

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBWA DISTRICT REGISTRY)**

AT BUKOBWA

MISC. LAND APPEAL No. 1 OF 2018

(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in Land Appeal No. 225 of 2014 & Kimuli Ward Tribunal in Land Case No. 4 of 2014)

ELBERT BURCHARD & ANOTHER ----- APPELLANT

Versus

PHOCAS KASIGARA ----- RESPONDENT

JUDGMENT

03/11/2020 & 06/11/2020

Mtulya, J.:

The present appeal was registered in this court on the 9th day of October 2017 attached with three (3) grounds of appeal to contest the decision of the **District Land and Housing Tribunal for Kagera at Bukoba** (the Tribunal) in **Land Appeal No. 225 of 2014** (the case). The said grounds of appeal were drafted and registered by learned counsel Mr. Lameck John Erasto on behalf of the Appellants, Mr. Elbert Burchard and Mr. Wilson Venant (the Appellants).

Having perused the stated grounds of appeal, Mr. Erasto briefly contests the decision of the Tribunal in the following matters: first, holding of the Tribunal on composition of **Kimuli Ward Tribunal** (the Ward Tribunal) in **Land Case No. 4 of 2014** (Land Case); second,

mediation procedure in the Ward Tribunal; and third, execution process and filing of execution proceeding in the Tribunal.

When the appeal was scheduled for hearing on 3rd November 2020, Mr. Lameck opted to join grounds number one and two of the appeal and argued them together whereas ground number three was submitted separately. In brief, Mr. Lameck stated in the two initial grounds that the Tribunal initiated the objection proceedings *suo moto* and held the Ward Tribunal in the Land Case was not properly composed which is contrary to the record of the Ward Tribunal.

In substantiating this claim, Mr. Lameck argued that the Respondent initiated a complaint letter in the Tribunal, instead of filing objection proceedings and the Tribunal proceeded to hear him in the main application without there being assessors or the Respondents as is depicted in the proceedings of the Tribunal of 14th November 2016. According to Mr. Lameck, the orders emanated from the proceedings of this date onward have faults and must be quashed for three reasons, *viz*, first, at the time when the proceedings were initiated and order of 23rd August 2017 was delivered in Appeal No. 225 of the Tribunal, the Appellants had already executed the land from the order of the same Tribunal granted on 11th November 2016;

second, the said order was delivered without consultation of the assessors; and third, the Appellants were not afforded the right to be heard.

To bolster his arguments, Mr. Lameck cited the authority in the precedent of: **Marwa Mahende v. Republic** [1997] TLR 249 on powers of this court to quash the proceedings of the lower courts; **Bibi Kisoko Medard v. Minister for Lands, Housing and Urban Developments & Another** [1983] TLR 250 and **Scolastica Benedict v. Martin Benedict** [1993] TLR 1 on the principle of *functus officio*; and section 4(3) of the **Ward Tribunals Act** [Cap. 206 R.E. 2002], section 11 of the **Land Disputes Courts Act** [Cap. 216 R. E. 2019], **Adelina Koku Anifa & Another v. Byarugaba Alex**, Civil Appeal No. 46 of 2019; **Edina Kibona v. Absolom Swebe**, Civil Appeal No. 286 of 2017 and **Y.S. Chawalla & Co. Ltd v. Dr. Abbas Teherali**, Civil Appeal No. 70 of 2017 on assessors opinions.

In the third ground of appeal, now reading second ground of appeal after consolidation of the first two grounds, Mr. Lameck submitted that Mr. Phocas Kasigara (the Respondent) had already lost the Land Case in the Ward Tribunal since 15th September 2015 and execution has been completed by the Appellants in the presence

of Kakanja Ward Executive Officer. However, son of Mr. Kasigara called Amos Phocas Kasigara emerged again and filed Appeal No. 225 of 2014 in the Tribunal and it was unfortunate that the Tribunal proceeded and issued an order of 23rd August 2017.

According to Mr. Lameck this order is against the law in *res judicata* as the subject matter of the dispute was direct and substantially determined to the finality in the Land Case in the Ward Tribunal between the same parties. To make it clear for the power of the two institutions, Mr. Lameck submitted that during that year, 2014, all appeals from the Ward Tribunals were registered in primary courts as per requirement of the law in section 20 of the **Ward Tribunals Act** and their decisions were final except on point of law, appeal lie to the district courts as per section 20 (3) of the **Ward Tribunals Act**. To substantiate his statement, Mr. Lameck cited the authority in the precedent of **Chuchuba v. Rector, Itaga Seminary** [2002] TLR 213 on the subject of *res judicata*.

