IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND CASE APPEAL NO. 74/2018
(*Arising from land application No. 81/2016 of the District Land and Housing Tribunal of Muleba*)

RWANGANILO VILLAGE COUNCIL AND 21 OTHERS.....APPELLANTS

VERSUS

JOSEPH RWAKASHENYI.....RESPONDENT

JUDGMENT

Date of last order 20/10/2020
Date of judgment 13/11/2020

Kilekamajenga, J.

The respondent sued Rwanganilo and Kikuku village councils and some of the villagers for trespassing into the land he alleged to own since 1988. On the other hand, Rwanganilo village council claimed to own the disputed land. It was alleged that Rwanganilo village council allowed her villagers to cultivate perennial crops on the land. The respondent alleged that both Rwanganilo village council and Kikuku village council and other villagers who cultivated the land trespassed into his land. During the trial before the District Land and Housing Tribunal of Muleba, the respondent's case had only two witnesses namely, the respondent himself and Paulo Ezekiel. In his testimony, the respondent testified that he was given the land by his father in 1988. He continued to use the same land until in

2009 when the encroachment happened. His testimony was supported by PW2 who testified that he witnesses his father giving the land to the respondent as a gift.

In response, the defence had four witnesses; DW1 testified that she was born in 1977. All her life time, she knew that the land belonged to the village council. The respondent also has a piece of land near the suit land. The village council allowed villagers to use the land for cultivating seasonal crops. His evidence was supported by DW2 who testified that the disputed land was allocated to villagers by the village council in 2010. He insisted that the disputed land does not belong to the respondent. He testified further that the respondent owns a piece of land near the disputed land. He insisted that the disputed land was used by their grandfathers as a village land. The testimony of the above two witnesses was supported by DW3. DW4 also testified that the respondent has no right over the disputed land because the land belongs to the village council.

Finally, the case was decided in favour of the respondent. Aggrieved by the decision of the trial tribunal, the appellants lodged this appeal challenging the decision. They raised the following grounds of appeal:

1. *That, the District Land and Housing Tribunal for Muleba erred both in law and fact for deciding in favour of the respondent without respondent to establish sufficiently the size, mark, the amount of Acres of disputed land*

claimed in order for recovery of disputed land purported to be trespassed by respondents.

2. *That, the Muleba District Land and Housing Tribunal erred in law and fact by holding that the 1st Appellant being a trustee of village land on behalf of villagers cannot claim tittle over village land.*
3. *That the Muleba District Land and Housing Tribunal grossly erred in law and fact for hearing the matter and entering decision in favour of respondent while the 1st and 2nd Appellants were not dully served and informed over the suit against them, hence the act is amounting to condemning a party unheard hence the Tribunal acted against the principle of natural justice.*
4. *That, the Muleba District land and Housing Tribunal erred both in law and fact for deliberate denying the 3rd – 22nd appellants and their Advocates right to defend the suit and cross examine the respondent at the standard required by the law, thus non-compliance of it makes the proceedings and decision thereto irregular and nullity.*
5. *That, the Muleba District land and Housing Tribunal Trial chairman misdirected himself for failure to concur with his gentlemen assessor's opinion and holding in favour of respondent and at the same time made a finding that the 1st and 2nd appellant lastly appeared at Tribunal on 04.08.2015 when the matter came for issues and thereafter they defaulted while the issues was not drawn on the said date ad on the exact date when the issues were drawn 1st and 2nd respondent were neither dully informed (served) nor present.*
6. *That, the Muleba District Land and Housing Tribunal had No jurisdiction to hear the matter started at Bukoba District Land and Housing Tribunal and*

finally disposed it to finally without direction for transferring to it from the Registrar.

7. *That, the appeal is in time as a copy of judgment pronounced by the Tribunal on 25/10/2018 and the certified copy of judgment and Decree were issued on 01/11/2018 (Hereby attached to form a part of this appeal).*

The appeal was finally fixed for hearing, the learned solicitor, Mr. Muyengi Muyengi appeared for the 1st and 2nd appellants whereas the respondent appeared in person. On the first ground, the counsel for the appellants argued that, in the application, the respondent failed to indicate the size of the disputed land to enable the District Land and Housing Tribunal to order vacant possession from the suit land. For that reason therefore, the respondent's application before the tribunal violated **Regulation 3(2)(b) of the Regulations of District Land and Housing Tribunal** which demands the applicant to indicate the location of the disputed land. In the instant case, the respondent did not show the size of the disputed land, the respondent simply stated that the land is located at Rwanganilo village. The respondent was supposed to state where the land located, its size and boundaries. These facts could assist the tribunal in understanding the nature of the dispute and establish the exact location and size of the land in dispute. Failure to show those particulars caused the tribunal to decide without citing the size of the land. Therefore, there was an irregularity in

the proceedings. He fortified the argument with the case of **Daniel Ndagala Kanuda v. Masaka Ibeho and others, Land Appeal No. 26 of 2015** (unreported).

