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

LAND CASE APPEAL No. 19 OF 2020
(*Arising from DLHT at Bukoba Land Application No. 52/2019*)

JOSEPH BITAKWATE.....APPELLANT
VERSUS
THEMISTOCLES FELCIAN.....1ST RESPONDENT
DEUS NSIMEKI.....2ND RESPONDENT

JUDGMENT

26th July & 6th August 2021

Kilekamajenga, J.

In this case, it is alleged that the appellant bought a piece of land from William Rwegoshora Protace Bashange in 2007. He planted trees on the land. It was further alleged that William Rwegoshora Protace Bashange was the son of Protace Bashange who was married to Valentina. When Protace Bashange died in 1967, his wife Valentina shifted to Muleba. It was alleged that, Valentina sold the disputed land to the 2nd respondent in 2011. In other words, while the appellant alleged to have bought the land from the son of Protace Bashange (William Rwegoshora Protace Bashange), the 2nd respondent bought the same land from the wife of Protace Bashange (Valentina). However, William Rwegoshora Protace Bashange was the step son of Valentina.

In 2019, the appellant alleged that the respondents encroached into his land and cut down 150 trees valued at Tshs. 15,000,000/=. As a result, the appellant sued

the respondents at the District Land and Housing Tribunal of Bukoba. The trial tribunal finally decided in favour of the respondents. The appellant was aggrieved with the decision of the trial tribunal hence approached this Honourable Court for justice. He advanced five grounds of appeal coached as follows:

1. *That, the District Land and Housing Tribunal for Kagera at Bukoba erred in law in holding for the respondents in an irregular trial tainted with illegalities and occasioning miscarriage of justice to the appellant.*
2. *That the trial chairman erred in law in failing to record the evidence produced by the parties leading to wrong decision.*
3. *That, the District Land and Housing Tribunal for Kagera erred in la and fact in holding for the respondents in disregard of the evidence produced by the appellant which proved the appellant's title over the disputed plot of land o the standard required.*
4. *That, the District Land and Housing Tribunal erred in la and fact in holding for the respondents basing on a forged document which was manufactured at the suit was pending before the Tribunal purposely to suit the facts of the case contrary to the law.*
5. *That, the trial chairman erred in law and fact in giving a biased and contradictory judgment which is not supported by evidence on record.*

The Court finally invited the parties to argue the appeal; the appellant appeared in person and the respondents were absent but enjoyed the legal services of the learned advocate, Mr. Samweli Angelo. The counsel for the respondents prayed to dispose of the appeal by way of written submissions and the prayer was

granted. After complying with the scheduling order, the matter was fixed for judgment. In the written submissions, the appellant argued that, the trial tribunal failed to adhere to the guidelines for visiting the locus in quo as laid down in the case of **Sikuzani Said Magambo and Kirioni Richard v. Mohamed Roble, Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported).** Furthermore, during the visit to the *locus in quo*, only one assessor was involved contrary to **Section 23 (2) of the Land Disputes Courts Act, Cap. 216 RE 2019**. Also, after the visit to the land, the trial tribunal did not re-assemble to read to the parties and witnesses the notes taken during the visit. Therefore, the parties and witnesses were not given the chance to give evidence on the facts observed during the visit. Based on these irregularities, the proceedings of the trial tribunal are a nullity.

The appellant pointed another irregularity thus: Though only one assessor visited the *locus in quo*, the judgment of the tribunal seems to contain opinion of two assessors. Furthermore, the assessors were not afforded the opportunity to read their opinions in the presence of the parties before the chairman composed the judgment. The appellant invited the Court to read the case of **Edina Adam Kibona. V. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017, CAT at Mbeya (unreported).** The appellant insisted that the above irregularities are fatal and caused injustice rendering the whole proceedings of the trial tribunal a

nullity. The appellant argued further that the trial tribunal relied on a forged document that was authored before the trial commenced.

In response, the counsel for the respondent submitted that, the law allows the tribunal to proceed for hearing with one assessor. Hence, the absence of one assessor during the visit to the *locus in quo* did not vitiate the proceedings as per **Section 23 (3) of the Land Disputes Courts Act, Cap. 216 RE 2019**. Mr. Angelo further argued that the guidelines for visiting the locus in quo were complied. Also, the assessors' opinions were read in the presence of the parties and the case was thereafter adjourned for judgment. The counsel was of the view that the appellant failed to prove his case. He thereafter analysed the appellant's evidence vis-à-vis the evidence of the respondent. He objected the allegation that the tribunal chairman relied on a forged document to form the decision. The counsel invited the Court to dismiss the appeal with costs.

When rejoining, the appellant insisted that, the assessor who disappeared was not supposed to reappear at the later stage. He further averred that the trial tribunal did not re-assemble after the visit to the *locus in quo* and the opinions of assessors were not read to the parties.

In this appeal, I have considered the rival arguments from both sides and it is apposite to address the pertinent issues involved. There are two pertinent points, if analysed, may dispose of this appeal. First, I wish to start with the issue of

whether the assessors' opinions were read in the presence of the parties. It is the requirement of the law, under **Section 23 (1) (2) of the Land Disputes Courts Act** that, 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) Of the Land Disputes Courts (The District Land and Housing Tribunal) of 2003 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 perusal of the proceedings reveals that, on 13th January 2020, the matter was supposed to come for assessors' opinion on 16th January, 2020. The case came on 16th January 2020, the chairman recorded that:

Date: *16/01/2020*

Coram: *R. Mtei – Chairman*

T/c: *Mizambwa*

Members: *H. Muyaga*

Applicant: *Present*

Respondents: *1st present*

2nd Absent

Tribunal: The matter is coming for assessor's opinion

1st respondent: I am ready to receive it.

Sgd: R. Mtei
Chairman
16.01.2020

Order: Judgment on 02.03.2020

Sgd: R. Mtei
Chairman
16.01.2020

As indicated above, the proceedings does not show whether such opinion were read to the parties. Even the opinion of assessor does not feature in the proceedings though the tribunal chairman seemed to consider the opinion of two

assessors in the judgment. It is actually a strange thing to note that the chairman referred to opinion of two assessors while on 16/01/2020 only one assessor (Muyaga) was present to give the opinion. I take the discretion to reproduce part of the trial judgment where the chairman stated that:

> "*The **assessors** who sat with me Mr. H. Muyaga and F. Rutabanzibwa had an opinion that...*" (Emphasis added).

It is therefore not clear when did the other assessor (F. Rutabanzibwa) give his opinion because only one assessor H. Muyaga was present on the date when the tribunal alleged the assessors read their opinion in the presence of the parties.

Furthermore, it seems, only the 1st respondent was recorded to be ready to receive the opinion of the assessor. While the applicant (appellant) was also present, but he was not asked whether he was ready to receive the assessors' opinion. I find these anomalies to be the major irregularities in the proceedings of the trial tribunal. This ground alone goes to the root of the case because it is as good as the case was heard without assessors something which violates **Section 23 of the land Disputes Courts Act, Cap. 216 RE 2019**. The irregularity vitiates the proceedings of the trial tribunal and I do not see the need to consider the other grounds of appeal. I hereby allow the appeal and quash the proceedings of the trial tribunal and the decision thereof. The party with interest

in this case may institute a fresh suit at the competent forum. The parties should bear their own costs. It is so ordered.

Ntemi N. Kilekamajenga
Judge
06th August 2021

Court:

Judgment delivered this 06th August 2021 in the presence of the appellant present in person. The respondents were however absent. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga
Judge
06th August 2021