

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

LAND APPEAL NO. 80 OF 2021

(Originating from Land Appeal No. 04 of 2021 of the District Land and Housing Tribunal for Kagera at Bukoba, Originating from Makuru Ward Tribunal in Land case No. 13 of 2020)

JOHANSEN M. TIMANYWA.....APPELLANT

VERSUS

GODFREY MUGANYIZI..... RESPONDENT

RULING

30/03/2022 & 14/04 /2022

NGIGWANA, J.

The appellant has preferred this appeal against the judgment and decision of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in Land Appeal No. 04 of 202021 delivered on 10/08/2021.

Briefly, the facts giving rise to this appeal as per lower court records may conveniently be stated as follows; the appellant alleged that he is a rightful owner of the disputed land located at Rubare Hamlet, Ward of Maruku within Bukoba District in Kagera Region after purchasing it from one Daniel Kakuru in 2001 at a tune of TZS. 1,500,000/=. On the other hand, the respondent alleged that the disputed land belongs to him as he bought it from one Joel Daniel Kato in 1984.

As a result, appellant instituted a suit against the respondent for trespass/encroachment to wit; Civil Case No.13 of 2020. After a full trial, the Ward Tribunal was convinced that the respondent purchased the

disputed land in 1984, thus the matter was decided in favor of the respondent.

Dissatisfied, the appellant appealed the DLHT vide Land Appeal No. 04 of 2021. After hearing the parties, the appeal was dismissed with costs for want of merit.

Still aggrieved, the appellant has now come to this court while armed with three (3) grounds of appeal to challenge the decision of the lower tribunals;

- 1. That the lower tribunals erred in law and fact when relied on mere allegations and decided that the lawful owner of the disputed land was the respondent.*
- 2. That the lower tribunals erred in law when failed to consider that the appellant had been possession of the disputed land for over 17 years.*
- 3. That the lower tribunals erred in law and fact when failed to consider that the evidence of the vendor in relation the sale of the disputed land to the respondent was hearsay evidence.*

Wherefore, the appellant prays that this appeal be allowed with costs, the judgment and orders of the trial tribunal and the first appellate tribunal be quashed and set aside, and the appellant be declared the lawful owner of the disputed land.

On the other hand, the respondent filed the reply to the memorandum of appeal contesting the appeal, wherefore, prays for the dismissal of the

appeal with costs, and that the judgment, decree and orders of the trial tribunal and appellate tribunal be confirmed.

When the appeal came for hearing, the appellant was represented by Mr. Eliphazi Benges, learned advocate while the respondent was represented by Mr. Fredy Gervas learned advocate.

Before submitting in support of this appeal, Mr. Bengesi with leave of the court prayed to draw the attention of the court on the anomaly committed by the DLHT. The anomaly was unwarranted change of Assessors. After drawing the attention of the court on the anomaly, the learned counsels were both invited to address the court on that issue.

Mr. Benges submitted that, Appeal No. 04 of 2021 was heard by way of written submissions, and that when the filing scheduling order was set, Assessors who were present were Mr. **Yusuph Mbelwa** and Ms. **Christina Kabigiza**, but after the compliance of the filing scheduling order, another set of assessors namely; **J. Mugango** and **D. Rutailulwa** were invited to opine, and no reasons were assigned in the DLHT record for that change. Mr. Benges further submitted that the omission is fatal as it occasioned miscarriage of justice to the parties. The learned counsel referred this court to the case of **Andrew Sitta versus Sylvester Mioki Kisika**, Land Appeal No. 8 of 2020 HC-Musoma (Unreported) and **Neema Upendo and 2 others versus Eliwaha M. Mfinanga**, Land Appeal No. 269 of 2019 HCLD - Dsm (Unreported) to emphasize that change of assessors during the hearing or allowing assessors who did not hear the case to opine is a fatal irregularity.

On his side, Mr. Gervas conceded to submissions made by Mr. Benges, and added that, hearing by way of written submission is equal to hearing viva voce. He ended his submission urging the court to invoke its revisional powers under section 43 (1) (a) and (b) of the Land Disputes Courts Act, Cap. 216 R:E 2019 to nullify the proceedings of the DLHT, set aside the judgment and orders thereto, and order a re-trial.

Having heard submission by both advocates, the issue for determination is whether the pointed-out irregularity is capable of vitiating the proceedings of the DLHT.

