

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

MISC. LAND CASE APPEAL No. 12 OF 2021

(Arising from the District Land and Housing Tribunal of Kagera at Bukoba in Land Appeal No. 45 of 2020 and original Civil Case No. 2 of 2020 at Gera Ward Tribunal)

MAMELITHA ALEXANDA----- APPELLANT

Versus

WILIBUROD ALEXANDA----- RESPONDENT

JUDGMENT

Date of last order: 26/08/2021

Date of Judgment: 01/10/2021

Mwenda, J.

This appeal emanates from a land dispute which was determined by the Gera Ward Tribunal in Civil Case No. 02 of 2020. The respondent Wiliburod Alexanda being aggrieved by the said decision preferred Land Appeal No. 45 of 2020 before the District Land and Housing Tribunal for Kagera at Bukoba.

After a full hearing of the case, the District Land and Housing Tribunal decided in favour of the Respondent. Aggrieved by that decision, the appellant preferred the present appeal with a total of four grounds.

When this Appeal came for hearing, the appellant hired the legal representation of Learned counsel one Mr. Ally Chamani while the respondent was represented by Mr. Brighton Mugisha, the learned advocate.

During hearing on 26th August 2021 the learned counsel for the respondent prayed for this appeal to be argued by the way of written submission in which the counsel for the appellant did not object. The order was granted and parties did comply with the scheduling order.

In his written submission the counsel for the appellant submitted that on the 2nd and 3rd ground of appeal he is challenging the mode of participation of assessors in the first appellate tribunal as the assessor's opinion were not considered despite of noting them in the judgment and their participation as well as reading of their opinion prior to the delivery of judgment. To bolster his argument, he cited the case of **Edna Adam Kibona vs Absolom Swebe (sheli) Court of appeal of Tanzania Civil Appeal No. 286 of 2017** Mbeya Registry at page 6 of the typed judgment the Court held inter alia that:

"Assessors before the District land and Housing Tribunal must fully participate and the conclusion of the evidence must be required to give opinion. The opinion must be in the record and must be read to the parties before the judgment is composed."

He went further by submitting that this requirement of law has also been stated in the case of **Sikudhani Sadiki Magambo vs Mohamed Roble, Court of**

Appeal of Tanzania Civil Appeal No. 197 of 2018 Dodoma Registry at page 9 of the typed judgment that:

"Every assessor to give his opinion and the same be recorded and be part of the trial proceedings"

He also submitted that at page 5 of the District Land and Housing tribunal proceedings the assessors were required to give out their opinion and the opinion were read to the parties. To him the challenge is that, the said opinion was not on the record of the tribunal and worse still at page 5 of the typed judgment the chairman just remarked that he has considered the assessors opinion but were not disclosed in the judgment.

He went further by submitting that this anomaly cannot be cured by the principle of substantive justice because it is the procedure which must be complied with by first appellate tribunal. He was of the view that failure to comply with this procedure renders the proceedings and judgment nullity and its remedy is to quash them.

On the first ground of appeal which is on the locus standi, the learned counsel for the appellant submitted that, the evidence on record reveals that the Suitland is among the estate of the parties relative. He went further by submitting that the law requires for any party who is interested in the estate of the deceased must be clothed with the letter of administration. As it was stated in the case of **Felix Costantine vs Jofrey Modest High Court of Tanzania**

in Misc. Land Case Appeal No. 9 of 2010 Bukoba Registry at page 7 of the typed judgment held that:

"To be heir of the estate creates an interest on the part of the heir, but that does not give him an automatic locus standi to sue or to be sued over the property of the deceased. The court further held that, the irregularity of having a person without legal standi to prosecute a suit renders the proceedings before the court nullity".

He concluded by submitting that it is very unfortunately that the first appellate court considered this ground at page 7 of the typed judgment but shifted the blame to the appellant that since she was the one who complained then ought to know that she was not appointed as administrator and why did she institute a suit at ward tribunal. To him this is misdirection on the part of the said chairman as the court ought to follow the requirement of the law and not the parties wish.

He therefore prayed for this appeal to be allowed by quashing the lower tribunal decisions with costs.

In reply to the appellant's written submissions, the learned counsel for the respondent submitted that, on the issue of the mode of participation of assessors to him this is a clear fabrication. He was of the view that how did this

come to the surface without going through the entire proceedings of the District Land and Housing Tribunal. To him so far as this matter is concerned the allegation is blatant lie. On the cited cases by the appellant such as **Edina Adam Kibona (supra)** and **Sikudhani Sadiki Magambo (supra)** the learned counsel for respondent submitted that these cases are distinguishable to the present appeal.

According to him **section 45 of the Land Dispute Court Act [CAP 216 R.E 2019]** cured the said anomalies but according to him there is no such irregularity in this matter. To him the case of **Yakobo Magoiga Gichere vs Peninah Yusuph Civil Appeal No. 55 of 2017(unreported)** cures anomaly at hand by the use of overring objective.

