

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CONSOLIDATED LAND CASE APPEAL No. 48 & 55 of 2018

Arising from Application No. 12 of 2010 of the DLHT for Kagera at Bukoba)

1. BUKOBA MUNICIPAL

DIRECTOR.....1ST APPELLANT

2. ELITHER MUGYABUSO LULINDA.....2ND APPELLANT

VRS

GODWIN MUGANDA.....RESPONDENT

JUDGMENT

14.4.2021 & 4.6.2021

KAIRO, J

Being aggrieved by the judgment and decree of the District Land and Housing Tribunal for Kagera at Bukoba delivered on 29.08.2018, the 1st Appellant and 2nd Appellant preferred separate appeals which were later on consolidated as Land Appeal No.48 of 2018. The 2nd Appellant filed 5 grounds of appeal while the 1st Appellant has filed 9 grounds of appeal

including the additional grounds filed with the leave of the court. The 1st Appellant's grounds of appeal are as follows:

- i) the judgment is defective for omission to put on board the opinions of tribunal assessors.
- ii) the learned Chairman erred in law and facts to entertain the suit as it was hopelessly time barred.
- iii) the decree is not valid as it does not conform with judgment contrary to mandatory requirements of the law.
- iv) it was a gross error for trial Chairman to rely on weak evidence adduced by the first applicant witness (AW1) and failed to consider the strong evidence adduced by the first defense witness (DW1).
- v) the trial Chairman grossly erred in law and facts to rely on hearsay adduced by second applicant witness (AW2).
- vi) it was a gross error for the trial tribunal to admit a survey plan as an exhibit RW-1 during cross examination.
- vii) the Respondent (AW-1) (sic) grossly erred in law and fact for his omission to tender a statutory notice of intention to sue Local Government Urban Authority as an exhibit during trial.
- viii) the Respondent (sic) grossly erred in law and fact for suing Bukoba Municipal Director who is not a legal entity in law.



- ix) it was procedural irregularity for three tribunal chairmen to have presided over the matter in various times without assigning reason thereat.

The 2nd Appellant's grounds of appeal were:

- a) the judgment was delivered without assessor's opinion.
- b) the trial chairman erred by giving decision basing on evidence of the Respondent only and neglected the Appellant evidence regarding the ownership of suit land.
- c) It was an error for trial tribunal giving victory to the Respondent while the land in dispute was and still is in the ownership of the Appellant who holds Certificate of Occupancy.
- d) the trial tribunal erred in law to issue the order which he had no jurisdiction.
- e) The whole decision was against the evidence and law applicable.

During the oral hearing, the 1st and 2nd Appellants were represented by Solicitor Msosole and Advocate Zedi Ally respectively while Advocate Mathias Rweyemamu stood for the Respondent.

The 1st Appellant's counsel abandoned 4 (four) grounds and argued the remaining five grounds (1,4,7,8 and 9).

On the 1st ground, he submitted that on pg.9 of the typed judgment, the trial chairman conceded to have written judgment without opinions from

assessors. He clarified that section 23(1)(2) of Cap 216 R. E 2019 stipulates the composition of the Land Tribunal which is to sit with at least two assessors, the requirement which has not been complied with. Thus, the decision cannot in those circumstances stand. He cited the case of **Sikuzani Said Magambo and Another vrs Mohamed Roble**, Civil Appeal No.197 of 2018, CAT, at Dodoma (Unreported) where similar omission resulted to nullification of the entire proceeding and resultant decision.

As for the 4th ground, the 1st Appellant's counsel submitted that the trial chairman erred in law and fact to have relied on weak evidence of the Respondent and decide the case in his favor. He substantiated that the Respondent tendered a sale agreement as exhibit A1 upon which he claims to have bought the suit land and executed the sale document on 2/6/1991 from one **Kitabi Katabaro**. However, the seller was not called by the Respondent to verify that fact and neither was he included in the case at the trial court to assist the court in its determination. To bolster his argument, Mr Msosole referred the case of **Hemed Said vrs Mohamed Mbilu** (1984) TLR 113-116 which stated that the side with heavier evidence is the one to win the case. He concluded that the evidence by AW1 and AW2 weren't heavy enough and that the court was supposed to draw adverse inference for the Respondent's omission to bring the seller of the disputed land in court as witness.