The law governing Land disputes is very clear that the District Land and Housing Tribunal established under section 22 of the Land disputes Courts Act Cap. 216 R: E 2019 is said to be properly constituted when held by a chairman and two assessors. For easy reference, let the law speak for itself; -Section 23 (1) of the Land Disputes Courts Act Cap. 216 R:E 2019 provides that;

"The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors."

Section 23 (2) of the Act provides that;

"The District Land and Housing Tribunal established under Section shall be composed of one chairman and not less than two assessors who shall be required to give out their opinion before the Chairman reaches the judgment."

When dealing appeals from the Ward Tribunals, the composition of the DLHT is still the same. Section 34 (1) of the Land Disputes Courts Act provides that;

"The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors, and shall-

(a) consider the records relevant to the decision;

(b) receive such additional evidence if any; and

(c) make such inquiries, as it may deem necessary.

Section 23 (2) the Act, read together with Regulation 19 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 generally imposes a duty upon the assessors who fully participated in the hearing of the case to give opinion in writing before the chairman reaches the judgment. Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations; 2003 provides;

"Notwithstanding subsection (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".

In the case of Mbaraka and Another versus Edger Kahwili, Civil Appeal No. 54 of 2015 the court of Appeal stressed that it is wrong to make change of assessors in the course of trial and it is wrong to allow assessors who did not hear the suit through out to opine.

In the case at hand, Appeal No. 04 of 2021 was heard by way of written submissions. The record revealed that on 10/6/2021 the parties agreed

that the appeal should be disposed by way of written submissions, and from there, the filing scheduling order was set and duly complied with by the parties. On that date, assessors were two; **Mr. Yusuph Mbelwa and Ms. Christina Kabigiza**. After the filing scheduling order being fully complied with, the Chairman ordered the case file to be taken to the assessors for the them to opine. The order was coached as follows;

*"Amri: (i) Jalada lipelekwe kwa wajumbe kwa ajili ya maoni
(ii) Maoni tarehe 14/07/2021"*

From there, the case file was presented before a new set of assessors; Ms. **Dora Rutailulwa and Mr. John Mugango** whereas each opined in writing and on their opinion were read, however, the record show that the said opinions were read in the presence representatives of the parties to the case. Let the same speak for itself;

"Tarehe: 03.08.2021

Akidi: R. Mtei-Mwenyekiti

K/B: Felister

Wajumbe: J. Mugango, D.Rutailulwa

Mrufani: Hayupo kwa taarifa kutoka kwa Joel Timanya

Mrufaniwa: Hayupo kwa taarifa kutoka kwa Fredrick Muganyizi

Baraza: Shauri linakuja kwa ajili ya maoni

R. Mtei

Mwenyekiti

Baraza: Maombi haya yamesomwa mbele ya wawakilishi wa wadaawa.

R. Mtei

Mwenyekiti

Amri: Hukumu tarehe 10/08/2021"

In its judgment, the Chairman considered the opinions given by that new set of assessors, though he avoided to mention their names. Part of the judgment at page 8 read;

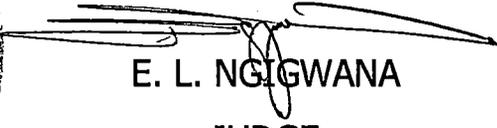
"Nanaungana na maoni ya Wajumbe wa Baraza hili kwamba mmiliki halali wa eneo la mgogoro ni Mrufaniwa Godfrey Muganyizi kama ilivyo amuliwa na Baraza la Kata ya Makuru."

It is a principle of law that filing of written submissions is tantamount/ similar to a hearing. See **P 3525 LT Idahya Maganga Gregory versus The Judge Advocate General, Court Martial**, Criminal Appeal No.2 of 2002 (Unreported). In the premise, in Appeal No.4 of 2021, assessors who ought to have given their opinion are **Mr. Yusuph Mbelwa and Ms. Christina Kabigiza and not otherwise.**

In the final analysis, I hereby invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Courts Act, Cap 216 R: E 2019 to nullify the whole proceedings, quash and set aside the judgment and decree of the DLHT in Land Appeal No. 04 of 2021. I further I order that Appeal No.04 of 2021 be heard afresh before another Chairman and with a new set of Assessors. Since, the anomaly was not caused by the parties, each party shall bear its own costs.

It is so ordered.




E. L. NGIGWANA
JUDGE

14/04/2022

Ruling delivered this 14th day of April, 2022 in the presence of the respondent in person, Mr. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C and Mr. Joel Timanywa for the appellant.




E. L. NGIGWANA

JUDGE

14/04/2022