

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBWA DISTRICT REGISTRY

AT BUKOBWA

MISC. LAND APPEAL NO. 24 OF 2022

(Arising from District Land and Housing Tribunal for Kagera at Bukoba in Appeal No. 44 of 2020 and Nyakato Ward Tribunal in Land Case No. 29 of 2020).

EDWIN MWOMBEDI.....APPELLANT

VERSUS

RAYMOND MOSES.....RESPONDENT

JUDGMENT

19/07/2022 & 12/08/2022
E. L. NGIGWANA, J.

This is the second appeal. It emanates from Nyakato Ward Tribunal where the respondent, Raymond Moses instituted a suit to wit; Land Case No. 29 of 2020 against the appellant, Edwin Mwombeki for trespassing into his piece of land located at Nyakato Ward within Bukoba Municipality, which he alleged to have inherited in 2002 from his Aunt namely; Felister Michael (deceased).

At the Ward Tribunal, the dispute was resolved in favour of the respondent, Raymond Moses. The trial tribunal ended its judgment as follows;

"Baraza kutokana na mdaiwa kushindwa kesi linaamuru mdaiwa kurudisha gharama za mdai alizotumia kuendesha kesi hii, vilevile baraza linaagiza mdai na mdaiwa kwa kushirikiana na uongozi wa kitongoji kuwawekea mipaka ya kudumu ili kuondoa mgogoro na ya kwamba yeyote kati ya mdai na mdaiwa atakayeng'oa mipaka hiyo, hatua za kisheria zichukuliwe dhidi yake."

Aggrieved by the decision of the Trial tribunal, the appellant appealed to the District Land and Housing Tribunal for Kagera at Bukoba in Land Appeal No. 44 of 2020. His petition of appeal contained five (5) grounds of appeal as follows;

- 1. That, the quorum of the Trial Tribunal was not properly composed as the alleged **Paschary Daudi** being a member thereto did not participate in proceedings nor did he sign the judgment.*
- 2. That, the respondents evidence indicates that the suit land was bequeathed to him by the late Felister Michael but there is no any evidence supporting the same from the administrator of the estate of the late Felister Michael, thus the respondent had no locus standi to sue the appellant.*
- 3. That, according to the finding of the trial tribunal and the order thereto that "mdai na mdaiwa kwa kushirikiana na uongozi wa kitongoji kuwawekea mipaka ya kudumu kati ya mdai na mdaiwa" indicated that the respondent did not properly disclose the boundaries of the suit land.*
- 4. That, the respondent did not prove his ownership unto the suit land for want of prescribing the location of the suit land.*
- 5. That, the trial tribunal did not adequately consider the evidence of the appellant by testing it with the respondent's evidence.*

Wherefore, the appellant prayed for the reliefs that the appeal be allowed by reverting the trial tribunal's judgment in favour of the appellant, grant the ownership of the suit land to the appellant, costs and any other relief at the discretion of the appellate tribunal. After hearing the appeal, the appellate

tribunal confirmed the trial tribunal's decision and dismissed the appeal in its entirety.

Further aggrieved and determined to fault the two tribunals below, the appellant knocked the doors of this court equipped with six grounds of appeal which can be rephrased as follows;

- 1. That, the appellate Tribunal erred in law and fact for failure to identify that the trial Tribunal was not properly constituted in law to determine the matter.*
- 2. That, the successor chairman of the appellate Tribunal erred in law and fact to bypass and disregard the previous order of a fellow chairman concerning a scheduled hearing regarding respondent's prayer for his previous filed documents to be expunged from the record so as to re-file others, while the filling of submissions from both parties already completed.*
- 3. That, the appellate Tribunal erred in law and facts to grant respondent's prayer of refilling other documents without first according the appellant a right to be heard on that concern.*
- 4. That, the appellate Tribunal erred in law and facts for failure to realize that written submission amounts to oral submission and hence, the respondent could not have submitted twice on the same matter.*

5. That, the appellate Tribunal erred in law and facts for failure to identify that the trial tribunal never applied its mind to the appellant's evidence on record while giving its decision.

6. That, both the appellate Tribunal and trial tribunal decided against the weight of evidence.

Wherefore, the appellant is praying for these reliefs; an order quashing and setting aside the proceedings and judgments of both lower tribunals and all orders emanating thereto or **(in alternative)**, an order quashing and setting aside the judgments of both lower courts by declaring the appellant the lawful owner of the suit land, costs of the suit and any other relief the court may deem fit and just to grant.

