

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

AT BUKOBA

MISC. LAND APPEAL NO. 58 OF 2021

(Arising from Land Appeal No. 47/2018 of Karagwe District Land and Housing Tribunal and Original Civil Case No. 01/2018 of Songambele Ward Tribunal)

AMELIA BACHWENKIZI..... APPELLANT

VERSUS

FORTUNATUS KANYARWANDA..... RESPONDENT

JUDGMENT

Date of Judgment: 04.03.2022

Mwenda, J

The present appeal arises from the judgment of District Land and Housing Tribunal for Kagera in Land Appeal No. 58 of 2021, original Civil Case No. 01 of 2018 Songambele Ward Tribunal.

The gist of the matter are that, before Songambele Ward Tribunal, the present appellant sued the respondent one Fortunatus Kanyarwanda for encroachment and trespass to her piece of land. When the hearing commenced each side called witnesses to support its case and at the end of the trial the Ward Tribunal decided in the respondent's favour in that the appellant failed to prove her case.

Aggrieved by the decision reached by the Ward Tribunal the appellant lodged an appeal before the District Land and Housing Tribunal for Kagera in Appeal No. 47

of 2018. After the hearing of the parties submissions and perusal of the Ward Tribunal records, the District Land and Housing Tribunal dismissed the said appeal for want of merits and upheld the decision of the Ward Tribunal.

Again, aggrieved by the decision of District Land and Housing Tribunal for Karagwe the appellant lodged the present appeal with six grounds to wit:

1. That, both tribunals grossly erred in law and fact to decide the case against the Appellant since the Appellant acquired her own Suitland from clan members in 2000 and up to now is more (sic) 20 years possessing her own suitland until the respondent started trespassed (sic) in 2018 without any legal justification.
2. That, both Tribunals grossly erred in law and fact to entertain this matter which was time burred (sic) as per Rule 2 and 3 of the customary law (limitation of proceedings) Rules of 1963 as applied by the law of limitation Act under item 22 part 1 of the schedule to the law of limitation Act (Cap 89 R.E 2019) which provides that; "suit to recover land is twelve years" (sic).
3. That, both Tribunals grossly erred in law and facts to receive the forged purchase agreement dated 24.06.2002 from the respondent without any signatures shown by the witnesses on the contract but only listed names contrary to the contract Act (Cap 345 R.E 2019) which cannot be taken as evidence in the court of law (sic).

4. That, the appellate Tribunal grossly erred in law and facts for failure to know that the Ward Tribunal failed totally to disclose the pecuniary jurisdiction before the determination of the matter contrary to section 15 of the Land Dispute Courts Act (Cap 2016 R.E 2019).
5. That, the District Tribunal (sic) grossly erred in law and in facts for failure to recognize that the Ward Tribunal determined the matter without indicating the coram (sic) of the members in all proceedings which renders the proceedings null and void under section 14 (1) and (2) of the Land Disputes Courts Act (Cap 2016 R.E 2019).
6. That, the appellate Tribunal grossly erred in law and facts for failing to make assessment of evidence adduced in the Ward Tribunal and failed to test such evidence against that of the Ward Tribunal and thus wrong decision (sic).

When he was served with the appeal papers, the respondent opted to keep silent and he never appeared in court despite receipt and endorsement of the summons. Following a proof of service to the respondent, this court ordered the hearing of the present appeal to proceed exparte. When she was invited to make submissions in support to her grounds of appeal, the appellant had nothing of essence to add. She prayed for this court to consider the grounds of appeal raised and the available courts records in making its finding.

In order to finalize this matter, this court asked itself as to whether or not the present appeal has merits.

Basing on the contents of the 5th ground of appeal this court found it pertinent to satisfy itself on the legality of the lower Tribunal's records. That is whether the Ward Tribunal was properly constituted. The Ward Tribunal's records show that after the filing of suit (ie. Civil Case No. 1 of 2018) the matter went through three hearing dates and adjournments. On 05/01/2018 the case was adjourned to 26/01/2018 for visit of locus in quo, on 26/01/2018 the case was adjourned to 23/02/2018 for recording witnesses' evidence and on 23/2/2018 the case was adjourned to 09/3/2018 for delivery of judgment. The proceedings however, do not indicate the names of assessors who participated in the whole proceedings. Before the District Land and Housing Tribunal the present appellant complained about this anomaly in one of her grounds of appeal however the Hon. Chairman overruled her relying on oxygen principle.

With due respect to the Hon. Chairman reasoning this court is of the view that oxygen principle cannot be applied when the Law imposes a mandatory legal requirement. In the case of ***Mbezi Fresh Market Limited and two others vs. International Commercial Bank (Tanzania) Limited, Misc. Commercial Case No. 35 of 2020***, this court while citing the case of ***SGS Societe Generale De Surveillance SA and two others vs. VIP Engineering and marketing***

Limited, and another Civil Appeal No. 124 of 2017 CAT (unreported) held

inter alia that:

"We also find that the overriding objective principle does not and cannot apply in the circumstances of this case since its introduction in the written laws (miscellaneous Amendment) (No. 3) Act, 2017 (Act No. 8 of 2017) was not meant to enable parties to circumvent the mandatory rules of the court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case". [emphasis added].

The rule requiring attendance of assessors before the Ward Tribunal is canvassed under the following laws. Section 14(1) and (2) of the Land Dispute Courts Act state as follows:

S.14 (1) The Tribunal shall in all matters of mediation consist of three members at least one of whom shall be a woman.

(2) The Chairman to the Tribunal shall select all the three members including the convenor who shall preside at the meeting of the Tribunal

(3) N/A

(4) N/A

From the foregoing section it is crystal clear that the sitting of the tribunal with three members (assessors) is imposed in a mandatory terms.

In the present matter therefore, it is not clear if the tribunal sat with the aid of assessors. This is so because there are no names of assessors appearing during the trial. In the case of ***Rev. Peter Benjamin vs. Tumaini Mtazamba @ Mwema, Land Appeal No. 69 of 2019***, this court while citing the case of ***Tubone Mwambeda vs. Mbeya City Council, Civil Appeal No. 287 of 2017*** (unreported) held inter alia that;

"The involvement of assessors is crucial in adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinion before the determination of the dispute. As such their opinion must be on record."

In the same case that court held further that;

"In the case at hand ... the proceedings do not show whether the assessors gave their opinion. Under the law, it is as good as, assessors were not involved. This fact alone is sufficient to nullify the proceedings of the trial tribunal." (emphasis added).

From the foregoing observation this court is of view that the proceedings at the Ward Tribunal are tainted with irregularity for want of assessors involvement and their opinion.


Since this anomaly is sufficient to dispose off the present appeal, this court finds no reasons to deal with other grounds of appeal. This appeal therefore succeeds and the proceedings of District Land and Housing Tribunal and that of the Ward Tribunal are nullified/quashed and the judgment and orders emating there from are hereby set aside.

Whoever wishes to pursue any matter in respect to the land in dispute is advised to institute a fresh suit before a compent tribunal.

Each party shall bear its own costs.

It is so ordered.




A.Y. Mwenda

Judge

04.03.2022

This Judgment is delivered in chamber under the seal of this court in the presence of the Appellant and in the absence of the Respondent.




A.Y. Mwenda

Judge

04.03.2022

