IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPEAL NO. 25 OF 2022

(Arising from decision of the District Land and Housing Tribunal for Land for Bukoba Application No. 88 of 2017, originated at Civil Case No. 48 of 2017 at Kashai Ward Tribunal)

ADVENTINA KAMUGISHA..... APPELLANT

VERSUS

APOLONIA MWOMBEKI .....RESPONDENT

RULING

07/09/2022 & 29/09/2022
E. L. NGIGWANA, J.

This is a second appeal. It traces its origin from the decision of the Kashai Ward Tribunal in Land Case No. 48 of 2017 whereby the Appellant herein sued the respondent herein alleging that the respondent had trespassed into her land which she inherited from her deceased mother. In his defence before the Ward tribunal, the respondent asserted to have bought the said land in 1971 from one Issa Abdulahaman.

Upon trial, the Ward tribunal decided the matter in favour of the respondent. The appellant being aggrieved by the decision and orders of the Ward Tribunal, she appealed to the District Land and Housing Tribunal for Kagera at Bukoba in Land Appeal No. 88 of 2017.

After hearing the parties, the District Land and Housing Tribunal found that, since the appellant had alleged to have inherited the disputed land from her deceased mother, appellant had no *locus standi* to institute Land Case No. 48 of 2017 owing to the reason that being a heir does not give a person an automatic locus standi to sue or be sued over the property of the deceased. Consequently, the proceeding and judgment of the Ward Tribunal were quashed and set aside.

Aggrieved by the decision of the DLHT, the appellant has knocked the doors of this court clothed with five grounds of appeal as follows:-

1. *That, the trial tribunal erred in law and fact when it failed to discover that the appellant obtained the disputed land through gift intervivo, it was a land which was given to her as a gift before the death of her late mother.*
2. *That, the trial tribunal erred in law and fact by declaring the appellant to have no locus standi in the case while she is a real owner of the disputed land obtained by gift during the deceased life time.*
3. *That, the trial tribunal erred in law and fact for failure to consider the evidence and testimonies tendered by the appellant, that the appellant build the house in 1997 and the deceased died on 2006, the facts shows that the appellant was given a piece of land and did not inherit.*

4. *That, the trial tribunal misdirected itself when it relied on the ownership of the land without considering how the appellant obtained the disputed land.*
5. *That, the tribunal erred in law and fact for determining the issue not tabled before it for determination and not assisting to resolve the dispute among the parties.*

Wherefore, the appellant is praying that this appeal be allowed with costs.

When the matter came from hearing, the appellant had the legal services of Ms. Theresia Bujiku, learned counsel while Ms. Erieth Barnabas, learned counsel appeared for the respondent.

However, before the commencement of the hearing, upon reading the records and proceedings of the DLHT, I drew the attention of the parties and invited them to address me on the following legal issues **one,** improper involvement of assessors in the proceedings before the DLHT. **Two,** denial of the right to be heard on the issue raised by the DLHT in its own motion. **Three,** non-compliance of the procedures of locus *in quo.* I did so because, in my view, all these three legal points are capable of disposing this appeal.

Ms. Erieth Barnabas for the respondent submitted that the record of the DLHT show that Appeal No.88 of 2017 was heard on 01/08/2018 but the hearing proceeded without the aid of assessors, thus the Tribunal was not

properly constituted when it heard the said appeal. She added that, finally the Chairman made reference to the opinion of assessors who did not sit with him but yet, the opinions were not reflected in the proceedings. She added that, assessors appeared at the amidst of the hearing whereas on 16/01/2019 when the locus in quo was visited, assessors were **Mr.Muyaga** and **Mpanju** but the judgment revealed that assessors who gave their opinion were Mr. **Rutabazibwa** and **H. Muyaga** .The learned counsel referred this court to the case of **Pudensian Salvatory Biyengo versus Stivin Shamba (Administration of the estate of the Case Speratus Biyengo,** Misc. Land appeal No. 43 of 2021 HC. Bukoba where it was held that the DLHT is properly constituted when is held by one chairman and not less than two assessors.

On the issue of the locus in quo, Ms. Erieth submitted that the records revealed that the locus in quo was visited but what transpired in the locus in quo did not form part and parcel of the proceedings. As regard the issue of locus standi, Ms Erieth submitted that, it was raised by the tribunal in its own motion and arrived to its decision without affording the parties the right to be heard.

