

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

**MISC. LAND APPEAL NO. 83 OF 2020**

*(Originating from the District Land and Housing Tribunal of Bukoba in appeal No. 152/2016 and also arising from Ibwera Ward Tribunal in Land Application No. 1 of 2016)*

**ALOIS BENEDICTO RUTAIHWA.....APPELLANT**

***VERSUS***

**JOACHIM THADEO.....1<sup>ST</sup> RESPONDENT**  
**JULIANA JOACHIM.....2<sup>ND</sup> RESPONDENT**  
**EDITA JOACHIM THADEO.....3<sup>RD</sup> RESPONDENT**  
**ARISTIDES JOACHIM THADEO.....4<sup>TH</sup> RESPONDENT**  
**FORTUNATUS JOACHIM THADEO.....5<sup>TH</sup> RESPONDENT**  
**PRICIUS JOACHIM THADEO.....6<sup>TH</sup> RESPONDENT**  
**VEDASTINA JOACHIM THADEO.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

*28<sup>th</sup> May & 11<sup>th</sup> June 2021*

***Kilekamajenga, J.***

The appellant sued the respondents at Ibwera Ward Tribunal claiming for a tradition path or access, called Eilembo, to the appellant father's house called Benedictor Joseph Rutaihwa. After hearing the parties and their witnesses, the Ward Tribunal was convinced that the traditional path was not blocked nor enterfered by the respondent. The Ward Tribunal finally decided in favour of the respondents. The appellant appealed to the District Court and Housing Tribunal for Kagera at Bukoba seeking an order setting aside the decision of the Ward Tribunal. The appellate tribunal also decided in favour of the respondents. Still aggrieved, the appellant approached this Honourable Court of Justice challenging



the decision of the District Land and Housing Tribunal. The appellant coined four grounds of appeal thus:

- 1. That, the appellate tribunal grossly misdirected itself by the failure to reverse the Ibwera Ward Tribunal decision upon a consistent analysis of the totality of the evidence tendered by the appellant;*
- 2. That, the appellate tribunal grossly erred in law and fact for not quashing the findings of the Ibwera Ward Tribunal upon the respondents' acknowledgment of the historical existence of the traditional access to the appellant's homestead (Eilembo) on the shared border between the appellant's side and the respondent's side;*
- 3. That, the appellate tribunal grossly erred in law and fact for upholding the Ibwera Ward Tribunal's findings made during the visit to the locus in quo without taking into full account of the evidence tendered by the appellant;*
- 4. That, the judgement and decree of the appellant tribunal are contradictory, that is, in the judgment, the appellate tribunal dismissed the appeal while in the decree, the appellate tribunal has allowed the appeal.*

When the appeal was due for hearing, the appellant appeared in person and enjoyed the legal services of the senior learned advocate, Mr. Bernard Mbakileki. The respondents appeared in person and without representation save the first and second respondents who were absent. The Court ordered the appeal to proceed in the absence of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The counsel for the appellant informed the court about the error committed by the appellate tribunal which failed to set aside the decision of Ibwera Ward Tribunal. The appellant

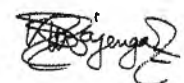
tribunal failed to appreciate the appellant's evidence adduced before the Ward Tribunal which confirmed the existence of the traditional access to the appellant's father homestead. He further submitted that the appellant's father died in 1978 and the traditional access was existence since 1930s. The Ward Tribunal failed to appreciate this evidence which was heavier than that of the respondents. He invited the court to consider the case of Hemed Said v. Mohamed Mbiru [1984] TLR 130.

On the second ground of appeal, the counsel submitted that it was an error for the appellate tribunal to uphold the decision of the Ward Tribunal. Even the appellate tribunal hinted that the traditional access was untraceable. Mr. Mbakileki invited the court to take judicial notice in the case No. 151 of 1946 which was between Shuzari Yohana and Benedicto Joseph Rutaihwa who was the appellant's father. The same case decided on the traditional access. To bolster his argument, the counsel referred the court to the case of Alex Senkoro and others v. Eliambuya Lyimo (Administrator of estates of Fredrick Lyimo) Civil Appeal No. 16 of 2017 (unreported) where the Court of Appeal of Tanzania decided that where a passage or road has been used for more than 20 years, the same cannot be blocked. For that reason therefore, the right to traditional access could not be interfered by the respondents. On the third ground, the counsel further reiterated his dissatisfaction on the Ward Tribunal's failure to consider the appellant's evidence. When the trial tribunal visited the locus in quo, the appellant showed

the traditional access (Eilembo) but the tribunal was of the view that the same was not traceable. On the fourth ground, Mr. Mbakileki argued that the decision of the appellate tribunal was contradictory. While the judgment seemed to dismiss the appeal, the decree allowed the appeal. Therefore, the appellant was not in a position to know the correct decision of the appellate tribunal. He further informed the court that the Ward Tribunal was not full consisted. He finally urged the Court to allow the appeal, set aside the decision of the appellate tribunal and the respondents should be declared trespassers in the appellant's traditional access. He also prayed for the court to set aside the order of costs against the appellant.