In ground No.7, He submitted that section 106 (1) of the Local government Authorities Act, Cap 288 makes it a legal requirement for a party who



wishes to sue the Local government to issue a 30 days' notice before instituting a case and the said notice is supposed to be tendered as exhibit during trial. That the notice was not issued, tendered or even recorded in the proceedings. According to the 1st Appellant's counsel, the omission is fatal and incurable, the irregularity which has the effect of vitiating the entire proceedings and judgment.

As to the 8th ground, it was a flaw to sue "Bukoba Municipal Director" instead of "Bukoba Municipal Council" as the former is not a legal entity in law. That Bukoba Municipal Council is a legal entity established under section 14(1)(b) of Cap 288 which can sue and be sued in its own capacity. He insisted that suing the Director is improper as it was decided in the case of **Auson Nzingu vrs Director Bukoba Municipal Council and 3 others**; Land case No.3 of 2017 HCT at Bukoba (Unreported).

Regarding the 9th ground, three tribunal chairmen presided over the suit at various times without assigning reasons. He amplified that the case was heard by Hon. Chenya, Hon. Assey and finally Hon.Mogasa on diverse dates as per proceedings. However, no reasons have been assigned for the said shifting of hands which is contrary to Order XVIII Rule 10(1) of CPC Cap 33 R. E 2019. As such, the Chairman who eventually gave decision had no mandate. He referred this court to **Kinondoni Municipal Council vrs Q Consult Limited**, Civil App No.70/2016 CAT DSM (Unreported) to support his argument which case resolved that failure to give reasons for shifting hands among presiding chairpersons renders the proceedings and decision thereon a nullity.

Advocate Zedi Ally for the second Appellant argued the 2nd and 3rd grounds together and the remaining three were argued in seriatim.

Starting with the 1st ground which touched the issue of the trial chairman's failure to obtain opinion of assessor, he had similar stand with the 1st Appellant counsel but on top of that, he had novel observation to the effect that the reason given by the tribunal chairman that assessors left their tenure before they gave opinions were insufficient. Besides, assessors were changing through out the trial as per proceedings. The advocate went on that the lack of assessors' opinions in the record and the change of assessors are incurable irregularity which offends section 23(3) of Cap 216 thus, cannot be left to stand. He cited the cases of **Emmanuel Christopher Lukumai vs Juma Omari Mrisho**, Civil Appeal No.21/2013, CAT DSM(Unreported), **Ameir Mbarak and Another vs Edgar Kahwili**, Civil Appeal No.154 of 2015, CAT, at Iringa (Unreported) to back up his contention.

On grounds number 2 and 3, He submitted that the tribunal based on the Respondent's evidence only and failed to take into account that the 2nd Appellant had a Granted Right of Occupancy. That the 2nd Appellant was allocated the suit land after the former owner one Rosemary Visram's tittle was revoked (pg 82 of the proceedings). He added that by the year 1983, the planning and survey was done already to the land in dispute by the Bukoba Municipal Council. The Advocate further asserted that in the impugned decision at pg 10, 4th paragraph, the trial chairman suggested that though the Respondent had no certificate of tittle, he held the deemed



right of occupancy/customary right of occupancy which he argued to be against the decision in **Mwalimu Omary and Another vrs O.A. Bilal** (1990) TLR 10 which declared that the deemed right of occupancy and Granted Right of Occupancy cannot co -exist. He further stated that a recent Court of Appeal decision of **Amina Maulid Ambali and two others vrs Ramadhani Juma**, Civil Appeal No.35 of 2019, CAT, at Mwanza (Unreported) has stated that when two persons have competing interests on a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained.

The Advocate also stated that the 2nd Appellant considered and compensated the Respondent by allocating him plot No.84 Block EE Kashura (pg 83 of proceedings) and issued him with the Certificate of Occupancy. Thus, the DLHT didn't consider the evidence of the 2nd Appellant but solely relied on the sale agreement which was also objected for want of stamp duty. The stance of the law is to the effect that any document which requires stamp duty to be paid should not be admitted in evidence until stamp duty is paid. He cited the case of **Malmo Montagekonsult AB Tanzania Branch vrs Margaret Gama**, Civil Appeal No.86 of 2001, CAT at Dar (Unreported) to back up his argument wherein the court quoted section 5 of Stamp Duty Act No.20/1972 which replaced Stamp Duty Act No.189 on section 46(1).