On the issue of locus standi the counsel for the respondent submitted that, the learned counsel for the appellant cited the case of **Felix Constative vs Jofrey Modest (supra)** to show how one could attain interest in the deceased's estate according to him the respondent is not fighting to be the heir. To him this court should look whether the appellant has title in which she can dispose the land. He went further by submitting that, according to Baihuzi clan meeting of 24/7/1995 it prohibited Mamelitha Alexandra from selling the suit premise as she is only required enjoy all necessities of life until she dies and he cited three authorities in support of his submissions which are Costantine Bulagile vs. Bi Genereza Mashakala (1969) H.C.D, In Kyokukaiile vs Kikanja and four others

[1971] H.C.D 185 and Angela Bisiki vs Antonia Bisiki and others [1969] TLR 225.

He concluded by submitting that the appellant had no title to the land and he prayed for this appeal to be dismissed and the respondent to be paid costs.

In rejoinder the counsel for appellant submitted that, the counsel for the respondent is salvaging the subordinate's tribunal's decision in respect of irregularity committed by the first appellate court on the propriety of involving the assessors in the determination of the suit.

He also submitted that at page 2 of his typed submission, the learned counsel invoked **section 45 of the Land Disputes Court Act, [Cap 216 R.E. 2019]** to take off the irregularity, if any, basing on the principle of substantive justice.

He went further by submitting that, with respect to the said principle of substantive justice it was even considered by the Court of Appeal in the case of **Sikuzani Saidi Magambo and others Versus Mohamed Roble (Supra)** at page 11 of the typed judgment when held that,

"On the strength of our previous decisions sited above, we are satisfied that the pointed omissions and irregularities amounted to a fundamental procedural errors that have occasioned a miscarriage of justice to the parties

***and had vitiated the proceedings and entire trial
before the tribunal"***

The learned counsel also submitted that, the first appellate court did not record the opinions of the assessors in the proceedings. For instance, at 5 of the proceedings, it is recorded that, Tribunal: Assessor opinion read to parties" But the said opinion was not recorded in the proceedings.

The learned counsel also submitted that, the procedure of recording the said assessors opinion has been spelt out by his lordship Kilekamajenga in **Rev. Peter Benjamin Vers Tumain Mtazambwa @, Mwema, High Court of Tanzania, Land Appeal No. 69 of 2019**, Bukoba registry,

***Tribunal: The case is coming for assessor's opinion,
Applicant. I am ready for the opinion.***

Assessors' Opinion:

***1st Assessors: Name:Maoni yangu
ni kwamba***

***2nd Assessor: Name: Katika kesi hii, maoni
yangu***

The counsel for the appellant concluded by submitting that, from there afore demonstration, there were illegalities in the proceedings which vitiates the proceedings and judgment thereto.

Having gone through the records and submissions by both parties this court found out that the issue to be determined is whether this appeal has merits.

In the present appeal the learned counsel for the appellant submitted that, before the District Land and Housing Tribunal there are anomalies which can vitiate the trial proceedings. He submitted that assessors opinion were not considered despite of noting them in the judgement. To him the records are clear that there was full participation of assessors before the tribunal as they give out their opinion prior before delivering of judgment.

This court went through the tribunal's proceedings and found out that at page 2 of the handwritten proceedings, the records are clear that on 12/11/2020 assessors' opinion were read before the parties but the learned chairman did not put them on records as it has been the guidelines in the case **Rev. Peter Benjamin Vers Tumain Mtazambwa @, Mwema, (supra)**.

Apart from that in the typed judgment at page 5 the record shows that the learned chairman recorded assessors opinion which read and I quote:

"The assessors of the tribunal who sat with me, John Mugango and Dorah Rutainulwa had both opined that, the matter be remitted back to the clan member who will re- install the boundaries marks."

However at page 7 of the typed judgment the learned chairman dismissed the appeal, meaning he did not take into account of the opinion of assessors. This is contrary to **section 24 of the Land Dispute Court Act [CAP 216 R.E 2019]** which read that:

"In reaching decisions, the chairman shall take into account the opinion of assessors but shall not be bound by it, except that chairman shall in the judgment give reasons for differing with such opinion".

In the present appeal it is clear that the learned chairman's decision differs with the opinion of the assessors as the chairman dismissed the appeal while the assessors opined that the matter be remitted back to the clan members who will re-install the boundary marks and there is no any reason to that effect. In essence he did not give reasons for differing with the opinion of assessors.

In the upshot this court finds the District Land and Housing Tribunal's proceedings tainted with irregularity for lack of reasons for differing with the opinion of assessors and failure for the learned chairman to put in records the summary of the opinion of assessors.

Therefore, this appeal succeeds by quashing the proceedings of District Land and Housing Tribunal and set aside the judgment and any other order emanating from Land Appeal No. 45 of 2020 decided by the tribunal. Any

interested party shall institute a fresh suit before another chairman with a new set of assessors.

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

01.10.2021

Judgment delivered in chamber under the seal of this court in the presence of Mr. Mugisha the learned counsel for the respondent and in absence of the learned counsel for appellant with notice.




A.Y. Mwenda
Judge

01.10.2021

