IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

LAND APPEAL NO. 48 OF 2019

(Arising from decision in Misc. Application No. 248 of 2017 in the District Land and Housing Tribunal for Kagera ,dated 06th August 2019 which arose from Application No. 124/2016 and Application No. 108/2005 of the District Land and Housing Tribunal for Kagera, at Bukoba and Civil Case No. 71/1994 RM's Court Bukoba)

AMIDA IBRAHIM
MATABARO BARONGO ----------**APPELLANTS**
TARASISI YOYA

VERSUS

THEOPISTER FELICIAN ----------**RESPONDENTS**
THE DIRECTOR BUKOBA MUNICIPAL COUNCIL

JUDGMENT

Date of Judgment: 13.05.2022
A.Y. Mwenda, J

Sometimes back in 1994, the late, first respondent's father one Felician s/o Bajumizi filed a suit [civil case no. 71 of 1994] against the appellants praying for, among other remedies, for an order for vacant possession against the appellants in respect of suit land at plot No. 111 Block B Rwamishenye area of Bukoba Township for the plaintiff's [now the 1st respondent's] immediate occupation. Having heard both sides' evidence the Hon Senior Resident Magistrate noted that,

before its survey, the plot in dispute was made of two (2) pieces of lands belonging to different persons. One, is the land belonging to the plaintiff's (now the 1st respondent) and two, the land that belonged to the late Cecilia's. It was also evident that the late Cecilia's land was then subdivided into three plots which came to be owned by the appellants in the present appeal. The Hon. Senior Resident Magistrate also noted that the said survey to the land in dispute was undertaken without compensating the respondents. At the end of the judicial day the Hon. Senior Resident Magistrate declined to grant the remedies/reliefs sought by the second respondent (the then applicant). Instead he ordered the original boundaries to be observed/maintained and each party to remain with its respective piece of land until when it is otherwise directed in accordance to the law.

After the pronouncement of the above judgment, the plaintiff's wife now the (1st respondent mother) having been appointed administratrix of the plaintiff's (her late husband's) estate filed a fresh Application No. 124 of 2016 before the District Land and Housing Tribunal for Kagera at Bukoba. In the said application she, among other things prayed for an order compelling the 2nd respondent to pay compensation to the defendants in Civil Case No. 78/1994 Resident Magistrate's Court of Kagera at Bukoba and for Vacant possession in respect of suit Plot No. 11 BLOCK "B" RWAMISHENYE. At the end of the judicial day, the Hon. Chairman for the District Land and Housing Tribunal ruled out that the suit is RES JUDICATA. He however went on issuing directives in that the Bukoba Municipal Council should

make sure the respondent are compensated and if not, the portion of land appropriated by them be surveyed, and if Compensated they should give vacant possession. The records show that after the issuance of the said orders the first respondent being appointed administratrix of the estate of her late mother who died sometimes in between, applied for execution of decree vide Misc. Application No. 248 of 2017. In the cause of determining the said application (for executions) the Hon. Chairman issued two rulings, one dated 05/04/2018 where he reminded Bukoba Municipal Council to compensate the appellants in the 2018/2019 financial year as it was promised and after being compensated the appellants should vacate the suit land. Two, After the financial year 2018/2019 had passed without compensation being paid, he issued another the ruling dated 06/08/2019 which emanated from the Municipal Council's new proposal to have the Plot in dispute re-surveyed or the applicant (the 2nd respondent) be refunded compensation money which she paid to the Municipal Council at the current value. In this ruling the Hon Chairman did not heed to the council's proposal and refused to vacate from his previous order. He thus came up with the new order directing the appellants' properties be valued and compensation be made to them and thereafter they should vacate the suit land immediately. The Hon Chairman was of the view that the Council being a public institution should live to its words (i.e to its promise to pay compensation in the Financial Year 2018/2019) in order to continue attracting public trust.

Following the Hon Chairman's order the appellants appealed before this court with a memorandum containing six grounds of appeal as follows:

1. That, the Honorable Trial Tribunal erred in Law and in fact by ordering the appellant's customary title to land to be extinguished over 1st respondent's personal interest.

2. That, the Hon. Trial Tribunal erred in law and in facts in believing the alleged compensations that were said are paid to Bukoba Town Council (Tsh. 5,093.25) [sic] adhered to principle of paying compensation.

3. That, the Hon. Trial Tribunal erred in law and in facts by relying on the compensation which is alleged to be paid by the late Felician Bajumuzi (the husband of the 1st respondent) to 2nd respondent while he knew that the 2nd respondent is not the owner of the land, or agent of the appellant of representative. [sic]

4. That, the Hon. Trial Tribunal erred in law and in facts to deprive the appellant's rights to own property contrary to the law.

