

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

IN THE DISTRICT REGISTRY OF BUKOBA

(AT BUKOBA)

LAND CASE APPEAL No. 53 OF 2019

*(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in Land
Application No. 139 of 2018)*

SIMON KAJUGUSI BANDAULA ----- APPELLANT

Versus

1. STEWATH PETRO

2. MERNA EZERA

3. KOKUSIMA LAURIAN

----- RESPONDENTS

RULING

30.08.2021 & 12.10.2021

F.H. Mtulya, J.:

Mr. Simon Kajugusi Bandaula (the Appellant) was dissatisfied with the decision of **the District Land and Housing Tribunal for Kagera at Bukoba** (the Tribunal) in **Land Application No. 139 of 2018** (the Application) which dismissed the Application and held, at page 6 of the decision, that: this Tribunal, having ruled that the Applicant had no *locus standi*, the Tribunal is *functus officio* and cannot re-determine the same issue again. This holding was based on the decision of the Tribunal in **Application No. 26 of 2017** which

was struck out on 23rd February 2018 for want of *locus standi* of the Appellant. Being dissatisfied with the decision in **Application No. 26 of 2017**, the Appellant preferred the Application in the Tribunal in respect of the same land located at Kyelima Village, Ishuju Ward of Missenyi District in Kagera Region. In one of his prayers, the Appellant prayed for the Tribunal to declare that the disputed land belongs to Joshua Rutwe of *Abagabo* clan. However, before the Application was heard on merit, a preliminary objection was raised by the Respondents on two (2) points of law, *viz*: first, the applicant has no *locus standi* to sue the respondents with regard to the ownership suit land; and second, the applicant had filed the Application in contravention of the Tribunal's order in **Application No. 26 of 2017**.

The record in this Application shows that during the hearing of the points, Mr. Lameck Erasto John, learned counsel, appeared for the Respondents and briefly argued that the dispute on the land between the parties was registered and determined in **Application No. 26 of 2017** by the Tribunal in favour of the Respondents for want *locus standi* on part of the Applicant. However, according to Mr. Lameck, before applying for letters of administration of the owner, Joshua Rutwe, the Appellant preferred another appeal in contravention of the Tribunal's order in **Application No. 26 of 2017**.

In support of his arguments, Mr. Lameck cited precedents in **Lujuna Shubi Balonzi v. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203, **Godbless Lema v. Mussa Hamis Mkongo & Two Others**, Civil Appeal No. 47 of 2012, and **Attorney General v. The Malawi Congress Party**, Civil Appeal No. 22 of 1996 on *locus standi* and **Bibi Kisoko Madard v. Minister of Lands, Housing and Urban Development Settlement** [1983] TLR 250 on *functus officio*.

The objection and registered precedents were protested by the Appellant who argued that Joshua is not dead, but left for Uganda since 1964 and as of current, cannot be traced or found in Uganda hence the question of letters of administration is unfounded. To his opinion, he is currently in possession of the *Abagabo* clan consent letter and able to sue the Respondents on-behalf of the clan.

On the Tribunal being *functus officio*, the Appellant submitted that **Application No. 26 of 2017** was struck out for want of *locus standi* at preliminary stages and cannot act as a bar to the Application. In order to substantiate his submission, the Appellant cited the precedent of **Regional Manager, TanRoads Lindi v. D.B. Shapriya & Co. Ltd**, Civil Appeal No. 86 of 2010.

As the decision in the Application dissatisfied the Appellant, he decided to approach this court on 13th September 2019 and filed **Land Case Appeal No. 53 of 2019** attached with three grounds of appeal. However, glancing at the grounds of appeal, only two (2) matters which this court is asked to determine, namely: first, whether the Tribunal was wrong in inviting **Application No. 139 of 2018** in the Application as per section 9 of the Civil Procedure Code [Cap. 33 R.E 2002]; and second, whether the tribunal erred in holding the issues of *locus standi* and *functus officio*.

In substantiating his grounds, the Appellant briefly submitted that after the struck out order in **Application No. 26 of 2017**, he rectified the issues raised in **Application No. 26 of 2017** and preferred **Application No. 139 of 2018** which was also protested on the same grounds. To the Appellant's opinion, the order pronounced by the Tribunal in **Application No. 26 of 2017** was struck out order which gives the Appellant a remedy of filing fresh and proper Application in the Tribunal. The Appellant further invited several decisions of the Court of Appeal in justifying his arguments (see: **Peter Nghomango v. Attorney General**, Civil Appeal o. 114 of 2011; **Yahya Khamis v. Hamida Haji Idd**, Civil Appeal No. 225 of 2018; and **Ngoni Matengo v. Corporative Marketing Union v. Ali Mohamed Othman** [1959] EA 577).

