IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 75 OF 2020

(Arising from the District Land and Housing Tribunal for Kagera at Bukoba Application No. 82 of 2017)

ABDUL HAMISI.....PLAINTIFF

VERSUS

JOSEPHAT KAROLI.....RESPONDENT

JUDGMENT

28/03/2022 & 28/04/2022

NGIGWANA, J.

This appeal fetches its origin from the decision of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in Land Application No. 82 of 2017 delivered on 08/06/2020.

Briefly, the material facts leading to this appeal as can be gathered from the trial tribunal record are to the effect that, the respondent who was the Applicant in the trial tribunal sued the appellant in the DLHT alleging that the appellant had encroached into his land located at Kashai within Bukoba Municipality whose value is estimated to be Tshs. 4,000,000/=.

The respondent further alleged that having encroached into the disputed land, the appellant built therein a small hut and consequently made him (respondent) unable to pass through the said land to his home place. On the other side, the appellant alleged that the disputed land belong to him. In that

premise, then the respondent sued the appellant in the DLHT claiming for the following reliefs;

(a) *An order to permanently restrain the appellant and his agents from trespassing and conducting any activities in the suit land.*

(b) *An order to the appellant to permanently remove the hut built in the disputed land.*

(c) *Costs of the application.*

(d) *Any other relief the tribunal would deem fit and suit to grant.*

On his side, the Appellant filed the (Written Statement of Defence) and asked for the following reliefs.

(a) *That the suit be dismissed with costs.*

(b) *An order to permanently restrain the respondent/applicant and his agents from trespassing into the suit land.*

(c) *Costs of the suit and.*

(d) *Any other relief the tribunal would find fit to grant.*

At the end of the hearing, the trial tribunal was satisfied that the disputed land belongs to the respondent **Josephat Karoli**. The tribunal further ordered the appellant to demolish the structure constructed in the suit land, and pay costs of the suit.

Being aggrieved by the decision of the DLHT, the appellant preferred this appeal based on the following grounds;

1. *That the trial tribunal erred in law and fact for allowing the application while the respondent has failed to prove his case on the balance of probability.*

2. *That the chairman erred in law and fact for failure to consider the health condition of the appellant who was having strike during trial*
3. *That the trial chairman erred in law and fact by allowing the application without considering the fact that the appellant has obtained the certificate of right of occupancy as pleaded on his written statement of defence.*

Wherefore prays the court to allow this appeal with costs. When the appeal was called for hearing, the appellant appeared in person, unrepresented while the respondent was represented by Mr. Mathias Rweyemamu, learned advocate.

Since the appellant was not represented, for the interest of justice, it was agreed that this appeal be disposed by way of written submissions. Both parties complied with the scheduling order for filing the written submissions and the appellant's written submissions were drawn gratis by Ms. Maria George Lupindo, Legal Office for Mama's Hope Organization for Legal assistance (MHOLA), and filed by the appellant himself; while the respondent's submissions were drawn and filed Mr. Mathias Rweyemamu learned advocate.

On the first ground, the appellant submitted that, in civil cases the standard of proof is in the balance of probability, and that the appellant's evidence was heavier because he tendered the sale agreement between him and Tausi Tibaijuka in relation to the disputed land.

On the 2nd and 3rd grounds of appeal, the appellant submitted that the disputed land belonged to him as he purchased it from one Tausi Tibaijuka and finally obtained the right of occupancy.

Mr. Rweyemamu on the 1st ground submitted that the respondent had proved the case to the required standard. He referred to section 123 of the Evidence Act Cap. 6 R: E 2019 that when a person has, by way of his declaration, act or omission, intentionally caused on permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative to deny the truth of that thing. That the respondent proved the claim to the preponderance of proof and the Appellant believed so and failed in toto to cross-examine.

On the 2nd ground, Mr. Rweyemamu submitted that the 2nd ground was misconceived for being an afterthought and it was not supported by the record or evidence in the Tribunal from the time of commencement of the suit up to the time appellant entered hearing of his defence.

As regard the 3rd ground, Mr. Rweyemamu submitted that the appellant had never possessed a certificate of Right of Occupancy issued by the Commissioner for Land to enable him to own the land in dispute.

Upon reading the grounds of appeal contained in the petition of appeal, reply to the petition of appeal, records of the trial tribunal and submissions made by both parties, I have found that the **2nd ground which touches the issue of fair trial or the right to be heard is sufficient to dispose this**

appeal, and for that reason, I see no compelling reasons to address the other two grounds of appeal.

The trial Tribunal records dated 09/11/2017, 27/8/2018, 27/02/2019 revealed that the Respondent now appellant entered no appearance due to sickness. He entered appearance on 14/05/2019, the day in which issues were framed and the hearing commenced. The Respondent was fully represented by Mr. Mutagahywa, learned advocate while the appellant appeared in person. There is nowhere in the trial record indicating that before the opening the Applicant's case, the respondent (now appellant) was asked whether he was ready for the hearing on the material date or otherwise.

Furthermore, Regulation 12 of the Land Disputes (The District and Land Housing Tribunal) Regulations, 2003 was not at all complied with. The same provides that;

12 (1)

"The chairman shall at the commencement of the hearing, read and explain the contents of the application to the respondent"

12 (2)

"The respondent shall, after understanding the details of the application under sub-regulation (1) be required either to admit the claim or part of the claim or deny"

12 (3) (b)

"The tribunal shall where the respondent does not admit the claim, or part of the claim, lead the parties with their advocates if any to frame issues."

