

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

LAND CASE APPEAL NO. 22 OF 2021

(Arising from District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 27 of 2010)

1. ALEXANDAR MABIRAAPPELLANTS

2. KASI HAMADI

VERSUS

FELIX MUGASHA NGODO.....RESPONDENT

JUDGMENT

Date of Judgment: 08.10.2021

Mwenda, J

Before the District Land and Housing Tribunal for Kagera at Bukoba, The respondent sued the appellants for the following prayers, to wit; that the trial Tribunal declare the suit premises located at Nyamkera Village, Mwemage Ward Missenyi District the respondent's property; that the trial tribunal be pleased to nullify the sale agreement between the respondents; that demolition order be issued against the respondents for any developed properties in the suit premises, that eviction order be issued against all the respondents; compensation order of Tshs. 3,000,000/= being the value of the demolished and vandalized non-exhaustive improvements and costs of the said suit be issued.

The hearing of the matter was exparte and after the exparte hearing on 27/04/2018, exparte judgment was announced in favour of the respondent. Aggrieved by the said decisions the appellants filed this appeal which contain three grounds to wit:

1. That the Trial Tribunal erred in law to grant ownership of the disputed land to the respondent while he has not proved his ownership on the balance of probabilities.
2. That the trial Chairman erred in law and fact when he believed the respondent without any justifiable evidence that the 1st Appellant was a caretaker of the disputed land before it was sold to the 2nd respondent (sic).
3. That the trial tribunal was biased on its findings hence arrived to (sic) unfair judgment.

When this appeal was set for hearing the appellant appeared in person while the respondent enjoyed the services of Mr. Rweyemamu Mr. learned Counsel. Submitting in support of grounds of appeal, the first appellant submitted that before the trial tribunal they proved ownership of the land in dispute by tendering the sale agreement. He also submitted that when the trial tribunal's judgment was read by Assey, Hon. Chairman, they were told that they won the case but later, to their dismay they came to be told that the respondent is the one who won the case and to them the said judgment was a cooked one.

On his part, the second appellant submitted that he bought the land in dispute and the sale agreement was signed to that effect. He concluded by praying this appeal to be allowed.

Mr. Rweyemamu, learned Counsel for the respondent submitted that the respondent proved ownership of the farm as he bought it from one Alfred Bitwaiz in 1993 and left his wife to use it. He said that after the demise of the respondent's wife, Alexander Mabira was entrusted to take care of the farm and livestock but later on it was rumoured that the house and livestock were destroyed by fire. Mr. Rweyemamu said that when the respondent went to the village he found the second appellant occupying the land and therefore he sued him for vacant possession. Mr. Rweyemamu further submitted that the respondent proved ownership and even the assessors opined in his favour, the opinion which was endorsed by the Hon Chairman at page 3 and 4 of the typed copy of the judgment.

Mr. Rweyemamu concluded by submitting that in the circumstance of this case the appellants did not prove their case as they filed their defence out of time and therefore the tribunal was not biased as alleged by the appellants. He thus prayed this appeal to be dismissed.

In rejoinder to the submission by Mr. Rweyemamu, the first appellant submitted that the judgment which was read in their presence by Hon. Assey, Chairman they

were declared the winners as he proved their case by producing all the relevant documents.

The second appellant rejoined to the effect that in the judgment which was read on 17.5.2017 they were declared the winners and they then relaxed but later on they were surprised with a summon which required them to appear before the tribunal again. He prayed this appeal to be allowed with costs.

Having summarized the parties submission, this court framed one issue for determination and that is whether the present appeal is meritorious.

From the records of the trial tribunal, the impugned decision was arrived following ex parte hearing of the Land Application No. 27 of 2010. The said suit was chaired by Hon. Mogasa. In that decision (exparte judgment), the Honourable Chairman, after summarizing the evidence of PW1, (the respondent) and that of assessors, he concluded that he was in agreement with the opinion of assessors who found the respondent proved his case. He thus declared the respondent the rightful owner of the disputed piece of land and nullified the sale agreement between the appellants. He also ordered demolition of the structure on the suit land.

Mr. Rweyemamu, responding to the submission by the appellants was of the firm view that the respondent proved ownership which was supported by opinion by assessors.

