

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

LAND APPEAL NO. 110 OF 2020

(Originating from Land Application No. 246 of 2012 at the District Land and Housing Tribunal for Kagera at Bukoba)

FROLIDA EMMANUEL -----1ST APPELLANT

WINIFRIDA EMMANUEL -----2ND APPELLANT

MATUNGWA EMMANUEL -----3RD APPELLANT

VERSUS

RICHARD KABYEMELA-----1ST RESPONDENT

MUDDY ALLY-----2ND RESPONDENT

HENERY EMMANUEL-----3RD RESPONDENT

RUGEMARILA EMMANUEL-----4TH RESPONDENT

HELENA EMMANUEL-----5TH RESPONDENT

SUNDAY EMMANUEL-----6TH RESPONDENT

JUDGEMENT

Date of Last Order: 28/07/2021

Date of Judgment: 06/08/2021

Hon. A. E. Mwipopo, J.

The Appellants herein namely Frolida Emmanuel, Winifrida Emmanuel and Matungwa Emmanuel have filed the present appeal against the decision of the

District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 246 of 2012 before Hon. R.E. Assey, Chairman delivered on 5th September, 2016. Aggrieved by the said Judgment of the Tribunal, the Appellants filed the present appeal with 4 grounds of appeal as contained in the Memorandum of Appeal. The Appellants grounds of appeal are as follows:-

1. That, the Honourable Chairperson erred in law for having dismissed the application on the basis of an issue which was not part of the issues framed.
2. That, the Honourable Chairperson erred in law for having reached at judgment which fell short of being termed as legal judgment.
3. That, the Honourable Chairperson erred in facts and in law for having poorly assessed and analyzed the evidence of the Appellants and that of the 1st Respondent.
4. That, the Honourable Chairperson erred in fact and in law for having entered the judgment which was reached against the weight of evidence adduced.

On the hearing date, Applicants were represented by Mr. Dastan Mutagahywa, Advocate, whereas Respondents namely Richard Kabyemela, Muddy Ally, Enery Emmanuel, Rugemarila Emmanuel, Helena Emmanuel and Sunday Emmanuel were represented by Mr. Zeddy Ally, Advocate.

Mr. Mutagahywa submitted on the 1st and 2nd grounds only and abandoned 3rd and 4th grounds. On the 1st ground of Appeal he argued that the chairman of

the District Land Tribunal erred to dismiss the application on the bases of the issue not framed by parties. The Chairman *Suo Motto* raised the issue of res-judicata without inviting the parties to address the tribunal on the issue. The issues which were framed by the tribunal were four, but the Chairman left all four issues and raised his own issues and determined it. As a result, the affected party was condemned unheard. It was wrong for the court to raise *Suo Motto* the issue and determine it without affording the parties right to address it as it was held in the case of **DPP V. Fonya Mathayo, [1995] TLR 23 CAT**. He is of the view that this grounds is sufficient for the court to declare the whole proceeding as null and void and proceed to quash it.

On the second ground, the Counsel submitted that the judgment delivered by the District Land and Housing Tribunal has fall short of the proper legal judgment. Under section 24 of the Land Disputes Court Act No. 2 of 2002, the decision of the District Land and Housing Tribunal must include the opinion of assessors. However, the opinion of the assessors was not recorded in the Judgment. For that reason the Judgment was improper in the eyes of the Law. He is praying for the court to quash the proceedings judgment and decree of the trial District Land and Housing Tribunal with cost and the matter be tried de novo.

In Reply, Mr. Zeddy Ally, Advocate for the Respondents submitted that there was no need for the District Land and Housing Tribunal to determine the matter

on merits as there was an issue of Jurisdiction. The District Land and Housing Tribunal observed that there was Preliminary Objection. The Tribunal erred not to invite the parties to address the court on the issues as result the matter has to be reverted back to the trial District Land and Housing tribunal and to invite parties to address the court on the matter of jurisdiction. The Court has to revert the matter back to the Tribunal so that the issue of Jurisdiction has to be determined by the tribunal.

On the failure to record the opinion of the Assessors in the Judgment, the Respondents' Counsel is of the opinion that the matter which determined the application before the tribunal was matter of Law. Thus, the Assessors has nothing to do with the issues of Law. The Counsel prayed for the Court instead of ordering trial de novo, to order the matter be reverted back to the tribunal where parties have to address the court on the issue of jurisdiction.

