

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 93 OF 2020

(Originating from Application No. 18 of 2016 of DLHT for Karagwe at Karagwe)

PASCHAL PHILIPO APPELLANT

VERSUS

MARTIN NICHOLAUS1ST RESPONDENT

MONICA LWIMILINZI.....2nd RESPONDENT

EXPARTE JUDGMENT

23/11/2021 & 10/12/2021

NGIGWANA, J.

This appeal emanates from the decision of District Land and Housing Tribunal for Karagwe at Karagwe in Land Application No. 16 of 2016 delivered on 20th day of July 2019.

Briefly, the facts that gave rise to this appeal are that; it is alleged on 04/10/1993, the appellant purchased from one Philemon Katulamu a piece of un-surveyed land/farm located at Omururama Village, Ward of Chanica within Karagwe District in Kagera Region whose current value is estimated to be TZS 45,000,000/= That the appellant erected a house in the said land, whereas later on, he fall in love with the 2nd respondent who was first married to the 1st respondent, thus invited her and both lived in the said house for some years. It is further alleged that, the 2nd respondent

invited her former husband, and as a result the appellant demanded them to give vacant possession but in vain, whereas he finally filed a case against the respondents for trespassing/ encroaching his land. After full trial, the 2nd respondent was declared the lawful owner of the suit land. Consequently, the suit was dismissed with costs.

Dissatisfied with the decision of the DLHT, the appellant who is lay person and unrepresented has preferred this appeal on the following two grounds:

1. That, the Learned trial Chairman of the Tribunal erred in law and facts for failure to take into consideration that the purchase agreement dated 04/10/1993 was tendered by the appellant in the tribunal to prove the ownership of the shamba and built house in the same shamba and thus wrong decision against the appellant.
2. That, the Learned trial Chairman of the Tribunal; erred in law and facts for failure to know that the 2nd respondent was a mere witness to the appellant's purchase agreement which was tendered by the appellant in the tribunal to establish ownership of the shamba and the house thus wrong decision against the appellant.
3. That, the Learned trial Chairman of the Tribunal; erred in law and facts for failure to recognize that the appellant was having relationship with the 2nd respondent since 1994 without being married to each other and thus the 2nd respondent did wrongly invite the first respondent on 04/12/2015

4. That, the learned trial Chairman of the Tribunal; erred in law and facts for failure to know that the 2nd respondent wrongly invited the 1st respondent who was once married to her and came to live with her in the house of the appellant without any permission from the appellant.
5. That, the Learned trial Chairman of the Tribunal erred in law and facts for failure to know that the 2nd respondent had no legal title to claim the properties of the appellant without any supporting document.
6. That, the Learned trial Chairman of the Tribunal erred in law and facts to refuse the opinions of assessors without giving any sufficient reasons of his departure.
7. That, the Learned trial Chairman of the Tribunal erred in law and facts for not considering watertight evidence adduced by the appellant by the appellant beyond the balance of probability.

Wherefore prays for five orders as follows; that the, judgment, and orders, be quashed and set aside, that appellant be declared the lawful owner of the suit premises, that Respondents or their agents be permanently restrained from interfering with the suit land and, costs of this appeal be provided.

The Respondents filed no reply to the memorandum of appeal, and entered no appearance, after the court was informed on the effective service of the summons to file a reply. Appeal proceeded *ex parte* against the appellant. Considering that the appellant is a lay person, and for the interest of justice, the hearing by way of written submissions was ordered.

Having keenly gone through all seven (7) grounds of appeal, this court found that the ground No.6 and the anomaly discovered by this court on the change of Chairpersons without assigning reasons are sufficient to dispose this appeal. The appellant prayed to argue the appeal by way of written submissions, the prayer which was duly granted. He did comply with court order, but as regards the 6th ground of appeal, he had nothing to add. The grounds read;

“That, the Learned trial Chairman of the Tribunal erred in law and facts to refuse the opinions of assessors without giving any sufficient reasons of his departure”

The composition of the District Land and Housing Tribunal is stated under section 23 (1) of the Land Disputes Courts Act, Cap 216 R: E 2019 which provides;

“The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors”
(Emphasis supplied)

It therefore noted that, assessors are not the court ornaments, and they are not there by accident, and without them the tribunal cannot be said to have been duly constituted, and before reaching the judgment, assessors must give out their opinion.

Section 23 (2) of the Land Disputes Courts Act, Cap 216 which provides;

“The District Land and Housing Tribunal shall be constituted when held by a chairman and two assessors who shall be required to give out their

opinion before the Chairman reaches the judgment" (Emphasis supplied)

Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations; 2003 imposes a duty upon the Chairman/Chairperson to require every assessor present at the conclusion of the hearing, to give his/her opinion writing. The same provides;

"Notwithstanding subsection (1) the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili".

Section 24 of the Land Disputes Courts Act Cap 216 R: E 2019 Provides;

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

In the case at hand, upon careful perusal of both typed and handwritten proceedings, I discovered that the hearing commenced on 20/10/2016 and assessors who sat with the Predecessor Chairman (Hon. J. K Banturaki) were **Akwiline France** and **Mr. J. M. Mshashu**.

