

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

AT BUKOBA

HC LAND APPEAL NO. 89 OF 2021

(Arising from Misc. Land Application No. 3 of 2020 of the High Court of Tanzania Bukoba and Original Land Case No. 59/2018, District Land and Housing Tribunal for Kagera at Bukoba)

DOMINIC KATEME..... APPLICANT

VERSUS

1. CHARLES THEONEST

2. JOVINA BANYENDELA

3. MARY WILLIAM

.....RESPONDENTS

JUDGMENT

Date of Judgment: 18.03.2022

Mwenda J,

Before the District Land and Housing Tribunal for Kagera at Bukoba, the appellant sued the respondents for the following reliefs, these are:-

1. That, this application be allowed with costs
2. That the applicant be declared as the rightful owner of the suit premises as per execution report of the decree delivered from the judgment (sic) No. 224/2008 issued by Bukoba District Land and Housing Tribunal (sic).
3. That, the respondents be ordered to vacate the suit premises in favour of the applicant.

After the hearing of the evidence from both sides, the trial tribunal delivered its judgment in favor of the appellant in that he is the rightful owner of the suit Land but he was also ordered to compensate the respondents the purchase price and developments on the suit land because they are *bonafide* purchasers.

Aggrieved with the trial tribunal's order (that he should compensate the respondent) the appellant appealed against that order before this court with the following grounds, to wit:

- 1. That, the trial tribunal erred in law to order compensation to the respondents over the development made on the suit land under "unjustifiable intrusion".*
- 2. The trial tribunal erred in law to term respondents as bonafide purchasers while in fact they were "fraudster purchasers" on a team with the vendor.*

Upon being supplied with a copy of memorandum of appeal, the respondents filed a joint reply to the memorandum of appeal which can be summarized one point in that the trial tribunal's order for compensation is justifiable as they are the bonafide purchasers to the suit land who effected unexhausted developments.

During the hearing of this appellant both parties appeared without any legal representation. When invited to submit in support of the grounds of appeal, the appellant submitted that the trial tribunal ought to have ordered the vendor (of the land to respondents) one PAUL MWELA to compensate the respondents and

not him. He said he is of that view because, before transfer of land to the respondents (by the said vendor), the appellant sued the said vendor vide civil case no. 224 of 2008 where the tribunal ruled in his favor. According to him the vendor sold the land to the respondent while he knew that the tribunal declared him (the appellant) as the rightful owner. He said that the sale was illegal as it was neither witnessed by neighbors nor by the village authority.

In the cause of hearing, this court suo moto raised the issue of involvement of assessors in the proceedings. Parties were thus invited to also submit on that aspect. On his part, the appellant said he has nothing to say as he leave it to the court to decide. He concluded by praying this appeal to be allowed with costs.

In reply to the submission by the appellant, the first respondent submitted that he bought the land in question in 2007 from the vendor one PAUL MWELA. He said, he having bought it planted various crops and entrusted his neighbor to take care of the said farm. He said, he was told later on that there is a dispute over the ownership of the said Land. He said he however did not tender the sale agreement because the case before the trial tribunal was heard in his absence. With regard to attendance and involvement of assessors he said he has nothing to add and that he leave it to this court to decide. He thus prayed this appeal to be dismissed.

On her part, the second respondent submitted that she bought the land in dispute from PAUL MWELA in 2012 without knowing that there was a dispute over its

ownership. She said after she had bought the said land she built a house on it which, before roofing she was sued by the appellant. On the issue of assessors' involvement, she said she leave it to the court to decide. She concluded by praying this appeal to be dismissed.

The third respondent during her submissions said that she bought the land in dispute in 2012 and thereafter she cleared it, fenced and planted various crops. She also submitted that she did not know if there was a dispute over the ownership of that land between the appellant and PAUL MWELA, the vendor. She submitted further that she came to be told later that there is a dispute over ownership of the said land. On the issue of involvement of assessors before the trial tribunal she submitted that she leave it to the court to decide as she has nothing to say. She also concluded by praying this appeal to be dismissed.

Having summarized the submissions by the parties, it is now the duty of this court to determine the fate of this appeal. To do that, the issue for determination is whether the present appeal has merits.

As I have stated earlier, in the cause of going through the trial tribunal's records, this court detected illegality which surrounds the involvement of assessors in the proceedings. Guided by the Court of appeal's decision in ***B.9532. CPL EDWARD MALIMA Versus THE REPUBLIC, CRIMINAL APPEAL NO. 15 OF 1989*** this

court invited the parties to address this court on that issue during their submissions.

