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

LAND APPEAL No. 69 OF 2019
(Originating from Land Application No. 107 of 2017 of the District Land and Housing Tribunal at Bukoba)

REV. PETER BENJAMINI .....APPELLANT
VERSUS
TUMAINI MTAZAMBA @ MWEMA.....RESPONDENT

JUDGMENT

30th July & 13 August 2021

Kilekamajenga, J.

In this case, the appellant's evidence suggests that the disputed land, on plot No. 197 Block E was allocated to him by the Bukoba Municipal Council as compensation for his land which was taken by TANESCO at Kibeta, within Bukoba Municipality, in 1991. After the allocation of the land, the appellant was given a letter of offer dated 1st March, 2007. Then years later, the respondent arose claiming that the land belonged to Abankango clan and that he inherited the land from his father.

The District Land and Housing Tribunal, being the trial tribunal decided in favour of the respondent. The appellant, being unhappy with the decision of the trial tribunal approached this Honourable Court for justice. He was armed with five grounds of appeal thus:

1. *That the trial tribunal erred in law and fact to hold that the respondent proved his root of title by tendering exhibit P1 and P2 which by itself was not a sufficient proof of title of the respondent whose name was not*

among the list of beneficiaries and that these exhibits were procured maliciously to defeat the interest of justice;

2. *That the trial tribunal erred in law and fact to hear and determine an application file out of time in absence of any evidence from the respondent that prevented him to sue against the encroachment t of his land since the year 1992 till 2016;*
3. *That the trial tribunal erred in law and fact to hold that the respondent is the lawful owner of the disputed land without due regard that in the pleading the respondent did not plead to have inherited the suit land from the clan or to the late one Celestine Mutazamba Jonathan;*
4. *That the trial tribunal erred in law and fact to base on the evidence of the applicants whose evidence was nothing but a fabricated story without raising adverse inference to the respondent's failure to call any neighbouring witness such a Buberwa, Thadeo's or a fellow beneficiary or any other relative to testify;*
5. *That the trial tribunal erred with bas to disregard the evidence of the appellant and his witnesses which proved on balance of probabilities his root of title since the year 1992, that the land is not the property of the respondent's clan and that he has undergone exhausted improvements.*

The case was set for hearing; the appellant was present in person but also represented by the learned advocate, Mr. Projestus Mulokozi whereas the respondent was present in person and without representation. Mr. Mulokozi for the appellant impugned the decision of the trial tribunal which relied on an exhibit P1 and P2 (the forms that appointed the respondent to administer the estates of the late Selestine Mutazamba). In his view, such forms did not prove

ownership of the disputed land. He argued further that, while probate and administration case that appointed the respondent as an administrator was filed in 2012, the appellant was allocated the land in 1991. Surprisingly, the respondent sued the appellant in 2017. In his view, the respondent's appointment did not prove ownership over the land. Over all, exhibit P1 and P2 does not bear the name of the respondent.

On the second ground, Mr. Mulokozi argued that this matter was time-barred because the appellant had stayed on the land for more than 12 years. On the third ground, Mr. Mulokozi submitted that, the respondent's evidence does not show that he inherited the land from Celestine Mutazamba Jonathan. The respondent only alleged to belong to the Abankango clan. On the 4th ground, the counsel for the appellant argued that, the respondent failed to summon the neighbours as his witnesses. He invited this Court to draw an adverse inference on the failure to summon the neighbours. On the 5th ground, Mr. Mulokozi assailed the trial tribunal for failing to consider the evidence of the appellant because the appellant owned the land since 1991 and tendered the letter of offer (exhibit D1) as proof of ownership. He cemented the argument with the case of **Amina Maulid Ambali, Rose Kashinde and Masaki Kashinde v. Ramadhani Juma, Civil Appeal No. 35 of 2019.**

In proving ownership, the appellant summoned a Municipal land officer who confirms that the Municipal allocated the land to the appellant. Furthermore, DW3 who was the respondent's clan member testified that the respondent was given his portion of inheritance but sold it. Mr. Mulokozi urged the Court to set aside the decision of the District Land and Housing Tribunal and declare the appellant as the owner of the disputed land.

