IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 62 OF 2019

(Originating from District Land and Housing Tribunal for Kagera at Bukoba in Application No. 112 of 2013)

ANDREW KAZINDUKI..... APPELLANT

VERSUS

JOSEPHAT MBAGA (Administrator of the estate of late Ernest Kaserwa)
....RESPONDENT

JUDGMENT

31/01/2022 & 14/03/2022
E.L. NGIGWANA, J.

In the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba, the respondent herein one Joseph Mbaga (administrator of the estate of the late Ernest Kaserwa) successfully instituted a suit against the Appellant herein one Andrew Kazinduki claiming that the suit land located at Buhendangabo Ward, Bukoba Rural District be declared as part of the estate of the late Ernest Kaserwa and be handed over to him in his administratorship capacity for distribution to beneficiaries.

Before I venture in the intricacy of grounds of appeal, reply thereon and the submissions advanced by parties in this appeal, I find it apposite to dig down by recapitulating the material facts revolving in this case, albeit in brief.

The records gather that, in the year 2000, the appellant grabbed the disputed land belonging to the estate of the Late Ernest Kaserwa. That on the same year, one of the beneficiaries of the estate one Theonestina Ernest instituted legal proceedings against the appellant which was determined at the level of the Tribunal and bounced on technical grounds as the said person was not a legal representative of the late Ernest Kaserwa.

On account of that reason, the tribunal reverted the dispute to the clan members for the purpose of appointing an administrator of the estate as the said beneficiary had filed a case without having a "*locus standi*". Responding to the tribunal's directive, the respondent was therefore legally appointed as an administrator of the late Ernest Kaserwa.

The record further has it that the disputed land is a property of the late Ernest Kaserwa and he continued to utilize the land until 1989 when he died. That, after his death, the disputed was placed in the care of the sister of the late Kaserwa one Catherine Augustine, and other clan members.

That by the time the disputed land was still under the care of the sister of the late Ernest Kaserwa, the appellant grabbed the same without the knowledge and consent of the owners/beneficiaries.

It is further gathered that the disputed land is estimated to be two acres and the appellant is not in any way related to the late Ernest Kaserwa and hence, he has no legal interest to the disputed land.

On the other hand, the record reveals the other line with diverging facts, which now appear to be center of controversial between the parties. The said reveal that the appellant was granted the land under love and affection from Clezensia, Angelina and Catherine d/o Kaserwa, a different land from that of Ernest s/o Kaserwa where the appellant made development from the year 2000 that is to say more than 12 years. That the land which the respondent is claiming was not purchased by the late Kaserwa and handled over to his sisters save that the late donors (Clezensia, Angelina and Catherine) were granted the land by Tibyange Kagya under love and affection that he had no any child and then the appellant was further granted by them also under love and affection as he used to take care said three women.

After a full trial, the respondent was declared a lawful owner of the suit land in his administratorship capacity of the estate of the late Ernest Kaserwa and the appellant herein was ordered to vacate the land and was therefore, permanently restrained from encroaching the same. The decision of the trial tribunal did not amuse the appellant hence the current appeal as preferred by him.

In his memorandum of appeal, the Appellant has coined eight grounds of appeal as quoted in verbatim viz: -

1. *That after the Trial Tribunal had received the evidence of the Respondent from PW2 that the suit land was from Tibanyange, erred in Law and fact to call Tibanyange Kaagya as Kaserwa Rukyakya, a*

fact which misled the Tribunal to grant the property of Tibanyange Kaagya to the siblings of Kaserwa Rukyakya.

2. *That the Trial Tribunal grossly erred in law and fact to credit the evidence of the Respondent which did not disclose the way the land of Tibanyange Kaagya could have been of Ernest Kaserwa who was not a sibling of Tibanyange Kaagya.*

3. *That the Trial Tribunal grossly erred in law and fact for failure to take the proof of the conveyance of Tibanyange Kaagya to himself under love and affection from the three sisters who lived in Tibanyange land under possession and ownership of Tibanyange Kaagya property apart from the estate of Ernest Kaserwa.*

4. *That the eye witness of the Appellant property identified the activities carried on to the grantors to the Appellant land of which showed that there two different Shambas; one of Ernest Kaserwa – Subject to administration and another of Tibanyange Kaagya donated to the Appellant, but the Trial Tribunal grossly erred in law and fact for failure to different two Shambas and ended in wrong Decision.*

5. *That the Tribunal misleads itself to create its rationale of its Decisions that there was evidence from Tibanyanges's Family to testify against the Appellant a fact which never existed.*

6. *That the Trial tribunal grossly erred in law and fact to discredit the Applicant's side who proved to the standard the root of title in dispute that it was belonged to Tibanyange Kaagya and not from Ernest Kaserwa.*

7. *That the Trial tribunal grossly erred in law to declare that the Appellant is not a legal owner of the Suit Premises and issued order of vacant possession while he failed in toto to assess the evidence in the record which entitled the Appellant the right of ownership and time lived with the Deceased Ernest Kaserwa without any dispute.*

8. *That the whole Tribunal Proceedings after the Trial Tribunal had issued the Decree disclosed that the Trial Tribunal proceeded with H. Muyaga, F. Rutabanzibwa and Anamery Mutajwaa acted in against the Statutory Requirement which governed the Coram of Assessors to assist the Chamber and against the Jurisdiction of the Tribunal.*

The grounds of appeal were opposed by the respondent in his reply to petition of appeal. Parties opted to conduct a hearing by way of written submission and both are appreciated as they managed to comply with the filing scheduling order as directed by the court. Advocate Mathias Rweyemamu represented the Appellant and the respondent was peddling for his own canoe.

