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

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**LAND CASE APPEAL NO. 22 OF 2022**

*(Originating from Application No. 26 of 2017 in the District Land and Housing Tribunal for Kagera at Bukoba)*

**SIMON KAJUGUSI BANDAULA---------- APPELLANT**

**VERSUS**

**STEWATH PETRO----------1ST RESPONDENT**

**MERNA EZERA----------2ND RESPONDENT**

**KOKUSIMA LAURIAN----------3RD RESPONDENT**

**JUDGEMENT**

**Date of Last Order: 01/09/2022**

**Date of Judgment: 16/09/2022**

**A. E. Mwipopo, J.**

Simon Kajugusi Bandaura sued Stewart Petro, Merna Ezera and Kokusima Laurian in Application No. 26 of 2017 at Bukoba District Land and Housing Tribunal (DLHT) for encroaching into land in dispute located at Kyeuma Village within Ishunju Ward in Misenyi District. The application was struck out by the DLHT following the Preliminary Objection raised by respondents that the appellant has no locus stand to sue as he has no interest to the suit land. The DLHT said that

the land in dispute is owned by Jushua Lutwe and the appellant was an invitee. The appellant was aggrieved and filed the present appeal containing 4 grounds of appeal as they are found in the Memorandum of Appeal. The said grounds of appeal are as follows:-

1. *That the learned Chairman of the Bukoba District Land and Housing Tribunal erred in law and fact to strike out the Application No. 26 of 2017 on ground that the appellant have no locus standi to sue over the disputed clan land, without taking into account that the proper cause of action that ought to have been taken was to reject or strike out the said application without deciding the rights of the parties at the preliminary objection stage.*
2. *That the Hon. Chairman of the trial Tribunal misdirected himself to uphold point one of the raised preliminary objection by striking out the said application without taking into consideration that the said preliminary objection is not demurer or pure point of law capable of disposing of the matter summarily without requiring adduce of evidence or ascertain factual matters.*
3. *That the learned Chairman of the Bukoba District land and Housing Tribunal went astray in law and fact to decide that the disputed land belongs to Joshua Rutwe who was not a party to the proceedings, without taking into account not only interlocutory decision or order does not decide the rights of the parties, but also it is wrong in law to decide the suit in favour of the stranger to the proceedings.*
4. *That the Hon. Chairman misdirected himself to decide the issue of ownership of the clan land in favour of the respondents without being composed by two members of the Tribunal and also without inquiring and recording their opinions in the ruling / proceedings, something that is contrary to the*

*provision of section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019 and regulation 19 (2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, G.N. 174 of 2003.*

When the matter was coming for hearing the appellant appeared in person unrepresented and respondents were represented by Mr. Lameck Erasto, advocate. The Court invited both sides to address the Court on the grounds of appeal.

The appellant said in his submission in support of the first ground of appeal that the trial Chairman of District Land and Housing Tribunal erred in law to strike out Application No. 26 of 2017 in Bukoba District Land and Housing Tribunal following the Preliminary Objection raised by respondents that he have no locus standi to claim for clan land. The Tribunal Chairman was wrong to strike out the said application instead of rejecting it before it was admitted. The Chairman was supposed to do it without saying who has right over the land in dispute on Preliminary Objection. The Chairman upheld the preliminary objection and strike out the application without determining the application on merits. In determining the preliminary objection the Chairman decided who has rights over the land in dispute. The court or Tribunal is not supposed to say who has right while determining the preliminary objection. The decision on the preliminary objection is preliminary decision which is not supposed to determine the right of parties.

The Court of Appeal in the case of **National Bank of Commerce vs. Dar Es Salaam Education and Others** [1995] TLR 272 to 275 and in another case of **Selcom Gaming Ltd Gaming Tanzania Ltd and Others** [2006] TLR 200-210 was of position that when determining the preliminary objection the court is not supposed to determined rights of parties on merits. The same position was stated in another case of **University of Dar Es Salaam vs. Sylvester Cyprian and 210 Others** [1998] TLR at page 175. The Chairman misdirected himself to upheld the raised point of Preliminary Objection without taking into consideration that the said Preliminary Objection is not a pure point of law. This was said in the case of **R.S.A. Limited vs. Hanspaul Automechs Limited and Another**, Civil Appeal No. 179 of 2016, Court of Appeal of Tanzania at Dar Es Salaam, (unreported).