On 18/08/2017, the hearing proceeded whereby AW2 testified before R. E. Assey, Successor Chairman, the Chairman sat with one assessor; **Akwiline France**, and on 14/11/2017 whereby AW3 testified, assessors were; **Akwiline France** and **Nzorombi**, and on 30/11/2017 whereby AW4 testified, the Successor Chairman sat without assessors. On 08/03/2018

when the defense case was heard, (DW1, DW2, DW3 and DW4) the Hon. Chairman sat with one assessor; **J. M. Mshashu**, and on 20/03/2018, the tribunal visited the locus in quo whereby the assessor was **Akwiline France**. Finally, opinions were given by **J. M. Mshashu and Akwiline France**. However, there is nothing indicating that the assessors' opinions were read to the parties as required by the law. In a nutshell, Akwilina France opined that, the applicant purchased the disputed land lawfully, hence the lawful owner of the disputed land. She further opined that, the relationship between the applicant/appellant was blessed with a child, the farm should be used to maintain the child. **J. M. Mshashu** opined that the disputed land was purchased by the applicant/appellant though no evidence as who developed the suit land thereafter.

The Chairman concluded the judgment as follows;

"I partly concur with these opinions for the reason that the applicant could not establish his claim. Therefore the application is not allowed. The Suitland belongs to the 2nd respondent. Costs follow the event. It is so ordered.

Sgd R. E. ASSEY CHAIRMAN

20/7/2019"

In the case at hand, relying on what I have explained herein above, the following anomalies have observed;

One, there was irregular change of assessors. The requirement that members of the tribunal who are present at the commencement of the trial

should be the ones sitting in the tribunal to the finality of the case is a mandatory legal requirement provided under section 23 (3) of Cap 216 R: E 2019, and one of the members happens to be absent, the remaining shall proceed with the matter, and the Chairman only remains, then he shall proceed with the matter to its finality. In the case at hand there was unwarranted replacement of assessors on several occasions, and that suffices to vitiate the proceedings of the trial tribunal. **See Y.S. Chawalla and Co.Ltd versus Dr.Abbas Tahereali, Civil Appeal No.70 of 2017 CAT** (Unreported)

Two, there was a failure of the Hon. Chairman to give reasons for differing with the opinion of assessors. Before the Chairman reaches a final verdict, he ought to consider the opinion of the assessors though not bound by it, but should give reasons for differing with such opinion. See section 24 of Cap 216 R: E 2019 and Zubeda **Hussein Kayagali versus Oliva Gaston Luvakule and Another, Civil Appeal No.312 of 2017 CAT** (Unreported)

Three, there was as failure of the Chairman to read the opinion to the parties.

The Court of Appeal the case of **Edina Adam Kibona versus Absolom Swebe (sheli)**, Civil Appeal No. 286 of 2017 CAT (unreported) held that;

"We wish to recap at this stage that the trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19(2) of the Regulations, the Chairman of the District Land and Housing Tribunal must

*require every one of them to give his opinion in writing. **It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed.** For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose"*

Four, there was change of Chairpersons without reasons being assigned. The law recognizes circumstances where a case change hands from one Magistrate or Judge to another. See Order XVIII rule 10(1) of the Civil Procedure Code Cap 33 R: E 2019. The reasons for such change depend on the circumstances of each case, and this may include disqualification, death, resignation, retirement or transfer.

In the case of Ms. **Georges Centre Ltd versus The Honorable Attorney General and Ms. Tanzania National Road Agency, Civil Application No.29 of 2016 CAT** (Unreported) it was held that;

"The provision cited above imposes upon the successor Judge or Magistrate an obligation to put on records why he/she has to take the case that is partly heard by another. There are number of reasons why it is important that the trial started by another judicial officer be completed by

the same judicial officer unless it is not practicable to do so. For one thing..... the one who sees and hears the witness is in the best position to assess the witness credibility. Credibility of a witness which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised”

The Magistrate, Chairperson or Judge who fails to assign reasons after taking over the case lacks mandate to proceed with the trial and the proceedings before him are null and void. **See the case of Abdi Masoud Iboma and 3 others, versus Republic, Criminal Appeal No. 116 of 2015 CAT** (Unreported).

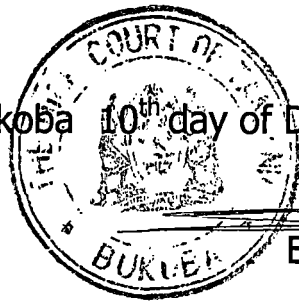
As already pointed out, it is on record that this case was handled by two Chairpersons namely; J.K. Banturaki and R. E. Assey. It started with Mr. Banturaki, and he recorded the evidence of PW1. Thereafter, the case moved to Mr. Assey who heard the rest of witnesses and finalized the matter.

Given the above position of the law in respect the trial conducted with the aid of the Assessors like the case at hand, and what transpired in the District Land and Housing Tribunal, it is obvious that the District Land and Housing Tribunal failed to keenly involve the assessors in the hearing Land Application No 18 of 2016.

Again, R. E. Assey (Hon. Chairman) assigned no reasons after taking over the case which was partly heard by J.K. Banturaki, therefore, he had no mandate to proceed with the trial and the proceedings before him were

null and void. Consequently, the proceedings are quashed, the judgment and orders thereto are set aside. I direct the application to be expeditiously heard afresh before another Chairman/Chairperson and a different set of assessors. Since the anomalies were not caused by the parties, and since the matter was heard ex parte, I make no order as to costs. It is so ordered

Dated at Bukoba 10th day of December, 2021.

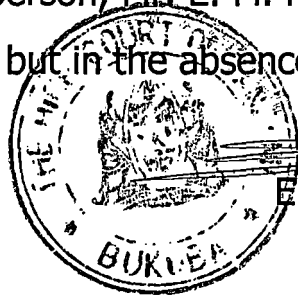


E. L. NGIGWANA

JUDGE.

10/12 /2021

Judgment delivered this 10th day of December, 2021 in the presence of the appellant in person, Mr. E. M. Kamaleki, Judge's Law Assistant, Mr. Gosbert Rugaika, B/C but in the absence of the respondents.



E. L. NGIGWANA

JUDGE.

10/12 /2021