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

LAND APPEAL NO. 45 OF 2019

(*Arising from the District Land and Housing Tribunal of Bukoba in Application No. 149 of 2013*)

ABDUL SHABANI.....APPELLANT

VERSUS

JONATHAN ARON RUGAIMUKAMU.....RESPONDENT

JUDGMENT

23rd July & 6th August 2021

Kilekamajenga, J.

The respondent, Jonathan Aron Lugaimukamu (as an administrator of the estate of the late Paschal Kishaka Baitwa) sued the appellant and Karonge Villange Council at the District Land and Housing Tribunal of Bukoba. The respondent alleged that to have been using the disputed land since 1970 after inheriting it from his uncle (Paschal Baitwa) through a will. Conversely, the appellant alleged that Karonge Village Council allocated the land to him in 2000. From that time, the appellant planted trees and has been using the same land. At the end of the trial, the District Land and Housing Tribunal was confident that the respondent acquired the land from his uncle through a will. As a result, the respondent won the case. The appellant was unhappy with the decision of the trial tribunal and decided to approach this Court for further justice. The appellant's petition of appeal contained nine grounds of appeal coached thus:

1. *That the successor Chairman continued to hear the suit without assigning reasons thereof thus lacking jurisdiction.*

2. *That, the respondent did not describe the location of the suit land from the tendered 'will' but was supplemented by oral evidence which is contrary to the law hence the trial Court had no jurisdiction to determine the incompetent suit.*

3. *That the respondent, as a claimant, did not prove his good title, but remained as a story for want of calling a person who witnesses the execution of the said 'will'.*

4. *That the respondent as the administrator of the estate late Paschal Kishaka Bitaitwa, has not yet distributed the said estate to himself for want of account presented in Court which appointed him to be the administrator of the estate.*

5. *That the appellant was allocated the land at Nyakashanga area within Lukindo hamlet in Karonge and not the land purported to the mention in the said 'will' of the respondent which is not property described.*

6. *That the trial chairman did not assess the evidence of the respondent, but was biased and one sided against the appellant's evidence in respect of how he acquired the suit land.*

7. *That the trial Court erred in law for not considering the fact that the village council had power to allocate the suit land at the material period.*

8. *That the suit was decided against the weight of evidence.*

9. *That the respondent has benefited the fruits of the appellant without compensation him.*

The Court invited the parties to argue the appeal; the appellant had already died and Murshid Mutalemwa Mustapha was appointed his administrator of estates. The Court granted an order for the administrator to take over the case. Despite his presence in Court, he was also covered with the legal representation from the learned advocate, Mr. Alli Chamani. His adverse party, the respondent, was present in person and represented by the learned advocate, Mr. Aron Kabunga.

When taking the floor for discussion, the counsel for the appellant argued that it was a misdirection to decide that the village council had no mandate to allocate the land to the appellant. The village council is vested with power to distribute land under section 15(1) and 16 of the Village Land Act, Cap. 114 RE 2002. Also, the will alleged to give the land to respondent did not describe the boundaries of the land. The documents must speak by themselves as it was stated in the case of **Tanzania Fish Processors LTD v. Christopher Luhanyula, Civil Appeal No. 21 of 2010**, CAT at Mwanza (unreported). Furthermore, the said will gave

the land at Lukindo different from the disputed land; it was not executed nor validated. In cementing his argument, the counsel invited the Court to consider the case of **Mark Alexander Getje and others v. Brigitte Gietje Defloor, Civil Revision No. 3 of 2011**, CAT at Dar es salaam (unreported). In addition, the respondent alleged that he was appointed by Katoro Primary Court in 2013 to administer the estates of the deceased who died in 1970. Despite lack of proof on that appointment, the respondent alleged that he got the land in 1970. These two pieces of evidence are contradictory.

Moreover, this matter was time-barred because the recovery of land was done after the expiry of 12 years. This point of law may be raised at any time as it was stated in the case of **B.9532 CPL Edward Malima v. The Republic, Criminal Appeal No. 15 of 1989**, CAT at Mwanza (unreported). To resolve the issue of time limit, the counsel urged the Court to consider **section 9 of the Law of Limitation Act, Cap. 89 RE 2019**; the cases of **Yusuf Same and another v. Hadija Yusufu [1996] TLR 347** and **Haji Shomari v. Zainabu Rajabu, Civil Appeal NO. 91 of 2001**, CAT at Dar es salaam (unreported). The counsel finally urged the Court to grant the prayers stated in the memorandum of appeal.