On the second ground, Mr. Muyengi submitted that the tribunal erred in law and fact to decide that the 1st respondent cannot claim title over the village land. The village council is the trustee of the village land and it is the corporate body. The village council has power to sue and be sued; it may acquire and dispose of property; this is according to **section 26(2)(1) of the Local Government (District Authority) Act, Cap. 287 RE 2019**. Also, under section 7 of the Village Land Act, the village council is the village land management authority. Therefore, the village council has power to claim ownership over the village land. Therefore, the tribunal erred in deciding that the village council cannot claim title over the village land.

On the 3rd ground, the trial tribunal erred in law and fact in deciding in favour of the respondent without affording the 1st and 2nd appellants the right to be heard. Also, the case was transferred from District Land and Housing Tribunal at Bukoba to Muleba. The case was finally determined by JK Banturaki. There was no order to transfer the case to the District Land and Housing Tribunal at

Muleba. Therefore, the 1st and 2nd appellant never appeared as they were not informed about the case. Few appellants appeared to defend the case on behalf of the 5th to 22nd appellants something which was wrong because this was not a representative suit.

On the 4th ground, the counsel for the appellants argued that the District Land and Housing Tribunal erred in law and fact to decide the case while the 3rd to 22nd appellants did not appear to defend their case. On the 6th ground, Mr. Muyenga argued that the District Land and Housing Tribunal had no jurisdiction to determine this matter as there was no order of the Registrar to transfer the case to Muleba. The case was supposed to be transferred under the order of the Registrar of the tribunal. The counsel for the appellants finally urged the Court to allow the appeal and set aside the decision of the trial tribunal.

On the other hand, the respondent argued that during encroachment to the disputed land by the appellants, the village council of Rwanganilo never existed. The tribunal decided to summon Kikuku village leaders to answer the application. As Rwanganilo village council never existed, the respondent decided to sue the trespassers by their names. The trespassers later wanted the village council to be joined because they alleged that they were allocated the land by the village

authorities. The respondent later joined the village council in the suit. Therefore, the village leaders appeared to defend the case. It is not correct to allege that the appellants were not informed about the case.

The respondent further argued that he was given the land as a gift by his parents in 1988. By then, the land was under Kikuku village council. He was given the land when he was 20 years old. The size of the land is about 293 x 71 footsteps. He further informed the Court that he summoned one witness before the trial tribunal. The appellants also summoned three witnesses. Also, the appellants are the ones who prayed for the transfer of a case to Muleba District Land and Housing Tribunal. He urged the Court to dismiss the appeal.

When rejoining, the counsel for the appellants insisted that the disputed land belongs to Rwanganilo village council. The allegation that Rwanganilo village council never existed is not true. Also, the size of the disputed land is more than the footsteps mentioned by the respondent. The appellants used the land under the order of Rwanganilo village council. He further objected the allegation that the appellants prayed for the case to be transferred to Muleba District Land and Housing Tribunal. Furthermore, there is no gift deed showing that the respondent got the land as a gift from his father. He insisted that the 1st and 2nd

appellants were not informed about the case and therefore they were denied the right to be heard. He finally reiterated the prayer to allow the appeal.

In disposing of this appeal, I take the discretion to consider two grounds which are pertinent. **First**, on the 3rd ground, the counsel for the appellant argued that the two village councils (1st and 2nd appellants) were not given the right to be heard. It is further alleged that, when the case was transferred from Bukoba to Muleba District Land and Housing Tribunal, the two appellants were not informed about that transfer. As a result, the major two parties, namely the village councils were not defended. In other words, they were not given the right to be heard and there is no record showing that they were served with the summons about this case. The right to be heard is the fundamental constitutional right provided under **Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977**. See, the case of **The Managing Director Kenya Commercial Bank (T) Limited and Albert Odongo v. Shadrack J. Ndege, Civil Appeal No. 232 of 2017**, CAT at Mwanza (unreported). Therefore, it is contrary to the law to determine any right that affects a party without giving him/her the right to defend the case. For instance, in the case of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma [2003] TLR 251** the court stated that:

'...natural justice is not merely a principle of the common law, it has become a fundamental constitutional right, Article 13(6)(a) includes the right to be heard among the attributes of equality before the law.'

The principle of natural justice is fortified in the case of **I.P.T.L. v. Standard Chartered Bank (Hong Kong) Ltd, Civil Revision No. 1 of 2009** (unreported) when the Court of Appeal stated that:

'no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interest of any person without first giving him a hearing according to the principles of natural justice.'

