IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 20 OF 2022

(Originating from Application No. 31 OF 2013 of the District Land and Housing Tribunal for Kagera at Bukoba)

RICHARD ERNEST KAZAULA.....APPELLANT

VERSUS

BUHEMBE PRIMARY COOPERATIVE SOCIETY.....RESPONDENT

RULING

04/08/2022 &19/08/2022
E. L .NGIGWANA, J.

The appellant has preferred this appeal against the decision of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in Land Application No. 31 of 2013 delivered on 30/01/2020.

Briefly, the facts giving rise to this appeal as per available records may conveniently be stated as follows; the appellant sued the respondent and one Gidion Msumali for trespassing into his piece land located at Bulibata area, Buhembe Ward within Bukoba Municipality in Kagera Region, whose value is estimated to be Tshs ten Million (Tshs.10,000,000/=).

The appellant alleged that on 28/12/1980, his father namely; Ernest Kazaula purchased the disputed land from one Gidion Msumali. He further alleged that, in 1998, his father, now deceased, under love and affection donated the disputed land and all developments therein to him. It is also on record that the appellant's father demised in 2002.

It was further alleged that, sometimes in 2013, the respondent unlawfully entered into the said land, destroyed banana trees and erected a house therein.

On the other hand, Gidion Msumali who was the 2nd respondent in the trial tribunal alleged that the respondent had crossed the boundaries and entered into the appellant's land. At the same time, the respondent claimed ownership of the disputed land.

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

(i) *An order for vacant possession of the suit land by the respondent*

(ii) *An order for Payment of compensation.*

(iii) *An order that the structures in the suit land be demolished*

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

(v) *Costs of the suit.*

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 declared the lawful owner of the suit land. Consequently, the appellant was ordered to vacate the suit land and demolish his structures therein.

The appellant was aggrieved by the decision of the trial tribunal but filed no appeal within the prescribed time. In that respect, he sought and obtained extension of time in Land Application No.104 of 2021 to file

appeal out of time, hence this appeal in which he has approached this court while armed with three (3) grounds of appeal as follows: -

1. *That, the Hon. Chairman erred in law reaching the decision without proper assessors' involvement.*
2. *That, the trial tribunal erred in law and in facts for failure to adhere to the guidelines and procedures when it visited the locus in quo.*
3. *That The Hon. Chairman erred in law and facts when misdirected himself and dismissed the suit despite the crystal evidence which proved the case the claim to the balance of probability.*

Wherefore, the appellant prays that this appeal be allowed with costs, and that, the judgment and orders of the trial tribunal be quashed and set aside

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 was called on for hearing, the appellant was represented by Mr. Lameck Erasto, learned advocate while the respondent was represented by Mr. Frank Karoli, learned advocate.

At the outset, Mr. Lameck abandoned the 3rd ground of appeal, hence argued the 1st and 2nd grounds only. Submitting on the first ground of appeal, Mr. Lameck argued that, the trial tribunal records revealed that on the commencement of the hearing, the tribunal did not sit with assessors; and that is contrary to the law because the law is very clear that in land

matters no hearing shall commence without assessors, though they may be vacated in amidist the hearing or before judgment upon reasons to be assigned by the Chairman.

Mr. Lameck made reference to the case of **Restuta Rweikiza versus Godfrey Syprian (Administrator of the estate of the late Aloyce),** Land Appeal No.26 of 2021 where the Court cited with approval the case of **Dickson Kamala versus Republic,** Criminal Appeal No.422 of 2018 CAT (Unreported) where the Court held that;

In every procedural irregularity, the crucial question is whether it has occasioned miscarriage of justice".

Since there was such omission, which according to Mr. Lameck has occasioned miscarriage of justice, he prayed for the nullification of the proceedings of the DLHT and that the judgment and orders thereto be quashed and set aside.

Submitting on the 2nd ground Mr. Lameck stated that, as per tribunal record, the Tribunal visited the *locus in quo* but what transpired in the locus in quo does not feature in the court proceedings except in the judgment, and that is also a gross irregularity. Mr. Lameck referred this court to the case of **Vedasto Tibyampasha versus Theobard Boniphance Tibahikaho**, Land Appeal No.27 of 2020 HC-Bukoba Registry where the court had this to say;

"A court or tribunal visiting the locus in quo has to make note or record, invite parties to call their witnesses who can give evidence in relation to the location of the disputed land, the extent, identify boundaries and physical features on the land. The witnesses may also point out objects

and places referred to in evidence physically and in order to clear doubts arising from conflicting evidence if any about physical objects on the land boundaries".