When this appeal is called on for hearing, the appellant had the legal services of Mr. Gildon Mambo, learned advocate while the respondent had the legal services of Mr. Brighton Mugisha, learned advocate. At the outset, the learned counsel for the appellant abandoned the 6th ground of appeal and argued the rest of the grounds.

Arguing the first ground of appeal, Mr. Gildon submitted that the trial tribunal was not properly constituted to determine the matter. The learned counsel made reference to section 11 of the Land Disputes Courts Act Cap. 216 R: E 2019 read together with section 4 (1) of the Ward Tribunal Act Cap. 206 R: E 2002 that, according to the cited provisions of the law, the Ward Tribunal is said to be properly constituted when is held by not less than four members.

The learned counsel went on submitting that, the trial court record revealed names of four (4) members as persons who entertained the matter but in reality, one member by the name of Paschary Daudi had never involved

himself in the hearing and determination of Land Case No. 29 of 2020. To support his argument, he referred the court to the trial tribunal proceedings and addressed three scenarios; **One**, that on 16/06/2020, the locus in quo was visited and the members signed the proceedings to prove their attendance but the said Paschary Daudi did not sign. According to Mr. Gildon, that is evidence that he did not involve himself in the hearing of the matter. **Two**, that, the judgment of the trial tribunal was signed by three members only, the said Paschary Daudi did not sign despite the fact that his name was written. **Three**, that, page 4 of the trial court judgment revealed that before judgment, the tribunal members gave their opinions except the said Paschary Daudi. **Four**, that in the reply to petition of appeal filed in the DLHT, the respondent had admitted that the said Paschary Daudi did not involve himself in the hearing of the matter because he had personal interest.

Mr. Gildon further submitted that where the trial tribunal is not properly constituted, the irregularity is fatal, capable of vitiating the proceedings of the trial tribunal. He referred the court to case of **Adelina Koku Anifa and Another versus Byarugaba Alex**, Civil Appeal No. 46 of 2019 CAT. (Unreported)

Mr. Gildon also referred me to the case of **Leonard Mrefu High Court Bukoba versus Anna Petro**, Misc. Land Appeal No. 69 of 2021 where it was emphasized that the quorum of the Ward Tribunal should be maintained in all sitting.

Arguing the 2nd and 3rd grounds together, Mr. Gildon submitted, that the appellant after he had filed appeal in the DLHT which was registered as Appeal No. 44 of 2020, the respondent filed a reply to the petition of appeal drawn by Mr. Lameck Erasto, learned advocate, and signed by the

respondent. He added that it was agreed that the appeal be argued by way of written submissions and the filing order was duly complied with.

The learned counsel further argued that on 16/11/2020, the respondent wrote a letter to the DLHT requesting the tribunal to expunge from the record the reply to petition of appeal together his written submission on the ground that the documents which were filed in court were not his documents but the documents of Mr. Lameck Erasto, learned advocate.

The learned counsel further submitted that the records revealed that on 23/02/2021, the DLHT wrote a letter to the respondent notifying him that, that is a legal issue thus, cannot be handled administratively, parties have to appear before the court and be heard, therefore, the matter was adjourned to come for hearing on 05/03/2021. According to Mr. Gildon, that a proper procedure.

Mr. Gildon added that, the record of the DLHT revealed that before the parties were invited and heard on the issue raised by the respondent, the Chairman (**E. Mogasa**) who was presiding over the matter was transferred to another working station. That, upon the matter being re-assigned, the Successor Chairman (**R Mtei**), proceeded without taking into account the previous orders issued by his Predecessor, therefore, ordered the respondent to file the reply together with written submissions. The learned counsel added that the appellant noted that, that was a fatal irregularity, but since an interlocutory order is not appealable, he did not appeal.

Mr. Gildon further submitted that considering the principle of *functus officio*, the successor chairman had no mandate to vacate the order of his predecessor. He added that, under the circumstances of this case, it is apparent that in DHLT, the appellant was denied the right to be heard.

He added that, as a matter of law, the court cannot decide on any matter that affects the parties to the case without affording them the right to be heard. He referred this court to the case of **Evodius Petro Majura versus Victor Gervas**, Probate and Administration Appeal No. 10 of 2018 HC Bukoba Registry where the right to be heard was emphasized, and where the right to be heard is violated, the only remedy is to nullify the proceedings, quash and set aside the resultant decision and orders.

