

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

**AT BUKOBA**

**LAND CASE APPEAL NO. 54 OF 2021**

*(Arising from District Land and Housing Tribunal for Kagera at Bukoba in Land Appeal No. 26 of 2020 and Original Civil Case No. 4 of 2020 from Kitobo Ward Tribunal)*

**EUSTHER EUSTACE.....APPELLANT**

**VERSUS**

**LESTITUTA BASHASHA.....RESPONDENT**

**JUDGMENT**

***Date of Judgment: 08.10.2021***

***Mwenda, J.***

The Appellant Eusther Eustace was dissatisfied with the judgment of the District Land and Housing Tribunal for Kagera at Bukoba in land Appeal No. 26 of 2020 hence preferred this Land Case Appeal No. 54 of 2021 with a total of nine (9) grounds of appeal which are

- (1) That the first appellate tribunal erred in law and fact for not properly involving the assessors in determination of the judgment.*
- (2) That the lower tribunal erred in fact and law to find the appellant a proper party to be sued whereas she was only a care taker and the owner was Pereus Patriki.*

- (3) That the evidence of the alleged owner of the suit land one Pereus Patriki who appeared as a witness was not considered by lower tribunal's.*
- (4) That the alleged disposition of the Suitland to non-clan member was not considered by the lower tribunals to be unlawfully done.*
- (5) That the order of compensating the respondent as a redemption cost was arrived at without any evidence.*
- (6) That the lower tribunal did not consider that the said sale transaction indicated that the said shamba was a joint ownership, thus the respondent on her own could not sue the appellant without the consent of another co-owner.*
- (7) That the sale transaction was not tendered by the respondent and was not testified.*
- (8) That the said sale transaction was improperly admitted in evidence for want of fixing stamp duty*
- (9) That the evidence of the appellant was not properly evaluated*

When this appeal was scheduled for hearing both parties invited legal services of learned counsels, Mr. Ally Chamani for the Appellant and Ibrahim Muswadick for the Respondent.

When Mr. Ally Chamani was given the floor to address this court in support of his appeal, he submitted that, before arguing their grounds of appeal, there is a point

of law which is not among the ground of appeal in the memorandum of appeal but the law is clear that it can be raised at any time during trial as stated in the case of **B.9532 CPL. Edward Malome vs. Republic, Court of Appeal of Tanzania Criminal Appeal No. 15 of 1985** (Mwanza registry) at page 2 where the court said:

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

The learned counsel also submitted that, the point of law which is not part in the memorandum of appeal is failure to adhere to the composition of the Ward tribunal in accordance to **Section 11 of Land Dispute Court Act [Cap 216 R.E 2019]**, which require the composition of assessor must accommodate a woman. To cement his argument, he cited the case of **Mariam Madali vs. Hadija Kihemba High Court of Tanzania Misc. Land Case Appeal No. 16 of 2019** (Dar es salaam Registry) at page 3 paragraph 3 requires the composition of members

should be recorded each day failure to do so, it becomes difficult to know which member fully participated in the proceedings and at page 4 the court stated:

***"Composition of the tribunal concerns its existence because a tribunal which is not well composed is as good as is a non – existing of tribunal"***

He further submitted that, at page 6 of the judgment the court said this irregularity can be cured under Section 45 of CAP 216 which requires substantive justice but the court found out that substantive justice wouldn't apply.

The learned counsel submitted that, in our case, before Kitobo Ward Tribunal, Civil Land Case No. 4 of 2020, there were no compliance to the said procedure and even in the judgment of the tribunal, they have only mentioned names of assessors without their gender. To him it is difficult to know who among them is a woman. According to him the Ward Tribunal was not legally composed.

On the 1<sup>st</sup> ground of appeal, the learned counsel for the appellant submitted that assessors were not properly involved and he referred this court to the case of **Rev. Peter Benjamini vs. Tumain Mtazambe @ Mrema, Land Appeal No. 69 of 2019** at page 10. He went further by submitting that, at page 11 of the cited case, there is a procedure to be followed during recording of assessor's opinion. He also



submitted that, in the present case at page 9 on 9/11/2020 the tribunal recorded **“opinion recorded by the assessors”** and on the judgment the records are silent if the parties were availed with the content of their opinion. However, at page 4 last paragraph the honourable chairman made reference just by the way. According to him, this alone vitiate the proceedings as stated in the case of **Edina Adam Kibona vs. Absolon Swebe** quoted on the case of **Rev. Peter Benjamin (supra)**.

