

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOB A

LAND APPEAL NO. 21 OF 2021

(Originating from Land Appeal No. 47 of 2018 and Original Land Case No. 4 of 2018 of Rwamishenye Ward Tribunal)

FROLIAN KASHAIGIRI-----APPELLANT

VERSUS

ERASMUS RUTAYUGA-----RESPONDENT

RULING

20/07/2021 & 22/07/2021

NGIGWANA, J.

The Respondent Erasimus Rutayuga who was the Applicant at Rwamishenye Ward Tribunal unsuccessfully sued one Florian Kashaigiri for blocking the path commonly known as "eilembo" and crossing boundaries.

Aggrieved, he lodged an appeal to the District Land and Housing Tribunal for Kagera and Bukoba. The same was heard and decided in his favour.

The Appellant Florian Kashaigiri who was the Respondent in both lower tribunals was dissatisfied with the decision of the DLHT, hence filed an appeal to this court on following grounds:-

1. That, the District land and Housing Tribunal grossly erred in law and fact to quash orders of the Ward Tribunal while the District Land and Housing Tribunal was on the nullity proceedings which did not involve Tribunal Assessors in all stage;
2. That, the appellate Tribunal grossly erred in law and fact to hold that the Ward Tribunal reduced the measurement/size of eilembo while in fact the trial Ward Tribunal considered all the evidence tendered by the parties;
3. That, Hon. Chairman grossly erred in law and facts for ordering that the size of eilembo was four (4) meters while no such evidence was tendered before the trial Ward Tribunal to prove the same;
4. That, in totality the proceedings of the District Land and Housing Tribunal are nullity and tainted with illegalities.

Where prays that this appeal be allowed with costs, the judgment of the DLHT be quashed and set aside, the judgment and orders of the Ward Tribunal be restored.

The respondent in his reply to Petition of Appeal and urged for the dismissal of the appeal for want of merit

When the matter was called up for hearing, the appellant was represented by Ms. Gisera Maruka, learned counsel while the respondent was represented by Mr. Lameck John Erasto learned counsel.

Before commencing the hearing, Mr. Lameck addressed the court that he had gone through the proceedings of the DLHT and discovered the major

irregularity committed by the appellate Tribunal, that the DLHT on 07/06/2019 visited the locus in quo but the proceedings of the said date as to what transpired there are missing in the court record. The learned counsel further stated that the irregularity is sufficient to vitiate the proceedings of the DLHT. The learned counsel also conceded to the 1st ground of appeal that the DLHT did not involve the assessors in all stages of its proceedings. He added that under that situation, the only remedy is retrial. As regards the issue 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 her side, Ms. Gisera Maruka, learned counsel for the appellant conceded to that position of law, and to the prayer that the irregularities were not caused by the parties but the Tribunal itself thus it is proper that each party should bear its costs.

Now, the main duty of the court is to determine whether the pointed out irregularities 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)

Assessors are not the court ornaments 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 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 appeal before the DLHT was argued by way of written submissions. The record shows that the Scheduling order was set on 27/08/2018, and assessors were H. Muyaga and Fortunata Rutabanzibwa. The proceedings also revealed that on 07/06 2019 when the DLHT visited the locus in quo, the said Assessors were not involved. Nothing shows also that their opinions were read to the parties before

composition of the judgment, and that was wrong. See **Edina Adam Kikona versus Absolom Swebe (SHELI) Civil Appeal No. 286 of 2017 CAT** (unreported).

The fact the opinions of assessors were not read to the parties before the composition of the judgment and the fact that assessors were not involved when the DLHT visited the locus in quo renders the judgment a nullity.

Again, there is no doubt that, the Tribunal visited the Locus in quo on 07/06/2019 as reflected at page 14 of the typed proceedings but the proceedings as to what transpired on the locus in quo visit are missing. 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 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.

In our case, the tribunal miserably failed to keep the necessary records when visited the locus in quo, and that was wrong.

In the event, I nullify the entire proceedings and judgment of the appellate Tribunal. Subsequent orders thereto are set aside. For the interest of justice, I order that Land Appeal 47 of 2018 be heard a fresh 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

22/07/2021

Date: 22/7/2021

Coram: E. Ngigwana, J.

Appellant: Present & represented by Lameck John (adv)

Respondent: Absent

B/C: Gosbert Rugaika

Mr. Lameck John Erasto:

My Lord, this matter is coming for ruling. We are ready to receive it.

Ruling delivered this 22nd day of July 2021 in the presence of the Appellant and his Advocate Mr. Lameck John Erasto but in the absence of the Respondent.




E.L. Ngigwana

JUDGE

22/07/2021