As regards the 4th ground of Appeal, Mr. Gildon submitted that hearing by way of written submission is tantamount to an oral hearing and since the written submissions were already filed in the DLHT, it is apparent that the matter was already heard therefore, it was a gross irregularity for the DLHT to order filing of the written submission by the respondent for the second time.

Arguing the 5th ground, Mr. Gildon submitted that, reading the judgment of the trial tribunal, it is very easy to discover that the appellant's evidence was not at all touched by being credited or discredited, and that makes the judgment of the trial tribunal a nullity. He added that, in civil cases the standard of proof is on the balance of probability, therefore it is very wrong to evaluate and analyze the evidence of one party, leaving the evidence of the other party unevaluated and unanalyzed.

He made reference to the case of **Luta Syphorian Nelson versus Attorney General and Another** [2000] TLR 419 where the Court of Appeal held that a judgment must convey some indication that the judge or magistrate has applied his mind to the evidence in record and that it must show that no material portion of the evidence laid before the court has been ignored.

Mr. Gildon ended his submission urging the court to nullify the proceedings of the lower tribunals, quash and set aside the concurrent judgments and resultant orders, and allow any interested party to file a suit afresh before any competent tribunal.

Submitting on the first ground of appeal, Mr. Brighton Kamugisha, learned advocate for the respondent stated that the trial tribunal was properly constituted as it was held by four (4) members, Paschary Daudi being one of them. He added that, Paschary's failure to sign the proceedings or judgment is not in itself sufficient proof that he did not participate in the adjudication of the matter.

Explaining the composition of the Ward tribunal, the learned counsel made reference to the case of **Henerico Felex and Another versus Hermes Muhazi**, Misc. Land Case Appeal No. 46 of 2011 where the court (Mjemmas, J. he then was) held that;

" In view of that, I find that the composition of members who decided the matter was correct according to sections 14 (1) and (2) of the Land Disputes Courts Act, Cap. 216. For avoidance of doubt, it is my holding that the members who decided the matter were three as required by the above quoted section of the law".

Mr. Mugisha further stated that the procedure observed by the Successor Chairman to allow the respondent to file the reply to petition of appeal and written submission was very proper. He ended his submission that the court is a court of justice as opposed to technicalities, hence prayed for this court to concentrate on substantive justice as opposed to procedural technicalities.

In his rejoinder, Mr. Gildon stated that the learned counsel for the respondent ended saying Paschary Daudi was present in the trial tribunal as a member, but he did not go a step ahead to show how he participated in the hearing. This marked the end of submissions by the parties.

I have carefully examined the grounds of appeal, submissions, cited authorities of both parties and records of the lower tribunals. Now, the issue for determination is whether this appeal is meritorious.

I would like to start with the first ground of appeal. The record of the 1st appellate court revealed that, this ground was also raised there as the first ground of appeal.

Before dismissing it, the first appellate court (**R. Mtei**) had this to say;

"Baada ya kupitia kumbukumbu za Baraza la Kata niona kwamba wajumbewaliokaa kusikiliza na kuamua shauri walikuwa wane (4) kama alivyoeleza mrufaniwa. Wajumbe hao kwa majina ni 1. Generoza Oswald, 2. John Abdon, 3. Liberata Albert 4. Paskari Daudi; Majina haya ya wajumbe yanaonekana kwenye ukurasa wa kwanza kabisa wa mwenendo wa Baraza la Kata Nyakato. Lakini pia hakuna kokote Mrufani alikanusha katika hoja zake za maandishi kama mjumbe huyu hakushiriki na badala yake akajielekeza zaidi kwamba mjumbe huyu hakusaini. Kwa msingi huo basi na kwa kuzingatia kumbukumbu za Baraza la Kata nimeona kwamba akidi katika Baraza la Kata iliuwa sahihi."

The composition of the Ward Tribunal when determining land matters is governed by section 11 of the Land Disputes Courts Act Cap 216 R: E 2019 read together with section 4(1) of the Ward Tribunal Act Cap 206 R: 2002.

Section 11 of the Land Disputes Courts Act Cap 216 R: E 2019. Which provides that;

“Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act”.