When invited for the response, the counsel for the respondent informed the Court that the issue of time limitation was not among the grounds of appeal and was not raised during the trial. He blamed the appellant for failing to adhere to

the requirements of **Order XXXIX, Rule 2 of the Civil Procedure Code, Cap. 33 RE 2019** in raising the new ground of appeal. Mr. Kabunga further argued that the respondent owned the land since 1970 while the appellant was allocated the land in 2000 and the cause of action arose in 2000. Also, the only person who testified on the allocation of land to the appellant was the Village Executive Officer, Mr. Bruno Kawa who did not participate in the allocation of the land. The exhibits tendered by Bruno did not show the size of the land allocated to the appellant. On the issue of the will, Mr. Kabunga blamed the counsel for the appellant for trying to challenge the same at this stage. The will was admitted during the trial without any objection; it was therefore inappropriate to challenge the will at this stage. The counsel invited the Court to dismiss the appeal with costs.

When rejoining, Mr. Chamani was of the view that the issue of time limitation did not fall under the procedure stated under **Order XXXIX, Rule 2 of the Civil Procedure Code**. Also, the admissibility of the will is different from establishing its validity; in this case, the District Land and Housing Tribunal had no power to determine the validity of the will.

I have considered the competing arguments from the parties which now invite me to address the merits of the appeal. However, I wish to address some pertinent issues blatant in this case. **First**, after going through the proceedings of the District Land and Housing Tribunal, it is evident that the case was heard

by three different chairmen and there are no reasons ascribed for the transfer of the file from one chairman to the other. For instance, the tribunal chairman called Chenya recorded the evidence of Jonathan and the file was transferred to chairman Assey who also recorded the evidence of Clemence Mulokozi. The defence was heard by chairman Mogasa who went further composing the judgment. Apart from the fact that failure to ascribe reasons for the taking over the case from one chairman to the other might have faulted the proceedings and decision of the trial tribunal, but also violated the principles of fair hearing. The trial tribunal enjoys the right to see the demeanour of the witnesses and assess whether or not the witnesses are credible, though change of chairman may be inevitable for some reasons, such change must be accounted for the purposes of integrity of the records of the court as it was stated in the case of **Mariam Samburo v. Masoud Mohamed Joshi and two others, Civil Appeal No. 109 of 2016** (unreported) thus:

> *'In the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reasons for the succession advanced on record of appeal. We think that in the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity.'*

The above principle of the law squarely applies to the District Land and Housing Tribunal hence failure to assign reasons rendered the proceedings a nullity.

Second, according to the records available in the file, the respondent alleged that the disputed land was bequeathed to him through a will by his uncle in 1970. He continued to occupy the land until the dispute arose in 2013. However, as submitted by the counsel for the appellant, the alleged will was not tested in any court to ascertain its validity. It seems that the respondent applied for the administration of estate of his uncle in 2013 and immediately filed this case. However, there is dearth of evidence on his appointment because such information are lacking in the file.

Third, the appellant's evidence points towards the fact that the disputed land was just an empty land within the village. The appellant applied for it and was granted in 2000; he immediately planted trees which are now due for harvest. The respondent being a resident of the same village could have immediately objected the allocation if, at all, the land was bequeathed to him by his uncle in 1970. He could not have waited for more than 12 years before taking action. Before this court, the respondent, in person, admitted that the trees on the disputed land were planted by the appellant. It is therefore questionable why he did not take any action when the appellant took steps to plant the trees in the land in 2000.

Fourth, though the issue of time limit arose at an appellate stage, as rightly argued by the counsel for the appellant that, this is a point of law which may be raised at any stage as it was stated in the case of **B.9532 CPL Edward Malima v. The Republic, Criminal Appeal No. 15 of 1989** thus:

> *'...we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of the matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of the parties.'*

It is therefore evident that, the time from 2000 when the appellant was allocated the land and started planting trees to the year 2013 when the respondent applied for the administration of the estate and filed this case, there was a lapse of 12 years; this period bars the respondent from recovering the land as per the Law of Limitation Act, Cap. 89 RE 2019.

