IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 79 OF 2021

(Originating from Application No. 122 of 2014 of the District Land and Housing Tribunal for Kagera at Bukoba)

STEPHEN BARUTI.....APPELLANT

VERSUS

INNOCENT MUTAHYABARWA.....RESPONDENT

RULING

07/03/2022 &31/03/2022

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 Application No. 122 of 2014 delivered on 13/08/2021.

Briefly, the facts giving rise to this appeal as per records of the trial tribunal may conveniently be stated as follows; the appellant alleged that he is a rightful owner of the suit premises as he bought it from the late one Evaston Mwombeki since 16th day of May, 2002 for purposes of making it a path from the road to his residential area. That from that time, the appellant made exhausted improvement including clearing the land and leveling it for the purpose of using it as a path to his home. That, sometimes in 2008, there happened a land conflict in regard to the same suit premises between the Appellant and other two persons namely; Athumani Hamidu and Ratipha Athumani but the matter was resolved amicably out of court.

The appellant further alleged that the respondent, maliciously and without any color of right had collected stones to the suit premises intending to erect there a building and stopped the appellant from using it as a path to his residential area, an act which infringed the right of the appellant. The appellant further alleged the act by the respondent to collect stones for purposes of erecting a building on the suit premises had destroyed the path made by the appellant, and made the appellant to suffer a loss of TZS. 1,640,000/=.

On the other hand, the respondent alleged that the Suitland had never been the property of the Appellant nor occupied the same and the purported sale agreement there to was forged. The respondent further alleged that the suit land belongs to him and the act of piling the stones for the purpose of erecting a fence was lawful.

As a result, the applicant, now appellant instituted a suit against the respondent seeking for the following orders.

(i) *Declaration orders that the applicant now appellant is the rightful owner of the suit premises.*

(ii) *An order for vacant possession of the suit premises by the respondent.*

(iii) *An order permanently restraining the respondent and his agents from interfering with the suit premises.*

(iv) *An order of payment of TZS. 1,640,000/= being value of the path destroyed by the respondent.*

(v) *Costs of the suit.*

(vi) 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 a tune of TZS. 2,000,000/=.

Dissatisfied, the appellant has approached this court while armed with four (4) grounds of appeal as follows: -

1. *That, the trial tribunal erred in law and in fact to hold that appellant has no right of way over suitland in disregard of exhibit P2 and the testimony of DW3 who testified to the effect that during the sale between her husband and Evaston Mwombeki there was a way heading to the appellant and that the appellant does not own either plot number 6 or plot number 5;*

2. *That, the trial tribunal erred in law and in fact to hold that exhibit P1 was doubtful without due regard that the maker of the said exhibit testified as DW2 and DW3 and acknowledged to have made it. Further, pleadings are very clear that when Athuman Habibu acquired respondent's land the appellant was a neighbor at the west side contrary to exhibit D1.*

3. *That, the trial tribunal erred in law and in fact for failure to consider that survey and registration of title by the respondent did not consider the road towards the appellant that existed before and that the appellant having his right of way that he acquired by way of sale cannot be placed on a task of obtaining the extra width of 1.5 on plot*

number 5 which he has no dispute. Further, the said survey was done fraudulently as it did not involve neighbors hence surveyors depended on the improper boundaries pointed to them by the respondent;

4. *That, the trial tribunal erred in law and in fact to impose costs and punitive general damages to the appellant while as per exhibit D2, D3 and D5 it is evident that the road that existed before the survey was blocked and it could be restored at the pleasure of owners of plots number 5 and 6 to leave 1.5m each.*

Wherefore, the appellant prays that this appeal be allowed with costs, the judgment and orders of the trial 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 be confirmed.

When the appeal came for hearing, the appellant was represented by Mr. Peter Joseph Matete, learned advocate while the respondent was represented by Mr. Ally Chamani learned advocate.

Before submitting in support of this appeal, Mr. Matete with leave of the court prayed to draw the attention of the court on some of the irregularities committed by the trial tribunal; **One**, failure of the trial tribunal to adhere to the guidelines and procedures when it visited the locus in quo. **Two**, change of chairpersons without assigning reasons, **three**, commencement

of the hearing without Assessors, **four,** determination of matters neither raised by the parties in their pleadings nor in evidence.