In response, the respondent objected the allegation that the land was surveyed in 1991. He argued that, the land was surveyed in 2003 and the offer was issued on 2007. The respondent insisted that he inherited the land from his father Selestine Mutazamba. He alleged to have constructed a foundation on the land. The respondent admitted that DW3 was his clan member though he objected the allegation that the land belonged to the Prison department. He finally urged the Court to uphold the decision of the trial tribunal.

In the rejoinder, Mr. Mulokozi insisted that the appellant stayed on the land since 1992 while the dispute arose in 2017. The respondent failed to prove the root of tittle hence he cannot prove ownership.

After considering the grounds of appeal and submissions advanced by the parties, I wish to address the pertinent issues garnered from therefrom. On the

second ground of appeal for instance, the counsel for the appellant argued that, it was wrong for the trial tribunal to entertain an application which was already time-barred. The counsel argued that, the appellant was allocated the land by the Bukoba Municipal Council after his land at Kibate was given to TANESCO for the electric project back in 1991. On the other hand, the respondent argued that the land was surveyed in 2003 and the letter offer was given to the appellant in 2007. However, this matter was filed at the trial tribunal in 2017. Now, if the respondent owned the land under customary right of occupancy, he definitely knew or he ought to know about the survey conducted in 2003. At that time, he never raised any concern about the encroachment of his land by the Bukoba Municipal Council. It is actually doubtful, if the respondent real owned the land because since that time, he did not make development over the land that within the Municipality. This fact, however, presents to legal issues; **first**, if the land was surveyed in 2003 and the case to claim the land was filed in 2017, that means the matter was already time-barred. Under the law, the respondent was time-barred from filing a suit for the recovery of the land. The period of limitation to recover land is always 12 years in terms of **section 3 (1) of the Law of Limitation Act, Cap. 89, RE 2019**, read together with Part I item 22 of the schedule to the same Act. In the case of **Yusuf Same and Another v. Hadija Yusuf** [1996] TLR 347, this court stated that:

'Whether the issue was raised as a defence or not limitation is a relevant issue at any stage of the proceedings...The suit filed in the trial court is for the recovery of land hence the limitation period is 12.'

Second, the law on the competing ownership between customary right of occupancy and granted right of occupancy is now settled. Initially, the jurisprudence of justice demanded the owner of the land under customary law to seek for a right of occupancy when his land is declared a planning area. On this point of law, the case of **Mwalimu Omari and another v. Omari A. Bilali [1990] TLR 9** decided that:

'Once an area is declared an urban planning area and land surveyed and plot demarcated whoever occupies land under customary law has to be quick to apply for right of occupancy. If such person sleeps on such right and the plot is given to another, he becomes a squatter in law and would have to move away; he strictly would not be entitled to anything.'

When this matter reached the Court of appeal of Tanzania, a new position of law was established in the case of **Mwalimu Omari and Another v. Omari A. Bilali [1999] TLR 432** thus:

'The title of a holder of right of occupancy under customary law can only be taken away from the holder by an act authorized by relevant law, i.e. the Land Acquisition Act, not by a simple act of declaring an area a planning area.'

The Court of Appeal went further stating that:

> *'If the appellants in this appeal held customary title on the disputed plot prior to its grant to the respondent, they would be protected by section 33(1)(b) of the Land Registration Ordinance and therefore their title could not be extinguished by the sequent grant of the right of occupancy on the same plot to the respondent.'*

Although the above stance of the law has not been reversed, new developments have been made in the case of **Amina Maulid Ambali, Rose Kashinde and Masaki Kashinde v. Ramadhani Juma, Civil Appeal No. 35 of 2019**, CAT at Mwanza (unreported), the Court of Appeal observed that:

> *'...whereas the appellants' contention is that they have a right over the suit property by virtue of inheritance, on his part the respondent tendered documentary evidence showing that he has a certificate of title in respect of the suit property...In our considered view, when two persons have competing interest in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained.*

In the instant case, while the respondent alleged to inherit the land from his father, the appellant's documentary evidence shows that the area was declared an urban planning area in 1990s. It was later surveyed and the appellant, being a bonafide person, applied for the plot at the Bukoba Municipal Council and he

was granted letter of offer in 2007. Ten years down the line, the respondent arose claiming ownership of the land under customary title. In my view, the appellant did not violate any law in acquiring the law. He applied for it from the responsible body and he was lawfully given. Also, evidence shows, one of the respondent's clan member testified at the trial tribunal to the effect that the respondent was given his inheritance which is different from the disputed land though he (respondent) is claiming ownership over the land that never belonged to their clan. This piece of evidence fits with the fact that the respondent, being the legal owner of the land, could not have slept for all that time without doing any development or complaining about the encroachment. In my view, the respondent's claim is vexation and devoid of merit.

