



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**MISC LAND APPEAL NO.62/2018**

*(Arising from Land Case Appeal No.110/2017 of the Bukoba District Land and Housing Tribunal originating from land case No.2/2017 of Kitendaguro Ward Tribunal and land case no.4/2015 of Bugambakamoi village)*

**PAULO RUMBERI..... APPELLANT**

**VRS**

**MARGARITA JOHN..... RESPONDENT**

**JUDGMENT**

**15/12/2020&19/3/2021**

***Kairo, J***

Being aggrieved by the decision of the Bukoba District Land and Housing Tribunal before Hon. Chairman E. Mogassa, the Appellant herein has lodged four grounds of appeal in the amended petition of appeal. For the purpose of understanding what the grounds of appeal entail, I will paraphrase and re -arrange them as I hereunder:

*1. The learned chairman of the first appellate tribunal misdirected himself by ordering the retrial of the Kitendagulo Ward Tribunal Land Case No. 2/2017 after he had correctly found its proceedings to be null and void*

*thereby quashing and setting aside the same without considering that the said order makes no sense.*

*2.That the proper order of the DLHT was to set aside the nullity proceedings of the Ward Tribunal without ordering retrial which would have made the decision of Bugambakamoi Village land council to remain intact over the matter.*

*3.It was wrong for the first appellate tribunal to hold that the Appellant consented the retrial order while the facts on the ground reveals the contrary.*

*4.It was wrong for the first appellate tribunal to fail to uphold the decision of Bugambakamoi Village Land Council which declared that the disputed land belonged to the Appellant. By so doing the tribunal misconstrued the provisions of the law which clearly provides that the Village Land Council is among the courts vested with the power to hear and determine land disputes.*

The Appellant therefore prayed for the following reliefs in this court:

*a) To quash and set aside the order given by the 1<sup>st</sup> appellate Tribunal to retry the said case afresh.*

*b) To give an order upholding the decision of Bugambakamoi village Land Council*

*c)This Hon.court be pleased to issue a declaration order to the effect that the disputed land belongs to the estate of the late Paulo Rumberi.*

*d) And any other order or relief this Hon.court deems fit to grant or award.*

The Appellant was unrepresented while the Respondent enjoyed the service of Advocate Gildon Mambo. Both parties opted to dispose this

appeal by way of written submissions and eventually the court so ordered. Their prompt compliance to the filling of their submissions is highly commended.

In the written submission the Appellant amplified on the first and second ground of appeal collectively that the Ward Tribunal illegally dealt with the proceedings of Village Land Council as an appeal instead of dealing with the case before it afresh taking into account that the ward tribunal has no appellate jurisdiction over the Village Land Council. It was the Appellant's further submission that after the DLHT had taken such a move of declaring the decision of the Ward Tribunal to be null and void, it correctly quashed the entire proceedings but it wrongly ordered a retrial, the order which makes no sense. The Appellant was to the effect that the proper order was to quash and set aside the decision as it did but without ordering a retrial. That now with the retrial order of the appellate tribunal in place, the decision of the Village Land Council cannot remain intact over the matter. He fortified his stance by citing the High Court case of **Village Chairman K.C.U Mateka vs Anthony Hyera (1988) TLR pg 188** where it was ruled that *"The effect of quashing court proceedings is to put the parties in the same position as if there had never been any proceedings instituted"*

Insisting further that *trial de novo* was not a proper order, the Appellant pin pointed the circumstances which warrant ordering *de novo*: that it can only be ordered in a situation when the appellate court or tribunal has found that the judgment of the court of the first instance was fatal, defective or unsatisfactory for being grounded on lack of evidence or if there is a miscarriage of justice or violation of some principal of law or procedure which does not render the proceedings and decision made

therein a nullity. He further contended that also *de novo* can arise when the appellate court found out that the judgment of the trial court or Tribunal is defective for leaving contested material issues unresolved and undecided which error or omission renders the said judgment a nullity and incapable of being upheld. To back up his stance he referred me on the Court of appeal case of **Stanslaus Rugaba Kasusura & Attorney General vs Phares Kabuye (1982) TLR pg 192.**

Submitting on ground No.3, the Appellant vehemently opposed that there is nowhere in the proceedings before the DLHT the Appellant prayed to try the case afresh instead the Appellant prayed for the decision of Bugambakamoi Village Council to be upheld and to quash the decision of the Ward Tribunal. He contended that the Judgment of the DLHT confirms that it was the Respondent who prayed for retrial. However, he submitted that the court had obligation to follow the law regardless of who prayed for such order.

With regards to the fourth and last ground, the Appellant had a view that the DLHT would have upheld the decision of the Village Land Council which declared the Appellant the owner of the disputed land as it carried proper evaluation of evidences adduced by parties including witnesses from clan members after it had quashed the decision of Ward Tribunal and declaring it a nullity.

