

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

LAND CASE APPEAL NO. 32 OF 2020

(Arising from Application No. 7/2018 of Ngara District Land and Housing Tribunal)

1. GERVAS NYAMULOMBA } ----- **APPELLANTS**
2. JOTHAM KAYAGIRO }

VERSUS

DAVID BALAMBA-----**RESPONDENT**

JUDGMENT

Date of Judgment: 31.03.2022

A.Y. Mwenda, J

Before the District Land and Housing Tribunal for Ngara at Ngara, the respondent sued the appellants for trespass of his land located at Murusagamba Village, Ngara District. He prayed to be declared as the lawful owner of the suit land and for issuance of eviction order against the appellants.

Having analyzed the evidence from both parties, the Hon Trial Chairman pronounced judgment in favor of the respondent by declaring him the lawful owner of the suit land and ordered the appellants to vacate the land.

Aggrieved, the appellants have lodged the present appeal in a memorandum of appeal with seven (7) grounds namely:

- 1) That, the Trial Chairman of the Tribunal grossly misdirected himself in law to preside over and determine the Land Dispute between the parties which was statutory time barred.
- 2) That, the Trial chairman of the Tribunal grossly erred in law and on facts to preside over and determine the Application which was **RES JUDICATA** in respect of **Application No. 110 of 2006** of Bukoba District Land and Housing Tribunal which was determined between the same parties and the same disputed land in the judgment and decree handed down on **6th March 2009** attached herewith to form part in this Appeal.
- 3) That, the Trial Chairman of the Tribunal erred in law and on facts to misconstrue the evidence in the case he was presiding over and Application No. 110/2006 which had double standard and being allegedly a clan land and then abruptly turning to be the deceased's estate of one **Daudi Balamba** in this case, a total travesty of justice (sic).
- 4) That, the Trial Chairman of the Tribunal grossly erred in law to hold in favour of the respondent as a lawful owner of the dispute suit land in total disregard of the decision in Application No. 110/2006 which declared the Appellant the lawful owners and thus overruling the decision of his fellow Chairman of the same Tribunal without such jurisdiction.
- 5) That, the Trial Chairman of the Tribunal grossly erred in law and on facts for failure to order compensation to the Appellants on the developments in

the suit land having ordered vacant possession depriving them the disputed suit land.

6) That, the trial chairman grossly erred in law to give the decision in favour of the respondent in the proceedings which were illegal and thus illegal decision.

7) That, the Trial Chairman grossly erred in law and on facts for misapprehension of evidence which were irresistibly pointing out in favour of the Appellants.

When the appeal was called for hearing, the appellants were represented by Mr. Aaron Kabunga, learned counsel. The respondent was represented by Mr. Raymond Laurent, learned counsel.

When invited to submit in support of grounds of appeal, Mr. Kabunga informed this court that he would argue the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal collectively and 6th and 7th separately. In respect to the 6th ground of appeal, he said the whole proceedings before the trial tribunal is tainted with irregularities which is not curable. He said the first irregularity is found at page 7 of the typed proceedings dated 30/10/2018 when the issues were framed. He said the issues were framed in the absence of assessors and for that matter the case was prosecuted without the assessors knowing the nature of the matter.

Another irregularity according to him is that this case begun with Hon. Assey Chairman who handled the issues until the 26/2/2019. On 26/2/2019 the case

came before him for hearing but strangely on the same date Hon. E. Mogasa surfaced while he had not appeared in the quoram. He proceeded to handle the case until the 27/3/2019. Again on 28/3/2019 Hon. Assey reappeared but strangely on the same date at page 14 Hon. Mogasa surfaced again. He said, on 30/4/2019 Hon. Assey appeared and sat with Hon. Members Charles and Mbeikya but strangely, on the same date the applicant's case commenced hearing under Hon. E. Mogasa. The learned counsel submitted further that on the same date Hon. Member one Christina appeared to ask the witness some questions while she is not among the members appearing in the quoram and it is not known how she surfaced. The learned counsel further submitted that at page 33 when the defense hearing had already started, Hon. Mogasa recorded that he is taking over the case from Hon. Assey who had been suspended (while he has handled the case almost to its finality). He said, the Hon Chairman ought to have given the said reasons immediately after taking over the case from Hon. Assey.

Mr. Kabunga went on submitting that another serious irregularity is that the Hon. Chairman ordered the 27/11/2019 as a date of judgment without having recorded the opinion of assessors. However, on 31/01/2020 he vacated from this order. Strangely on 27/2/2020 (while there is no quoram) it appears like Christina issued her opinion but there is nowhere the said opinion is read to the parties and at end the Hon. Chairman issued an order that judgment shall be delivered on the same day.

