IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA.

LAND CASE APPEAL NO. 90 OF 2020

(Arising from Land Case No. 08 of 2016 of the District Land and Housing Tribunal at Bukoba)

WINFRIDA KOKUILWA..... APPELANT

VERSUS

BRIGHTON SLIVERY BAHITWA.....RESPONDENT

JUDGMENT

10/12/2021 & 24/12/2021
NGIGWANA J.

In the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba, the respondent filed a case against the appellant that she had encroached the Suitland purporting to have inherited it from her late mother, Ntagilege Rusana. The respondent averred that the Suitland belonged to Mbile Mushumbusi who died on 1st January, 1940 therefore it was a part of estates subject to distribution to the rightful heirs. The DLHT decided in the favour of the respondent and ordered the appellant to vacate it.

Aggrieved with that decision, she preferred the appeal before this court. Briefly, the background of the dispute, which was believed by the DLHT, shows that, the owner of the Suitland was Mbile Mushumbusi, who

according to the respondent, died intestate in 1940 as stated above, being survived by two daughters, Apronia Kokunura and Kyamuyonjwa and his wife Ntagilege Rusana whom they had divorced in 1936/1937. That the respondent was born in 1944, after Mbile and Ntagilege had already divorced. That after the death of Mbile Mushumbusi, the land remained in the hands of the respondent's father, Bahitwa Byanyuma and his grandfather, Byanyuma Byaitanga because Apronia Kokunura and Kyamuyonjwa got married. In 1978 Ntagilege came back to that shamba and lived there until her death in 2012.

In 2013, the respondent instituted a probate case at Gera Primary Court vide Probate Cause No. 5 of 2013 to be appointed the administrator of the estates of the late Mbile Mushumbusi. He was appointed. That, upon being appointed, **in 2016, he filed a suit at the DLHT against the appellant claiming that she is not a daughter of the deceased therefore, be ordered to vacate Suitland.** He alleged that as the children of Mbile, the rightful heiresses, are dead, the Suitland is the clan land and the respondent is not a clan member as stated above. Therefore, he claimed the Suitland in order to distribute it to the beneficiaries.

His allegations were supported by Balingilaki Prosper Bahitwa who narrated the same story. Being of 46 years when he testified before the DLHT, being born in 1973, he contended that he was told on what happened in 1937 and 1940. Unfortunately, he did not reveal who told him all those stories.

In defence, the appellant contended that she is the daughter of the deceased who died in 1948 and Ntagilege Rusana. That she was born in 1944. That the father of the respondent immigrated to that place from Itahwa. Upon arriving there at Nyantahi, Kashekya, Bahitwa found Mbile and they became friends as they belonged to the same Clan of Abazigu though not from the same family tree. That Mbile died before the respondent was born and he had no proof if the properties of Mbile were bequeathed to his family. That even after the death of the respondent's father, Bahitwa, the Suitland was not distributed to his children because he was not a relative of Mbile. She concluded saying that the respondent was never proposed to administer the estates of Mbile.

Her contentions were supported by George Nchaliwo, her age mate, by stating that the appellant is the child of Mbile and was raised in the residence of Mbile until she got married at Nshisha in Kangabusharo.

That Mbile had three daughters, and after the death of the two daughters, Apronia Kokunura and Kyamuyonjwa, the land remained in the hands of the appellant.

Theonestina John supported the contentions of the appellant that she is the child of Mbile. That after the death of Mbile, his properties were distributed to his children and his wife in 1975. That she witnessed the same as she was an adult of 20 years.

As stated above, the DLHT believed the story of the respondent, the case was decided in his favour something that aggrieved the appellant, hence this appeal. The grounds of appeal are as follows;

1. *That the application was wrongly admitted, proceeded, and decided out of time without the applicant seeking and obtaining the leave of the Appropriate Minister out of time.*
2. *That the Tribunal Misdirected itself in law when decided the matter relying on the hearsay evidence of PW1 and PW2.*

That the tribunal made a non-direction in the law because there was no proof that the Appellant is not the biological daughter of the late Mbile who died in 1948.

When the case was called for hearing before this court, Mr. Bengesi appeared representing the appellant while Ms. Erieth Barnabas represented the respondent, both learned counsels.