To back up his stance, he referred me to Section 9 of the Land Dispute Court Act Cap. 216 that the decision of the Village Land Council can be altered by opening the case to Ward Tribunal afresh but not as an appeal as the Respondent did, and further that the Village Land Council decision should remain intact.

He further argued that it was wrong for the Ward Tribunal to treat the matter which originated from the Village Land Council as an appeal and the retrial order by the District Land and Housing Tribunal of the proceedings of the Ward Tribunal which sat as an appellate tribunal was totally a violation of the provisions of Section 3(1) and 2(a) and Section 7 (a), (b) and (c) of Cap. 216 and also provision of Section 167 (1)(e) of Land Act No. 4 of 1999 [Cap. 113 RE: 2019) which provides that the Village Land Council is among the Court that are vested with powers to hear and determine land disputes in a given area.

Replying to the written submission, the learned counsel, Mr. Gildon Mambo, for the Respondent elaborated that when ordering retrial after quashing and setting aside the Ward Tribunal decision, the DLHT was acting under the dictate of S. 35 (1) of cap. 216. That It was an order directing the Ward Tribunal to deal with the matter afresh after treating it as an appeal instead of a fresh case.

Mr. Mambo categorically stated that He is aware the Appellant is aggrieved by the order of retrial; this is because after quashing the orders of the Ward Tribunal which was in his favour, the Appellant wanted the decision of the Village Council to remain intact. However, what is being sought before this court has no sense because the Respondent has already opened a new case at the Ward Tribunal as ordered by the DLHT. Further that his wish to quash the re-trial order has no any legal justification and purpose to save, after all, the one vested with the duty to re-file a new suit at the Ward Tribunal is the Respondent; He added. He was to the effect that even if this court quashes the order of re-trial, the Respondent will go back to Ward Tribunal and the decision of the Village Land Council will have no legal effect whatsoever. He contended

that courts have severally quashed the entire proceedings of the trial tribunal and ordered the matter to be re-tried.

He backed up his argument with the cases of **John Masweta Vrs General Manager MIC (T) LTD**; Civil Appeal No. 113 of 2015 CA at Mwanza (unreported) and **Y.S. Chawalla & Co. LTD Vs Abbas Teherali**; Civil appeal No. 70 of 2017 CA at Tanga (unreported).

Dismissing the arguments on ground No. 3 that the appellate Tribunal misdirected himself to hold an order for re-trial of the case which was consented by the Respondent, the Advocate stated that the argument holds no water as courts/tribunal do not give orders on wishes of the parties but on requirement of law regardless who prayed for such order.

With regard to ground No. 4 and the last one, Mr. Gildon Mambo submitted that there is no way the DLHT could have upheld the decision of the Village Land Council as the law does not regard the dispute from the Village Land Council to Ward Tribunal as an appeal or revision rather, a mediation and if parties are not satisfied by the outcome they must refer the matter to Ward Tribunal as a fresh case. It was therefore a total misconception by the Appellant on the cited provisions of Land Act and Cap 216 which according to him provides for a Village Land Council to be among the courts with power to hear and determine land disputes. Advocate Gildon insisted that, the decision of the Village Land Council is not appealable to the Ward Tribunal as per section 9 of Cap. 216 RE: 2019.

The Respondent further elaborated that under Section 62 of the Village Land Act Cap. 114, The Village Land Council is a mediation court only and

any party who wishes to cease its findings should refer the matter to the Ward Tribunal.

In rejoinder, the Appellant submitted that even if it is assumed that the Respondent has already instituted a fresh case at the Ward Tribunal, still the order of the DLHT is in defect as it was not ordered to re-institute a case but rather to be tried *de novo*. He further contended that section 35 was misconceived as the tribunals has no power to order re-trial after quashing the proceedings. That for those Court of Appeal cases referred by the Respondent allowing to order re-trial after declaring a proceeding a nullity, were decided as a result of oversight or forgetfulness and therefore are bound to be distinguished.

**Having keenly considered the record and rival arguments of both parties, I now grasp that parties are at one on the following:**

1. That this matter/dispute was once determined by the Bugambakamoi Village Land Council as Land Case No.4/2015 and gave its decision.
2. That the decision of the Bugambakamoi Village Land Council was appealed to the Kitendaguro Ward Tribunal by the Respondent and won the appeal.
3. That the Appellant appealed to the DLHT where it declared the proceedings of the Ward Tribunal a nullity and quashed them and ordered retrial.
4. That it was a flaw by the Ward Tribunal to deal with the proceedings before it as an appeal instead of treating the same as a fresh case.