The elaborations on the above grounds of appeal by Advocate Mathias Rweyemamu solely hinged on the 8th ground on the petition of appeal

where he greatly blamed the trial tribunal to have proceeded with the opinion of one assessor only and second to have not recorded the opinion in the proceedings. The entire submission of the learned counsel on this ground was to the effect that the assessors who sat with the trial Chairman, there is nowhere in the proceedings were invited to give their opinion in terms of section 23(2) of the Land Disputes Courts Act,Cap.216 R.E 2019 as well as Regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal)Regulations 2003 (the Regulations).

Mr. Mathias further stated that that the Chairman only proceeded to schedule a date on which the Judgment would be pronounced but he failed to invite the assessors to give opinion when he closed the defence case. That, while composing a judgment, is when he made a reference to the opinion of one assessor. It is Mr. Mathias's argument that it is not known how opinions found their way into a judgment and that they were not read before parties in court before the judgment was composed.

With the aid of a plethora of cases, the appellant's counsel prayed this court to quash the entire proceedings and set aside the judgment and decree and orders thereon as the illegality amounts to fundamental errors which have occasioned failure of justice and suffice to vitiate the entire proceedings. He cited the Court of Appeal decisions as follows; **Sikuzani Said Magambo and another versus Mohamed Boble,** Civil Appeal No.197 of 2018 Court of Appeal of Tanzania at Dodoma, **General Manger Kiwengwa Stand versus Abdalla Said Mussa,** Civil Appeal No.13 of

2012, **Ameir Mbaraki and Azania Bank Corp. Ltd versus Edgar Kahwili**, Civil Appeal No.154 of 2015, **Tubone Mwambeta versus Mbeya City Council,** Civil Appeal No.187 of 2017, **Edna Adam Kibona versus Absolom Swebe(Sheli)**, Civil Appeal No. 286 of 2017 and **Y. S. Chawala & Co. Ltd versus Dr. Abbas Teherali**, Civil Appeal No.70 of 2017 (All unreported).

Apart from the flaw of the proceedings not featuring assessors' opinion, the learned counsel challenged the non-involvement of assessors to some of the court proceedings. That PW1 and PW2 commenced to testify without the aid of assessors as their names were not in Coram as the advocate for the respondent made cross examination in the absence of assessors in record, though they were seen pausing questions.

That when PW3 was testifying, only Mr. Muyaga posed questions and until the prosecution side closed the case, the record does not depict the whereabouts of the other assessor namely; Anamary thus, she did not therefore hear PW3.The learned counsel was of the effect that under section 23(3) Cap 216 (Supra), the absence of one assessor is to adjourn or to proceed with one after recording such excuse in the order, the fact which did not feature in the trial tribunal proceedings.

As regard to the rest of the grounds, Mr.Rweyemamu made no elaborations save for the fourth ground. In the fourth ground, the learned counsel submitted that parties are bound by their pleadings and their testimonies, and once any party's testimonies differ with his filed

pleadings, he cannot be entitled the judgment. He was to the effect that the respondent in application No.112 of 2013 pleaded at paragraph 6(a)(ii) of the trial tribunal application that the late Ernest Kaserwa got the land by way of purchase whereas the evidence of the applicant (PW1) and PW3 one Philemon John at page 5 of the tribunal judgment was couched that the late Ernest Kaserwa got the land from his late father Tibayange Kaserwa therefore, it was wrong for the tribunal to have ruled in favor of the respondent while the testimony on how the late Ernest Kaserwa got the suit land contradicted itself.

That the trial tribunal would have ruled in favor of the appellant who managed to prove that the land in dispute belonged to Tibayange who under love and affection donated it to Cresencia Kaserwa, Catherine Kaserwa and Angeline Kaserwa who gave it to the respondent under love and affection.

In his self-drawn submissions in reply, the respondent has conceded the flaw of the record of the trial tribunal failing to disclose the opinion of assessors but he submitted that, the irregularity committed by the trial tribunal cannot grab the ownership of land from the late Ernest Kaserwa to the appellant. He added that it's upon the jurisdiction of this court to revert the parties to the clan to settle the dispute as they are the ones best staged to know the root cause of the dispute. He therefore refrained to respond to the remaining submitted grounds and ended there.