After drawing the attention of the court on the herein above points, the learned counsels were both invited to address the court on those issues/points.

Submitting on the issue of non-compliance with the procedure of visiting the *locus in quo*, Mr. Matete stated that as per tribunal record, on **6/8/2021**, the Tribunal visited the *locus in quo* but all those in attendance did not re-assemble in court so that the notes in relation to what transpired in the *locus in quo* can be read to the parties to ensure its correctness.

Mr. Matete referred the court at page 109 of the typed proceedings of the tribunal to stress his argument that after visiting the *locus in quo* the tribunal did not re-assemble. Matete went on stating that the omission has occasioned miscarriage of justice because there are matters reflected at page 12 of the typed judgment, which do not feature in the pleadings, and evidence adduced in court.

On his side Mr. Chamani conceded that the procedure in relation to the visit of the *locus in quo* was not observed. He made reference to the case of **Prof. T. L. Maliyamkono versus Wilhem Sirivester Erio**, Civil appeal No. 93 of 2021, where the Court of Appeal found that the omission to comply with the procedure when the court visited the *locus in quo* occasioned injustice and thus vitiated its decision. But, the court instead of nullifying the whole proceedings, the proceedings of the trial court from

when the visit to the locus in quo was ordered, was nullified, the resultant judgment was quashed, and orders thereto were set aside. The proceedings before the order of the visit were found to have no problem, hence left undisturbed. In that premise Mr. Alli Chamani for the respondent urged the court to do the same in this case.

Amplifying on the 2nd point, Mr. Matete submitted that page 32 of typed proceedings of the trial tribunal revealed that on 23/01/2017 Hon. Kitunguru, Hon. Chairman took the proceedings presided over by another Chairman namely, Mogasa and proceeded with the matter without assigning reasons. He added that Mr. Kitunguru (Hon. Chairman) framed the issues of the suit, and then re-assigned the case file to Mr. Mogasa, and no reasons assigned by Mr. Kitunguru for the said re-assignment. Matete, went on submitting that since framing of issues is part of the hearing, it is obvious that the case was partly heard by the Hon. Chairman (Kitunguru). He made reference to order XIV rule 1 (5) of the Civil Procedure Code Cap. 33 R: E 2019 to emphasize that, at the first day of the hearing pleadings are read and finally issues are framed; and according to Order XV rule 1 of the same Code, if the parties are not in controversy the judgment may be pronounced. Advocate Matete referred this court to the case of **Kinondoni Municipal council versus Consult Ltd, Civil Appeal No. 70 of 2016 CAT (Unreported)** to emphasize on the imposed upon a successor judge or Magistrate to put on record why he/she has to take up a case that is partly heard by another, and in absence of any reason on record for succession by a judicial officer in a partly heard case, the succeeding judicial officer lacks jurisdiction to proceed with the trial and consequently all

proceedings pertaining to the takeover of the partly heard case becomes a nullity.

As regard issue of change of chairpersons, Mr. Chamani conceded to the submission made by Mr. Matete, and added that this court is bound by the Court of Appeal decision, hence it cannot depart from them.

As regard the issue of Assessors, Mr. Matete submitted that the trial tribunal records at page 33-34 reveal that on the date when the issues were framed, the tribunal did not sit with assessors; and that the law is very clear in land matters that no hearing can commence without assessors, though they can be vacated in the mid of the hearing or before judgment upon reasons to be assigned by the Chairman. That since there was such omission, Matete prayed for the nullification of the proceedings of the DLHT from page 33 dated 28/02/2017, and the judgment be quashed and orders thereto be set aside.

Mr. Chamani on his side, invited the court when addressing all irregularities to consider Section 3 (1) (m) the Land Act Cap. 113 R: E 2019 and section 3(1)(a) of the village Act Cap.114 R: E 2019 but also Section 45 of the Land Disputes Courts Act Cap. 216 R: E 2019.

After careful consideration of the submissions and examination of the record of appeal especially the proceedings and the judgment of the DLHT, as it relates to the four points of law raised and under scrutiny, it is apparent that the DLHT committed gross irregularities capable of vitiating the proceedings, the resultant judgment and orders thereto.

