

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBIA DISTRICT REGISTRY**

**AT BUKOBIA**

**LAND APPEAL NO. 68 OF 2021**

*(Arising from Land Case No.34 of 2019 of the High Court-Bukoba, Land Case Appeal No.40 of 2020 of the High Court-Bukoba and Application No 54 of 2014 of the District Land and Housing Tribunal for Kagera at Bukoba)*

**HELI MANJILIDA KOKUSHUBIRA (Administratrix of the estate of the late Dominic Mutembei) .....APPELLANT**

**VERSUS**

**COSTANCIA BONIFACE.....RESPONDENT**

**JUDGMENT**

*20/06/2022 & 17/08/2022*  
**E. L. 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 Application No. 54 of 2014 delivered on 10/05/2019.

Briefly, the facts giving rise to this appeal as per available records may conveniently be stated as follows; Sometimes in 2014, one Dominic Mutembei, now deceased instituted a suit against the respondent in the Land and Housing Tribunal for Kagera at Bukoba for encroaching into her suit land located Mugana area within Misenyi District, whose value is estimated to be **Tshs. 7, 000,000/=**.

Dominic Mutembei further alleged that he purchased the said land on 1/03/1984 from the Board of Trustees of Bukoba Catholic Diocese at a consideration of **Tshs. 5,000/=**, and from Belina Kokubanza January, on

05/01/1999 respectively. He further alleged that from there, he developed the suit land by planting permanent crops namely; bananas and coffee. It was further alleged that sometimes in 2013; the said vendors encroached into part of the disputed land and started destroying demarcations and crops therein.

On the other hand, the respondent denied to have encroached into the land of Dominic Mutembei. In such a situation, Dominic instituted a suit against the respondent seeking for the following reliefs:-

- (i) *A declaration orders that the applicant (Dominic Mutembei) is the rightful owner of the suit land.*
- (ii) *An order permanently restraining the respondents and his agents from interfering with the suit land.*
- (iii) *Costs of the suit.*
- (iv) *Any other relief the tribunal may deem proper to grant.*

After a full trial, the matter was decided in favor of the respondent. In other words, the application was dismissed with costs. The respondent was further awarded general damages at the tune of TZS. 3,000,000/=.

Dissatisfied, Dominic Mutembei appealed to this court through Appeal No.34 of 2019, but the same was withdrawn on 30/11/2020 with leave to re-file. From there, Appeal No 40 of 2020 was filed by Dominic Mutembei, who then expired on 18/03/2021.

Again, Appeal No.40 of 2020 was withdrawn with leave to re-file within 14 days after the appointment of the Administrator/Administratrix of the deceased's estate. Upon grant of letters of administration of the estate of

the deceased, Helimanjilida Kokushubira, an administratrix of the estate of her late husband Dominic Mutembei has now approached this court armed with six (6) grounds of appeal;

as follows: -

- 1. That, the trial tribunal erred in law and in fact to proceed with a non-amended pleadings even after the applicant had dropped the 2<sup>nd</sup> and 3<sup>rd</sup> respondents*
- 2. That, the trial tribunal erred in law because it did not disclose the reason of moving a suit from one chairman to another.*
- 3. That, the trial tribunal erred in law by completing its proceedings and reaching its final decision without involving assessors and no proper assigned reasons for that.*
- 4. That, the trial tribunal erred in law and in fact by misinterpreting the position of the applicant (herein appellant) in Misc. Civil Case No 30 of 2000 and the dispute itself.*
- 5. That the trial tribunal erred in law and fact by relying on contradictory documents to enforce the frustrated non-existing contract.*
- 6. That the trial tribunal erred in law and facts by reaching its final decision against the weight of the evidence.*

Wherefore, the appellant is praying that this appeal be allowed by quashing the proceedings of the trial tribunal, set aside the judgment and orders thereto.

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 be confirmed.

When the matter came for hearing, the appellant was represented by Mr. Victor Blasio, learned advocate while Mr. Frank John appeared for the respondent. At the outset, Mr. Blasio abandoned the 2<sup>nd</sup>, 4<sup>th</sup> 5 and 6<sup>th</sup> grounds of appeal, hence remained with grounds No.1 and 3 only.

Submitting in support of the 1<sup>st</sup> ground Mr. Blasio argued that page 3 of the trial tribunal judgment reflects the non-amended pleadings, while in real sense the pleadings were amended, making the former pleadings as of no use. The learned counsel made reference to the case of **Sarbjit Singh Brarya and another versus Nic Bank of Tanzania and Anther**, Civil Appeal No.94 of 2017 C AT (Unreported) where it was held that;

*"It is trite law that when a pleading is amended, the previous document ceases to have any legal force/effect as it is taken as if it was never part of the record".*

As regards the 3<sup>rd</sup> ground, Mr. Blasio submitted that the trial Chairman proceeded with the hearing and reached the final decision without involving assessors and no good reasons assigned by the Hon. Chairman because he just indicated that the assessors' tenure had expired. According to Mr. Blasio, the said reason was not sufficient. He made reference to the case of **Bukoba Municipal Director and Another versus Godwin Muganda**, Consolidated Land Case Appeal No. 48 & 55 of 2018 HC-