Apart from the reasons stated above, which actually disposes the appeal, I have further perused the file and spotted an irregularity in this matter. According to the trial tribunal's proceedings, on 14th August 2019, the assessors were F. Rutabanzibwa and H. Muyanga. On the same date, the case was scheduled for judgment and the record does not show whether the assessors gave their opinions before the chairman composed the judgment. As long as the record of the trial tribunal does not show the opinion of assessors, it is not clear when and how such opinions landed in the judgment. As a matter of law and procedure, after hearing of the case, the chairman is legally bond to invite assessors for

opinion. Such opinion must be read in the presence of the parties and the chairman must record such opinion in the proceedings. Failure to do so renders the whole proceedings a nullity because, if the record does not show the assessors' opinions, it is as good as the case was heard without assessors. The Court of Appeal of Tanzania was confronted with a similar irregularity in the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported)** where Hon. Kerefu, JA. observed *inter alia* that:

> *"It is also on 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 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".

Furthermore, a similar situation occurred in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** and the Court of Appeal of Tanzania had the following to say:

> *"Therefore, in our own considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the*

acknowledgement of the chairman in the judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."

Similarly, in the land mark case of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported). The Court of Appeal of Tanzania reiterated the above stance of the law. In that case Hon. Mugasha, JA further insisted that:

"...Such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict."

The Court of Appeal further stated that:

"...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinions before the determination of the dispute. As such, ***their opinion must be on record."*** (emphasis added).

See also, the cases **of Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil appeal No. 286 of 2017, CAT at Mbeya (unreported); **General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa,** Civil Appeal No. 13 of 2012; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali,** Civil Appeal No. 70 of 2017.

Based on the directions given in the above cases, and for the purposes of giving guidance to the District Land and Housing Tribunal, I wish to reiterate that, after the closure of the defence case, the chairman must schedule the case for assessor's opinion. On the date fixed for assessors' opinion, the proceedings, for instance, should read as follows:

Date: 10th August 2021
Coram: S. J. Mashaka – Chairman
T/c: Magoma
Members: T. J. Kashisha and J. N. Ndoma
Applicant: Present in person
Respondent: Present in person

Tribunal: *The case is coming for assessors' opinion.*
Applicant: *I am ready for the opinion*
Respondent: *I am ready too.*

Assessors' opinions:
1st assessor – T. J. Kashisha:
Maoni yangu ni kwamba.....
.....

2nd assessor – J. N. Ndoma:
Katika kesi hii maoni yangu.....
.....

Tribunal:

Assessors' opinion read before the Tribunal in the presence of the parties.

Order: *Judgment on 20th August, 2021*

Sgd: S. J. Mashaka
Chairman
10th August, 2021

Thereafter, the chairman may compose the judgment and take into account the assessor's opinions. In the case at hand, as already stated, the proceedings do not show whether the assessors gave their opinions. Under the law, it is as good as, assessors were not fully involved. This fault alone is sufficient to nullify the proceedings of the trial tribunal. Based on the above reasons, I hereby allow the appeal and quash the proceedings of the trial tribunal. I am hesitant to order retrial in this matter because, as already stated, the respondent has no good case against the appellant and the matter was already time-barred when was filed before the trial tribunal. No order as to costs. It is so ordered.

Date at Bukoba this 13th August 2021.

THE HIGH COURT OF TANZANIA
BUKOBA

Ntemi N. Kilekamajenga
Judge
13th August 2021

Court:

Judgement delivered this 13th August 2021 in the presence of the parties. Right of appeal explained.

Ntemi N. Kilekamajenga
Judge
13th August 2021