The Appellant submitted further that the Tribunal erred to decide the issue of *locus standi* and *functus officio* in favour of the Respondents, because: there was no evidence on record of the Ruling of the Tribunal in **Application No. 26 of 2017**; the raised points of objection were not accompanied with the Ruling in **Application No. 26 of 2017**; the Tribunal in **Application No. 26 of 2017** did not determine the matter on merit; the Tribunal in **Application No. 26 of 2017** decided the issue of Joshua Rutwe who was not a party to the proceedings; that there is no evidence that Joshua Rutwe expired hence the letter of administration is not necessary; and there is no need of letter of administration in presence of clan letter consenting representation of the Appellant.

Replying to the submission of the Appellant, Mr. Lameck contended that the Appellant is required to sue as an administrator of Joshua Rutwe under the presumption of death in the **Law of Marriage Act** [Cap. 29 R. E. 2019] but also precedent in **Maulid Saad v. Nestory & Two Others**, Civil Appeal No. 137 of 1995. According to Mr. Lameck, the Appellant cannot sue under the umbrella of *Abagabo* clan as it will not only contravene the order of the Tribunal in **Application No. 26 of 2017** and precedents in **Lujuna Shubi Balonzi v. Registered Trustees of Chama Cha Mapinduzi** (supra) and **Godbless Lema v. Mussa Hamis Mkanga**

(supra). In a brief rejoinder, the Appellant submitted that it is impossible to apply for letters of administration in absence of proof of death of Joshua Rutwe and since the Appellant is the clan head of the *Abagabo* clan, he can sue by authority of **paragraphs 578 to 606 of the Customary Law of Haya Tribe by Hans Corry & M.M Hartnonol** as part of the taking care of the clan land. Finally, the Appellant argued that the status of customary law is similar to statutory law as per decision in **Maagwi Kimito v. Gibeno Werema** [1985] TLR 132 and the issue of *functus officio* cannot arise in a fresh application.

I have perused the record of this appeal and found out that the Applicant had filed **Application No. 139 of 2018** in the Tribunal and attached **Application No. 26 of 2017**. Page 2 of the decision in **Application No. 26 of 2017** of the Tribunal delivered on 8th February 2018 shows that: *the suit land does not belong to the applicant, but Joshua Rutwe*. After the finding, the Tribunal struck out the application for want of *locus standi*. The Appellant did not protest the struck out order to this court, but went back home and after a lapse of ten (10) months, on 3rd December 2018, he preferred **Application No. 139 of 2018** and at paragraph 6 (a) (i) & 6 (a) (iv), he stated that:

That, the disputed land is a clan land of Abagabo clan and it was bequeathed to Joshua Rutwe in 1937 before the death of his father Rutwe Bandaula who died in 1939. The Applicant is the head of the Abagabo clan and also he is the younger brother of Joshua Rutwe. In the year 1964, the said Joshua Rutwe left for Uganda and up to now he has never returned back and his where about is not known at all.

That, following the aforementioned misdeed of the Respondents, on 28th February 2017, the Applicant instituted land case Application No. 26 of 2017 at Bukoba DLHT seeking for the intervention of Hon. Tribunal in order to rectify the situation, unfortunately the said suit/application was struck out on 23rd February 2018 for being incompetent due to the reason of lack of locus standi on my part.

In order to substantiate his application, the Appellant annexed in the Application several documents, including copies of several minutes of *Abagabo* clan meetings held on 31st March 2009, 14th October 2014, 25th October 2014, 5th March 2017 and decision of the Tribunal in **Application No. 26 of 2017**. In in his prayer number 7 (b), the Appellant prayed for an order of the court to declare the land in dispute belongs to Joshua Rutwe and *Abagabo* clan

members. However, the Application was protested on 24th December 2018 at two levels, viz: first, *locus standi* on part of the Appellant in the dispute at the Tribunal and *functus officio* status of the Tribunal in the Application; second, contravention of the Tribunal's order in **Application No. 26 of 2017** delivered on 23rd February 2018. On 5th August 2019, the Tribunal ruled against the Appellant and reasoned that:

The Applicant in paragraph 6 (a)(iv) admits that he filed Application No. 26 of 2017 at this Tribunal and that it was struck out for lack of locus standi and that he filed this Application to rescue the situation...having ruled the Applicant has no locus standi. The Tribunal is functus officio and cannot re-determine the same issue again.