Bukoba Registry (Unreported). In this case, the reason considered by this court (Kairo J as she then was) to be insufficient was coached by the Hon. Chairman as follows:

*"I should make it clear that there are no Assessors opinions in this case as when the case started, the members were Mr. Kawegere and Ms. Nyakato but they vacated office before the case was set for judgment".*

Furthermore, Mr. Blasio argued that, in the DLHT, there was change of Assessors, and he made reference to the typed proceedings of the DLHT, page 3 which revealed that on 08/07/2014, Assessors were **Nyakato and Kawegere** while on 19/01/2015, Assessors were **Mr. Bwahama and Ms. Anamery**. According to Mr. Blasio, the change of assessors made in the DLHT is capable of vitiating the entire proceedings. The learned counsel made reference to the case of **Andrew Sitta versus Silivester Mioki Kisika**, Land Appeal No. 8 of 2020 HC-Musoma where it was held that in the course of the trial, the chairman cannot be aided by different sets of assessors. In other words, replacement of assessor during trial before the DLHT is fatal. He also made reference to the case of **Neema Upendo and two others versus Eliwaha M. Mfinanga**, Land Appeal No. 269 of 2019 CAT. (Unreported)

Opposing the 1<sup>st</sup> ground of appeal, Mr. Frank, submitted that page 13 of the DLHT typed proceedings revealed that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were dropped, and from there, issues were framed to address the controversy between the applicant now respondent and the appellant. Thus, the dropped parties were just mentioned in part of the facts of the case and no more. He added that, in the present case, there was no

application for amendment, as opposed to the case of **Sarbajit Sing Bharya** (Supra), therefore, this case is distinguishable.

As regards the issue of the involvement of assessors, Mr. Lameck conceded that the DLHT is properly constituted when held by one Chairman and not less two assessors, but only assessors who heard the matter to its finality are duty bound to give their opinions. Mr. Lameck argued that the argument that there was change of assessors is baseless because the hearing commenced with two assessors namely; **Bwahama and Anamery**, and were not replaced though their tenure later expired, that is why the chairman proceeded and concluded the proceedings in absence of assessors. He added that, assessors; **Nyakato and Kawegere** appeared during the preliminary stages, thus cannot be said to have involved themselves in the hearing of the case. Mr. Frank ended his submission that this appeal be dismissed with costs.

Mr. Blasio in his rejoinder stated that the act of dropping the 2<sup>nd</sup> and 3<sup>rd</sup> respondent has affected the plaint and the W.S.D hence that was no more but amendment. He also reiterated that the reason as to why the opinions of assessors were missing is insufficient.

I have carefully examined the grounds of appeal, submissions and cited authorities of both parties, record of the DLHT therefore; the issue for determination is whether this appeal is meritorious.

I would like to start by addressing the 1<sup>st</sup> ground of appeal. Section 51 (2) of the Land Disputes Courts Act, Cap. 216 R: E 2019 Provides that;

*“The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code”.*

Regulation 16 of the Land Disputes (The District Land and Housing Tribunal) Regulations, 2003 which specifically governs amendment of pleadings in the DLHT provides that;

*"The Chairman may, on his own motion or application by either party, order amendment of the pleadings".*

In the case at hand, there was no clear application for amendment of the plaint made by the respondent in the DLHT under the herein above cited rule or that the Chairman ordered amendment of the pleadings on his own motion. In that respect, no amended pleadings were filed in the DLHT.

However, the record revealed that 07/11/2016; Dominic Mutembei through advocate Alli Chamani prayed to drop the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the prayer which was duly granted. The names of 2<sup>nd</sup> and 3<sup>rd</sup> respondents were struck out from the plaint, but there was no order to file an amended plaint and the Written Statement of Defence to the Amended plaint.

I am alive that once pleadings are amended, that which stood before amendment is no longer material before the court. In the instant case, since there was no amended plaint filed, likewise the W.S. as there was no tribunal order to do so, there no way it can be said that the previous plaint or that the previous W.S.D D (pleadings) ceased to exist.

Order1 rule 10 (2) of the Civil Procedure Code Cap. 33 R:E 2019 provides;

*"The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added"*

At this juncture, the question is whether the act of striking out the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without ordering the filing of the amendment documents has affected the case? The answer to this question is in the negative because the framed issues after dropping them were confined to the dispute between Dominic Mutembei (Applicant) and the respondent. They were coached as follows;

- 1. Who between the applicant and the respondent is the lawful owner of the suit land.*
- 2. Whether or not the respondent intentionally encroached upon the suit land*
- 3. Reliefs*

After a full trial, the matter was decided in favor of the respondent. In other words, the application was dismissed with costs. The respondent was further awarded general damages at the tune of **TZS. 3,000,000/=**.