In the said case state the Court of appeal held inter alia that: -

"Firstly, we are satisfied that it is elementary Law that an appellate court is duty bound to take judicial notice of matters of Law relevant to the case even if such matters are not raised in the Notice of appeal or memorandum of appeal."
[emphasis added]

With regard to the said illegalities of the proceedings, this court detected the following. Firstly, the tribunal was not properly constituted and also that there were no active participation of assessors in the whole tribunal's proceedings. The record shows that on 24/01/2019 when hearing commenced there is no assessor who appeared in the quorum. However, when PW1 finished being cross examined it appears he was asked questions by assessors one Mr. Muyaga and Ms. Fortunata Rutabanzibwa. When defence case commenced on the same date, it was adjourned to 18/02/2019 where again the quorum is silent on attendance of assessors but later on the record shows DW1 was asked questions by the above mentioned assessors. The problem did not end up there. On 21/02/2019 when DW2 was called to defend his case the quorum shows two assessors, one Mr.

Mapanju and Muyaga were in attendance. However when time for asking DW2 questions came it appears the same was done by Mr. Muyaga and Ms. Rutabanzibwa. It is not known as to why Mr. Mpanju who appeared in the quoram did not ask DW2 some questions and instead Ms. Rutabanzibwa who is not appearing in the quoram surfaced and asked question. Again when Dw3 appeared to defend his case on the same date it appears he was asked questions by one assessor only, that is Mr. Muyaga. With this mix up, it is difficult to conclude that the tribunal was properly constituted and the assessors actively participated in the whole proceedings. On the composition of the District Land and Housing Tribunal it is important to make reference to the Land Disputes Courts Act, Cap 216 RE 2019. Section 23 (2) of the Act reads as follows;-

"The District Land and Housing Tribunal shall be duly constituted when held by a chairman and two assessors who shall be required to give opinion before the chairman reaches the judgment."

This position was emphasized by this court in the case of ***Ameir Mbarak and Azania Bank Corp. Ltd vs. Edgar Kahwilli, Civil Appeal No. 154 of 2015*** when the importance of assessors' active involvement was discussed. In this case the Court of Appeal of Tanzania while making reference to section S.23 (3) Land Dispute Court Act held:

"...The consequence of unclear involvement of assessors in the trial renders such trial a nullity."

In the same case the court while citing the case of **Joseph Kabul vs. Reginam (1954 – 55 [EACA VOL. X41 – 2** held further that:

"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case the trial is a nullity."

In our case therefore since assessors did not feature in the quoram in some dates, we therefore we cannot assume that they were in attendance and actively involved. It is thus unclear whether they actively participated in the proceedings and this therefore is an irregularity that renders the proceedings a nullity.

Another illegality which is apparent on the trial tribunal's proceedings is lack of assessors' opinion. The records show that on the 21/02/2019 when the tribunal concluded recording evidence from the parties, it set 31/05/2019 as a judgment date. The record shows the judgment was subjected to four adjournments before it was read on 07/10/2019. Until the pronouncement of the judgment there were no opinion of assessor which was read before the tribunal. Interestingly, the honorable chairman appears to consider it in his judgment and it is not known how the Hon. Chairman got it. This court, in the case of **REV. PETER BENJAMIN**

held inter alia that: -

"As long as the record of the tribunal does not show the opinion of assessors, it is not clear when and how such opinion landed in the judgment."

This further stated that: -

"As matter of law and procedure, after hearing of the case, the chairman is legally bound to invite the assessors for their opinion. Such opinion must be read in the presence of the parties and the chairman must record such opinion in the proceedings. Failure to do so renders the whole proceedings a nullity because, if the record does not show the assessors opinion, it is as good as the case was heard without assessors."

Furthermore the court citing a case of ***Sikuzani Said Magambo and Kirion Richard vs. Mohamed Roble, Civil Appeal No. 197 Of 2018, CAT (Unreported) Held: -***

"It is also on record that, although the opinion of the assessors was not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed."

Furthermore the court also cited the case of ***Ameir Mbarak and Azania Bank CORP. Ltd vs. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)*** where confronted with the similar situation the court held : -

"Therefore, in our considered view, it is unsafe to assume the opinion of assessor which is not on the record by merely reading the acknowledgment of the chairman in the judgment. In the

circumstances, we are of the considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."

The court the concluded by holding as follows:

"In the case at hand, as already stated, the proceedings do not show whether the assessors gave their opinions. Under the Law, it is as good as, assessors were not fully involved. This fault alone is sufficient to nullify the proceedings of the trial tribunal."

In the similar circumstances this court finds, with the said anomalies, assessors were not fully involved and they were also not afforded room to give their opinion. Since the said anomalies concludes this matter I find no reason to dwell on the grounds of appeal. This appeal is therefore dismissed by nullifying the proceedings and setting aside judgment and orders of the trial tribunal. Whoever wishes to persue his right shall prefer a fresh suit before a competent tribunal. Each party shall bear their own costs.

It is so ordered.





A.Y. Mwenda

Judge

18.03.2022

This judgment is delivered in chamber under the seal of this court in the presence of Appellant and in the presence of Respondents.




A.Y. Mwenda

Judge

18.03.2022