On the other hand, the rival arguments are as follows:

1. The Appellant submits that after declaring the proceedings of the Ward Tribunal a nullity and quash them, it was wrong for the DLHT to order for a retrial. However, the Respondent on his part submits that the DLHT was legally right to do so.
2. The Appellant argued that as the DLHT declared the Ward Tribunal proceedings a nullity and quashed them, he was further supposed to declare that the decision of the Village Land Council remains intact. However, the Respondent argues that the DLHT could not have ordered the proceedings of Village Land Council remain intact as its proceedings are not appealable to the Ward Tribunal.

The two disagreements above (No.1 &2) are issues which this court is now called upon to determine in this appeal.

The first issue is whether *it wasn't legally proper to order retrial after the DLHT declared the proceedings of the Ward Tribunal a nullity.*

There is a plethora of authorities including the referred ones by the Appellant on the concept of *de novo* but in our case, I will be guided by the land mark case of **Fatehali Manji versus Republic** (1966) EA 344 which was cited with approval by the Court of Appeal of Tanzania in the case of **William Stephen Vs Leah Julius**, Civil Appeal No.65 of 2013, CAT at Arusha (Unreported) wherein the principle underlying *de novo* order was explained as follows:

*"In general, a retrial may be ordered only when the original trial was illegal or defective .... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require..."*

Basing on the above principle, I am inclined to agree with the argument by the Appellant that, the facts of the matter doesn't call for the said

order. The reason is not farfetched: It is not in dispute that the DLHT has declared the Ward Tribunal proceedings a nullity, which was a proper finding following the Ward Tribunal to confer to itself an appellate jurisdiction it didn't have. Essentially a nullity means void. In other words, the null proceedings are as if they never existed or nothing existed. As such it is illogical to order re trial from void proceedings.

If the Kitendaguro Ward Tribunal had jurisdiction but it appears there to be a defect, irregularity or illegality in the trial, re trial order could have made sense.

As rightly submitted by the Respondent and correctly found by the DLHT, Section 9 of the Land Dispute Court Act, Cap 216 read together with section 62(1) of the Village Land Act, Cap 114 R.E 2019 does not give appellate jurisdiction to the Ward Tribunal over Village Land Council. However, upon perusal to the record of the Ward Tribunal, the court observed that the proceeding before it was treated as an appeal instead of a fresh case while the Ward Tribunal had no jurisdiction to conduct such an appeal. Therefore, ordering retrial or *de novo* is to condone and bless the act of determining an appeal afresh by Ward Tribunal over Village Land Council which is improper legally. In my view after the DLHT had nullified the Ward Tribunal proceedings, it was to order parties to file a fresh suit before a competent tribunal. In the circumstance therefore, the first issue is answered positively.

I now move to determine the second issue.

*The second issue is; Whether the DLHT was supposed to order the decision of the Village Land Council remain Intact.*

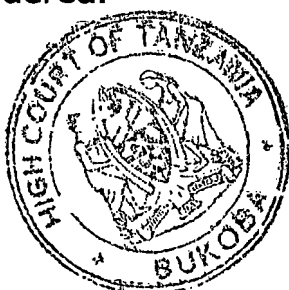
This issue should not detain me. As I have ruled out in issue no.1 that matters dealt by Village Land Council are not appealable to the Ward Tribunal. The Village Land Council plays only a role of mediation and reconciliation of parties but not adjudication. If parties are satisfied the dispute will end there. However, if a party is not satisfied, the law requires the unsatisfied party to take the matter to a competent tribunal. If the matter goes to the Ward Tribunal it will start afresh [See section 9(2) of Cap 216(Supra)]. The Village Land Council being the mediator, its record doesn't go to the adjudicating tribunals. Besides, it's decision has no binding effect where a party decides to refer/take the dispute to the Tribunal for adjudication [See section 62(1) of VLA Cap 114 R.E 2019 (supra)].

It goes therefore that there was no way the DLHT could have ordered the decision of the Village Land Council to remain intact and even if it would have so declared, such a decision could not be left to stand. The second issue is therefore answered negatively.

In the foregoing, the appeal is partly allowed with no order to cost.

The court further orders that any party dissatisfied with the Village Land Council's conclusion/findings is at liberty to refer the matter to the tribunal with competent jurisdiction to try it where the owner of the land in dispute shall be determined.

It is so ordered.



  
L.G. Kairo  
Judge

19/3/2021

R/A Explained.



  
L.G. Kairo

Judge

19/3/2021

Date: 19/3/2021

Coram: Before Hon. Kairo,J

Appellant: Present in person

Respondent: Advocate Gildon

B/C: Gosbert Rugaika

Court: The judgment is read over before the Appellant and  
Respondent in person and before Advocate Gildon representing the  
Respondent in today in chambers.



  
L.G. Kairo

Judge

19/3/2021