Since the basis of Hon. Trial chairman's decision was the opinion of assessors, and following the counsel for respondent's submission which hinged on the said opinion, this court having gone through the said opinion noted a point of Law worth of determination.

What is revealed from the records is that there was irregularity on the attendance and opinion of assessors. This court therefore, finds it pertinent to deal with it although it was not raised as a ground of appeal. Since the learned counsel for respondent made reference to the opinion of assessors as the basis of the impugned decision, this court found no reason to re-open the proceedings to enable the parties to address the court on it as was already argued during submissions. In the case of **B. 9532 CPL Edward Malika vs. The Republic, Criminal Appeal No. 15 of 1989**, the Court of Appeal held inter alia that;

"...We are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or memorandum of appeal. This is so because such court is a court of law and not a court of parties." [emphasis added].

In the copy of proceedings and the judgment of Land Application No. 27 of 2010, District Land and Housing Tribunal of Kagera at Bukoba, this court noted two issues of regarding the assessors participation and the way they opined. One, the record shows two sets of assessors appeared on the day of hearing of this application that is 16.01.2018. While at page 47 of the typed proceedings the names of assessors in the coram appear to be Fortunata and Anamary, at page 50, it appears Mr. Muyaga and Mrs. Mpanju as the assessors who questioned the witness (PW1). This create doubts and confusion as between Anamery and Fortunata and Mr. Muyaga and Mpanju who was in attendance. If it was Fortunata and Anamery one would ask why didn't they asked some questions to the witness that is (PW1), and if it were Mr. Muyaga and Mr. Mpanju, one would ask why didn't they appear in the coram. With this kind of confusion it cannot be ruled out that the assessors attended and actively participated in the proceeding. In the case of ***Edina Adam Kibona vs. Absalom Swebe (SHELI) Civil Appeal No. 286 of 2017*** (unreported), the court, while citing the case of ***Tubone Mwambede vs. Mbeya City Council, Civil Appeal No. 287 of 2017 (unreported)*** held inter alia that;

"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors...they must actively and effectively

participate in the proceedings so as to make meaning for their role of giving their opinion before the judgment is composed...since regulation 19 (2) of GN 174 of 2003 require every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, 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."

In this matter it is clear that there were no assessors in attendance and even if they were it is clear that they did not actively and effectively participate as the ones who appeared in coram were not afforded opportunity to question the witness.

Again, the records are silent as to whether the said opinion were read in court. After the applicant (now the respondent) closed his case, the Hon. Chairman fixed a date for judgment and until then there is nowhere it is shown that the assessors gave their opinion. In the copy of a typed exparte judgment, the Hon. Chairman stated that the assessors are of the view that the applicant have proved his case.

He quoted the purported opinion as being issued by "**assessor one**" and "**assessor two**". With this statement, this court noted two problems; one, the proceedings do not show that the assessors gave their opinion and it therefore cannot be assumed that they actually, in the course of proceedings/hearing gave their opinion. It is not known how and when the said opinion surfaced. In the case of **Edina Adam Kibona vs. AbsaLom Swebe (SHELI), Civil Appeal No. 286 of 2017** (supra) it was also held:

"Therefore, in our considered view it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgement of the chairman, we are of the considered view that the assessors did not give an opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."

Two, in the summary of the assessors opinion (in a copy of judgment) it is not clear which assessor issued what opinion. The words "**assessor one**" and "**assessor two**" are not featuring in the proceedings. The assessors ought to be referred by their own names and not by number as the Hon. Chairman did. From the fore going observations, this court is of the firm view that the trial tribunal's

proceedings was tainted with irregularity for lack attendance and active of participation of assessors. This court therefore finds merits in this appeal and hereby quash the proceedings of the District Land and Housing Tribunal and set aside exparte-judgment and any other order emanating from Application No. 27 of 2010. Each part shall bear its own costs. Any interested party may institute a fresh suit before a competent tribunal.

It is so ordered.




A.Y. Mwenda

Judge

08.10.2021

This Judgment is delivered in chamber under the seal of this court in the presence of the Appellants and in the presence of Mr. Mathias Rweyemamu for the Respondent.




A.Y. Mwenda

Judge

08.10.2021