The names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were just referred in the Judgment of the DLHT in the historical part of the case. Since, the issues framed and resolved did not involve them; and being guided by well-



established principle that in every procedural irregularity, the crucial question is whether it has occasioned a miscarriage of justice, it is my considered view that the omission is curable because it has not occasioned any miscarriage of justice to the appellant's side. See **Restuta Rweikiza versus Godfrey Syprian (Administrator of the estate of the late Aloyce)**, Land Appeal No. 26 of 2021 and **Dickson Kamala versus Republic**, Criminal Appeal No. 422 of 2018 CAT (Unreported). See also section 45 of the Land Disputes Courts Act, Cap 216 R:E 2019 which provides that;

*"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**".*

I now turn to the 3<sup>rd</sup> ground. The composition of the District Land and Housing Tribunal is stated under section 23 (1) of the Land Disputes Courts Act, Cap 216 R: E 2019 which provides;

*"The District Land and Housing Tribunal established under section 22 **shall be composed of one Chairman and not less than two assessors**".*  
(Emphasis supplied)

Section 23 (2) of the Land Disputes Courts Act, Cap 216 which provides;

***"The District Land and Housing Tribunal shall be constituted when held by a chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment".***  
*(Emphasis supplied)*

Even appeals from the Ward Tribunals, (**which is not the case here since the DLHT did not deal with the matter at hand in its appellate jurisdiction**) but for a better understanding, the DLHT is said to be properly constituted when held by the chairman and not less than two assessors. 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*

Reading section 23 (1) and (2) and 34 (1) of the Land Disputes Courts Act, Cap 216 R: E 2019, it is apparent that the DLHT is properly constituted where it consist of one Chairperson and not less two assessors. Unless properly constituted, the DLHT has no jurisdiction to determine the matter before it.

However, after the commencement of the hearing with the aid of assessors, Section 23 (3) of the Land Disputes Courts Act Cap 216 allows the Chairman to proceed in absence of one assessor or both of them, but

he/she must assign reasons as to why the assessor/assessors are absent. Section 23 (3) of the Land Disputes Courts Act Cap 216 provides that;

***"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".***

In the instant case, the records of DLHT revealed that on the date set for framing of the issues, that is to say; 07/11/2016 the trial tribunal sat with two Assessors namely; Ms. **Anamery** and **Mr. Bwahama** and went on to frame issues. On 05/12/2017 when the hearing of applicant's (now appellant) case opened, assessors were **Mr. Bwahama** and **Ms. Anamery**. On 10/05/2018 when Belina January (PW2) testified, Assessors were **Mr. Bwahama** and **Ms. Anamery**. On 26/02/2019 no assessor entered appearance. At page 41 of the typed proceedings of the DLHT, the Hon. Chairman had this to say;

***"The tenure of Assessors expired in August, 2018. Case proceeds in their absence".***

Furthermore, at page 10 of the DLHT typed judgment; the Chairman had this to say;

***"In this case, there will be no Assessors' opinions as the tenure of assessors handling the case, Mr. Bwahama and Anamery expired before the delivery of the judgment".***

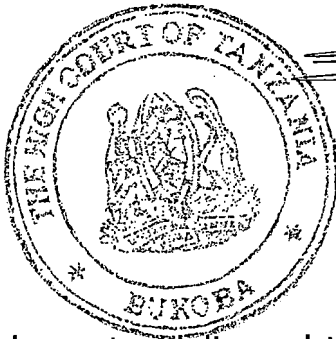
In that premise, this court agrees with Advocate Frank that at the commencement of the hearing, the DLHT was properly constituted, and during the trial, there was no replacement of assessors, and, since the tenure of the said assessors had expired in the mid of the hearing of the applicant's case (Mr. Mutembei), under section 23 (3) of the Land Disputes Courts Act, Cap 216, the Hon. Chairman was entitled to proceed and conclude the proceedings in absence of assessors.

Therefore, the argument by Mr. Victor Blasio, learned counsel for the appellant that the tribunal was not properly constituted or that there was replacement of assessors or that assessors ought to have given their opinions as the reason given for their absence was not sufficient is a baseless and unfounded argument which deserves nothing more other than dismissal. The case of **Bukoba Municipal Director and Another versus Godwin Muganda (Supra)** is distinguishable because in that case, assessors sat with the Chairman until the conclusion of the hearing interparties, ought to have given their opinions, before the chairman reaches the judgment.

Before I pen off, I would like to state that since the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal have been abandoned before the commencement of the hearing, I have no mandate to go beyond and argued the remained grounds to wit; 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal.

In the upshot, this appeal is devoid of merit; therefore it is hereby dismissed accordingly. Given the nature of this matter and the conduct of the parties, I enter no order as to costs.

Dated at Bukoba this 17<sup>th</sup> day of August 2022.

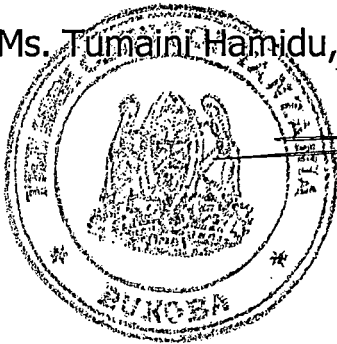


E. L. NGIGWANA

JUDGE

17/08/2022

Judgment delivered this 17<sup>th</sup> day of August, 2022 in the presence of Mr. Victor Blasio, learned advocate for the Appellant, Mr. Frank John, learned advocate for the respondent, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

17/08/2022