With regards to the 4th ground, the Advocate stated that it was an error for tribunal chairman to issue an order which he had no jurisdiction. Clarifying

on the point, the Advocate stated that among the reliefs granted was revocation of the right of occupancy granted to the 2nd Appellant and granting of the same to the Respondent. In so doing, the DLHT usurped powers of the executive while it had no such jurisdiction; argued the Advocate. He referred me to **Mbeya Rukwa Auto parts and Transport Ltd vrs Jestra George** (2003) TLR 251 at pg 266 where the court of Appeal declared that the High Court Judge's order to revoke the Right of Occupancy and grant it to another person was an error which is fatal and the said order had no legal effect.

In the 5th ground and the last one, the Advocate concluded that for all of the the reasons advanced above, the decision of the DLHT was against the evidence on record and the law applicable. He finally prayed the appeal to be allowed with costs and that the judgment, decree and proceeding be set aside. Alternatively, the 2nd Appellant be declared by this court as the lawful owner of the suit.

In reply, Advocate Rweyemamu briefly submitted that he refutes all of the grounds raised by the 1st and 2nd Appellants. He further came up with an objection with regards to the additional grounds of appeal filed by the 1st Appellant, arguing that the same were filed out of time without seeking an extension of time. He clarified that initially the appeal was filed within time but the additional grounds were file beyond 45 days prescribed by section 41 of Cap 216 RE 2019. Advocate Rweyemamu argued that if the 1st Appellant thought his filed grounds were insufficient, he was supposed to amend the memorandum of appeal or apply for the extension of time. He



insisted that since the additional grounds were filed after two years lapse, the same are out of time and should suffer dismissal with costs.

In rejoinder, Advocate Msosole dismissed the argument by the Respondent's counsel for want of merit. He argued that the appeal was filed within 45 days on 2/10/2018 as required under section 41(1) of Cap 216 having five grounds of appeal. That the Respondent's counsel raised a preliminary objection which was overruled by Bahati J, on 11/8/2020. The Advocate for the 1st Appellant then prayed for leave to file additional grounds of appeal without receiving objection from the Respondent's advocate who was not in court without notice. The leave was granted. The 1st Appellant complied by filing additional grounds on 27/8/2020. He finally argued that the filed new grounds (grounds 6 to 9) of appeal is the continuation of the already filed appeal No.48/2020.

I have considered the submissions of all of the parties' advocates and the entire record of this case. I feel obliged to determine the grounds of appeal in seriatim as submitted by parties. But before I venture in the 1st and 2nd Appellants' grounds, I wish to react on the raised preliminary objection by the Respondent's counsel in his rebuttal submission whereby he argued that the additional grounds were time barred and should be dismissed. I wouldn't want to be detained by the said objection as it is a straight forward issue. It is imperative to note that on 24/3/2021, Advocate Rweyemamu had sent Advocate Evance Kaiza to hold his brief. The brief holder Advocate on reflection, decided to withdraw the said objection and thus the appeal was scheduled to proceed. Surprisingly Advocate



Rweyemamu when invited to respond to the grounds of appeal on the scheduled date, he again reverted to his objection which was withdrawn. To circumvent the improper procedure he used, he decided to start submitting on it when replying to the grounds of appeal. To say the least, I found the Respondent Counsel's modality to submit his objection to be an abuse of the court process. Nevertheless, the court will address it all the same.

Analyzing his arguments concerning his objection to the additional grounds of appeal, I found the same to have no merit as the additional grounds do not imply that a new case was filed independently from the existing one. Rather it is just a continuation of the existing case as rightly argued by Mr Msosole, and in the matter at hand, case No.48/2018. Besides leave to file the same was sought from the court and accordingly granted. Thus the objection in my view is a misconception and has no merit with much respect to Advocate Rweyemamu.