The appellant went on to submit that the Chairman erred to hold that the appellant who is clan member and head of the clan has no locus standi to sue for clan land. In so doing, the Tribunal did not consider that the raised P.O. raises matters of facts which need to be proved. It is strange that the objection on the locus standi to institute a case over the clan claims has to be determined without adducing evidence. For that reason, the raised P.O. was not supposed to be determined on preliminary stage as it was decided of appeal in the case of **Karata Ernest and Others vs. Attorney General**, Civil Revision No. 10 of 2010, Court of Appeal at Dar Es Salaam, (unreported). The Chairman was not aware of the

meaning of locus standi. The locus standi is right to sue. The same was stated in the case of **Rujuna S. Balonzi vs. Registered Trustees of CCM** [1996] TLR 203. The right to sue arises where there is interest in the land or property and the same has been emphasized by the court in the case of **Josiah Baltazary Buisy and 138 Others vs. Attorney General and Others** [1998] TLR 331.

From above points and grounds, the Chairman erred to struck out the application while the appellant has locus in accordance with Haya customs in paragraph 178, 573 and 606 of Haya customary laws, read together with rule 28,29,45 and 48 of G.N. No. 436 and 605 of 1963, the order No. 4 of 1963 and G.N No. 436 of 1967. As clan member and Head of clan the appellant have locus standi to claim for the land in dispute on behalf of the clan. This was stated in case of **Stanley Kamala Malick vs. Chihiyo Kwisiya Ndeligo Ngumuo** [1981] TLR 143 and in the case of **Petro N. Mushi vs. Minister of Land, Housing and Urban Development** [1984] TLR 64.

The appellant said on the last ground of appeal that the Chairman determined the issue of ownership of land in the Preliminary Objection. The issue of ownership of land has to be determined in the presence of assessors who have to give their opinion according to section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019 and Regulation 19 (2) of G.N. No. 174 of 2003. This was not done in this case as a result the District Land and Housing Tribunal

has no jurisdiction to determine the land dispute as it was not properly composed. The whole decision is a nullity.

In his response, the counsel for the respondent said on the first ground of appeal that the trial Chairman did not continue to determine the issue of ownership after he found that the appellant had no locus standi. In his pleading in Application No. 26 of 2017 at Bukoba District Land and Housing Tribunal, the appellant listed in paragraph 6 that several documents including the decision of the District Land and Housing Tribunal at Bukoba in Appeal No. 98 of 2015. In the said decision, District Land and Housing Tribunal held that the house in dispute belongs to Joshua Rutwe. The trial Chairman held that the party who has right to sue is the one with locus standi. There was no need to bring evidence as the pleadings provides sufficient facts about the dispute before the Tribunal. It was wrong assertion that the Tribunal was supposed to be determine the dispute first before determining the locus standi. Locus stand has to be determined at preliminary stages. Where there is point of law, the court has to determine it first.

The counsel said on the 3rd ground of the appeal that it has to be noted that the decision of the trial District Land and Housing Tribunal is temporary decision when the matter is still pending in court or Tribunal after the said decision. Preliminary Objection is the preliminary matter on point of law which may dispose of the matter. This is not the interlocutory order.

On the last ground of appeal, the counsel said that assessors are not involved on determination on the preliminary point of law. The trial Chairman was not required to involve assessors in determining preliminary issue of law. The customary law when is in conflict with other written laws, the said written law prevails. In the case of **Kabaka Daniel vs. Mwita Marwa Nyang'anyi and Others** [1989] TLR 64 where it was held that customary law are applicable but they should not be in conflict with constitution and other written laws.

In his brief rejoinder, the appellant emphasized that the trial Chairman erred to determine the issue of locus standi as Preliminary Objection to determine the issue of ownership which is not supposed to be determined at preliminary stage.

After hearing the submissions from both parties, the issue for determination is whether the appeal has merits or not.

The available record shows that the trial District Land and Housing Tribunal struck out the application for the reason that the appellant had no locus standi to institute the application. The Tribunal held that the appellant has no interest to the suit land as the pleadings reveal that the suit land belongs to Joshua Lutwe. The appellant in his submission said that the trial Tribunal was not in position to decide if the appellant has locus standi or not without evidence being adduced, the trial Tribunal decided in preliminary matters the issue of ownership of the land and the assessors were not involved in decision of the Tribunal.