To start with the first point, *failure of the trial tribunal to adhere to the guidelines and procedures when it visited the locus in quo.*

It is common understanding that visiting the locus in quo is not mandatory and it is done only in exceptional circumstances. Some of the factors to be considered by the court or tribunal before exercising its discretion to visit the locus in quo as discussed in the case of **Avit Thadeous Massawe versus Isidori Assenga,** Civil appeal No. 6 of 2017 CAT (unreported) are as follows;

(i) *Where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence.*

(ii) *Where the dispute between the parties' centers on location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land.*

(iii) *Where it is manifested that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute and that the only way to resolve the conflict is for the court to visit the locus in quo.*

It should be noted very clearly that the essence of a visit to locus in quo in land matters is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence (if any) about physical objects on the land and boundaries. See the case of **Akosile versus Adeye** [2011]17 NWLR cited with approval by the Court of

Appeal in **Avit Thedeus** (Supra). The essence has never been **to afford a party an opportunity to make a different case from the one he led in support of his claims.**

When the court decides to exercise its discretion of visiting the locus in quo, the guidelines and procedures laid down must be duly observed. In other words, compliance of the guidelines and procedures is not optional. The Court of Appeal of Tanzania in the case of **Sikuzani Saidi Magambo and Another versus Mohamed Roble,** Civil appeal No. 197 of 2018 (unreported) held that;

"There is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the court or the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial'

The procedure to be followed was well elucidated in the case of **Nazir M. H. versus Gulamali Tazal Janmohamud** [1980] TLR 29 where the court held Inter alia that; -

"When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made

thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by the witnesses. We trust that this procedure will be adopted by the courts in future."

As a mandatory procedure, all parties, their witnesses and their advocates (if any) must be present at the locus in quo and notes must be taken and properly recorded, and then the court or tribunal must be reconvened or reassembled in the court room to consider the notes obtained from that visit because the said notes forms part of the court record and it cannot be considered in isolation from the existing evidence recorded in court. **See** the two cited cases; **Sikuzani** and **Nazir M.** (Supra). The departure or violation of guidelines and procedures laid down for doing any act may render the act a nullity. See **Oraro & Rashier Advocates versus Cooperative Bank of Kenya Ltd [2001]** e KLR

In this matter, the trial tribunal visited the locus in quo on 06/08/2021. For clarity, let the record speak for itself;

"Date: 06.08.2021
Akidi R.Mtei-Mwenyekiti
K/Baraza: Mizambwa
Wajumbe: NIL
Mwombaji: Yupo

Mjibu Maombi Yupo

Wakili Chamani: *Kwa ajili ya Mjibu Maombi. Shauri linakuja kwa ajili ya kwenda kutembelea eneo la mgogoro.Tupo Tayari.*

Wakili Mulokozi: *Kwa upande wetu tupo tayari*

R. Mtei

Mwenyekiti

06/08/2021

Baraza: *Yaliyojitokeza kwenye eneo la mgogoro*

-Waadawa walikumbushwa kwamba wapo chini ya kiapo

-Wadaawa kila mmoja alipewa nafasi ya kuonyesha eneo la mgogoro

Pamoja na kuulizwa maswali ya ufafanuzi na mawakili wao

Ramani ya eneo la mgogoro imeambatanishwa.

R. Mtei

Mwenyekiti

06/08/2021

Amri: *Hukumu Tarehe 13/08/2021"*

From the above proceedings it is apparent that the tribunal did not re-assemble in the court room so that all such notes recorded at the locus in quo can be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary be incorporated. In other words, the parties were neither asked to confirm or otherwise on the findings nor notes taken by the trial Tribunal. In the case of **Maliyamkono** (Supra) the Court of Appeal held *interalia* that;

"Notes should be taken during the visit and then all those in attendance should re-assemble in court and the notes be read out to the parties to ensure its correctness"

Part of the trial tribunal judgment at page 11 read;

