

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOB A DISTRICT REGISTRY)

AT BUKOB A

LAND CASE APPEAL NO. 43 OF 2019

(Originating from Land Application No. 180 of 2013 at the District Land and Housing Tribunal for Kagera at Bukoba)

EDMUND THEONEST-----1ST APPELLANT

DESDERY THEONEST-----2ND APPELLANT

VERSUS

LEONARD PATRICE---RESPONDENT

JUDGEMENT

Date of Last Order: 17/08/2021

Date of Judgment: 27/08/2021

Hon. A. E. Mwipopo, J.

Edmund Theonest and Desdery Theonest who are Appellants herein have filed the present appeal against the decision of the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 180 of 2013 before Hon. E. Mogasa, Chairman, which was delivered on 5th July, 2019. The Appellants' Petition of Appeal contains five (5) grounds of appeal as provided hereunder:-

1. That the trial Tribunal erred in law and fact by not giving the chance to the assessors to give their opinions before the loss of their contract which was tendered in the Tribunal.
2. That the Chairman deliberately erred in law by turning a blind eye and deaf ear when the Appellants requested him to make a locus in quo visit at Appellants own expenses to see for himself and come up with a true picture in order to be able to deliver a fair judgment, but the Chairman turned down the request a thing which denied Appellants rights.
3. That the Respondent played a dirty game by collaborating with one of the clerks of the Tribunal to steal Appellants vital documentary evidence from the file which is the sale and purchase deed. The Appellants noted the loss and complained to the Chairman R. Assey who ordered for the same copy to be refiled, but funny enough the document refiled was lost again. This came into Appellants knowledge through the Judgment. The Appellants annexed the sale deed as Annexure AA1.
4. That the Appellants late father bought the suit land on 10/07/1967 and died in 1988. Appellant's paternal uncle namely Prosperly Makonje and Kashambagani gave the Suitland when they became of the age of majority in 1980 and 1999. The Respondent's mother being the elder sister of the Appellants late father had no clan land to offer to his son who is not a clan member of Ababago but a member of Omuheta clan.

5. That it is not true that the Respondent was handed over the land by his mother in the year 1979 while the Appellants' late father was using the land in dispute. Furthermore, there is no documentary evidence authenticating the handing over the Suitland to the Respondent. Still the Respondent never brought the witness during the hearing to testify on his ownership. Christopher did testify the handling over the disputed land to the Appellants in 1980.

On the hearing date, both parties appeared in person as they have no legal representatives. The parties being lay persons they have no much to say. Their submissions were brief and the Appellants repeated their grounds found in the petition of appeal in their submissions. Edmund Theonest submitted in support of the appeal that the tribunal erred to remove in the file the documentary evidence they tendered as the Judgment of the Tribunal revealed. He said that the Chairman of Tribunal rejected their request to visit the locus in quo as a result the Chairman failed to understand the dispute. He said that the Respondent's mother has no right to the Land which was owned by their late father and the Tribunal was not doing any justice to them. The Respondent did not tender anything in the tribunal but the Chairman decided in his favor.

Desdery Theonest in his brief submission in chief stated that the Respondent's mother (Appellants' aunt) died even before they were born. Their

documentary exhibit which was tendered twice before the Tribunal was removed from the file. He said that they brought witnesses who proved that they are the rightful owner of the land, but, in the tribunal Judgment the evidence of those witnesses was never recorded and was not considered by the Chairman. He is of the view that the evidence proved that the land belongs to them and not to the Respondent.

In response, Leonard Patrice submitted in briefly that the judgment of the Tribunal is the right one since he proved his ownership of the land in dispute. He said that he was given the land in dispute by his mother who was given the said land by the clan. He is of the opinion that the judgment of the tribunal contained and considered all evidence and reached its verdict properly.

In their rejoinder, the Appellants said that the Respondent is not telling the truth as the disputed land is not a clan land. Their father (Appellants' father) bought it and as a result Respondent's mother has no claim over it. They argued that if the land belongs to the Respondent's mother, where was the Respondent when the Appellants started to cultivate the land as he came to claim for it after many years. They said that Respondent's mother passed away while Appellants were still young but he never claimed for it until recently when they are grown up. The Appellants said that the land was not owned by the Respondent's and he did not tender anything to prove that the land belongs to him.

From the submissions, the record and judgment of the District Land and Housing Tribunal of Kagera at Bukoba, I'm in a position to determine each of the issues raised by the parties.

