

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

LAND CASE APPEAL NO. 35 OF 2020

*(Arising from Application No.56 of 2014 of the District Land and Housing Tribunal for Kagera
at Bukoba)*

1. ERICK C. NZILUILE1ST APPELLANT

**2. BOARD OF TRUSTEES OF MASJID SUNNI
WALIJAMAA2ND APPELLANT**

VRS

ANNOSIATHA CHRIZOSTOM..... RESPONDENT

RULING

07/09/2021 & 24/09/2021

NGIGWANA J,

When this appeal was called up for hearing, the Appellant's counsel, Mr. Abel Rugambwa registered his concern that he had prepared the grounds of appeal basing on the copy of judgment but when he was later supplied with the copy of the trial court proceedings, he discovered a point of law that the impugned case passed through hands of two trial tribunal chairmen without giving reasons to parties for such change. He substantiated that one chairperson heard the applicant's case and the other heard the respondent's case at the trial. He cemented that it is trite law that whenever there is change of magistrate, reasons for such change must be assigned. He referred the case of **Helena Zahoro vs Josephina Rugomora**, Land Appeal No.68 of 2016, HCT at Bukoba (Unreported)

He also cited the provisions of order XVIII Rule 10 of the Civil Procedure Code Cap 33 R. E 2019. He further submitted that the omission has occasioned failure of justice as the mandatory procedure was not dully observed and further that there was no fair trial. He referred the case of **Kinondoni Municipal Counsel vs Consult Ltd**, Civil Appeal No. 70 of 2016, CAT at Dar es Salaam (Unreported). He recapped that the irregularities are incurable and vitiates the entire proceedings of the trial court and therefore prayed for an order of quashing the proceedings and setting aside orders thereof. He urged that a retrial be ordered.

In reply, the respondent being self-represented conceded that at the trial they were not told why there was a change of chairpersons and did not know whether giving reasons for such change was mandatory or not. He added that what they were told was that the tenure of assessors had expired.

In rejoinder, the appellant's counsel took back the respondent to his submission in chief that he didn't submit on the issue of involvement of assessors in the proceedings but he only talked on change of chairpersons in the trial.

The respondent's response does not deny that there was such irregularity of change of chairpersons. Therefore, I am enjoined to determine whether the spotted irregularity is curable?

The take-off point is visiting Order XVIII Rule 10(1) as referred by the appellant's counsel. It provides:

*"Where a judge or magistrate is **prevented by death, transfer or other cause** from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the*

foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.” (Emphasize is mine)

One can quickly jump into conclusion and argue that there is no requirement for assigning reasons for taking over a partly heard matter when reading the above provision. However, as the provision recognises the circumstances of **death, transfer or any other causes** which necessitates the taking over by the new magistrate, the reason to any of the prevailing circumstances in the relevant provision above should be explained and reflected in courts record. Consistently, the judicial interpretations of court of Appeal and High Court have now and then overemphasized the requirement of giving reasons and they have resolved that, such requirement cannot be derogated.

Taking on board the relevant two authorities referred to this court by the appellant and as much as I know, there are a plethora of authorities regulating this area.

In **Charles Chama and others vrs Regional Manager TRA and others** Civil Appeal No.224/2018, the proceedings passed through hands of three judges without assigning reasons and the last one who wrote a judgment was not the one who heard the case. The entire judgment and conviction thereon were quashed and the proceeding was partly reversed back at the point where the third judge chipped in to write a judgment. The court refuted to invoke the principle of Overriding Objective (on the focus of substantive justice) to cure this irregularity as prayed by state attorneys. However, the same principle of overriding

objective was accepted and applied by the same court in **Chacha Jeremiah Murimi & 3 v Republic, Criminal Appeal No. 551/2015** (Unreported). Part of the reasoning of accepting the oxygen principle by Court of Appeal justices on pg 17 of their typed judgment was couched thus:

"To begin with, in Chacha Jeremiah Murimi's case(supra), the arguments related to compliance with section 299 of the CPA as there was partial compliance. In the present case however, not only did the successor judges omit to assign reasons for the takeover, but more serious is the fact that the judgment was composed by the third successor judge who did not hear even a single witness. Having been a total stranger to the case, she was surely not in good position to do justice in the case. In our view, that aspect makes a big difference."

From the above two authoritative cases of the Court of Appeal, it is apparent that every case has to be decided on its own facts. Conversely, it is now learnt that wherever an adjudicator starts hearing a case, he/she must finish it and in case of change, a reason has to be given. The justification and rationale behind giving reason has been two folds; **one** that the one who sees and hears the witness is in the best position to assess the witness's credibility which is very crucial in determination of any case before a court; and **two** that the integrity of judicial proceedings hinges on transparency, as such where there is no transparency, justice may be compromised. **See** the cases of **David Kamugisha Mulibo, Tryphone Elias @Ryphone Elias and Kinondoni Municipal Council(supra), Ms Georges Centre Ltd v. The Attorney General & Another**, Civil Appeal No.29/2016 and **Kajoka v The Attorney General and Another**, Civil Appeal No.153 of

2016, **Justus P. Mutakyawa vs Bernadetha Kanyankole**, Land Case Appeal No.54 of 2019, HCT (all unreported) **In the case of Abdi Masoud Iboma and 3 others v Republic**, Criminal Appeal No. 116/2015 (Unreported), the court stated as follows on the issue of non-compliance with the giving of reason for change of magistrate.

"...It is a prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try the case since there is no reason on record in this case as to why the predecessor magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction hence a nullity"

In **Priscus Kimaro v R** Criminal appeal, No. 301 of 2013(unreported) the court stated as follows:

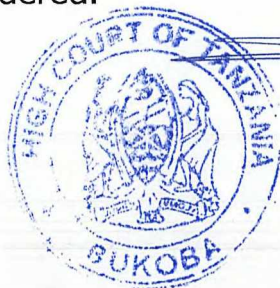
"Where it is necessary to re assign a partly heard matter to another magistrate, the reason for the failure by the first magistrate to complete must be recorded. If that is not done, it must lead to chaos in the administration of justice. Any one for personal reasons could pick up any file and deal with it to the detriment of justice"

Now, coming back to our case, the record has it that on 5/2/2015 the hearing commenced before Hon. J. K. Bantulaki who heard the prosecution side on all witnesses until the case was marked closed. Without recording any reason which prevented Hon.Bantulaki from continuing hearing the case, on 25/1/2018 Hon. E Mogasa cheaped in, heard the defence side and finally composed the judgment. No reasons were recorded in the entire trial proceeding. From the lengthy discussion

above, the omission is fatal and incurable which violated a fair trial and thus occasioned failure of justice.

In the end result, I am not hesitant to hold that the omission to assign reasons for second Chairman taking over to the partly heard matter is incurably defective and under these circumstances it cannot be cured by overriding objective. I therefore invoke revisional powers entrusted in this court by section 43 of the Land Disputes Courts Act Cap 216 R.E 2019 to nullify and quash the proceedings of DLHT for Kagera at Bukoba, judgment and decree arising from the said proceedings are also quashed and set aside. I further direct that the case file be remitted to the trial tribunal so that it can be placed before another chairperson with competent jurisdiction for an expedited fresh trial. Each party to bear its own costs because the irregularity was not caused by the parties.

It is so ordered.



E.L. NGIGWANA

JUDGE

17/09/2021

Ruling delivered in chambers this 24th day of September, 2021 in the presence of the Appellant, Ms. Gizera Rugemalira, Learned advocate for the Appellants, respondent in person and Mr. E. M Kamaleki, Judge's Law Assistant.



E.L. NGIGWANA

JUDGE

24/09/2021