The learned counsel submitted that in land cases, when the tribunal is sitting with assessors, assessors must issue their opinion which shall be read to the parties to appreciate the nature of the case and failure to do so is fatal which renders the judgment and proceeding a nullity. In support to this point he cited the case of ***Sikuzani Saidi Magambo and another vs. Mohamed Roble Civil Appeal No. 197 of 2018*** (unreported) Court of Appeal of Tanzania. In the cause, Mr. Kabunga said, if the court finds such irregularity exist, then it is the duty of the superior court (this court) to ensure proper applicability of the law. In support of this point he also cited the case of ***Adelina Kako Anifa and another vs. Byarugaba Alex, Civil Appeal No. 46 of 2019*** (unreported) CA, at page 7 where the court quoted the case of ***Marwa Mahende vs. Republic*** [1998] TLR. The learned counsel said, when the successor Judge or Magistrate takes over the case he is duty bound to state reason for such take over. He cited the case of ***Kinondoni Municipal Council vs. Q Consult Ltd, Civil Appeal No. 70 of 2016***, CA, (unreported) to support this point. With such irregularity, the learned counsel prayed the proceeding, judgment and orders of the trial Tribunal to be nullified.

With regard to the 1st, 2nd, 3rd, 4th and 5th grounds of appeal, Mr. Kabunga submitted that, before the District Land and Housing Tribunal there was once filed Application No. 110 of 2006 with the same parties; in that application the respondent was the applicant against the same parties. In the said case, 1st

appellant was the 5th defendant/respondent and 2nd appellant was the 4th respondent. In that case, the learned counsel said, the respondent was claiming to redeem the purposed clan land without approval of clan council. The District Land and Housing Tribunal ruled in his favor with a condition to refund the purchase price and compensation on unexhausted improvements. The learned counsel said, the respondent was satisfied and did not prefer any appeal but strangely, he later on applied to be appointed as the administrator of the estate of his late father, David Baramba to circumvent the judgment in Application No. 110/2006. Later he filed application No. 7/2018 purporting to be the administrator of the estate. Mr. Kabunga said the said case was however filed using his personal name of David Baramba and not as administrator of the estate of the late David Baramba. He said, at page 15 of the proceedings he raised the issue of being an administrator and he tendered a letter of administration while he has not filed the suit as the administrator. This issue was also raised at page 10 of typed proceedings that the case is **Res judicata** but at page 12 the Hon. Chairman issued a ruling that it was not res judicata. In the said case the tribunal ruled out that the land in dispute is his property. Mr. Kabunga, said this judgment complicates matters because the applicant should be paid purchase price as the judgment in Application No. 110 of 2006 is un challenged and is still valid.

The learned counsel submitted that under S. 9 of CPC courts are prevented to entertain matters which are res judicata. In support to this argument he cited the case of ***Fanuel vs. Gabriel [TLR] 2003, 314.***

The learned counsel further submitted that Application No. 07/2018 was time barred because 12 years had already passed from when Application No. 110/2006 was finalized to its filing. The learned counsel said in Application No. 110 of 2006, exhibits such as sale agreement which was concluded in 12/10/1999 were tendered. He said, the respondent however did not sue until 12 years passed despite being aware of the transfer of that land. However, by passing, the Hon. Chairman said the suit was not time barred while making reference to Application No. 110/2006 instead of the subsequent one filed in 2018.

The learned counsel concluded his submission by praying this appeal to be allowed by nullifying the whole proceedings and for an order declaring the said suit res judicata and for being filed out of time. He also prayed the respondent to be condemned to pay costs.

In response to submissions by the appellants' counsel, Mr. Laurent, learned counsel for the respondent submitted that is true that the respondent filed Application No. 110/2006 and it is true that the Appellants in that case were respondents No. 4 and 5 but he was of the view that the judgment in that Application cannot make the subsequent suit res judicata. He said, in Application No. 110/2006 at page (iii), the 4th and 5th respondent's lands were not touched

and the Hon. Chairman said the present respondent if he wish, could sue Balamba and Stanford Ntianda and to him this was not a final determination on the suit land because he was given option which he later came to exercise by filling a fresh suit in 2018. He added that in Land Application No. 110/2006 the compensation was ordered to be paid by 1st and 2nd and 3rd respondents in a clear terms and for that matter, the subsequent suit was not res judicata. The learned counsel also submitted that the time started to run in 2018 as the respondent had no knowledge before that and for that matter Hon. Mogasa was right to rule that Application 7/2018 was not time barred.

The learned counsel conceded to the submissions by Mr. Kabunga that the the proceedings before trial tribunal was tainted with illegalities. He however prayed that if the court finds that the suit is not res judicata then this file be remitted back before Ngara District Land and Housing Tribunal to be retried before a new chairman and new set of assessors and for each party to bear its own costs because the irregularities so pointed were caused by the Tribunal and the parties should not be punished by Tribunal's errors.

In rejoinder, Mr. Kabunga, learned counsel for the appellants submitted that the respondents misdirected himself to think the time started to run from the date of judgment. He said time started to run the moment he filed a suit in 2006 in Application No. 110/2006 as he became aware since 2006 and therefore time

begun to run from 2006 and until 2018 it was over 12 years. He then concluded by submitting that the suit was time barred and prayed to be awarded costs.

I have considered the rival arguments from the parties and I thus resort into addressing merits of this appeal.