On the 2<sup>nd</sup> and 3<sup>rd</sup> ground of appeal the learned counsel for the appellant submitted that, the appellant was a care taker and the owner of the land was Pereus Patrick. He also submitted that, the said Pereus Patrick was called to testify but his testimony was not considered as the rightful owner of the Suitland. The said Pereus Patrick ought to be impleaded to ensure fair hearing and therefore he is condemned unheard.

On the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> ground of appeal the learned counsel for appellant opted to abandon them.

And on the last ground of appeal, the learned counsel submitted that, the first appellate court did not determine and re-evaluate the evidence of the trial court and the appellants evidence was not properly evaluated with no reason.

He concluded by submitting that, he prays for this court to adopt reliefs as prayed in the petition of appeal.

In reply to the submissions by the learned counsel for the appellant, Mr. Muswadick prayed for the reply to the petition of appeal to be adopted and form part of his submissions.

On the issue of composition of the Ward Tribunal, he submitted that, there is a coram and the documents speak for themselves. He went further by submitting that, even if what the learned counsel for the appellant submitted is true it does not go to the root of the case as it did not cause any injustice to the parties and every case must be decided on its own merits.

He also submitted that under section 11 of Cap 216, and section 15(2) of the Ward Tribunal's Act Cap 206, it is stated that the tribunal shall regulate its own procedure. According to him on the issue of gender there is no requirement of law which requiring mentioning of gender. To him since there is introduction of overriding objective and substantive justice, especially in section 45 of Cap 216 and Article 107 A (1) (e) of the Constitution of United Republic of Tanzania courts are required not to be tied up with technicalities.

In regard to the case of **Mariam Madali** the learned counsel submitted that is not binding rather persuasive one and this court is not precluded to come up with





a different position. On top of that he also submitted that, this decision was delivered on 8/5/2020 and the decision of Ward Tribunal was on 26/03/2020 and for that matter this judgment cannot act retrospectively. To him this ground has no merit.

On the 1<sup>st</sup> ground of appeal with regard to assessors' opinion the learned counsel submitted that, assessors' opinion was read before the parties and the appellants were present. To prove this the learned counsel referred this court at page 4 of the tribunal judgment, to him since this court is having all the records then the court will be in the best position to evaluate this matter.

On the 2<sup>nd</sup> and 3<sup>rd</sup> ground of appeal the learned counsel submitted that before the District Land and Housing Tribunal this issue was well addressed on the failure of joining Pereus Patrick as necessary party. To him this allegation is unsupported even when he testified, he did not bring any evidence as the record is silent. He went further by submitting that, Pereus had never claimed the said land in any court or tribunal. To him joining of parties is guided by the Civil Procedure Code which does not apply before the Land tribunals. The learned counsel cited the case of **Abdi M. Kipoti vs. Chief Arthurntoi, Civil Appeal No. 75/2017** Court of Appeal Tanga at page 9, 2<sup>nd</sup> paragraph and prayed for this ground to be disregarded.

On the issue of appellants to be a care taker, he submitted that it is trite law that the appellant has a right to choose who is to sue. In support of his submissions, he cited the case of **Magdalena Daniel vs. Godwin Tabula Land Case Appeal No. 7 of 2013**, High Court of Tanzania where the court said who determine which part to sue the answer is applicant. He went further by submitting that, in the circumstances of this case, the appellant had the right to sue who disturbed him.

With regard to ground No. 9 that the evidence of the appellant was not properly evaluated, the learned counsel submitted that, at the first appellate court they went through the evidence by both parties and concluded that the respondent's evidence was stronger than the appellant's evidence. He went further by submitting that, at page 3 of the judgment last paragraph and at page 4, 1<sup>st</sup> paragraph the court discussed about the said evidence.

He concluded by submitting that, they are praying for this court to dismiss this appeal and uphold the trial tribunals decision and the appellant be condemned to pay costs.