Reading the herein above provision, it is apparent that the Ward Tribunal is properly constituted where it consist of not less than four nor more than eight members of whom three shall be women. Unless properly constituted, the Ward tribunal has no jurisdiction to determine the matter before it. In that respect, the Composition has to be reflected in the proceedings and in the judgment to show that it was properly constituted to hear and determine the case before it.

In the case of **Venance Tengeneza versus Kawawa Mwapili**, Misc. Application No.13 of 2008 which was quoted with approval in the case of **Kassim Ngoroka versus Bernard Masembula**, Misc. Land Appeal No.3 of 2016, my Senior learned brother Hon. Ngwembe, J. had this to say;

“The law requires, proper composition of the Ward Tribunal, must indicate names, gender and signature of each members; among members three must be women. Secretary is not among members of the Ward Tribunal”

However, I am alive that there is no law which mandatorily requires members of the Ward Tribunal to sign every day in the proceedings of the Ward Tribunal. What the law requires is for the members of the tribunal to sign the judgment. By giving signing the proceedings, and by giving his/her opinion/views and signing the judgment, in my view, it shows that the member has fully participated in the proceedings. It should be noted that signature is a mark or sign made by an individual on an instrument or

document to signify **knowledge, approval, acceptance or obligation**, thus signature is used for two purposes, first is to authenticate a document and the second is to identify the maker of the document. However it should be noted that signing or failure to sign every day proceedings is not fatal.

In the matter at hand, on 28/05/2020 when the matter was filed and registered, the members were four (4) Generoza Oswald, Paschary Daud, John Abdon and Liberatha Albert.

The hearing commenced in the Ward Tribunal 04/06/2020 but the quorum of the date was not disclosed, contrary to the principle stated in the case **Leonard Mrefu High Court Bukoba versus Anna Petro (Supra)** that the quorum of the Ward Tribunal should be maintained in all sitting.

I also agree with Mr. Gildon, learned that advocate for the appellant that the trial tribunal record revealed on 16/06/2020, the trial tribunal visited the locus in quo and the members signed the proceedings to prove their attendance and participation in the hearing and determination of the matter but the said Paschary Daudi did not sign.

I also agree with Mr. Gildon that the judgment of the trial tribunal was signed by three members only, that is to say; **Generoza Oswald, John Abdon**, and **Liberata Albert**. Paschary Daud did not sign.

Furthermore, I agree with Mr. Gildon that, page 4 of the trial tribunal judgment revealed that before judgment, three tribunal members gave their opinions. Paschary Daudi did not give his opinion, and no reasons for that omission.

It is also on record as submitted by Mr. Gildon that the reply to petition of appeal filed in the DLHT, the respondent had admitted that the said Paschary Daudi did not involve himself in the hearing of the matter because he had personal interest. Paragraph one reads;

" The contents of the 1st ground is partly admitted as the mentioned member namely; Paschary Daud has in the due course of the proceedings withdrawn himself from since he had the interest in the subject matter being closely related to the appellant despite his failure of making the declaration thereto".

Under the circumstances, it cannot be said that Paschary Daud fully participated in the proceedings. With no doubt, only three members namely; **Generoza Osward, John Abdon, and Liberata Albert** have participated in hearing and determination of Land Case No. 29 of 2020, thus there is no way the proceedings, judgment and resultant orders, likewise, those of the DLHT in Land Appeal No.44 of 2020 can stand.

Addressing the issue of improperly constituted Ward Tribunal, the Court of Appeal of Tanzania in **Adelina Koku Anifa and Another versus Byarugaba Alex**, Civil Appeal No. 46 of 2019 CAT (Supra) held that;

"since only three members participated in the trial of the matter subject of this appeal at the level of the Ward Tribunal, the proceedings were marred with irregularity, this and void. Hence because of that ailment which we consider to be grave, we are constrained to, and we hereby quash those proceedings, as well as those in the DLHT and the High Court, and set aside the judgments in both tribunals and the High Court. We direct that the suit be tried a new by that tribunal."

The argument by Mr. Mugisha, learned advocate that the Paschary Daud fully participated in the hearing and determination of Land Case No.29/2020 is a baseless argument with no leg to stand, thus I dismiss it accordingly.

Even if we assume for the sake of argument that the trial tribunal was properly constituted, still the judgment of the DLHT and resultant orders would not be allowed to stand due to gross procedural irregularities committed by the DLHT.