He also made reference to the case of **William Mukasa versus Uganda** (1964) EA page 700 where it was held that;

"A view of locus ought to be, I think to check on the evidence already given and where necessary and possible, to have such evidence aculary demonstrated in the same way the court examines a plan or map or some fixed objects already exhibited or spoken of in the proceedings. It is essential that after a view of a locus in quo, a Judge or Magistrate exercise great care not to constitute himself a witness in a case .Neither a view nor a personal observation should be a substitute for evidence".

On his side, Mr. Frank Karoli, learned advocate for the respondent conceded to grounds of appeal raised that the procedural irregularities committed by the trial tribunal renders the proceedings and the resultant judgment and orders thereto a nullity.

After careful consideration of the submissions and examination of the proceedings and the judgment of the DLHT, as it relates to the two grounds of appeal, it is apparent that the DLHT committed gross irregularities capable of vitiating the proceedings, the resultant judgment and orders thereto.

The record of the trial tribunal is very clear that on the commencement of the hearing, that is to say on 26/01/2017 in which the appellant testified as AW1, the trial tribunal sat without Assessors. 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)** 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 matter, I agree with Mr. Lameck Erasto, learned advocate for the appellant that the hearing commenced without the aid of assessors, thus the DLHT was not properly constituted, thus had had no mandate to hear and determine Land Application No.31 of 2013.

Even if we assume for the sake of argument that the trial tribunal was properly constituted, still the judgment and orders of the trial tribunal could not stand for the reason I endeavor to advance herein below.

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 22/10/2019 but what transpired in the locus in quo is not reflected in the proceedings. It should be noted that the well-established principle is that, court proceedings, in in this case includes the DLHT proceedings, are always presumed as representing the truth of what transpired in court. See **North Mara Gold Mine Limited versus Isaac Sultan,** Civil Appeal No.458 of 2020 CAT (Unreported)

In the case of **Prof. T. L. Maliyamkono versus Wilhem Sirivester Erio**, Civil appeal No. 93 of 2021, the Court of Appeal had this to say;

"*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*".

In the instant matter, there is nothing indicating that the tribunal did re-assemble in the court room so that all such notes recorded (if any) 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, there is nothing indicating that the parties were asked to confirm or otherwise on the findings or notes taken by the trial Tribunal.

Part of the trial tribunal judgment at page 6 read;'

"Wajumbe walitembelea eneo hilo la ardhi kwa kuhakikisha mipaka kama ifuatavyo;
Upande wa mashariki inapakana na ndugu Issa Swalehe, Ndugu Francis Mkela na eneo la Mahakama ya Mwanzo ukitengwa na Mtalo wa jadi. Kusini ikipakana na shamba dogo la migomba la Ndugu Ernest Kazaula nalo likitengwa na mtalo na njia ya jadi. Mashariki ikipakana na mbuga ya Ndugu Nestory Bwemelo na njia iendayo mtoni. Kazkazinini likipakana na barabara itokayo nyanga kuelekea Nyakato"

Reading from the judgment of the trial tribunal, one can easily see that the Chairman gave the decision basing among other things 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 judgment and resultant orders are nothing but a nullity.

It is common knowledge 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. See **William Mukasa versus Uganda (Supra).** In the

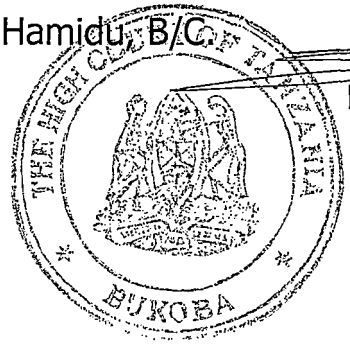
instant case, the Chairman did not warn himself on that danger, as a result, he was caught in that web.

In the upshot, I 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. 31 of 2013. I order that the matter be heard afresh before another Chairman sitting 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.

Dated at Bukoba this 19th day of August, 2022.

E. L. NGIGWANA
JUDGE
19/08/2022

Judgment delivered this 19th day of August, 2022 in the presence of the Appellant, Ms. Erieth Barnabas, learned advocate for the Appellant, Appellant in person, Hon. E.M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA
JUDGE
19/08/2022