

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**LAND APPEAL No. 88 OF 2020**

*(Arising from the High Court (Bukoba Registry) at Bukoba in Misc. Land Application No. 30 of 2018 original Application No. 63 of 2016 at the District Court of Karagwe at Karagwe)*

**DIDACE MBEKENG----- APPELLANT**

**Versus**

**WILBOARD MARCO MUGISHAGWE----- RESPONDENT**

**JUDGMENT**

*Date of last order: 28/07/2021*

*Date of Judgment: 09/08/2021*

*Mwenda, J.*

This appeal emanates from a land dispute which was determined by the District Land and Housing Tribunal for Karagwe at Karagwe in Land Application No. 63 of 2016. In that case Wilboard Marco Mugishagwe (the Respondent) sued Didace Mbekenga (the Appellant) on a dispute over ownership of land located at Katoma /Ruzinga Kayanga Township of Karagwe District in Kagera Region.

After a full hearing of the case, the District Land and Housing Tribunal decided in favour of the Respondent. Aggrieved by that decision, the appellant preferred the present appeal with a total of seven grounds which was registered as Land Case Appeal No. 88 of 2020.

When this Appeal came for hearing on 28 July 2021, the appellant hired the legal representation of Learned counsel one Mr. Mulokozi while the respondent was represented by Mr. Aaron Kabunga, the learned advocate.

During submissions in chief Mr. Mulokozi, learned counsel for the appellant argued the grounds of appeal in sequence. On the first ground of appeal, Mr. Mulokozi submitted that the trial tribunal erred to declare the respondent as the lawful owner of Plot No. 5 while the evidence shows that she bought Plot No. 6. He further submitted that for someone to acquire a title deed there must be a root of title before survey, which the respondent lacked as the title deed was acquired by fraud.

On the second ground of appeal Mr. Mulokozi submitted that the District Land and Housing Tribunal was biased when it heard and considered the case without affording the appellant the right to legal representation. He submitted on 30/06/2017, the appellant informed the Tribunal that his advocate was attending CLE meeting in Dar es salaam but the Tribunal proceeded to entertain the respondent's prayers which the appellant failed to grasp.

On 3<sup>rd</sup> ground of appeal Mr. Mulokozi submitted that the tribunal entered judgment without reading or recording assessors' opinion as in the proceedings there is no record which shows that assessors issued their opinion. He said that after the Tribunal's visit to locus in quo a date for judgment was fixed but no date to assessors to issue their opinion was fixed. According to him this is

contravened ***Regulation 19(1) (2) of the land disputes (District Land and Housing Tribunal) Regulation of 2013*** which requires assessors to issue their opinion before conclusion of the case and failure of which renders the proceedings a nullity. In support of this averment he cited the case of ***Sikuzani Said Magambo and Kirioni Richard vs Mohamed Roble Civil Appeal No. 197 of 2018 Cout of Appeal of Tanzania at Dodoma (unreported)***.

On the 4<sup>th</sup> ground of appeal Mr Mulokozi stated that GN. 174 OF 2003 governs the hearing of matters before the District Land and Housing Tribunal. According to the respondent he never appeared before the Tribunal to be cross examined but the Tribunal considered his sworn affidavit in making its findings. According to the learned advocate, the respondent is not a person exempted to appear and testify and therefore relying on his affidavit was a procedural irregularity as he was required to appear to enable normal procedures to follow.

On the 5<sup>th</sup> ground of appeal Mr. Mulokozi was of the view that so long as the land in dispute was surveyed by the time the respondent bought it, there was no need to conduct another survey and any re-survey that followed is a void.

On the 6<sup>th</sup> ground of appeal Mr. Mulokozi submitted that, the District Land and Housing Tribunal told the appellant not to complain about the land in dispute as he was already allocated Plot No.4 Block F. He said there is however

no proof that the appellant had at any point in time applied for and allocated the said piece of land. He said further that the land in dispute is un surveyed and the appellant was residing on that land since 1983.

On the last ground of appeal Mr. Mulokozi submitted that, the District Land and Housing Tribunal said that the long existence occupation in land cannot override the right of occupancy which is not correct as the Land Act, No. 4 of 1999 clearly state that no land can be taken without compensation. Mr. Mulokozi concluded by praying for this appeal to be allowed, judgment and decree be nullified and the appellant be declared as a lawful owner.

In reply to submissions by Mr. Mulokozi's submissions, Mr. Kabunga, the learned advocate for the respondent stated that the issue of nullification of the proceedings and declaration of the lawful owner to the land in dispute are two different things which cannot go together. He said the suit is either have to start afresh before another chairman and a new team of assessors and not otherwise.

With regard to the 1<sup>st</sup> ground of appeal Mr. Kabunga submitted that the respondent's ownership over the disputed land was proven to the standards required because the respondent has a title deed of Plot No. 5 Block F. TITLE No. 40189. According to him, a proof of ownership is in the title and this cannot be compared with mere words by the appellant as oral evidence cannot overrule documentary evidence.