5. That, the Hon. Trial Tribunal erred in law and in facts by entering judgment basing on weak reasons adduced by the 1st respondent without considering that the dispute is between the 1st respondent and the 2nd respondent whom the 1st respondent alleged to pay compensation.

6. That, the Hon. Trial Tribunal erred in law and in facts by admitting that that the suit in application No. 124/ 2016 (which Misc. Application No. 248/2017 arised to)

(sic) is res judicata to the Application No. 108/2018 and the suit No. 71/1994, but proceeded to hear and determine the same as a result of the drawn order compelling the 2nd respondent to compensate the appellants and the later to vacate the suit land after being compensated of which is unlawfully. [Sic]

The appellants then prayed for the following orders; that this appeal be allowed by quashing the trial tribunal's ruling by setting aside its orders; that the appellants be declared as lawful customary owners and the 1st respondent as a trespasser in the disputed land and that the 2nd respondent to subdivide and allocate the disputed land basing on the customary boundaries and ownership accordingly as it was before the survey (sic).

When this appeal was called on for hearing, the appellants appeared in person without legal representation while the 1st respondent hired the legal services of Mr. Muswadiq, learned counsel. The 2nd respondent on her part was represented by Mr. Athuman Msosole, learned State Attorney. By parties' consensus it was agreed that this appeal be disposed by way of written submissions and each party complied with the scheduling order.

In their written submissions, the appellants abandoned the 6th ground of appeal thereby remaining with 1st, 2nd, 3rd, 4th and 5th ground of appeal which were urged in sequence. With regard to the 1st ground of appeal the appellant's submitted that the Honorable Trial Tribunal erred in Law and in fact by ordering the appellant's customary title to land to be extinguished over 1st respondent's personal interest.

They said it is trite principal that customary ownership of Land can be acquired for public purpose under section 3 of the Land Acquisition Act, [Cap 118 R.E 2019] but acquisition for personal interest is prohibited. They said the Hon. Chairman erred to issue such order without considering that the appellants were neither informed on the acquisition of their land nor paid compensation and to them this makes the 1st respondent a trespasser to their land.

With regard to 2nd ground of appeal, the appellants submitted that the Hon. Trial Tribunal erred in law and in facts in believing the alleged compensations that is said was paid to Bukoba Town Council (Tsh. 5,093.25) which do not adhere to principle of paying compensation. They said the trial tribunal ordered the appellants to vacate the suit land while no compensation was paid to them contrary to the Law. They added that the said amount being paid to the second respondent and not the appellant, means their customary ownership on the suit land were not extinguished since the appellants received no payment of compensation. Further to that the appellants said that the procedure for acquisition and surveying of the suit land was not followed and therefore the customary title of the appellants did not pass to the first respondent. In support of this point they cited a case of JAMES IBAMBASI V. FRANCIS SARIYA MOSHA [1999] TLR 364.

Submitting in support of the 3rd ground of appeal the appellants submitted that compensation should be paid to the owner of the land and since there is no proof that the appellants received the same then it was not proper for the trial tribunal

to issue an order for appellants to vacate the suit land. They said failure by the 2nd respondent to pay compensation to the appellants violates the proper procedure of acquisition of land.

With regard to 4th ground of appeal the appellants submitted that every person is entitled to own property and to the protection of the same according to the law. They added that any acquisition of property without prompt and fair compensation violates Article 24 of the Constitution of the United Republic of Tanzania (1977).

With regard to the 5th ground of appeal the appellants submitted that they were not involved in the process of acquisition of the suit land as they were never paid any compensation.

They thus concluded by praying this appeal to be allowed in line with reliefs prayed in their memorandum of appeal.

Responding to the appellant's written submission the 1st respondent's counsel begun by summarizing the historical background of this matter as this court have done hereinabove. Having so summarized the learned counsel for the 1st respondent tackled the appellant's grounds of appeal in sequence.

With regard to the 1st ground of appeal the learned counsel for the 1st respondent submitted that the 1st respondent never extinguished appellants customary right because the grudge on the issue was determined in RM'S Court of Bukoba Civil Case No. 71 of 1994 where the court held as follows; that the area was surveyed; that the survey created Plot No. 11 and that by virtue of letter of offer and

certificate of occupancy Plot no. 11 was allocated to the 1st respondent. He said, the Judgment in Civil Case No. 71 of 1994 was not appealed by anybody who are also a party to this appeal. He added in that to discuss the issue of the 1st respondent's extinguishing the customary right of occupancy over disputed property is misplaced because if they were dissatisfied by the decision in Civil Case No. 71 of 1994 of Bukoba RM's Court they would have lodged an appeal subject to time limitation (30 days to appeal).