"...Lakini Baraza hili lilipotembelea eneo la mgogoro, halikutaka kuamini kama kweli mwombeki aliuza kipande hicho cha mbele kwenda kwa mwombaji wakati alishauza kwa Athumani Habibu. Na hata kama alifanya hivyo, alifanya kwa makosa kwa kuwa inavyoonekana sehemu hiyo ni sehemu aliyomuuzia Athumani ambaye naye alimuuzia mjibu maombi. Lakini pia mwombaji alishindwa kuonesha mipaka ya eneo hilo alilouziwa yeye na alilouziwa Athumani ambalo sasa ni la mjibu maombi.Wakati fulani alionyesha sehemu ya nyumba iliyojengwa na mjibu maombi kama mpaka, wakati mwingine akionyesha mti wa mkaratusi (ambao kwa sasa haupo) kama mpaka.....Baada ya Baraza hili kutembelea eneo la mgogoro liliona kwamba mjibu maombi ameacha barabara yenye karibu upana wa mita tatu kutoka katika kiwanja No. 6 anachomiliki mjibu maombi na kiwanja Na. 5 kinachomilikiwa na kanisa. Pia Baraza liliona ukuta uliojengwa na kanisa ndani ya kiwanja Na. 5 ambao haujaacha upana wa mita 1.5....."

Reading from the judgment of the trial tribunal, one can easily see that the Chairman gave the decision basing on the notes received at the locus and/or what he observed at the locus in quo, but since the evidence or notes (if any) taken during the visit are not in the trial tribunal record, and no record that all those in attendance re-assembled in court and the notes were read out to the parties to ensure its correctness, the proceedings in relation to the visit at the locus in quo are a nullity, and the resultant

judgment and orders thereto are equally a nullity, thus proceedings pertaining to the visit deserve to be nullified and the judgment and orders be quashed and set aside.

It is worth noting that, where a visit to the locus in quo is made, the trial Judge or Magistrate or Chairman should be very careful to avoid placing himself in a position of a witness and arriving at a conclusion based upon personal observations of which there is no evidence in support in the court record. In this case, the Chairman did not warn himself on that danger, as a result, he was caught in that web.

The question here is whether, the rest of the proceedings can be can remain safe? The 2nd issue which raised was the change of Chairpersons without assigning reasons. Page 33 of the typed proceedings of the trial tribunal reveal that issues were framed on 28/02/2017 and the presiding over Chairman was Hon. Kitunguru, and he heard the evidence of PW1. On 28/11/2017, the matter was re-assigned to Hon. Mogasa Chairman. Let the record speak for itself;

"Order:

(i) Let the parties appear before Hon. Mogasa because he is already at the station

(ii) Mention on 06.12.2017"

On 18/12/2017 the case file was returned to Hon. Kitunguru and no reasons were assigned for by Hon. Mogasa on that effect. Without assigning any

reason, Hon Kitunguru proceeded with the hearing of the case and heard PW2, PW3 and DW1 before being transferred to Musoma. From there, the matter was re-assigned to Hon. Mtei, Chairman. The assignment was done by Mr. Mogasa, Chairman, however, Mr. Mtei as the Successor Chairman, assigned no reasons for taking over the partly heard case. Another **problem seen is between Kitunguru and Mogasa. Since no reasons assigned as to why Kitunguru assigned a partly heard case to Mogasa, Chairman, and then no reasons assigned as why Hon. Mogasa, Chairman returned the case file to Hon. Kitunguru, Chairman, and Mr. Kitunguru proceeded with the hearing without assigning reasons for the re-taking over of the said case.**

It is now settled that the Magistrate or Judge who takes over a partly heard case, is required to state the reasons for taking over the case from his predecessor. See Order XVII rule 10(1) of the Civil Procedure Code Cap 33 R: E 2019. The rationale of this procedure is to ensure that the credibility of witnesses is assessed by the magistrate or judge who records the evidence; since the one who sees and hears the witness is in the best position to access the witness credibility. Therefore, the magistrate or Hon. Chairman who fails to give reasons after taking over the case lacks mandate to proceed with trial as correctly stated by Mr. Matete, learned counsel. See the case **of Kinondon Municipal Council** (Supra). What transpired in the case at hand case in relation to the change of Chair persons made the all proceedings a nullity.

