

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBIA DISTRICT REGISTRY

AT BUKOBIA

LAND APPEAL NO. 27 OF 2020

(Arising from Application No. 124 of 2013 of DLHT at Bukoba)

VEDASTO TIBYAMPASHA-----APPELLANT

VERSUS

THEOBARD BONEPHACE TIBAHIKAHO-----RESPONDENT

RULING

19/07/2021 & 20/07/2021

NGIGWANA, J.

In the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba, the Respondent Theobard Boniphace Tibahukaho (Administrator of the estate of the late Boniphace Kasenene Tibahikaho instituted a suit against the appellant Vedasto Tibyampansha claiming ownership of the land located at Rwambare sub-village Kayanga Ward, Karagwe District in Kagera Region. After full trial, the respondent was declared the lawful owner of the Suitland. The Appellant was ordered to vacate the suitland, but also to pay costs of the suit

Aggrieved, the Appellant preferred an appeal to this court against the said decision of the DLHT on four (4) grounds: -

1. That, the learned Chairman immensely erred in law and fact by holding that the Respondent had established the title over the suit land by relying on the tendered Exhibit A1 which on its face show another parcel of the land different from the land in contention as described in paragraph No. 3 of the respondent's application.
2. *That, the trial Tribunal Chairman misdirected himself by further grounding his decision on the Appellant's failure to bring the clan member of the family of Kebile Bwombeke while there was an ample testimonies adduced by the defense side including the documentary evidence to substantiate the ownership rights of the Suitland.*
3. *That, when delivering the judgment, the learned chairman failed to take into consideration the material facts observed and recorded during the visiting of the locus in quo.*
4. *That, the trial tribunal failed to discover the concocted evidence brought by the prosecution side that was unreliable and tainted with the discrepancies to discredit it.*

Wherefore prays for the following orders:-

1. *The reversal of the declaration order over the ownership of the suit land;*
 - (ii) *Costs of this appeal*
 - (iii) *Any other relief(s) of the court may deem got at suit to grant.*

The Respondent in his reply to petition of appeal disputed all the grounds and prayed that the appeal be dismissed with costs for want of merit.

When the matter was called up for hearing, the appellant was represented by Mr. Lameck John Erasto learned counsel, while the Respondent was represented by Mr. Joseph Bitakwate, learned counsel.

At the outset, before commencement of the hearing, Mr. Lameck learned counsel for the Appellant addressed the court that he had prepared the grounds of appeal basing on the copy of judgment only because the proceedings of the Tribunal were not availed to him on time, and that, having been availed with the same and having made a keen perusal on the proceedings he discovered three major irregularities committed by the trial Tribunal as follows;

- (i) There was change of Assessors in the course of hearing.
- (ii) Assessors did not play their role of asking questions to the witnesses who appeared before the tribunal, or gave their opinion as required by the law
- (ii) The DLHT on 14/06/2019 visited the locus in quo but the proceedings of the said date are missing in the court records.

The learned counsel further stated that the irregularities are sufficient to vitiate the proceedings of the DLHT. He lastly stated that, the only remedy under the circumstances is retrial, and as regards the question of costs, he prayed that since the irregularities were not caused by the parties to the case, let each party bear its own costs.

On his side, Mr. Joseph Bitakatwe, learned counsel for the respondent conceded to that position of law, and to the prayer that the irregularities were not caused by the parties but the Tribunal itself thus the respondent should not be condemned to pay costs.

Now, the main duty of the court is to determine whether the pointed out irregularities really existed, and if yes, whether they are capable of vitiating the proceedings of the trial Tribunal.

The composition of the District Land and Housing Tribunal is stated under section 23 (1) of the Land Disputes Courts Act, Cap 216 R: E 2019 which provides;

*"The District Land and Housing Tribunal established under section 22 **shall be composed of one Chairman and not less than two assessors**" (Emphasis supplied)*

It has to be noted that assessors are not the court decorations and they are not there by accident, and without them the tribunal cannot be said to have been duly constituted, and before reaching the judgment, assessors must give out their opinion.