On his part, the Respondent's son, Mr. Amos Phocas Kasigara, who had a power of Attorney to represent his sick father and appeared himself without any legal representation, briefly submitted that the dispute on ownership of the land occurred in 1995 between

Respondent and Leopold Lujumba @ Brakard Lujumba and was determined to the finality in favour the Respondent who was living in the land since 1950s. With the consolidated grounds one and two of appeal, Mr. Amos submitted that the composition of members was proper in the Tribunal, only that the records were faulted by the Tribunal and in any case, the Tribunal decided that way to avoid killing of human persons which was nearly to erupt in the disputed land.

On the size of the disputed land, Mr. Amos stated that it is 16 acres of land and that the Appellants have different land of 18 acres. Describing the location of the land, Mr. Amos stated that in the North there is big stone; in the South there is Mr. Lwakanyango Lusungu; in the West there is mountain; and in the East there is trees of Omunyima and cotton. Finally, Mr. Amos argued that the Ward Tribunal in its entire decision did not state how the Appellants acquired the disputed land.

In a brief rejoinder, Mr. Lameck submitted that the Appellants submitted evidences in the Tribunal and the decision of the Ward Tribunal was tendered in the Tribunal as part of the evidences. According to Mr. Lameck, the Ward Tribunal visited the land in

dispute before it delivered its decision in the Land Case. With location and size, Mr. Lameck stated that the size is six (6) acres located at former Nkwenda Ward in Kyerwa.

With regard to faults in the record of the Tribunal, Mr. Lameck stated that Mr. Amos contradicts Tribunal's record and as depicted in the proceedings of the Tribunal from 11th October 2016 to onwards. Replying on the dispute filed in 1995, Mr. Lameck argued that the initial dispute was initiated in Nkwenda Ward Tribunal and the Respondent lost the case. The Respondent preferred an appeal before the Primary Court of Nkwenda and District Court of Karagwe at Kayanga and in all cases he lost. According to Mr. Lameck, when Nkwenda Ward was separated from Kimuli Ward, the Respondent preferred another Appeal No. 225 of 2014 registered in the Tribunal.

I have had an opportunity to scrutinize the record of this appeal. I totally agree with the submissions registered by learned counsel, Mr. Lameck on his grounds of appeal, as is depicted at page 7 to 15 of the proceedings of the Tribunal, dated 11th October 2016 to 23rd August 2017, when the decision in Appeal No. 225 of 2014 was delivered. However, I noted three (3) important things in this appeal and for the sake of justice I will state them all, as may render both

decisions of the tribunals below a nullity. These are: first, composition of the Tribunal; second, composition of the Ward Tribunal; and finally, size, location and value of the disputed land.

I will begin with the composition of the Tribunal. The Tribunal in some cases was properly constituted (see proceedings: 29.10.2014 and 22.10.2014) whereas in some cases it was improperly constituted (see proceedings: 05.02.2015, 11.05.2015 and 4.03.2016), but the learned chairman proceeded with the case (see proceedings: 11.08.2014 and 25.11.2017). In the same level, there were changes or absence of learned assessors without any reasons being registered in the Tribunal (see proceedings: 10.05.2017 and 21.03.2017) and finally, there was no record on their consultation before delivery of the decision (see proceedings: 23.08.2017). It is fortunate that Mr. Amos admitted that fact, but said it was caused by the Tribunal.

The law is clear and certain on the subject and precedents are abundant and settled. I need not to go into details and labour my calories on that (see: sections 23 (1), (2) & (3) and 24 of the Land Disputes Courts Act [Cap. 216 R. E. 2019] (the Act); **Edina Adam Kibona v. Abdallah Swebe**, Civil Appeal 286 of 2017; **Moses David v. Alouis Anthony Ghiselli**, Land Appeal No. 16 of 2017; and

Kasanga Shabani v. Kasanga Hasani & Another, Land Appeal No. 2 of 2018; and **Ponsian Kadangu v. Muganyizi Samwel**, Misc. Land Case Appeal No. 41 of 2018).