On the second ground of appeal Mr. Kabunga submitted that the trial tribunal did not deny the appellant his right of representation as there were no any witness who testified on that day. Responding to submission in respect to the 3<sup>rd</sup> ground of appeal with regard to lack of the opinion of assessors, Mr Kabunga was of the view that, the case of ***Sikuzani Said Magambo and Kirioni Richard vs Mohamed Roble(supra)*** cited by the learned advocate for the appellant is distinguishable. According to him it is true that assessors' opinion should be taken and recorded in the proceedings but on 11/04/2018 the chairman ordered assessors to prepare their opinion for presentation on 13/04/2018. However, on that date the assessors' opinion was not read or presented and according to him presumably the said opinions were recorded.

In his response to appellant's submission with regard to the 4<sup>th</sup> ground of appeal Mr. Kabunga said that it is true that the respondent was not cross-examined before the trial tribunal but the normal procedure to prove his case was followed. According to him the respondent's affidavit is evidence used and the order to file the same was never contested by the appellant and on top of that the appellant did not file a counter affidavit.

On the fifth ground of appeal Mr. Kabunga submitted that the issue of surveying, allocation and issuance of the Title Deed of the land is the domain of the town council and the appellant cannot be blame the respondent who have no such powers.

On the last ground of appeal Mr. Kabunga stated that, there is no deemed right of occupancy on the surveyed land as alleged by the appellant as land in the town council is surveyed and his plot was surveyed and clearly marked as Plot No.6 Block H. He thus concluded with a prayer of having this appeal dismissed with costs.

In his rejoinder Mr. Mulokozi prayed for the appellant to be declared lawful owner of the disputed land and on the issue of ownership he stated that the title deed by the respondent was obtained by fraud. On the respondent's proof of his case by an affidavit Mr. Mulokozi submitted that it prejudiced the appellant as a prayer to file the same was raised when appellant was unrepresented. He added that, the appellant filed counter affidavit and in each paragraph he demanded the respondent strictly prove his claims, which he never did.

He then concluded by insisting that the land in dispute belongs to the appellant and thus he prayed for his appeal to be allowed as prayed in submission in chief.

Having summarized submissions from both parties the issue is whether this appeal is meritorious.

To determine this appeal, this court found it pertinent to begin with the third ground of appeal because if sustained it is capable of concluding this matter. This ground reads as follow:

**3. "THAT, the trial tribunal erred in law to enter  
judgment without recording and reading  
assessors' opinion."**

This court went through the records of the District Land and Housing tribunal and noted that there is no opinion of the assessors. **Section 23(2) of Law Dispute courts CAP 216 R.E 2019 and Regulation 19(2) of the Land Dispute Court (The District Land and Housing Tribunal) Regulation of 2003**, direct the Chairman to sit with two assessors who shall be required to give their opinion before judgment. This section reads as follows and I quote:

**23.(2) "The District Land and Housing Tribunal shall  
be duly constituted when held by a chairman  
and two assessors who shall be required to  
give their opinion before the chairman  
reaches the judgment".**

Inference drawn from the foregoing section is that assessors shall be in attendance in the tribunal's session and give their opinion which shall be recorded and be taken into account by the chairman when making decision. In this case the trial tribunal's records are silent as to whether assessors issued their opinion. From the copy of the typed proceedings it is shown that on 5/3/2018 the Honourable Chairman recorded that the **"judgment date is**

***11/4/2018 assessors to opine," but on the next scheduled date i.e. 11/04/2018 it was recoded that "the assessors have not opined, judgment on 13/04/2018, the assessors to opine parties to attend."***

However, on 13/04/2018 the judgment was pronounced without affording assessors opportunity to issue their opinion. as the records are silent in that regard.

On top of that in the Tribunal's judgment is silent as to whether the assessors gave their opinion or not. The Honourable chairman cited section 23 of the Land disputes Courts' Act, [ CAP 216 R.E 2019] without specifying which sub-section he was referring to. In the case of **EDINA ADAM KIBONA V. ABSALOM SWEBE (SHELI) Civil Appeal No. 286/2017** the Court of Appeal of Tanzania while making reference to **Amir Mbaraka and Azania Bank Corporation Ltd V. Edgar Kahwi** stated that:

***" Therefore, in our considered view it is un safe to assume the opinion of assessor which is not on the record by merely reading the acknowledgement of the chairman, we are of the considered view that assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularly"***



In the upshot this court finds the District Land and Housing Tribunal's proceedings tainted with irregularity for lack of assessor's opinion and therefore this appeal succeeds by quashing the proceedings of District Land and Housing Tribunal and set aside the judgment and any other order emanating from Application No. 63 of 2016 decided by the tribunal. Any interested party shall institute a fresh suit before another chairman with a new set of assessors.

Since the anomalies and irregularities giving rise to these outcomes was caused by the trial tribunal's error, this court order each party to bear its own costs.

It is so ordered.



A. Y. Mwenda

**Judge**

09.08.2021

Judgment delivered in Chambers under the seal of this court in the presence of the Appellant's learned counsel Mr. Mulokozi and the in the presence of the learned counsel for the respondent Mr. Frank Kalori.



A. Y. Mwenda

**Judge**

09.08.2021