Locus standi is a right or capacity to sue or bring action against another or right to appear before the Court in a proceedings. The same is possible where a person has an interest in a proceedings. In the case of **Lujuna Shubi Balonzi vs. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 208 it was held that:-

> *"In this country locus standi is governed by Common law. According to that law, in order to maintain proceedings successfully, a plaintiff or applicant must show not only that the court has the power to determine the issue but also that he is entitled to bring the matter before the court."*

In another case of **Godbless Jonathan Lema vs. Mussa Hamis Mkangaa and 2 Others**, Civil Appeal no. 47 of 2012, Court of Appeal of Tanzania, at Arusha (Unreported), held at page 11 that in common law in order for someone to succeed in an action, he must not only establish that his rights or interests were interfered with but must also show the injury he had suffered above the rest. The Court of Appeal went on to quote with authority the decision of Malawian Supreme Court of Appeal in the case of **The Attorney General vs. Malawi Congress Party and Another**, Civil Appeal no 32 of 1996 whereby it held that:-

> *"Locus standi is a jurisdictional issue. It is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in sufficiently close relation to it so as to give a right which requires prosecution or infringement of which he brings the action."*

From above cited decisions, a person have right to sue where her/ his right has been interfered and had suffered injury from the interference.

In the case at hand, the trial DLHT reason to strike out the application is that the pleadings shows that the land in dispute belongs to Joshua Rutwe. I have perused the said pleadings filed by the appellant. The said pleadings especially its attachment shows that the land in disputed belongs to Joshua Rutwe. There is nothing in the pleadings which shows that the appellant was suing on behalf of the clan or on behalf of Joshua Rutwe. The attached minutes of Abagabo clan shows that the land in dispute belongs to Joshua Rutwe and as his whereabouts is not known they allowed respondents to cultivate the land temporarily. Afterward the clan members asked the respondents to stop cultivating but respondents did not comply with the clan directives. Respondents continued to cultivate the land as result the appellant decided to sue the respondents for encroaching into disputed land. However, there is nothing in the record showing that the appellant was granted consent by the Abagabo clan to institute a suit to remove respondents from the suit land on behalf of the clan. Parties are always bound by their pleadings as it was held in the case of **Makuri Wassaga vs. Joseph Mwaikambo and Another** [1987] TRL 88. The appellant could only sue the respondents on behalf of the clan after getting the clan consent to institute the suit on their behalf. The DLHT did not need the parties to adduce evidence to reach decision if the appellant

has locus standi to sue since the same was supposed to be established by the appellant in the pleadings.

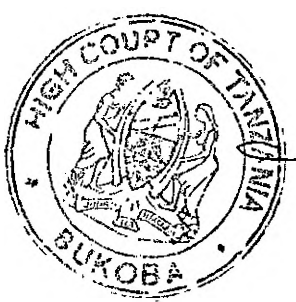
The appellant claimed that being a clan member and head of the clan he had automatic right to sue on behalf of the clan. This claim is not correct. Not every member of the clan has right to sue on behalf of the clan. In order for the clan member to sue on behalf on the clan, he / she must obtain the consent of the clan to sue.

The appellant said in his submission that the trial Chairman determined the issue of ownership of the suit land without involving assessors and held that the land belongs to the third party who was not part to the case. Looking at the pleadings filed by the appellant, it shows that the land was allocated by the clan to Joshua Rutwe who his whereabouts is not known. The respondents were allowed to cultivate the farm temporarily following the absence of Joshua Rutwe, but when they were told by the clan to vacate the land they did not comply. The relief prayed by the appellant is for the respondents to vacate and hand over the suit land to the clan to look and take care of Joshua Rutwe's land. This evidence from the pleadings prove that the land belong to Joshua Rutwe under the Abagabo clan watch and care. Thus, the DLHT did not determine the issue of ownership of the said land since the pleadings speaks for itself.

The appellant had duty to show that he has locus stand to sue on behalf of the clan, but he failed to prove that he was suing on behalf of the Abagabo clan. The respondents properly raise preliminary objection on locus standi and the trial Chairman properly determined it. Under regulation 22 (a) of G.N. No. 174 of 2003 the Chairman of the DLHT have power to determine preliminary objection on point of law. This means that in determining the preliminary objection on point of law the Chairman does not sit with assessors. This Court was of similar position in the case of **Fredrick Rwemanyira vs. Joseph Rwegoshora**, Land Case Appeal No. 13 of 2021, High Court at Bukoba, (unreported), where at page 13 it held that:-

> *"..... circumstances under which the Chairman should sit without assessors have been expressly stipulated under Regulation 22 of G.N No. 174 of 2003, and not otherwise and should be considered as this an exception to the general rule."*

Therefore, I find this appeal in its entirety is wanting merits and I hereby dismiss it. Each party shall take care of his/her own Cost of the suit.




**A.E. MWIPOPO**

**JUDGE**

**16/09/2022**

**Court:** The Judgment was delivered today 16.09.2022 in the presence of the appellant and the 1st respondent.


**A.E. MWIPOPO**

**JUDGE**

**16/09/2022**