See also the cases of **Margwe Erro and 2 others v. Moshi Mohalulu, Civl Appeal No. 111 of 2014** (unreported); **Mire Artan Ismail and Anr v. Sofia Njati, Civil Appeal No. 75 of 2008** (unreported) and **Kluane Drilling Ltd v. Salvatory Kimboka, Civil Appeal No. 75 of 2006**, Cat at Dar es salaam (unreported).

A party must be given the right to defend the case whether he/she has a good case or not. This principle of law was stated in the case of **Halima Hassan Marealle v. Parasistatal Sector Reform Commission, Civil Application No. 84 of 1999** thus:

'The concern is whether the applicant whose rights and interests are affected is afforded the opportunity of being heard before the order is made. The applicant must be afforded such opportunity even if it appears that he/she would have nothing to say, or that what he/she might say would have no substance.

Now, this being the case involving the village land, it was necessary for the village councils (1st and 2nd appellants) to be heard rather than determining the case without giving them the right to be heard. The village council is responsible for the overall management of village land. **Section 147(1) of the Local Government (District Authorities) Act, Cap. 287 RE 2002** empowers the village council to manage the affairs and business of a village. The section provides:

'A village council is the organ in which is vested all executive power in respect of all the affairs and business of a village.'

The Court of Appeal of Tanzania expounded the role of a village council in the case of **Bakari Mhando Swanga v. Mzee Mohamedi Bakari Shelukindo and 3 others, Civil appeal No. 389 of 2019**, CAT at Tanga (unreported) when it stated that:

'Even if we assume that the purported sale agreement was valid, which is not the case, then the same was supposed to be approved by the village council...Under normal circumstances, it was expected for the appellant

after he had executed the purported sale deed with Khatibu Shembilu, to present the document to the village council of Kasiga to get its blessings...The observation we make here is that there is no due diligence on the part of the appellant in the whole process of executing the purported deed of sale. In our view, he ought to have consulted the village council before embarking on the transaction.'

Second, on the first ground, the counsel for the appellant argued that the respondent did not state the location and size of the disputed land. Hence, the trial tribunal decided on the land which its exact location and size is not known. **Regulation 3(2)(b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** requires the applicant to indicate the location of the disputed land in the application. The regulation provides thus:

3(2) An application to the tribunal shall be made in the form prescribed in the second schedule to these regulations and shall contain:

(a)...

(b) the address of the suit premises or location of the land involved in the dispute to which the application.

(c)...

In the case of **Daniel Dagala Kanuda (As Administrator of Estates of the late Mbalu Kushaha Buluda v. Masaka Ibeho and 4 Others Land Appeal No. 26 of 2015** (unreported), my learned brother Hon. Judge Utamwa extensively analysed the essence of indicating not only the location but also the

size of the disputed land. I highly subscribe to his view and finding because it may be grave injustice and dangerous to decide on a case which its size and location is unknown. Suppose, the respondent gets an order against two village councils over a piece of land which its size and location is not well established and the respondent goes further to enforce vacant possession against all villagers? Definitely, this may be a serious misdirection this Court cannot afford to attempt. It is always prudent therefore for the exact location of the disputed land to be indicated in the application to allow the trial tribunal to issue more specific orders. In the instant case, the only information indicated in the application shows that the land is located at Kikuku Village within Kikuku Ward in Muleba district. As rightly argued by the counsel for the appellant, the size of the land is not known nor indicated. Even the evidence adduced before the trial tribunal does not indicate the exact size of the land. As earlier stated, in absence of the information on the size of the dispute land, it may be a serious misdirection to decide in favour of the respondent.

Furthermore, I have considered the evidence adduced by the parties before the trial tribunal and found weak evidence to suggest that the respondent owns the land. In civil cases, a party with heavier evidence is the one who wins the case.

In the case of **Hemedi Said v. Mohamed Mbilu [1984] TLR 113**, the Court stated that:

> *'According to the law the person whose evidence is heavier than that of the other is the one who must win...In measuring the weight of evidence in such cases as present one, it is not, however, the number of witnesses whom a party calls on his side which matters. It is the quality of the said evidence.'*

In this case, the respondent's evidence is weaker in supporting the allegation that he owns such vast land within the village. Based on the above reasons, I hereby allow the appeal with costs. The respondent should vacate from the disputed land as soon as possible. Order accordingly.

Dated at Bukoba this 13th November 2020.

Ntemi N. Kilekamajenga
Judge
13th November 2020

Court

Judgment delivered in the presence of Joseph Rwakashenyi (respondent) and the representative of the villages, Mr. Gosbert Kiruwa.

Ntemi N. Kilekamajenga
Judge
13th November 2020