In their submission the Appellants argued that the tribunal erred to remove in the file the documentary evidence they tendered. They asserts that the Respondent Colluded with the clerk to remove the document. This is a very serious allegation by the Appellants. Going through the record of proceedings, there is nothing to show that the documentary evidence tendered by the Appellants were removed from the file. The typed proceedings of the Tribunal shows that after the Plaintiff's case was closed on 21st October, 2014, the case was adjourned several times for almost 5 years until when the case came to the Tribunal before Chairman E. Mogasa, on 10th January, 2019. The Chairman was informed by the Appellants that they have testified but their evidence was not on record. Further, the Appellants informed the Tribunal that they are willing to testify again and they proceeded to testify. During hearing of Defence case, the Appellants prayed to tender probate documents to wit inventory, proceedings of primary Court and letter of appointment as administrator of deceased estate. The Tribunal admitted the inventory only and other documentary evidence were rejected for the reason that the documents tendered were copies. The inventory was admitted as Exhibit D1.

The Appellants attached in the Petition of Appeal the copy of the sale agreement written in Haya language alleging to be the agreement of the sale of the suit land to their late father. Unfortunately, the Court at this stage of appeal deals with evidence in record and not a new evidence save only in special circumstances. The record of Tribunal proceedings proves that the sale agreement was never tendered and also among the exhibit tendered by the Applicants it was only the inventory which was admitted as Exhibit D1. Thus, the assertion by the Appellants was that sale agreement tendered was removed from the file was not proved.

The Appellants argued that they requested the Chairman to visit locus in quo but he denied it. Looking at the evidence on record it does not show that they requested the tribunal to visit locus in quo. The visit to the locus in quo is discretion of the trial Court or Tribunal when it find it is necessary. In the present case there is nothing in record to show that the Appellant requested the Chairman to visit the locus in quo or there was need to visit the locus. In the case of **Sikuzani Saidi Magambo and Kirioni Richard V. Mohamed Roble**, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania, at Dodoma, (unreported), the Court of Appeal held that:

"As for the first issue, we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the locus in quo, as the same is done

at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial.”

Based on the above cited case, it is the discretion of the Chairman of the Tribunal to visit the locus in quo when he finds there is need to do so. The Chairman was not obliged to visit the locus in quo and there is no proof in the record that the Appellants requested the Chairman to visit the locus in quo. Thus, this ground also has no merits.

The Appellants also asserted that the Respondent was believed by the Tribunal while he did not call any witness to support their case. This ground has no merits as the records show that after the Respondent testified, he called one witness namely Christopher Theonest (AW2) – who is the elder brother of the Appellants. The witness in his testimony stated that the land in dispute belongs to the Respondent after he was handed over by his mother and he was among the witnesses of handing over. Also, no specific number of witnesses is required by law for the party to prove his case. Thus, I find that this ground also has no merits.

On the issue that the Respondent never tendered any document before the tribunal to prove his ownership of the suit land, the evidence available in record was sufficient to prove that the Respondent was handed the land by his late mother customarily. In such situation no document was required to prove his ownership, what is important is testimony of the persons who witnessed the

handing over of the Suitland by Respondent's mother to the Respondent. The Appellants assertion that the land in dispute was not a clan land was not proved since the sale agreement was not tendered in the Tribunal.

Further, in the petition of appeal the Appellants stated that the trial Tribunal erred in law and fact by not giving the chance to the assessors to give their opinions before the loss of their contract which was tendered in the Tribunal. Looking at the typed record of proceedings of the Tribunal, it shows in page 32 that the assessors' tenure expired and the Tribunal informed the parties. Thereafter, the Chairman proceeded with hearing of defense case on 10th January, 2019 without assessors until its conclusion.

The Chairman's decision is in line with Section 23 of the Land Dispute Court Act, Cap. 216 RE 2019, which provides as follows hereunder:

"23 (3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence."

Based on the above cited section, the tribunal was right to proceed without assessors after the expiry of their tenure before the hearing was completed (see

also the case of **Potence Mugumila V. Cleophance Kaiza**, Land Case Appeal No. 38 of 2019, High Court Land Division, at Bukoba).

Therefore, I find the appeal to be devoid of merits in it's entirely and I hereby dismiss it with cost. It is so ordered.




A.E. Mwipopo
Judge
27.08.2021

The Judgment was delivered today, this 27.08.2021 in chamber under the seal of this court in the presence of both parties.




A. E. Mwipopo
Judge
27.08.2021