Mr. Bengesi was the first to take the floor. In arguing for the appeal, he argued each ground separately. On the first ground, he contended that the land was owned by the person who died in 1940 and 12 years had elapsed when the suit was instituted. That the respondent was required to seek for the leave from the Minister responsible for land matters before instituting the suit.

On the second ground, Mr. Bengesi contended that the respondent and his witness had no firsthand evidence, but hearsay evidence. Arguing the third ground, Mr. Bengesi claimed that the contention that the appellant was not a daughter of Mbile was the conclusion that was arrived at by the tribunal with no justification. He pressed for the appeal to be allowed.

In reply, Ms. Erieth Barnabas, while arguing the first ground, she stated that the matter was filed before the expiry of 12 years. That the respondent became aware that appellant was selling the Suitland hence took actions against such a thing. Until 2016 when the suit was filed at

the DLHT, the period of 12 years was not expired from the time the dispute arose.

For the second ground, the learned counsel responded that the respondent (PW1) and his witness (PW2) were clan members who lived in that area therefore, their evidence were not hearsay evidence.

Regarding the third ground, she insisted that the appellant is not a clan member, thus, had no right over the disputed land. Finally, she prayed the appeal be dismissed with costs.

In rejoinder, Mr. Bengesi reiterated what he submitted earlier, had nothing to add.

The court wanted to satisfy itself if the trial tribunal was properly constituted and the propriety of the judgment therefrom. Mr. Bengesi was of the view that the assessors' tenure expired during the prosecution case therefore the court was not well constituted hence fatal; the proceedings became null and void likewise the judgment resulting therefrom.

Ms. Erieth on her side, stated that Section 23(3) of the Land Disputes' Courts Act Cap 216 R.E 2019 allows the Chairman to proceed with the proceedings even in the absence of all members. She stressed that as

the assessors did not hear all the evidence, they did not give their opinions that is why they were not referred by the chairman in his judgment. She concluded by saying that the assessors who have not heard the case cannot give opinions. To buttress her submission, she referred the court to the cases **of JOHN MASWETA vs GENERAL MANAGER MIC (T) LTD**, Civil Appeal No. 113 of 2015; **MWITA SWAGI vs MWITA GETEBA** Misc. Land Case Appeal No. 36 of 2019 (HC); and **ALEX MSAMBUSI vs ABDALLAH MABULA,** Land Appeal No. 27 of 2018. This court agrees with Ms. Erieth that since the assessors' tenure expired when the matter was at prosecution stage, the trial tribunal was right to hear and determine the matter with no aid of assessors.

Upon careful scrutiny of the allegations of the respondent, this court is of the considered view that, even if at some point the Suitland was under the supervision of the respondent's father and grandfather, that family had never acquired a rightful ownership over that land.

Being in supervision of the land, if at all that happened, did not entitle them to become owners of the same. Mbile had never bequeathed that land to the respondent's father or grandfather. It seems the respondent's mission is to own that land under the umbrella of the clan.

If we agree with the allegations of the respondent, which I don't agree with, that the appellant is not a child of Mbile, still, it is evident that Mbile was succeeded by other two daughters, Apronia Kokunura and Kyamuyonjwa. Therefore, that land, apart from the appellant, is owned by Apronia Kokunura and Kyamuyonjwa or their heirs. If they are dead, it is obvious that their children inherited that land. It has never reverted to the clan, and no any clan member has mandate to claim it.

When passing through the evidence of the DLHT, the 3rd ground of appeal and submissions made in respect of the 3rd ground of appeal, I noted a legal issue on the competence of the suit thereat. I have noted that the DLHT in its judgement discussed on the legitimacy of the appellant in order to satisfy itself if she is the daughter of Mbile. That issue formed the decision of the tribunal. **At page 8 of the judgment, the DLHT stated that the respondent is not a child of Mbile Mushumbusi, hence she is not entitled to claim the land.**

I think the DLHT went beyond its jurisdiction to determine the matters that were supposed to be determined by the **probate court**.

Its jurisdiction according to law is limited only in determining who is the rightful owner of the disputed land. It has no mandate to determine who is eligible to inherit or not entitled. That should be left to the probate

courts. There was no dispute on who is the owner of the land, it is well known that the land belonged to Mbile Mushumbusi until his death either in 1940 or 1948.

