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

MISC. LAND APPEAL No. 38 OF 2019

(Arising from Land Appeal No. 10/2017 at Bukoba District Land and Housing Tribunal Originating at Ishozi Ward Tribunal in Civil Case No. 08/2017)

SOSTENES KAIZA .....APPELLANT

VERSUS

NESTORY KAIZA.....RESPONDENT

JUDGMENT

22nd July & 06th August 2021

Kilekamajenga, J.

The appellant appeared before this Court challenging the decision of the District Land and Housing Tribunal of Bukoba. He was armed with three grounds of appeal thus:

1. *That the Tribunal Chairman failed to properly interpret prior ruling/judgments referred in this case by the parties, hence came to the unfair judgment.*
2. *That the Tribunal Chairman erred I law to rule in favour of the Respondent while the Appellant has been occupying the land in dispute for over 28 years uninterrupted.*
3. *That the Tribunal Chairman erred in law when he overlooked the issue of probate in this dispute, as it was testified that the fore owner of the land in dispute was the late Kaiza Kahabuka.*

When the appeal was due for hearing, the parties appeared in person and without representation. However, at that time of hearing this appeal, the respondent had died hence Mr. Dionizi Mwijage was appointed to administer his estate. Therefore, this Court ordered the substitution of the respondent with Dionizi Mwijage (as administrator of the estate of the late Nestory Kaiza).

When the appellant was invited for submission, being a lay person, he briefly narrated the background of the dispute. He submitted that, the dispute started at Ishozi Ward Tribunal in 2017 which decided in favour of the respondent. The appellant further claimed to own the land since 1996. He further confirmed that he has been in perennial disputes with the father of the respondent. He finally urged the Court to declare him the lawful owner of the disputed land.

The respondent, on the other hand, submitted that, the appellant owned the land since 1992. From that time, he has been raising objection through disputes over the same land. But all that time, the appellant has been a loser. In 2017, the respondent sued the appellant at the Ward Tribunal. The respondent won the case but the appellant appealed to the DLHT where he also lost the case hence this appeal. The respondent insisted that, according to the will, the land belongs to the respondent. He urged the Court to declare the land as the property of the respondent.

In the rejoinder, the appellant queried why the respondent failed to claim the land since 1990s; he further confirmed that there have been frequent cases over the same piece of land. He insisted that he has been in occupation of the land for more than 20 years.

Before I dispose this appeal, it is apposite if I take a brief background of the dispute in question. The Primary Court of Gera had declared a will valid but the appellant approached the same Primary Court for the second time which nullified the same will. Therefore, there were two conflicting decisions of the Primary Court. Thereafter, an appeal was preferred to the District Court challenging the decision of the primary Court. The District Court declared the will to be valid. Thereafter, there was no appeal.

Therefore, the appellant was supposed to vacate from the disputed land but he never did so. In 2017, the respondent, while trying to evict the appellant from the land, he filed a suit against the appellant at the Ward tribunal of Ishozi. At this point, the matter shifted from being a probate and administration issue to a land dispute. In my view, this was a wrong approach on the respondent because he was supposed to seek an eviction order against the appellant. However, the case filed at the Ward Tribunal ended in favour of the respondent. The appellant appealed to the District Land and Housing Tribunal where he also lost the case, hence this appeal.

Generally, there is no issue of ownership of land because the matter originated from a will which was determined by the District Court in 2005 and the appellant never appealed. The appellant, being a mere trespasser has remained in the land for over 20 years. He is actually using the Court processes as a shield to evade eviction. The appropriate step for now is for the respondent to seek an order to evict the appellant from the land. Being a trespasser for over 20 years does not give him justification to be the lawful owner because the respondent has been trying to evict the appellant who rushes to Court while enjoying the fruits of the land he does not own.

Apart from the above point, I have also perused the records of the DLHT and it is evident that the assessors were not invited to give the opinion before the chairman composed the judgment. It is the requirement of the law, under **Section 23 (1) (2) of the Land Disputes Courts Act**, the assessors must give their opinions before the chairman composes the judgment. For clarity, I wish to reproduce the 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) 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. 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".*

Based on that illegality, I hereby quash the proceedings and decision of the District Land and Housing Tribunal and uphold the decision of the Ward Tribunal. Based on the decision of the Ward Tribunal, I further order the appellant who has been using the Court process to evade eviction to be evicted from the land as soon as possible. It is so ordered.

Dated at Bukoba this 6th August, 2021.

Ntemi N. Kilekamajenga
Judge
06th August 2021