The present appeal shows similarities of three (3) years ago when the Court of Appeal was called to determine the precedent in **Edina Adam Kibona v. Abdallah Swebe** (supra). At page 6 of the precedent, their Lordship stated that:

In the view of the fact that the record does not show that the assessors were required to give [opinions], we fail to understand how and at what stage they found their way in the court record

Secondly, the Ward Tribunal sat with four members from 4th June 2014 when the dispute was initiated to 15th September 2014 when the decision was delivered. These members were: Haus Masud, Solina Pastory, Leonard Mlinda and Sylvery Mgalula, but it is not shown who was a member or secretary or whether there was a female member in the panel. Finally, there are faults with regard to the certainty of the land in dispute. Parties in the present appeal have mentioned decisions in previous disputes, and registered Land Case No. 4 of 2014, which is the source of this appeal. It is unfortunate

that there are no evidences in the record of previous disputes occurred in 1995 or any other time on the same land.

Record in the present appeal shows that the Respondent preferred Appeal No. 225 of 2014 as part of the resistance of execution of the decision in **Land Case No. 4 of 2014** decided by the Ward Tribunal. However, during the hearing of the **Land Case No. 4 of 2014** before the Ward Tribunal, neither the Appellants nor the Respondent who produced evidences with regard to the size of the disputed land, let alone how it was acquired or value of the disputed land. All witnesses who were marshalled and testified in the Ward Tribunal did not state with certainty the size of the land.

It is also confusing that the decision of the Ward Tribunal was attached with sketch map drawn at the *locus in quo*, but does not state the size of the disputed land. It is also disturbing that the Ward Tribunal when delivering its decision, remained silent on the size. Similar record available in the Tribunal. The Respondent when preferred Appeal No. 225 of 2014, did not describe the disputed land and the Tribunal when delivering its decision declined to state any size or location of the disputed land as per requirement of the law.

The parties opted to state the size and boundaries of the land at this stage of appeal hearing, which will not assist any party as such. There are two (2) reasons to that effect, *viz*, first, this is not proper forum and stage to state new things. They may be interpreted as afterthought. But again, second, the parties still differ on size and location. The Respondent mentioned his neighbours and size being sixteen (16) acres whereas the Appellants said on six (6) acres, and declined to mention their neighbours. I think this dispute must start afresh to have certainty in size, location and value.

In determining land disputes, lower tribunals must assure themselves with size, location and value of the land. That is the requirement of the law in of Regulation 3 (2) (b) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** GN. No. 174 of 2003 and precedents in **Daniel D. Kaluga v. Masaka Ibeho & Four Others**, Land Appeal No. 26 of 2015; **Rev. Francis Paul v. Bukoba Municipal Director & 17 Others**, Land Case No. 7 of 2014 and **Aron Bimbona v. Alex Kamihanda**, Misc. Land Case Appeal No. 63 of 2018. When this requirement is faulted, the decision cannot stand in an appeal stage.

Having noted all the mentioned defects in the record, the lower tribunals' decisions must be quashed and their proceedings set aside in search of justice of the parties, certainty of the land in terms of size, location and value, and for the sake of proper record in our courts. I therefore order as follows:

- i. This Misc. Land Appeal No. 1 of 2018 is hereby allowed;
- ii. Proceedings of the Tribunal in Land Appeal No. 225 of 2014 is hereby set aside;
- iii. Judgment of the Tribunal in Land Appeal No. 225 of 2014 is hereby quashed;
- iv. Any other order or decision emanated from the Tribunal in Appeal No. 225 of 2014 is hereby quashed;
- v. Proceedings of the Ward Tribunal in Land Case No. 4 of 2014 is hereby set aside;
- vi. Decision of the Ward Tribunal in Land Case No. 4 of 2014 is hereby quashed;
- vii. Any other order or decision emanated from the Tribunal in Land Case No. 4 of 2014 is hereby quashed;

viii. This appeal is allowed without any order as to the costs as the defects caused by the lower tribunals. Each party to bear its own costs;

ix. If parties, are still interested in the disputed land, may wish to correct the identified defects and file fresh suit as per requirement of the law regulating land matters; and

x. The parties duly informed.

Ordered accordingly.



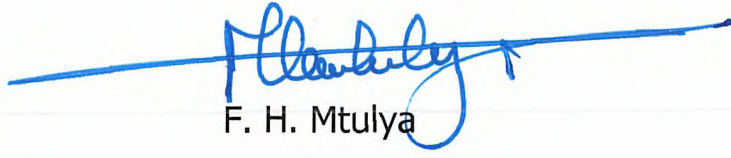

F.H. Mtulya

Judge

06.11.2020

This Judgment was delivered in Chambers under the seal of this court in the presence of the First Appellant, Mr. Elbert Burchard and his learned counsel Ms. Erieth Barnabas and in the presence of the Respondent's son, Mr. Amos Phocas.




F. H. Mtulya

Judge

06/11/2020