In respect to 2nd ground of appeal, the learned Counsel for 1st respondent submitted that the 1st respondent upon being required by the 2nd respondent to pay Tshs. 5,093.25/= he complied and was issued with receipt No. 70502 dated 10/06/1987 which had never been denied by the 2nd Respondent.

On allegation of the failure of Tshs. 5,093.25 paid to Bukoba Town Council to adhere to the principle of Compensation the learned counsel for the 1st respondent stated that this argument is misplaced because the duty of the 1st respondent was to only pay the required amount to the 2nd respondent for survey and allocation of plot. No. 11 Block B, Rwamishenye area.

With regard to the 5th ground of appeal which alleges that the 1st respondent's case is weaker against the appellants in that the dispute is between the 1st respondent and the 2nd respondent, the learned counsel for the 1st respondent submitted that the said allegation is also misplaced. He said, this matter emanates from Civil Case No. 71 of 1994 where the 1st respondent has been claiming

ownership in view of certificate of occupancy on Plot No. 11 Block B, Rwamishenye Area while the appellants are claiming ownership under customary right of occupancy. He added that since the 1st Respondent was allocated the suit premise by the 2nd respondent, it is now the duty of the 2nd respondent to compensate the appellants so that the Appellants can vacate the suit premise for the 1st respondent's immediate occupation. He concluded by praying this court to compel the 2nd Respondent to compensate Appellants so as to put this matter at rest.

On their part, the 2nd respondent were brief in their reply. They submitted that there were no compensation money paid to them by the 1st respondent despite undertaking evaluation exercise which came up with the value of the property to a tune of Tshs. 5,093.25. They said due to 1st respondent's failure to pay the said amount then acquisition of their land failed. They concluded by supporting the appellants prayers in the memorandum of appeal.

In rejoinder the appellants submitted as follows. With regard to survey done on the plot in dispute, they said such survey did not follow the Land Acquisition procedures and therefore the said survey is void ab initio. To support this argument they cited the case of **OBEDI MTEI V. RUKIA OMARY** [1989] TLR 111, CA.

With regard to the purported compensation money alleged to have been paid by the 1st appellant to the second respondent with a view of then paying the appellants, the appellants rejoined that the said money were never paid to them

and for that matter they are still in ownership of the land under customary rights of occupancy.

They further said, the 2nd appellant's survey to the land which they occupied under customary right of occupancy does not automatically crash their customary right as the procedure was not followed. They thus repeated to their previous prayer that this appeal be allowed.

The above being the summary of submissions by the parties, it is now the duty of this court to determine this matter. To do so, this court has framed the following issues, to wit:

1. Whether the decision in Misc. Application 248/2017 is appealable.
2. Whether the 2nd respondent lawful acquired the land in dispute to justify (her) transfer of the R/O to 1st respondent.
3. What are the remedies of the parties.

With regard to the first issue the learned counsel for the 1st respondent said the present order appealed against emates from Civil Case No. 71 of 1994 which was never appealed against and therefore discussing the issue of extinguishing customary right of occupancy is misplace. He added that if the appellant's were dissatisfied with the said decision they would have lodged an appeal. Much as the learned counsel might be correct that the present appeal is in respect of the order for execution in Misc. Application No. 248 of 2017, it is important to note that the circumstances surrounding this matter have necessitated this court to invoke its

revisional powers under Section 43 (1) (b) of the Land Dispute Court's Act [Cap 216 RE 2019] and deal with tis matter. Firstly, it is important to note that there is nothing the appellant would have appealed against Civil Case No. 71 of 1994. This is so because, in that decision there is no victor and each party was ordered to maintain the plots they occupied under customary right. Despite being aware of the said decision the 1st respondent misdirected herself by praying to execute the decree. For that matter the Hon. Chairman also misdirected himself when he allowed the application for execution while there is no decree granted in Land Case No. 71 of 1994. With this anomaly this court finds it pertinent to invoke its revisional power vested to it under S. 43 (1) b Cap 216 and determine this matter by correcting anomalies found in the said orders.

With regard to the second issue it is evident from the record that the Land in question which were partly owned by the 1st respondent and partly by the appellants under customary rights of occupancy were surveyed without either of the parties being aware. In **CIVIL CASE NO. 71 OF 1994**, the 1st respondent, the then applicant during his testimony before the court stated that when he went before the 2nd respondent to ask for survey to his land, he was told that, the said land had already been surveyed. In that position, it is clear that the 2nd respondent surveyed the land occupied by the parties without following legal procedures by failing to involve the parties.

