

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPEAL NO. 27 OF 2021

(Arising from Decision of the District land & Housing Tribunal Misc. Land Application No. 119 of 2018 and originating from the decision of Magata/Karutanga Ward Tribunal Case No. 01 of 2012)

ENOCK BABU..... APPELLANT

VERSUS

JOHN KATAMA..... RESPONDENT

JUDGMENT

03/12/2021 & 17/12/2021

NGIGWANA, J.

The appellant was aggrieved by the decision of the District Land and Housing Tribunal (DLHT) for Muleba at Muleba in Misc. Land Application No. 199 of 2018 which denied him extension of time within which to appeal out of time against the exparte decision of Magata/Karutanga Ward Tribunal in Land Case No. 01 of 2012.

Briefly, the facts which gave rise to this appeal are that, it is alleged that sometimes in 2012, the appellant Enock Babu and Katanga Village Council encroached into the land owned by Abayongo clan. As a result, Civil Case No. 01 of 2012 was filed against the appellant and Katanga Village Council. The case proceeded exparte as against the appellant. On 28/04/2016, the Ward Tribunal was informed by Medard Felician on behalf of Katanga Village Council that they have recognized that the owner of the disputed

land was Abayango clan. At the end of the trial, the Ward Tribunal delivered the judgment in favor of the respondent John Katama.

There was no appeal preferred thereof by the appellant within time, but after expiry of 45 days, he lodged an application in the DLHT for Muleba at Muleba seeking for extension of time within which to lodge appeal out of time but the DLHT found that no sufficient cause demonstrated by the appellant for the court to exercise its discretional powers to grant extension of time. The appellant was aggrieved, hence this appeal. The grounds of appeal raised by the appellant are as follows:-

- 1. That, the DLHT erred both in law and fact for considering fictitious fact that the appellant was summoned and absconded to appear since the appellant has never been served with the summons by the Ward Tribunal.*
- 2. That, the lower Tribunals misdirected themselves by deciding in favor of the respondent while denying the appellant right to be heard as the inherent right.*
- 3. That, the DLHT misdirected itself for dismissing the appellant's application by relying on the summons sworn by said Rwakyazi who is the blood relative with the respondent, hence the said summons verified by said Rwakyazi has never been served to the appellant. The copy of Ruling dated 04/03/2019 is hereby as annexure A1 forming part of this Appeal.*

Wherefore, the appellant prays for orders as follows:

- (i) That the ruling of the DLHT and judgment of Magata/Karutanga Ward Tribunal be quashed and set aside.
- (ii) Order that the case be heard afresh inter-parties.

At the hearing of this appeal, both parties appeared in person and unrepresented. When invited to make submission in support of the appeal, the appellant submitted that he was never summoned at Magata Ward Tribunal, thus he was not aware of Land Case No. 01 of 2012 until 23/03/2017 when the matter was at execution stage. He also stated that upon making follow-ups, he learnt that three summons were issued by the Ward Tribunal through the Hamlet Chairman namely; Mr. Rwaikiza who is the respondent's blood relative, and in the summons, it was indicated that he has refused serve. He further said, it is not true that he refused service. He ended his submission urging the court to allow this appeal so that the case can be heard inter parties.

On his side, the respondent admitted that the Hamlet leader Mr. Rwaikiza is his relative, but stated that, that had not at all affected the issuance of summons to the appellant. He urged the court to dismiss the appeal for want of merit.

However, when the court posed to compose the judgment, it discovered a procedural irregularity committed by the trial tribunal which had not been addressed by the parties; whether there was involvement of assessors to the finality of the case.

It has to be noted that this issue was not raised as ground of appeal. Since it is trite in our adversary system of administration of justice

where the Judge or Magistrate is as at all time expected to play the role of unbiased umpire, he/she cannot raise any issue **suo motu** and proceed to decide the matter on the said issue without hearing the parties. As to what procedure should be adopted where the issue has been discovered at the time of composing the judgment, I sought guidance from the cases of **Zaid Sozy Mziba versus the Director of Broadcasting, .Radio Tanzania Oms and Another**, CAT, Civil Appeal No.4 of 2001 and **Pan Construction Company and Another versus Chawe Transport Import and Export Co. Ltd** Civil Reference No.20 of 2006 CAT (Both unreported), where the court emphasized that where in the course of composing its decision a court discovers an important issue that was not addresses by the parties at the time of hearing , it is duty bound to reopen the proceedings and invite the parties to address it on the issues.