Now let the record speak for itself;

"Date: 14/-5/2019

Corum: E. Mogasa, Chairman

T/C: Evelyne

Parties: All present

Tribunal: Let issues be framed and hearing proceed.

Issues framed:

(i) Who is the lawful owner of the suit premises?

(ii) Relief if any to the parties.

Sgd: E. Mogasa,

Chairman

15/05/2019

APPLICANTS CASE OPENS"

After the applicant's evidence in chief, the appellant was invited to cross-examine the respondent but he prayed to cross-examine using documents. Let the record speak for itself;

XXd: Respondent:

Respondent: *I pray to cross –examine using documents.*

Order: *Hearing on 17/05/2019*

Sgd: E. Mogasa

14/05/2019

Date: 05/08/2019

Corum: E Mogasa

T/C: Eveline

Applicant: Present, Adv. Mutagahywa

Respondent: Present

***Respondent**: I pray to close my cross examination.*

The record is silent as to what was the reaction or respond of the trial tribunal on the appellant's prayer considering that cross-examination was adjourned on 14/05/2019 due to the reason that the Appellant prayed to cross-examine the applicant/respondent using documents which by then were not in the hands of the Applicant.

On 05/08/2019, PW2 Adrian Sarapion testified but when the Appellant invited to cross examine PW2 he said **"I have no question to ask.** The record revealed that, on 26/08/2019; the Appellant prayed for time to cross examine PW3 but on 10/02/2020, the record shows that the Appellant told the trial tribunal that he had no questions to ask.

After the close of the applicant's case, when the appellant invited to make his defence, the Appellant stated ***"I cannot testify on a case. I do not know about"***. From there, Mutagahywa, advocate for the applicant prayed for the judgment date on the ground that the Appellant had no intention to defend the case, as a result the judgment date was fixed to wit; 30/04/2020 at 2:00pm.

Indeed, the trial tribunal records revealed that all three witnesses; PW1, PW2, PW3 were not cross-examined by the Appellant and worse enough, no defence was made by the Appellant.

Under the circumstances of this case, the trial tribunal had the duty to ensure that there was a fair trial. In civil matters two parties to the case cannot tie but the party whose evidence is heavier than that of the other is the one who must win the case. Since the witnesses were not cross-examined, and the

defence of the Appellant is lacking while the matter suggest that it was heard interparties and taking into account the seriousness of land matters, and the record, it is not very clear as to why the Appellant did not cross-examine the witnesses, and after saying he could not make his defence because he did not know the case, the trial tribunal ought to have afforded him another time for him to prepare himself for the defence, considering the fact that before the commencement of the hearing, Regulation 12 of the Land Disputes (The District and Land Housing Tribunal) Regulations, 2003 was not complied with. This court is also alive of section 45 of the Land Disputes Courts Act Cap 216 R: E 2019 provides as follows;

"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any ***evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."***

It should be noted that it is a cardinal principle of natural justice that a person should not be condemned unheard. In our jurisdiction, the said principle is not merely a principle of common law, it is a fundamental Constitutional right stipulated under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977.Let the same speak for itself;

"Wakati *haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kingine kinacho husika, basi mtu huyo atakua na haki ya ya kupewa fursa ya kusikilizwa kwa ukamilifu."*

The Court of appeal of Tanzania in the case of **Deo Shirima and Two Others v. Scandinavian Express Services Limited,** Civil Application No. 34 of 2008 (unreported) had this to say;

"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. This principle of law of respectable antiquity needs no authority to prop it up. It is common knowledge" See also the case of **Christain Makondoro versus The Inspector General of Police and Another,** Civil Appeal No.40 of 2019 CAT (Unreported).

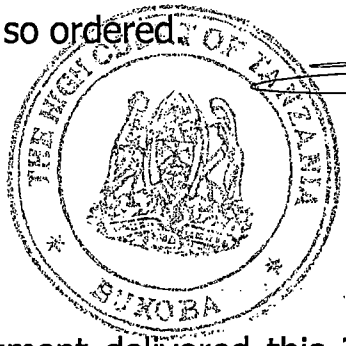
In the matter at hand, it is my firm view that the irregularities committed by the trial tribunal can neither be cured by Overriding Objective Principle nor by section 45 of the District Land Act, Cap 216 R: E 2019 because the affected the whole issue of **"fair trial".** In the administration of justice, it is very important to always remember the well-known maxim that;

"*Justice should not only be done but should manifestly and undoubtedly be seen to be done*". In the matter at hand it is apparent that the appellant was not afforded the right to be heard as required by law.

In the event, I am constrained to allow the appeal and invoke revisional powers under section 43 (1) (b) of the Land Disputes Act Cap 216 R: E 2019 to nullify the whole proceedings of the trial tribunal, quash and set aside the decision and orders of the DLHT. For the interest of justice, I order an expedited retrial before another Chairman and a new set of assessors. Since

the anomaly was to the large extent caused by the Trial tribunal, I order each party to bear its own costs.

It is so ordered.

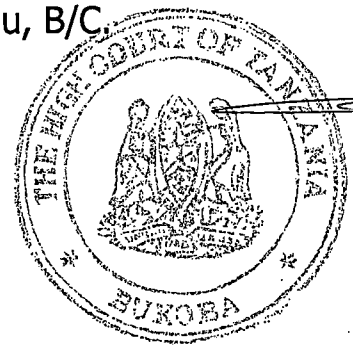


E. L. NGIGWANA

JUDGE

28/04/2022

Judgment delivered this 28th day of April 2022 in the presence of the both parties in person, Mr. E.M. Kamaleki, Judges' Law Assistant and Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

28/04/2022