From the 1st respondent's point of view, the survey which was done extinguishable the customary right of occupancy especially after she paid the 2nd respondent a sum of Tshs. 5093/25 to enable her (the 2nd respondent) to carter for compensation for un exhausted improvements undertaken by the previous owners (appellants) under customary right of occupancy.

In his judgment, the SRM dealt with this issue keenly. The Hon. Senior Resident Magistrate having analyzed the evidence realized that the survey procedure did not follow the laid down legal procedures. According to him the survey done by the 2nd respondent on the plot in dispute created a conflict between the deemed and granted rights of occupancy. Although he was aware that granted right of occupancy may extinguish deemed right of occupancy upon fulfilment of certain conditions, he noted that in our case such requirements/conditions were not met. He was of the view that since the appellants were not paid compensation and even the assessment done on the compensation to be paid did not involve them then the customary right of occupancy was not extinguished. At the end of the matter the Senior Resident Magistrate concluded that the granted right of occupancy did not extinguish the deemed right of occupancy and as such he ordered the original boundaries to be observed and each party to remain in his respective piece of Land until when it is otherwise directed in accordance to the land. The take away from the Hon. Senior Resident Magistrate's findings is that neither of the parties to the suit was a victor and this court subscribes to the Hon. Senior Resident

Magistrate's finding in that the whole surveying process by the 2nd respondent was tainted with illegalities. This is so because the said survey did not involve either of the parties and it was done while the 2nd respondent had not lawful acquired the said land. See the case of ***OBEDI MTEI VS. RUKIA OMARY [1989] TLR 111 CA*** where it was held that:

> *"(i). Before any survey it is the duty of the land officer to make sure that all 3rd party interest are cleared and if it is a farm the land Officer must see to it that the owners agree on the boundaries.*
>
> *(ii). Since the procedure was not followed the survey should be conducted again."*

Guided by the position in the authority above it was then wrong for either of the parties to apply for execution as there was no reliefs granted in Civil Case No. 71 of 1994. As I have stated above the Senior Resident Magistrate did not grant any reliefs sought by either party and he used the following words which I find it pertinent to quote as follows:

> *"The remedy sought by the plaintiff cannot be granted at all. Instead I order that the original boundaries be observed and each party to remain with their respective piece of land until when it is otherwise directed in accordance to the law."*

To me, "until when it is otherwise directed in accordance to the law" does not mean application for execution. This is so because to be able to execute any Decree, the rights of the parties to suit must be fully determined and concluded. It is thus clear that it was wrong for the 1st respondent to apply for execution of decree in Misc. Application No. 248 of 2017 and 124 of 2016 and 108 of 2015 as there was no decree to execute therefrom.

Since the Hon. Senior Resident Magistrate did not grant any reliefs to the parties and directed the parties to observe the original boundaries and each party to remain therein until when it is otherwise directed in accordance for the law, and since to date, the fate of the said plot is still hanging, vide S. 43 (1) (b) of the Land Disputes Courts Act [Cap 216 RE 2019] this courts invokes its supervisory powers to determine the fate of the parties in respect of plot in dispute.

From the records it is evident that the parties were in occupancy to the suit land before their lands were surveyed and to date, they are still in occupancy and use of the same and various unexhausted development are made. It is also evident that despite 1st respondent alleging that she paid Tsh. 5,093.25 to the 2nd appellant for the sake of compensating the appellants, the 2nd respondent refused receiving the said sum from 1st respondent and for that matter it cannot be concluded that the 1st respondent paid the said sum as compensation money. On the other hand the appellants have not been paid any compensation and are still in use of their respective lands. Now since, correctly found by Senior Resident Magistrate in Civil

Case No. 71 of 1994, the 2nd respondent's survey to the land was illegal for failure to involve the appellants, this court therefore, for interest of justice to the parties order the plot in dispute i.e Plot No. 11 Block B, Rwamishenye Area of Bukoba Township to be re-surveyed to accommodate the parties on their respective lands which were held under customary rights of occupancy. In the cause, the urban planning principles to accommodate services such as roads and electricity power lines, should be adhered to on the respective plots owned by the parties. If any party claim any sum of money to either party, he/she should do so through the proper legal forums. Otherwise each part shall bear its own costs.

It is so ordered.

A.Y. Mwenda

Judge

13.05.2022

This judgment is delivered in chamber under the seal of this court in the presence of the appellants and in the presence of Mr. Athuman Msosole, learned State Attorney for the respondents.

A.Y. Mwenda

Judge

13.05.2022