I opt to start determining the 8th ground of appeal as submitted by the appellant's counsel because if tested positively may vitiate the entire trial tribunal proceedings. The ground touches on the role of assessors and their involvement in the trial proceedings of the tribunal.

Courts have now and then over emphasized that assessors are not there for mere decorations but they are part and parcel of the proceedings and their role should not be undermined. I therefore shake hands with the appellant's counsel that there is no way we can conclude that the assessors were fully involved in the trial as the proceedings depict unusual circumstances.

One, when the case commenced for the respondent side, the assessors who sat with the Chairman were not disclosed in both records, neither the original proceedings nor the typed ones in the Coram hence the tribunal was not properly constituted.

Two, something unusual again, the names of assessors appear at the end pausing questions by names of Mr. Muyange and Ms. Anna Mary. (Page 18-30 of the typed proceedings).The trend is also featured on page 30 of the typed proceedings where only Mr. Mugaya is shown putting questions and the record is silent where did Anna Mary go, to have only left one assessor and no reason why the tribunal continued the hearing with only one assessor.

Moreworse, on page 35 of the said record, when it was the turn for defence side, Assessor Anna Mary returned and chipped in to ask questions with her fellow assessor but the coram went on keeping silent throughout the trial.

Three, what is more astonishing is that, on 16.07.2019 the tribunal ordered the opinion of only one assessor Mr. Mugaya to be written and read over to the parties on the subsequent date but the proceedings do not speak where was Anna Mary and why was she not invited write and read her opinion or what prevented her to give her opinion. All what is seen is the surprise in the judgment where Chairman indicated that he received only the opinion of one assessor Mugaya as Anna Mary's tenure had expired prior to finalizing of the case, the reason which is not featured in the proceedings as rightly argued by the appellant's counsel.

Four, to make again things worse, I had an ample time to peruse the entire record of this appeal to see if I may come up with any document of the written opinion of Mr. Mugaya so that the defect can be cured but in vain. I did so as the law allows receiving written opinions from assessors.

Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which also the Appellant's counsel referred me states that;

"Notwithstanding sub-regulation (1) the Chairman shall, before making his judgment, require every assessor present at the

conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili".

I paused to ask whether this appellate court can be ready to assume that the opinion was given and read to parties given the circumstances where the proceedings is silent and where no written document containing such opinion and no record which shows how the opinion of one assessor found its way into the tribunal's judgment. The answer is in negative. See Court of appeal decisions in **Ameir Mbarak and Azania Bank Corp** (Supra)

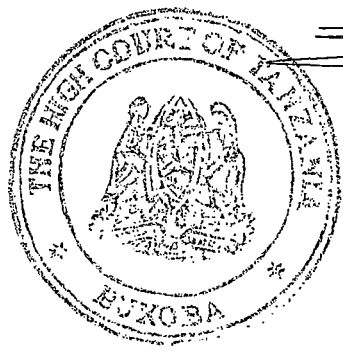
However, I am alive that the law allows the tribunal to proceed with the remaining assessor if one is absent as section 23(3) of Lands Disputes Courts Act, Cap 216 provides: ***"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence."***

The interpretation of the above provision cannot override the principle of natural justice of giving a reason for any action taken in the proceedings. The tribunal ought to have disclosed the reason in the proceedings which prevented the remaining assessor from attending and giving her opinion hence the *maxim justice should not only be done but should be seen being done.*

With the above analysis and going with the Court of Appeal Authorities as referred by the appellant's counsel, I am convinced that the trial did not involve the aid of assessors and the said irregularity is fatal and incurable which vitiates the entire proceedings of the trial tribunal. The respondent has also conceded on the discovered flaw and opted not to respond on the remaining grounds. Similarly, on my side, venturing in the remaining ground is the wastage of time as the flaw suffices to vitiate the matter.

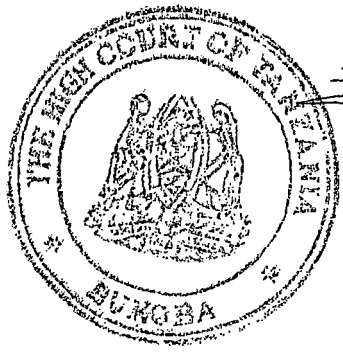
In the event, I hereby invoke revisional powers of this court under section 43(1) (b) of the Land Disputes Act Cap 216 R: E 2019 to nullify the whole proceedings, quash and set aside the judgment and decree of the DLHT. I direct that Application No. 112 of 2013 should be heard afresh before another Chairman/Chairperson and a different set of assessors. Should parties choose to settle their matter amicably outside the court, they are at liberty to do so subject to adherence to the laws of the land. Since the omission was not caused by the parties, I order that each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 14th day of March 2022.



E.L. NGIGWANA
JUDGE
14/03/2022

Judgment delivered this 14th day of March, 2022 in the presence of both parties in person, Hon. E. M. Kamaleki, Judges' Law assistant, and Ms. Tumaini Hamidu, B/C.



E.L. NGIGWANA

JUDGE

14/03/2022