I now revert to the grounds of appeal to which Advocate Rweyemamu replied to all of them in a blanket way/ modality by simply refuting them. Starting with the first ground of appeal which was common to the Appellants counsels. In their separate submissions, they both faulted the trial tribunal to have composed a judgment which has no opinions of the assessors. The omission was conceded by the trial Chairman and gave the reason for the said situation to which I wish to quote for reference:



"I should make it clear that there are no Assessors' opinions in this case as when the case started, the members were Mr. Kawegere and M/s Nyakato but they vacated office before the case was set for judgment"

The fact that the trial tribunal judgment lacked assessor's opinion was not specifically disputed in the Respondent's counsel rebuttal argument rather the Respondent's counsel as earlier stated had evasive denial on all grounds without advancing reasons. But a thorough scrutiny of this court, reveals that assessors did not give their opinions to the chairman neither orally nor in writing, the fact which was also conceded by the presided Chairman. Though the Chairman tried to justify the omission, but with much respect, the reason for non-taking assessor's opinion is not convincing. In my opinion, I consider the omission to be a mere negligence on the party of the trial adjudicator. How and why did the assessors allowed to vacate the office without giving opinions if at all they sat in the trial and they are normally paid for the case they are involved to adjudicate is surprising. What effort were made to get them so as to get their opinions was not stated either. All those questions do not have answers from the trial chairman. Following that, I am with candid view that the stated reason was just a scape goat so as to justify the omission.

Legally, the effect of having a DLHT judgment which contains no assessor's opinion is as good as no judgment was delivered. In fact, the trial tribunal was not properly constituted in the said circumstances. Section 23(2) of Cap 216 talks on the requirement of the chairman to seat with at least two assessors and rule 19 of the Land Disputes Courts (The District Land and



Housing Tribunal) Regulations, 2003 makes the need of assessors to give opinions in writing mandatory.

Since there is no dispute on the omission and having found the reason for the said omission wanting, the begging question is whether the omission is curable or not. It is the stance of law that failure to comply with that requirement is the serious irregularity which causes miscarriage of justice and therefore vitiates the entire proceedings. See **Emmanuel Christopher Lukumai vrs Juma Omari Mrisho**,(Supra), **Ameir Mbarak and Another vrs Edgar Kahwili**(Supra) Both referred by the 2nd Appellant's counsel.

In **Ameir Mbarak and Another vrs Edgar Kahwili** (Supra), the court of appeal observed

"We are aware of the need to free tribunals such as Ward tribunal, from legal technicalities and allow them to administer substantive justice. Indeed, justice may be done in substance without impeding it with technicalities. However, where it is in the opinion of the court that the irregularities and or illegalities detected on the record lead to a miscarriage of justice and offend the very basis of justice, they cannot be ignored."

Basing on the cited cases on the issue, it goes without saying that failure to get assessor's opinions by the trial tribunal is an incurable irregularity which cannot be left to stand. I thus found the ground to have merit.

Since this ground alone suffices to dispose this appeal, I find no need to proceed determining other grounds. The appeal is therefore allowed.

The court further quash the trial tribunal's proceedings and set aside the orders therein. However, whoever wishes to commence a fresh suit, is at liberty to do so subject to laws of limitation. No cost is awarded as irregularity/ defect has been caused by the trial tribunal.

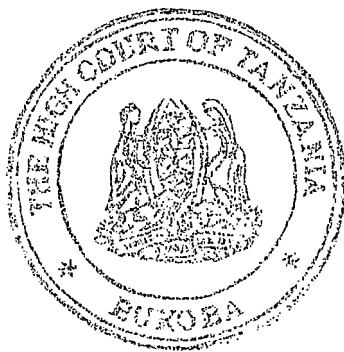
It is so ordered.





L.G. Kairo,
Judge

4/6/2021.

R/A Explained.




L.G. Kairo,
Judge

4/6/2021.

Date: 04/06/2021

Coram: Hon. J. M. Minde – DR

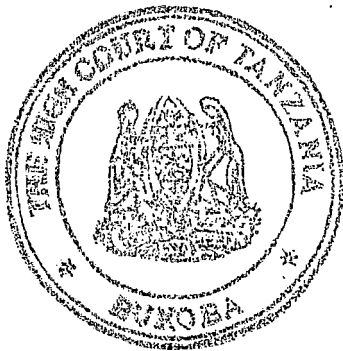
Appellant: Advocate Msoole

Respondent: Ally zaid

B/C: Lilian

Court:

This matter is scheduled for judgment. I deliver the judgment in the presence of parties and their advocates, this 4/6/2021.




Sgd: J. M. Minde – DR

04/06/2021