Coming to the issue of Assessors, the record of the trial tribunal is very clear that on the date set for framing of the issues, the trial tribunal sat without Assessors, and went on to frame issues. 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)*

The hearing of the case always commences with the framing issues. Regulation 12(1) and 3(b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation of 2003 stipulates that the Chairman **at the commencement of the hearing read and explain the contents of the application to the respondent. That 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.**

The stage of framing issues is an important one in as much as on that date the scope of the trial is determined by laying the path on which a trial should proceed excluding diversions and departures therefrom. In other words, the trial proceedings are guided by issues framed before

commencement of the hearing. It is the primary duty of the court after it has applied its mind to the pleadings of the parties. It is my considered view that, since this a very important stage as per Regulation 12(1) and 3(b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation of 2003, the Chairman cannot sit without assessors. In other words, the hearing cannot commence without assessors though the Chairman may not finish the proceedings with the assessors. Section 23 (3) of the Land Disputes Courts Act Cap 216 R: E 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****".*

In this matter, pleadings and contents of the claim were read and upon being disputed by the respondent, issues were framed, but in the whole exercise, assessors were not present. Indeed, the tribunal was not properly constituted. It is trite that assessors have the right to know the facts/ contents of the claim, the reply of the respondent and matters of controversy between the parties, listen to the evidence of the parties, ask questions for clarifications, and finally give their opinion.

In the trial Tribunal, both parties were represented by senior advocates, therefore, as honorable officers, well trained to assist the litigants and the court but also as Ministers of the Temple of justice, had the duty to assist the court to administer justice according to law. They would have reminded

the chairman that the Tribunal was not properly constituted, instead of waiting to raise the omission or irregularity at an appeal stage. This should not be considered as a blame but a reminder to the Advocates of their duty to clients and the court.

The last point is to the effect that the judgment reflects matters which did not feature neither in the pleadings nor in the proceedings, extraneous matters. As correctly stated by Mr. Matete, it is apparent that the Chairman did not confine himself to the pleadings, the evidence adduced in support of the averments in the pleadings, and that was wrong in law.

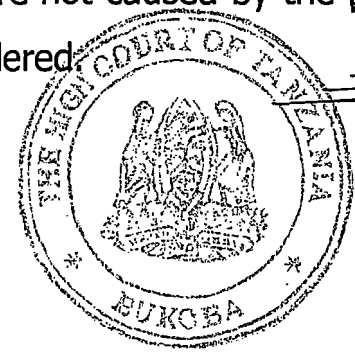
The position of the law is very clear that Parties to an action are bound by the pleadings and anything outside the pleadings cannot be considered. **Yara Tanzania Limited Vs Charles Aloyce Msemwa t/a Msemwa Junior Agrovet and another** (unreported) in which Hon. Mwambegele, J (as he then was) quoted the decision of the Supreme Court of Nigeria **in Mojeed Suara Yusuf versus Madam Idiatu Adegoke,** held that;
"Parties are bound by their pleadings, and the evidence led by any of the parties which does not support the averment in the pleadings, or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

Other cases with similar holdings are **Exim Bank (Tanzania) Ltd versus Dascar Limited and another,** Civil Appeal No.92 of 2009 (CA) (unreported) and **Mbowe versus Eliufoo** (1967) E.A. See also the case **of Bohari Oilfield Services FPZ Ltd versus Peter Wilson,** Civil Appeal No. 157 of 2020 CAT (Unreported).

Since the irregularities have occasioned failure of justice to parties, they cannot be cured by section 45 of the Land Disputes Courts Act Cap 216 R:E 2019, or the Principle of the overriding objective.

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 tribunal in Land Application No. 122 of 2014.

Under the circumstances, I order that the matter be heard afresh before another Chairman and with a new set of Assessors. Since, the anomalies were not caused by the parties, each party shall bear its own costs. It is so ordered.

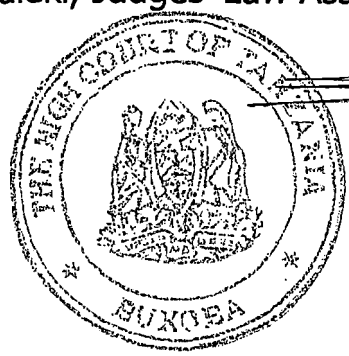


E. L. NGIGWANA

JUDGE

31/03/2022

Ruling delivered this 31st day of March, 2022 in the presence of both parties in person, Mr. J. Matete, learned Advocate for the appellant, Mr. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

31/03/2022