In response, the 3<sup>rd</sup> respondent informed the court that the appellant met the 3<sup>rd</sup> respondent's mother and wanted to buy portion of the land something which was objected. Before the Ward Tribunal one of the respondent's witness was the appellant's sister called Elizabeth Rutaihwa who testified that the respondents did not encroach into the traditional path (Eilembo). He invited the court to re-evaluate the evidence adduced before the Ward Tribunal.

The 5<sup>th</sup> respondent submitted that ever since the appellant's father died in 1978 the appellant failed to claim for the path. If the traditional path was closed villagers could have claimed it. Even the appellant's brother never claimed it. The



4<sup>th</sup> and 6<sup>th</sup> respondents supported the submission of other respondents. The 7<sup>th</sup> respondent briefly submitted that the appellant claimed the land that does not belong to him (appellant).

When rejoining, the counsel for the appellant had nothing substantial argument than insisting the submission in chief.


In determining the instant appeal, I have considered the grounds of appeal advanced by the appellant which revolve around two issues. **First**, whether the appellant proved his case at the Ward Tribunal. The **second** issue is whether the Ward Tribunal was fully constituted when determining this case. In answering the first issue, it is important to note that civil cases are always proved on the standard of balance of probability. See, **Section 3(2) of the evidence Act, Cap. 6 RE 2019**. It is also an established principle of the law that a person with heavier evidence has a good chance of winning the case. In the case of.....

On this issue, I was obliged to read and assess the evidence adduced before the Ward Tribunal. Despite an allegation the appellant's allegation that the tradition path was blocked, most witnesses testified that the same passage was not interfered by the respondents. For instance, Modes Rugakingira testified that, him being a Village Executive Officer witnesses the same area alleged to be the

traditional access and that there was no any changes as during the time of the appellant's father. By weighing the evidence between that of the appellant and that of the respondent, there stronger evidence suggests that the alleged traditional access to the appellant's father was not interfered nor blocked. The Ward Tribunal took steps to visit the locus in quo and observed the following:

*'Baraza lilitembelea eneo lenye mgogoro mnamo tarehe 01/06/2016 na kuona haya yafuatayo: Baraza halikuona dalili yoyote ya (ilembo) hivyo kama lilikuwepo liliziba lenyewe kwa kutotumika kwa muda mrefu kwani hapakuwepo dalili kuwa limezibwa kwa makusudi kwani limeziba kuanzia katika maeneo ya shamba la mlalamikaji. Eneo linalodaiwa kuvamiwa, mlalamikaji hakuonyesha mipaka yake ya asili wala dalili ya barabara katika maeneo yote ya mgogoro. Wanaukoo wa mlalamikaji walionyesha kutambua mipaka iliyopo sasa kwani wamelima na kuishia kwenye mipaka hiyo. Mipaka walioitaja walalamikiwa, mipaka hiyo baraza liliishuhudia na inaonekana kuwa ni mipaka ya muda mrefu na ni ya asili. Kwa kuzingatia ushahidi uliotolewa kwa pande zote mbili na ushuhuda wa wajumbe walipotembelea eneo lenye mgogoro, baraza linatoa uamuzi/hukumu kuwa mdai anashindwa.'*

On the composition of the Ward Tribunal, I carefully perused the proceedings of the Ward Tribunal and it is evident that the same was composed of four members and one of them was a woman which comprises with the requirement of the law. The four members appear on the judgment of the Ward Tribunal and also appears in the proceedings. In my view, this argument is misplaced and has no



merit and I do not need to waste the precious time of this court to discuss something which is too obvious. In conclusion, I find the appeal devoid of merit and it is hereby dismissed with costs. It is so ordered.

**DATED** at **BUKOBA** this 16<sup>th</sup> day of July, 2021.



  
**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**16/07/2021**

**Court:** Judgment delivered this 16<sup>th</sup> July, 2021 in the presence of the counsel for the appellant, Mr. Benard Mbakileki. The 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents were present in person



  
**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**16/07/2021**

