullity because it originates from the proceedings of the appellate Tribunal which are nullity. He also urged the Court to nullify the proceedings of the Ward

Tribunal on the ground that, the case was instituted by the appellant in his own capacity. The learned counsel prayed for costs because the proceedings were initiated by the appellant.

I have given due consideration to the evidence on record, petition of appeal and the submission by the learned counsels for the appellant and the respondent. In my opinion, two issues are required to be considered at this stage. These are, whether the proceedings before the Ward Tribunal were vitiated by the failure to indicate that the appellant was an administrator of the estates of the deceased; and whether the opinion of assessors before the District Land and Housing Tribunal was taken or given in accordance with the law.

Starting with the first issue, it is trite law as held in **Lujuna Shubi Balonzi Senior vs the Registered Trustees of Chaman cha Mapinduzi** (1990) TLR 203 that, a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. In a suit involving the estates of the deceased, it is the executor or administrator of the estates of the deceased who has the *locus standi* to institute or defend the suit. This is pursuant to section 100 of Probate and Administration of Estates Act [Cap. 352, R.E. 2002] which provides that:

> *"an executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debt due to him at the time of his death, as the deceased had when living"*

It is also settled that, a case filed by the executor or administrator of the deceased, should indicate in the title that, the party thereto is administrator of the deceased's estate. However, the omission to indicate that fact in the title of the case does not vitiate the proceedings if the evidence and letters of

administration have been tendered and admitted in evidence. This position was stated in in **Suzana S. Waryoba vs Versus Shija Dalawi, Civil Appeal No. 44 of 2017,** CAT at Mwanza (unreported), when the Court of Appeal held that:

> *"Before we pen off we wish to address one little disquieting aspect. This is that the appellant sued as an administratrix of the estate of the late Stanslaus Waroyba. However, that aspect did not reflect in the title of the case. We are of the considered view that the fact that Suzana Waryoba was suing in her capacity as an adminitratrix of the estate of the late Stanslaus Waryoba should have been reflected in the title of the case. However,* ***we haste the remark that the omission is not fatal given that it was clear throughout that she was suing in that capacity and the judgment of the Primary Court which appointed her as such, was tendered in evidence at the very outset.*** *We only wish to accentuate that when a litigant sues as an administrator or administratrix of estate, it is desirable that the same should be reflected in the title."*[Emphasize supplied]

In the instant appeal, the appellant stated before the appellate Tribunal that he had filed probate case before Nyaburonge Primary Court and granted with the letter of the administration of the estate of this late father on 31/1/2014. He also claimed that the land belonged to his late farther. However, as conceded by Mr. Mahemba and argued by Makongo, the proceedings before the Ward Tribunal do not show that the appellant was an administrator of the estates of his late father. However, it is on record that, the appellant submitted the letter of administration at the time of lodging the application before the Ward Tribunal. This is reflected in his evidence, when he testified:

> *"Mimi niliyesimama hapa ndiye mwenye mamlaka na ardhi hiyo ya mgogoro. Ardhi hiyo niliidai hapa mwanzoni hatimaye lilienda baraza la ardhi la nyumba Wilaya ya Tarime. Katika maeneo hayo mawili yote mimi nilishina mdaiwa*

alikata rufaa kwenda Mahakama ya Kanda katika kushauriana kule mahakama ya kanda wakili wake mdaiwa alishauri kwamba sisi sote hatuna haki ya kufungua kesi kwa sababu hatuna mamlaka. ...Jaji naye aliongeza kwamba tufanye mipango tupate mirathi ndipo tufungue kesi hii katika baraza ardhi lenye mamlaka ya kusikiliza kesi za ardhi. Na hukumu hiyo ilitolewa tarehe 15/10/2013 na hiyo hukumu nimeshaiwakilisha hapa barazani ndugu mwenyekiti, pamoja na barua ya mirathi toka kwenye ukoo wangu kupitia kiapo cha Mahakama ya Mwanzo Nyaburonge.

The above evidence suggests that, the appellant instituted the case before the Ward Tribunal after obtaining the letter of administration. It should be considered that, parties in the Ward Tribunal do not file pleadings. Upon submitting the claim, the case file is titled by the Ward Tribunal. Thus, it is the Ward Tribunal which was required to indicate that the case had been instituted by the appellant as an administrator of the estates of the late Wanyacha Ndaro. Therefore, I am not in agreement with Mr. Mahemba and Mr. Makongo that the proceedings of the Ward Tribunal was vitiated. However, this position does not dispose the grounds of appeal raised by the respondent before the appellate Tribunal. They are left for consideration and determination by the appellate Tribunal.

I now move to the issue whether the opinion of assessors was given in accordance with the law. This issue is premised on section 23 (1) of the Land Disputes Courts Act, Cap. 216, R.E. 2019 and regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, which requires the Chairman of the Tribunal to sit with at least two assessors and require them to give their opinion before he compose the judgement.

As rightly argued by the counsel for the appellant and the respondent, it is settled law that, the opinion of assessors should be given in the presence of the parties and that the proceedings should show that fact. In **Tubone Mwambeta Versus Mbeya City Council, Civil AppealNo.287 of 2017 (unreported),** the Court of Appeal considered this issue and held that:

> *"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors...they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed...since Regulation 19(2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict."*

I have inspected the records in the appeal at hand. The appellant (who was the respondent) closed his case before the District Land and Housing Tribunal on 1/08/2017. The Hon. Chairman did not address the assessors to give their opinion. He ordered that the judgement would be delivered on 6/10/2017. The judgement was not delivered on 6/10/2017 as scheduled. It was delivered on 14/12/2017. The assessors are not in the coram of 14/12/2017.

With that finding, I am satisfied that the assessors were not addressed to give their opinion and that, their opinion was not given or read in the presence of the parties. Also, their opinion is not reflected at all in the judgement. It is apparent that, the trial Chairman improperly exercised his jurisdiction. As rightly argued by the learned counsels for both parties, the said omission and irregularity contravened the law thereby vitiating the proceedings before the

District Land and Housing Tribunal. Hence, there is no need of considering other grounds of appeal.

In view of the above, I apply the revisional power conferred on the Court by section 43 of the Land Disputes Courts Act [Cap. 216, R.E. 2019] to quash the proceedings and set aside the judgement and decree of the District Land and Housing Tribunal for Tarime at Tarime in Land Appeal No. 18 of 2016. I order that, the appeal be heard afresh before another Chairman and new set of assessors. As the issue of irregularity which has disposed of the appeal was raised by the Court, *suo motu*, each party should bear its own costs.

Dated at MUSOMA this 19st day of May, 2020.

E. S. Kisanya
JUDGE
19/5/2020

Court: Jugdement delivered in this 19th day of May, 2020 in the absence of the parties with leave of the Court. Parties to be notified.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE
19/5/2020