Ms. Theresia Bujiku on her side conceded there was improper involvement of assessors in this matter. She also conceded that the issue of locus standi

was raised to the DLHT *suo motu* but the parties were not afforded the right to be heard. She also added that the procedure is visiting the locus in quo were not followed. She referred this court to the case of **Robert Rwabutare versus Jesca Juma,** Misc. Land appeal No. 14 of 2021 where the procedure to be followed in relation to the visit of the locus in quo were explained and emphasized.

Both learned advocates were of the view that, the anomalies committed by the DLHT are capable of vitiating the proceedings, resultant judgment and orders thereto.

Having summarized the submissions and arguments of both learned counsels, I am now in a position to determine whether the procedural irregularities do exist, and if yes, whether they are curable.

I would like to start with the issue whether there was improper involvement of assessors in the hearing of Land Appeal No.88 of 2017.

Section 34 (1) of the Land Disputes Courts, [Act Cap. 216 R.E 2019] 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; and

(c) make such inquiries, as it may deem necessary."

It is therefore apparent that, according to section 23 (1) and (2) and section 34 (1) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], the DLHT when exercising its Original Jurisdiction or appellate jurisdiction, is properly constituted when it consist of one Chairman and not less than two assessors. Unless properly constituted, the DLHT has no Jurisdiction to determine the matter before it.

The typed proceeding of the DLHT revealed that Land Appeal No. 88 of 2017 was heard on 01/08/2018. Assessors who sat with the Chairman E. Mogasa were not disclosed. However, upon perusal of the hand written proceedings of 01/08/2018, I discovered that the Hon. Chairman did sit with two assessors namely; **Mr. Muyaga** and **Ms. Anamery.** In that premise, it is not proper to say that on 01/08/2018, the tribunal was not properly constituted.

As regard the issue of change of assessors in the course of the hearing, the typed proceedings of the DLHT at page 33 revealed that; on 19/12/2019, assessors were **Mr.Muyaga and Mr.Mpanju.** On that date, assessors' opinions were read, but the hand written proceeding is silent as regards

the presence of assessors, though it was indicated that the opinions were read. Let the hand written proceedings of 19/12/2019 speak for itself;

"19/12/2019

Corum: R. Mtei- Chairman

Appellant: Present

Respondent: Absent

T/C Mizandwa

Adv. Evans Kiaza for the respondent

The matter is coming for assessors' opinion and we are ready to receive

Tribunal: Assessors opinion is read to the parties

Sgd Chairman

19/12/2019

Order: Judgment on 24/01 2020

Sgd Chairman

19/12/2019"

The written opinion available in the record of the DLHT is of **F. Rutabanzibwa and H.Muyaga.** Page 3 of the typed judgment of the DLHT reads;

"I therefore depart from assessors opinion H. Muyaga and F. Rutabanzibwa who were of the opinion who were of the opinion that the respondent did encroach the appellant's land."

Considering what transpired in the DLHT, it goes without saying that there was change of assessors. Assessors who sat with the Hon. Chairman to hear the appeal were Mr. **Muyaga** and **Ms. Anamery.** Assessors who gave their opinion were **F. Rutabanzibwa and H. Muyaga** but assessors who were present when opinions were read to parties were **Mr. Muyaga** and **Mr. Mpanju.**

Section 23 (2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], provides that;

"*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.***"

Regulation 19 (2) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations, 2003 also imposes a duty upon the Chairman to require every assessor present at the conclusion of the hearing, to give his or her opinion in writing. The same provides;

"Notwithstanding subsection (1) ***the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."***

In instant matter, assessors who were supposed to have given their opinion are Mr**. Muyaga** and **Ms. Anamery.** They are the ones who were also supposed to be present at the time of reading the opinions to the parties. It is wrong to make change of assessors in the course of the hearing of the suit or appeal, but also it is wrong to allow the assessors who did not hear the suit or appeal to its finality to opine it. See the case of **Ameir Mbaraka and Another versus Edger Kahwili,** Civil Appeal No.154 of 2015 CAT (Unreported), **Bubi Mulilo and Two others versus Shimba Jikonoka,** Land Appeal No.22 of 2021 HC Kigoma and **Johansen M. Timanywa versus Godfrey Muganyizi,** Land Appeal No.80 of 2021 HC-Bukoba. The omission vitiates all the proceedings, therefore, and the resultant judgment and orders cannot stand.