From the record, as was rightly pointed out by Mr. Kabunga, the proceedings of the District Land and Housing Tribunal shows the case was heard by more than one Chairman. The records show Hon Assey begun from 27.04.2018 where he handled the matter from framing of issues (on 30.10.2018) to 26.02.2019 when the matter came for hearing of Preliminary objection. On the said date Hon. Assey appears in the quoram but during submissions Hon. Mogassa surfaced. The record are however silent on what befell Hon Assey leading to Hon. Mogassa's take over. Again Hon. Mogassa continued with the matter from that date to 27/03/2019. On 28/03/2019 Hon. Assey re appeared and the case was subjected to two adjournments under him until the 30/04/2019 when Hon. Mogassa proceeded with the case to its finality. As was rightly pointed out by Mr. Kabunga, despite taking over the case as earlier as 30/04/2019 when the hearing of the application case commenced he did not assign reasons immediately after taking over. He did so on 28/10/2019 when the defense hearing have already started. It is the requirement of the law that when a case is heard by more than one judge or magistrate, the predecessor judge or magistrate must assign reasons for such take over. This court is mindful that the Land disputes courts Act [Cap 216 RE 2016] is silent on the

issue of Hon. Chairmen taking over the land cases as was in the said application. However, guided by Section 50 of the Land Disputes Courts Act [Cap 216 RE 2019], when there is a lacuna in the Land Disputes Courts Act [Cap 216 RE 2019] we resort to the Civil Procedure Code, [Cap 33 RE. 2019]. Section 51(2) of the Land Disputes Court Act reads as follows:

"51(2) The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code"

Now therefore, there being a lacuna in the Land Disputes Courts Act [Cap 216 RE 2019] with regard to change of Hon. chairmen we resort to order XVIII r.10(1) of the Civil Procedure Code. In applying the order mentioned above the Hon. Magistrate/Chairman is bound to assign reasons for such take over. In the case of ***Kinondoni Municipal Council V.Q Consult Limited, Civil Appeal No. 70 of 2016, CA (Unreported)*** while citing the case of ***M/S Georges Centre Limited V. The Hon. Attorney General and Another, Civil Appeal No.29 of 2016 (unreported)*** the court held inter alia that:

"The general premise that can be gathered from the above provision is that once the trial of the

case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. [Emphasis added]

With regard to consequence of such anomaly, in the case of ***Kinondoni Municipal Council V.Q Consult Limited, Civil Appeal No. 70 of 2016, CA (supra)*** the court while citing the case of ***Priscus Kimario v. Republic , Criminal Appeal No. 301 of 2013 and Abdi Masoud @Iboma and Others V. The Republic Criminal appeal No. 116of 2015*** (both unreported) held:

"...in the absence of any reason on the record for the succession by a judicial officer in a partly heard case, the succeeding judicial officer lacks jurisdiction to proceed with the trial and consequently all the proceedings pertaining to the takeover of the partly heard case become a nullity..."[emphasis added]

As it is stated above, Hon. Mogassa took over the case from Hon. Assey and did not give reasons for such taking over he then lacked jurisdiction to take over the

case and thus the entire proceedings after his taking over as well as the judgment and decree that followed are a nullity.

It also evident that the records are silent as to involvement of assessor(s) in giving opinion before the judgment was pronounced. The records show that on 27/11/2019 Hon. Chairman fixed a judgment date without having recorded the opinion of assessors. However, on 31/01/2020 he vacated from this order where on 27/2/2020 one Christina issued her opinion but there is nowhere it is shown that the said opinion was read to the parties. This is a serious irregularity because it is trite law that after hearing of the case the Chairman is legally bound to invite the assessors for their opinion and that the said opinion must be read in the presence of the parties and the chairman shall record such opinion in the proceedings. Please See ***REV. PETER BENJAMIN V. TUMAINI MTAZAMBA @MWEMA, Land Appeal no. 69 of 2019 HC (unreported)*** .

In the present appeal, failure to record the assessors' opinion in the proceedings is as good as the case was heard without assessors and the consequence of which is to render the whole proceeding of the tribunal a nullity. Also see ***Dominic Kateme V. Charles Theonest and Two others, HC, Land Appeal No. 89 of 2021(unreported) and Ameir Mbaraka and Nother V. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)***.

In the circumstances of this matter, this court finds the said anomalies concludes this matter by nullifying the whole proceedings of the District Land and Housing



Tribunal. For that matter also, this court finds no reasons to deliberate on other grounds of appeal. That being said this appeal is allowed by quashing the proceedings of the District Land and Housing tribunal, and thereby setting aside judgment and orders emanating therefrom.

Each party shall bear its own costs.

It is so ordered.





A.Y. Mwenda

Judge

31.03.2022

This Judgment is delivered in chamber under the seal of this court in the absence of Mr. Aaron Kabunga learned counsel for the appellants and in the presence of Mr. Raymond Laurent learned counsel for the respondent.




A.Y. Mwenda

Judge

31.03.2022