In rejoinder, the Appellants' Counsel averred that the remedy in this matter where the trial Tribunal raised the matter of Jurisdiction *Suo Motto* is for the matter to start afresh. Section 24 of the Act make it mandatory to record the opinion of the Assessors where the chairperson may divert from their opinion with reasons. This is gross violation of the Law. The court cannot allow the continuation of violation of the law.

After hearing the submissions and read the record and judgment of the District Land and Housing Tribunal, I'm in a position to determine the matter on issues raised by the parties herein. As it was submitted by both parties, the Chairman of the District Land and Housing Tribunal in course of drafting a judgment left issues which were framed and *suo motto* raised the issue of jurisdiction that the matter was *res judicata*. The Chairman proceeded to dismiss the application without affording the parties right to address the Tribunal on the issue. From the submissions, the only dispute between the parties herein is the remedy for the act of the Tribunal to raise the issue of jurisdiction *suo motto* and proceed to determine it without affording parties right to be heard. The Appellants' Counsel argued that the remedy is to quash all the proceedings and the decision thereof and to order retrial. On the other hand the Respondents' Counsel is of the view that the remedy is to revert back the file to the Tribunal and order the Tribunal to afford the parties right to address the issue of jurisdiction and the Tribunal to proceed to determine the issue of jurisdiction.

I'm of the opinion that it is not correct for the tribunal to raise jurisdictional issues *suo motto* while composing the judgment without giving the parties the opportunity to be heard on the issues. This is same as denying the parties right of hearing on the issue. This was the position of the Court of Appeal in the case of

MBEYA RUKWA AUTOPARTS AND TRANSPORT LTD V. JESTINA GEORGE

MWAKYOMA [2003] T.L.R. 251, where the Court held that, I quote:-

"...natural justice is not merely a principle of the common law, it has become a fundamental constitutional right Article 13(6) (a) includes the right to be heard among the attributes of equality before the law."

In the present case the Chairman of the Tribunal raised *suo motto* the issue of jurisdiction in the cause of drafting judgment and proceeded to determine it without affording the parties right to address the Tribunal on the issue. This is the same as denying the parties right of hearing on the raised issue.

In the case of **EXB.8356 S/SGT SYLVESTER S. NYANDA VS THE INSPECTOR GENERAL OF POLICE & THE ATTORNEY GENERAL, CIVIL APPEAL NO. 64 OF 2014 (unreported)**, the Court of Appeal held that:-

"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motu which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."

The Court of Appeal in the above cited case went on to quash the proceedings of the High Court and order retrial.

The Court of Appeal took similar position in the case of **Wegesa Joseph M. Nyamaisa V. Chacha Muhogo, Civil Appeal No 161 of 2016, Court of Appeal of Tanzania, at Mwanza, (Unreported)**, where it was held that:-

"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so."

Thus, from above cited decisions of the Court of Appeal it is settled that where the Court or Tribunal raises jurisdictional matters *suo motto* and determined it without affording the parties an opportunity to be heard, the entire proceedings and the decision of the Court becomes a nullity.

Therefore, I find that all the proceedings and the Judgment of the District Land and Housing Tribunal to be a nullity and I hereby quash it. I order the matter to be remitted back to the District Land and Housing Tribunal for Kagera at Bukoba where Application No. 246 of 2012 has to start afresh before another Chairman. If the Chairman finds that it is relevant to determine the issue of jurisdiction first

then the parties should be afforded right to address the Tribunal on the issue.

There is no order as to the cost of the suit.



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A.E. Mwipopo

Judge

06.08.2021

The Judgment was delivered today on 06.08.2021 in chamber under the seal of this court in the presence of 1st and 2nd Appellants, 2nd and 6th Respondents, Ms. Gisela Maruka, Advocate for the 2nd, 3rd, 4th and 6th Respondents who also hold brief for Mr. Danstan Mtaghywa Advocate for the Appellants.



A handwritten signature in blue ink, appearing to be "A. E. Mwipopo".

A. E. Mwipopo

Judge

06.08.2021