In rejoinder the learned counsel for the appellant submitted that, on irregularity on trial tribunal he wishes to refer the case of **Mariam Madali vs. Hadija Kilomba** (supra) and with regard to **CAP 206 of Ward Tribunal's Act**, the learned counsel submitted that **section 10 (2) of Land Disputes Court Act** shows if there is conflict between Ward Tribunals Act then, CAP 216 shall apply.

The learned counsel also submitted that, it is true that the High Court's judgment is not binding but if a judge wishes to depart from other judges, sufficient reasons should be advanced and he prayed for this court to adopt it.

On allegation that judgment before ward tribunal was issued before the judgment of High Court, the learned counsel submitted that, he has not supported it. On the issue of opinion of assessors the learned counsel submitted that, the document speaks for themselves as the documents are silent on that fact.

On ownership of Land by Pereus Patrick the learned counsel submitted that, on his evidence on 12/3/2020 showed he inherited the suit land from his fathers. On non-joinder of Pereus Patrick, he submitted that was not necessary, the cited case of **Abdi M. Kipozi** page 9, last paragraph there are circumstances under which a party may become a necessary party. To him, Mr. Pereus was required to be involved as necessary party as execution of Ward Tribunal's decree would affect his interest.

With regard to cost, he was of the view that, since the counsel for the respondent did not concede, he is required to pay costs.

This court took time to go through the submissions by both counsels, the record of the District Land and Housing tribunal and the record of the Ward Tribunal. To begin with, this court looked at the opinion of assessors, when you go through the

tribunal record before the District Land and Housing Tribunal on 09.11.2020 the tribunal recorded that "***Opinion recorded by the assessors***" when you look at this order by itself, it is not known if such opinion was ready before the parties. Also at page 4 of the typed judgment of the tribunal the learned chairman only stated "**I therefore subscribe to the opinion of Mr. Salum Mbelwa and John Mugango which were in favour of the Ward Tribunal findings.**" but he did record the said opinion in the judgment.

It is trite law that under **section 23(2) of the Land Disputes Court Act** and **Regulation 19(2) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulation of 2003** that, the District Land and Housing Tribunal shall be duly constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment.

From the tribunal's records, it is clear that the learned chairman acknowledges the presence of assessors but the records are silence as to whether the said assessors gave out their opinion before the parties.

This court in the case of **Rev. Peter Benjamini vs Tumani Mtazamba (supra)** at page 11 the court stated that:

"For the purpose of giving guidance to the District Land and Housing Tribunal, I wish to reiterate that, after the closure of the defense case, the chairman must schedule the case for assessors' opinion. On the date fixed for assessors' opinion the proceedings for instance should read as follows;

Date: 10<sup>th</sup> August 2021

Coram: S.J Mashaka

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 opinion

Respondent: I am ready too

Assessors opinions

1<sup>st</sup> assessor T.J Kasisha

Maoni yangu ni....."

2<sup>nd</sup> assessor J.N.Ndoma

Maoni yangu ni.....”

Also the court of appeal in the case of **Edina Adam Kibona V. Absalom Swebe (SHELI) Civil Appeal No. 286/2017** the Court of Appeal of Tanzania while making reference to are **Amir Mbaraka and Azania Bank Corporation Ltd V. Edgar Kahwi** stated that:

*"Therefore, in our considered view it is un safe to assume the opinion of assessor which is not on the record by merely reading the acknowledgement of the chairman, we are of the considered view that assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularly"*

Therefore, this court finds the District Land and Housing Tribunal's proceedings tainted with irregularity for lack of assessor's opinion. This appeal succeeds by quashing the proceedings of the District Land and Housing Tribunal and setting aside the judgment and any other order emanating from Land Appeal No.26 of 2020. The District Land and Housing Tribunal is required to follow the guidelines of recording assessors opinion as stated in the case of **Rev. Peter Benjamini vs**

**Tumani Mtazamba (supra)** with that regard, any interested party shall institute a fresh suit before proper forum.

Since the anomalies and irregularities giving rise to these outcomes was caused by the trial tribunal's error, this court order each party to bear its own costs.

It is so ordered.



  
A.Y. Mwenda

**Judge**

08.10.2021

Judgment delivered in Chambers under the seal of this court in the presence of the Appellant Eusther Eustace and the in the presence of the respondent Lestuta Bashasha.



  
A.Y. Mwenda

**Judge**

08.10.2021