Fifth, in terms of evidence, this being the first appellate court, it has an obligation to evaluate the evidence adduced during the trial. As already stated above, during the trial, the respondent testified that his uncle who died in 1970 left a will which named him (respondent) as one of the heirs. His uncle bequeathed the land to him which he continued to own it from 1970 to 2008 when the same was encroached by the appellant. The respondent tendered the will which was admitted without objection but not read before the tribunal which suffer the consequences of being expunged from the proceedings of the trial

tribunal. In the case of **Robert P. Mayunga and David Charles Ndaki V. R; Criminal Appeal No. 514 of 2016**, CAT at Tabora where the Court of Appeal of Tanzania stated that:-

> *"...documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of proceedings."*

The court went further stating that:-

> *"In essence the requirement to have the document read out to the appellant after it is cleared for admission is meant to let the appellant aware of what was written in the document so that he can properly exercise his right to cross-examine the witness effectively.*

Now, based on the above principle of the law, I hereby expunge the will from the proceedings of the trial tribunal and remain with the oral testimony of the appellant. The respondent's evidence was supported with Clemence Mulokozi who testified that he remembered the reading of the will back in 1970 that gave the land to the respondent. Nevertheless, Clemence Mulokozi does not remember anything whether the respondent ever used that land from 1970. Just on the mere balance of probability, the respondent failed to prove his case to the required standard. **See, section 3(2) (b) of the Evidence Act, Cap. 6 RE 2019**.

Sixth, the perusal of the trial tribunal proceedings do not show whether the assessors were afforded the opportunity to opine on the case in the presence of the parties. It is an established law under **Section 23 (1) (2) of the Land**

Disputes Courts Act for the assessors to give their opinions before the chairman composes the judgment. For clarity, I wish to reproduce the relevant section thus:

> *"23 (1) The District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors and;*
>
> *"(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment"*

The above provision of the law is further amplified by Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) thus:

> *"19 (2) Notwithstanding sub-regulation (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".*

It is therefore evident that, every assessor must give his/her opinion in writing and to ensure fair trial of the case, such opinion must be read before the tribunal in the presence of the parties before the case is scheduled for judgment. Apart from reading the opinion in the presence of the parties, all these processes must be reflected on the proceedings of the tribunal than merely seeing such opinion acknowledged by the chairman in the judgment. For instance, the same stance

was taken by the Court of Appeal of Tanzania in the case of **Sikuzani Saidi Magambo** (supra) thus:

> *"It is also an record that, though, the opinion of the assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that,* ***since the record of the tribunal*** *does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed".* (emphasis added).

Also, in the case of **Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 of 2017**, the Court of Appeal of Tanzania observed that:

> *'...the involvement of assessors is crucial in the adjudication of land disputes because apart from constitution the tribunal, it embraces giving their opinions before the determination of the dispute. As such,* ***their opinion must be on record****.' (Emphasis added).*

The requirement of reading the assessors' opinion in the presence of the parties was stressed further by the Court of Appeal in the case of **Edina Adam Kibona** (*supra*) thus:

> *"The opinion must be in the record and must be read to the parties before the judgment is composed".*

In the instant case, the record shows that, until the defence closed its case, the tribunal was composed of the chairman and two assessors. The defence case

was closed and the case was immediately scheduled for judgment without inviting the assessors for opinions. This was a fatal irregularity and vitiated the proceedings of the trial tribunal. Based on the reasons stated above, I hereby allow the appeal. I quash the proceedings and decision thereof of the trial tribunal. I am hesitant to order retrial of the case because the respondent's case was weak or rather vexatious. No order as to costs. It is so ordered.

DATED at **BUKOBA** this 06th day of August, 2021.

Ntemi N. Kilekamajenga.
JUDGE
06/08/2021

Court:

Judgement delivered this 06th August 2021 in the presence of the respondent and in absence of the appellant. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga.
JUDGE
06/08/2021