The record revealed that Appeal No 44/ 2020 was heard by way written submission before E. Mogasa (Chairman). Later on, the respondent wrote a letter requesting the tribunal to expunge his reply and the written submission. The Chairman was aware that legal issues cannot be tackled administratively; therefore, on 23/02/2021 the tribunal had this to say;

" The respondent was represented by Lameck John Erasto who filed reply to appeal and submission. The respondent did not remove Mr. Lameck and his advocate and wants that the submission filed by Mr. Lameck be expunged so that he can file his own. Let the issue be heard first before judgment".

Order: Hearing of the issue raised on 05/03/2021.

Sgd E.Mogasa

Chairman

23/02/2021"

Following the transfer of the Predecessor Chairman, the Successor Chairman (**R. Mtei**) never heard the parties on the raised issue, instead, he just allowed the respondent to file the reply to the petition of appeal, and thereafter, another filing scheduling order was set, and was complied with by the parties, and finally the judgment was composed.

I agree with Mr. Gildon that it is a principle of law that filing of written submissions is tantamount to a hearing. With no doubt, what was done by the Successor Chairman was a nullity owing to the reason that the matter was already heard by way of written submission before the Predecessor Chairman (E. Mogasa), and those proceedings were still intact. In other words; the next stage was for the DLHT to compose its judgment. Under *the doctrine functus officio*, the Successor Chairman had no legal competence of re-hearing Appeal No. 44 of 2020 because it was already heard by his Predecessor, and he had no mandate to vacate or challenge the order of his Predecessor.

Again, if we assume for the sake of argument that the trial tribunal was not functus officio, or that the hearing was not complete, still the decision of DLHT giving rise to this appeal could not be allowed to stand on account of being arrived at in violation of the constitutional right to be heard. It is apparent that the decision which allowed the respondent to file the reply to petition of appeal and submission was reached arbitrarily contrary to rules of justice because the appellant was denied the right to be heard, the irregularity which rendered the trial unfair. The Court of Appeal of Tanzania in the case of **Rukwa Auto Parts and Transport Ltd Versus Jestina George Mwakyoma**, [2003] TLR 251 had this to say;

"In this country, natural justice is not merely a principal of common law; it has become a fundamental constitutional right Article 13 (b) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part;

- (a) *Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamizi na Mahakama au chombo kinginecho kinacho husika, **basi mtu huyo***

atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."

In another case, Abbas **Sherally and Another Versus Abdul Fazalboy, Civil Application No. 33 of 2002**, the Court of Appeal emphasized the importance of the right to be heard as follows;

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

The argument by Mr. Mugisha, learned advocate for the respondent that the Successor Chairman observed all procedures accordingly, with due respect, this again is unfounded argument which is not reflected in the record.

All said, and considering that the Ward Tribunal was not properly constituted, I see no compelling reasons to address the 5th ground of appeal, because it will be just an academic exercise.

In the upshot, I am constrained to invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Act Cap 216 R: E 2019 to nullify the proceedings of both the trial tribunal, and the DLHT, quash and set aside the concurrent judgments and orders of the lower tribunals.

Having done so, and given the fact that through the Written Laws (Miscellaneous Amendments) Act No. 5 of 2021, power of the Ward Tribunals to hear and determine land disputes was removed, retaining their primary function to secure peace and harmony by attempting to mediate land

disputes referred to them by parties before the dispute is referred to the DLHT, re-trial is not a proper remedy. In that respect, Parties are at liberty to institute a land case afresh subject to the law of limitation. Given the fact that the anomalies were caused by the lower tribunals, each party shall bear its own costs. It is so ordered.

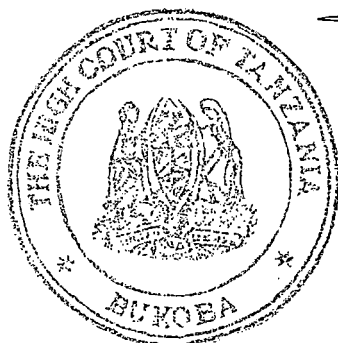


E. L. NGIGWANA

JUDGE

12/08/2022

Judgment delivered this 12th day of August, 2022 in the presence of both parties in person, Mr. Gildon Mambo, learned advocate for the appellant, Mr. Brighton Mugisha, learned advocate for the respondent, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

12/08/2022