It is this reasoning which dissatisfied the Appellant hence this appeal and contesting both the holding and reasoning of the Tribunal arguing that he rectified the issues raised in **Application No. 26 of 2017** and that the Tribunal in **Application No. 26 of 2017**: decided the issue of Joshua Rutwe who was not party to the proceedings; there is no evidence that Joshua Rutwe expired hence the letter of administration is not necessary; and there is no need of

letter of administration in presence of clan minutes consenting Appellant's representation.

However, my understanding of the present appeal tells me that the dispute is on *locus standi* and specifically: whether the issue of *locus standi* of the Appellant was resolved in inviting clan minutes to show that he is currently in possession of the mandate to institute a land suit on behalf of the *Abagabo* clan members. In order of resolve the matter, pleadings in the named applications, *viz*: **Application No. 26 of 2017** and **Land Application No. 139 of 2018**, must be glanced and specifically on ownership of the land and prayers registered.

I invited and perused the record in **Application No. 26 of 2017** and found out that the Application in paragraph 6 (a) shows that the Appellant was claiming the land in dispute which was encroached by the Respondents and that the Appellant at paragraph 7 prayed for an order for the Tribunal to declare the Respondents as unlawfully occupying the land and that the land in dispute be handled-over to him as a care-taker of the clan and Joshua Rutwe.

From the written submissions in support and against the Application, the Respondent submitted at the first page of his submission that: *it is not disputed that the lawful owner of the suit*

land had left for Uganda in searching for good pastures and is believed still working for gain...the Respondents are invitees ex-gratia from the real land owner, Joshua Rutwe. The statement was not disputed by the Appellant and was replied at page 2 of his written submission that: *I am not only a clan member, but the head of the clan...I have been appointed by my fellow clan members vide clan meeting of 31st March 2009 and confirmed by the minutes of that meeting that were attached to the application as annexure BB to take care of the clan land as required by the customary law of Haya Tribe.* The Tribunal after consideration of the submissions decided in favour of the raised point of law. No appeal was preferred then, as I stated from the beginning of this appeal.

However, the Appellant preferred **Land Application No. 139 of 2018**, and decided to twist and amended his Statement of Facts or Cause of Action in paragraph 6 (i) (a) of the Application to show that: *the land in dispute is a clan land of the Abagabo clan and it was bequeathed to Joshua Rutwe in 1937.* These facts were not registered in **Application No. 26 of 2017**, but the reliefs claimed in paragraph 7 (b) depicts the same claims: an order declaring that the disputed land belongs to Joshua Rutwe and the clan members of the *Abagabo clan.*

Having noted the changes of the cause of action on the same land, and recognizing the Order of the Tribunal in **Application No. 26 of 2017** pronounced on 8th February 2018 that the suit land does not belong to the Appellant, but Joshua Rutwe and since the order was not protested in any appropriate machinery of land disputes settlement, and considering the issue of *locus standi* has already been settled in a bundle of precedents (see: **Asia Juma Nkondo v. Jafari Juma Nkondo**, Misc. Land Case Appeal No. 22 of 2021, **Rhoda Athony v. Severian X-avery**, Misc. Land Case Appeal No. 49 of 2019, **Felix Constantine v. Jofrey Modest**, Misc. Land Appeal No. 9 of 2010, **Johansen Elias v. Paskarates Paschal**, Misc. Land Case Appeal No. 53 of 2019; **Ramadhani Mumwi Ng'imba v. Ramadhani Jumanne Sinda**, Misc. Land Case Appeal No. 8 of 2012; **Ally Ahmad Bauda v. Raza Hussein Ladha Damji & Two Others**, Civil Application No. 525/17/ of 2016; and **Lujuna Shubi Balonzi v. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203), I think the change of the cause of action or filing of the *Abagabo clan* minutes will not be of any assistance at this stage.


In my considered opinion, the Tribunal was right in inviting **Application No. 139 of 2018** in the Application and did not contravene any law in deciding the issues of *locus standi* and *functus officio* in favour of the Respondents. Finally, considering the

above stated reasons, I have therefore decided to dismiss this appeal with costs, as I hereby do.

Ordered accordingly.

Right of appeal fully explained.





F.H. Mtulya

Judge

12.10.2021

This judgment is delivered in Chambers under the seal of this court in the presence of the Appellant, Mr. Simon Kajugusi Bandaula and in the absence of the Respondents.




J.M. Minde

Deputy Registrar

12.10.2021