Section 23 (2) of the Land Disputes Courts Act, Cap 216 R:E 2019 which provides;

*"The District Land and Housing Tribunal shall be constituted when held by a chairman and two assessors **who shall be required to give out their opinion before the Chairman reaches the judgment**" (Emphasis supplied)*

Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations; 2003 imposes a duty upon the Chairman/Chairperson to require every assessor present at the conclusion of the hearing, to give his/her opinion writing. The same provides;

*"Notwithstanding subsection (1) the Chairman **shall**, before making his judgment, **require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili**".*

In the case at hand, the proceedings revealed that on 12/08/2015 when the hearing commenced, assessors were Kawegere and Bwahama, on 23/05/2017 were Bwahama and Anna Marry and 23/01/2019 when the defense case commenced were Muyaga and Fortunatus. Finally, the Chairman concluded in the judgment that there is no opinion of the assessors as correctly pointed out by both counsels due to expiry of their tenure. Indeed, there was change of assessors, but also assessors gave no opinion. Under the circumstances the proceedings and the judgment thereof are a nullity.

Again, there is no doubt that, the Tribunal visited the Locus in quo on 14/06/2019 as reflected in the judgment, but no proceedings as to what transpired on the locus in quo. It is a rule of practice that the Tribunal has a duty to record what transpires at the locus in quo. The Court of Appeal of Tanzania has laid down the procedure which a court or a tribunal visiting the locus in quo has to observe. In the case of **Nizar M. H. Vs. Gulamali Fazal Janmohamed** [1980] TLR 29 the court held that;

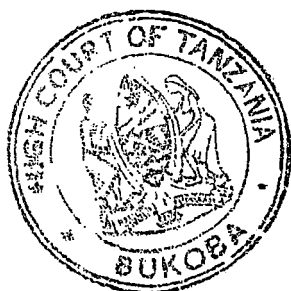
"A visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by the witnesses. We trust that this procedure will be adopted by the courts in future. "

The herein above decision shows that, a court or tribunal visiting the locus in quo has to make note or record, invite parties to call their witnesses who can give evidence in relation to location of the disputed land, the extent, identify the boundaries and physical features on the land. The witnesses may also point out objects and places referred to in evidence physically and in order to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries.

Using the record which were not made part and parcel of the court proceedings to form the base of the judgment renders the judgment a nullity on the obvious reason that the judgment will be hanging not based on facts.

In our case, the tribunal miserably failed to keep the necessary records when visited the locus in quo, that means, the judgment was based on the evidence which is not existing on the record therefore there is no way such a judgment can be allowed to stand.

In the event, I nullify the entire proceedings of the Trial Tribunal. Judgment and subsequent orders thereto are set aside. For the interest of justice, I order an expedited retrial before the District Land and Housing Tribunal for Kagera, at Bukoba presided over by another Chairman/Chairperson sitting with a new set of assessors. Each party shall bear its own costs.



E.L. NGIGWANA

JUDGE

20/07/2021

Date: 20/07/2021

Coram: Ngigwana, J.

Appellant: Absent

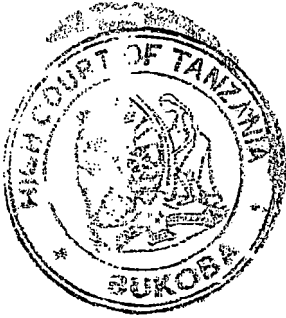
Respondent: Gildon Mambo holding brief for Mr. Joseph Bitakwate.


B/C: Gosbert Rugaika

Mr. Gildon Mambo:

My Lord, I am holding brief for Mr. Joseph Bitakwate, who is absent. The matter is coming for ruling. I am ready.

Ruling delivered this 20th day of July, 2021 in the presence of Mr. Gildon Mambo holding brief for Mr. Joseph Bitakwate learned advocate for the Respondent and in the absence of the Appellant and his advocate.




E.L. NGIGWANA

JUDGE

20/07/2021