As regards the issue of locus standi, the records of the DLHT showed that the issue was raised by the DLHT in its own motion since it was not among the five grounds of appeal raised by the appellant, and after being raised, the parties were not invited to address the court on that issue.

It is trite that once an issue is raised *suo motu* by the court/tribunal, it has a duty to invite parties to address on the same, failure of which is fatal. In the case of **Wegesa Joseph M. Nyamaisa versus Chacha Muhogo**, Civil Appeal No.161 of 2016, the Court of Appeal when addressing a situation where issues were raised *suo motu* and determined by the first appellate without affording the parties the right to be heard, had this to say;

"It is unacceptable in law for the first appellate Judge two raise the two salient jurisdictional issues while composing judgment without giving the parties the opportunity to be heard on the issues."

What happens if the issue crops up in the due course of composing judgment like what happened in the case at hand?. The answer to this question has been provided for by the Court of Appeal in the case of **Said Mohamed Said versus Muhusin Amiri**, Civil Appeal No.110 of 2020 CAT (Unreported) where the court held that;

"As to what should a judge do in the event of a new issue crops up in the due course of composing a judgment, settled law is to the effect that

the new question or issue should be placed on record and the parties must be given opportunity to address the court on it."

In the instant case, the issue of locus standi was raised by the Hon. Chairman in the due course of composing the judgment, and decided the Appeal basing on that issue without affording the parties the right to be heard and that was a gross irregularity.

Considering what transpired in the appellate tribunal, it is apparent that the decision was reached arbitrarily contrary to rules of justice because parties were denied the fundamental right to be heard. The Court of Appeal of Tanzania in the case of **Rukwa Auto Parts and Tran sport 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 uamuzi na Mahakama au chombo kinginecho kinacho husika,* ***basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."***

Furthermore, the Court of Appeal in the case of **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."

Now, being guided by the herein above cited authorities, it is apparent that the decision of DLHT giving rise to this appeal cannot be allowed to stand on account of being arrived at in violation of the constitutional right to be heard. This suffices to nullify and put to rest the impugned decision and, for that matter.

I now turn to the last issue of visit on the locus in quo. Page 31 of the typed proceedings of the DLHT shows that there was an order to visit the locus in quo on 15/11/2019. Let the record speak for itself;

"Date: 10/10/2019

Coram: E. Mogasa-Chairman

T/C Evalyn

Members:Muyaga & Mpanju

Appellant: Present

Respondent: Present, Adv. Lameck

Order: Visiting on 15/11/2019"

However, the proceedings and the judgment do not reflect whether the DLHT ever visited the locus in quo or not. Since, there is nothing indicating that the DLHT exercised its discretion by *visiting the locus in quo*, this court cannot rule out that the procedure of the visit of the locus in quo was violated. I need not go into the detail of this issue because it will remain a mere academic exercise as it has no purpose to save in this case.

In the upshot, I am constrained to 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 proceedings of the DLHT, quash and set aside judgment and orders thereto. Having done so, the case file is remitted back to the DLHT for an expeditious hearing of Appeal No.88 of 2017 before another Chairman and new set of assessors. The petition of appeal and reply thereto remain intact. Given to the fact that the anomalies were caused by the Tribunal, each party shall bear its own costs. It is so ordered.

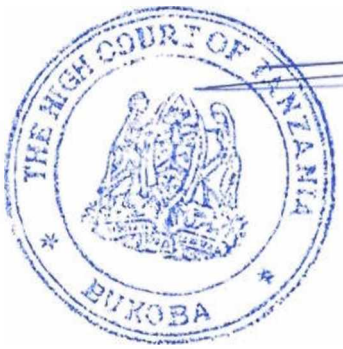
Dated this 29th day of September, 2022.

E.L. NGIGWANA

JUDGE

29/09/2022

Ruling delivered this 29th day of September. 2022 in the presence both parties in person, Ms. Erieth Barnabas, learned counsel for the Respondent, Hon.E. M.Kamaleki, Judges' Law Assistant and Ms. Mwashabani, B/C.



E.L. NGIGWANA

JUDGE

29/09/2022