After his death, in 1975 the land was distributed to his daughters. Therefore, the owners of that land are known.

What was adduced before the DLHT was purely a probate dispute on the eligibility of the appellant to be among the heirs, and not who was the rightful owner of that land.

The matter of which is still unsolved is whether the appellant is eligible to be among the heirs? This question cannot be answered by the land tribunal, the land tribunal has no mandate to that issue, that is the mandate of the probate court. For that matter, the matter was wrongly instituted at the land tribunal. There was no need for the tribunal to determine if the appellant is the child of Mbile or not. There was no need of calling the neighbours to prove that allegation. The tribunal was required to determine the issue of ownership, once proved, the matter would have ended there.

Worse enough, the land tribunal was caught into that web and decided to determine who are children of Mbile, the birth of the appellant. That

was not supposed to be discussed there. Discussing and determining it, the DLHT, clothed itself the power it did not have. It is only the probate court which is vested with powers to determine who is entitled to inherit and who is not, a Land Tribunal has no such powers. See **KAGOZI AMANI KAGOZI (Administrator of the estate of the late Juma Selemani) vs IBRAHIM SELEMA AND 6 OTHERS** Land Appeal No. 2 of 2019 (HC) and **MGENI SEIFU vs MOHAMED YAHAYA KHALFANI** Civil Application No. 1 of 2009.

This court and the Apex court of this country, in various cases, have insisted on the issue of jurisdiction that the court or tribunal should not assume the jurisdiction. The court or tribunal must satisfy itself if it has jurisdiction to determine the matter presented before it. The jurisdiction of the court is fundamental, is the creature of the law, it should not be presumed or taken for granted. The former East African Court of Appeal in **Shyam Thanki and Others v. New Palace Hotel [1971]** 1 EA 199 at 202 addressing the question of jurisdiction held that;

"*All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess.*"

The question as at what stage the issue of jurisdiction can raised was long time ago settled by the Court of Appeal of Tanzania in the case **of Richard Rugambura Versus Isack Ntwa Mwakajila and Tanzania Railway Cooperation, Civil Appeal No. 2 of 1998** (Unreported). The same court held;

"*The question of jurisdiction is paramount in any proceedings. It is so fundamental that in any trial, even if it is not raised by parties at the initial stages, it can be raised and entertained at any stage of the proceeding in order to ensure that the court is properly vested with jurisdiction to adjudicate the matter before it".*

The Court of Appeal of Tanzania, in the recent case of Sospeter Kahindi Versus Mbeshi Mashini, Civil Appeal No.56 of 2017, addressing the issue of jurisdiction held that;

"*The question of jurisdiction of a court of law is so fundamental and that it can be raised at any time including at an appellate level. Any trial of a proceeding by a court lacking requisite jurisdiction to seize and try the matter will be adjudged a nullity on appeal or revision. Parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction"* See also the case **of Tanzania-China Friendship Textile Co. Ltd Versus Our Lady of the Usambara Sisters [2006] TLR 70**.

The judgment or decision emanating from the tribunal not clothed with jurisdiction is a nullity together with the proceedings in which that judgement emanated. Had the tribunal directed its mind to the law, it would have discovered that it had no jurisdiction to that matter. It would have taken action of rejecting that application and allow the parties to go the appropriate courts to determine their dispute. This would have saved the court and the parties' precious time and resources. Having found so, I see no compelling reasons to address the rests of the grounds of appeal.

In the premises, I invoke revisional powers vested in this court under Section 43(1)(b) and (2) of the Land Disputes Courts Act Cap. 216 R:E 2019 to nullify the entire proceedings of the trial tribunal. Judgment and subsequent orders thereto are set for being a nullity. The respondent, if still interested, is at liberty to institute a proper suit against the appellant in the court with competent jurisdiction to hear and determine Probate matters. Taking into account the nature and circumstances of this case, each party shall bear its own costs. It is so ordered.

E. L. NGIGWANA

JUDGE

24/12/2021

Ruling delivered this 24th day of December, 2021 in the presence of the Appellant in person, Mr. Gosbert Rugaika B/C but in the absence of the respondent.

Right of Appeal fully explained.

E. L NGIGWANA

JUDGE

24/12/2021