When invited to make his submission, the appellant stated that, through ought the hearing of the matter, the Hon. Chairman sat with the aid of two assessors; **P. Marijani and J. Mutalemwa** but he never saw their opinions, and if any, were not read to them before the ruling is composed. When the respondent invited to address the court on that issue, he conceded with the submission of the appellant.

Now, the main duty of the court here is to determine whether the pointed-out irregularity existed, and if yes, whether it is capable of vitiating the proceedings of the DLHT

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).*

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).*

One may ask himself/herself as to whether the **ruling** is also covered under the here in above provision. The answer is in the affirmative. Section 23 (3) of the Land Disputes Courts Act, Cap 216 R: E 2019 shows that as a general rule, assessors must be involved in **any proceedings before the Tribunal**. The term "proceedings" has been defined under section 2 of the Act as follows;

"Proceedings includes any application, reference, cause, matter, suit, trial, appeal or revision, whether final or interlocutory, and whether or not between parties"

Furthermore, 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**".*

However, the Chairman may proceed with any proceeding in absence of the assessors, but he must assign reasons before he/she proceeds. Section 23 (3) of the Act provides;

*"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, **either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.**"*

In the case at hand, the records of the DLHT revealed that on 22/11/2018 when the matter came for mention, the Hon. Chairman sat with two assessors namely; **P. Marijani and J. Mutalemwa**. The records are silent

as to what later on transpired in relation to assessors since no reasons assigned thereto.

However, the parties to this case have stated that, through ought the hearing of the application, the Hon. Chairman sat with the aid of the said assessors. The record must speak for itself because opinion or involvement of assessors cannot be assumed. See **Tubone Mwambeta versus Mbeya City Council**, Civil Appeal No.287 of 2017 and **Ameir Mbarak and Another versus Edgar Kahwili**, Civil Appeal No.154 of 2015 CAT (Both unreported). In the case at hand, the records reveal that there was non-involvement of assessors in the DLHT.

The non-compliance of section 23 (2) of The Land Disputes Courts Act, Cap 216 R: E 2019 and Regulation 19(2) of GN. No. 174/2003 is an incurable irregularity. This position was stressed by the Court of Appeal of Tanzania in the case of **Edina Adam Kibona versus Absolom Swebe (Sheli)**, Civil Appeal No.286 OF 2017, CAT (Unreported). Therefore, I find that it is not necessary to discuss the grounds of appeal.

In the event, I invoke the revisional powers vested in this Court by section 43(l)(b) and (2) of the Land Disputes Courts Act, Cap 216 R: E 2019 to nullify the entire proceedings and ruling of the DLHT for Muleba at Muleba in Misc. Land Application No.119 of 2018. Subsequent orders thereto are set aside. For the interest of justice, the matter is remitted back to the DLHT to start afresh before another Chairman and a new set of assessors. Since the anomaly was not caused by the parties nor raised by any of them, each party shall bear its own costs.

It is so ordered.

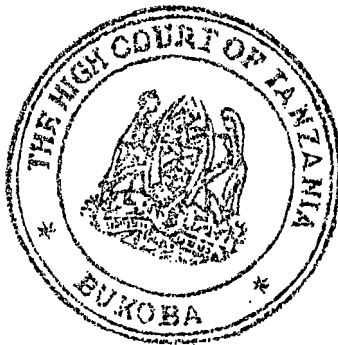


E.L. NGIGWANA

JUDGE

17/12/2021

Judgment delivered this 17th day of December, 2021 in the presence of both parties in person, and Mr. Gosbert Rugaika B/C.



E.L. NGIGWANA

JUDGE

17/12/2021