

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOBA DISTRICT REGISTRY
AT BUKOBA**

LAND APPEAL NO. 15 OF 2022

*(Arising from Land Appeal No.108 of 2018 of Karagwe District Land and Housing Tribunal
from original case No.16/2018 of Nyakabanga Ward Tribunal)*

FEREDINAND RUNWAVU.....1ST APPELLANT

SCALION RUNWAVU.....2ND APPELLANT

VERSUS

EDWARD GACHARO.....RESPONDENT

JUDGMENT

*22/08/2022 & 28/10/2022
E. L. NGIGWANA, J.*

This appeal traces its origin from the decision of the Nyakahanga Ward Tribunal whereby respondent sued appellants herein and one Ernest Runwavu who is not a party in this appeal for trespassing into his land which he alleges to have bought from Domitina Runwavu who is one of the wives of the appellants' father one Runwavu Kahimbi. The other second piece of land merged together with the former in dispute was purchased from one Iman Laurean. The two pieces of lands were respectively purchased in 2004 and 2005 and now form one piece of land.

The Ward Tribunal resolved that since the respondent had bought two pieces of land from two different persons which merge and form one piece of land, therefore the land in dispute which was bought from Domitina Runwavu who is the wife of the appellants' father should be returned to the clan members of her husband Runwavu Kahimbi and the

remaining piece of land which the respondent bought from one Iman Laurean was declared the respondent's land.

Being unhappy with the trial tribunal decision, the respondent preferred an appeal to the appellate tribunal. The appellate tribunal resolved that the suit land belongs to the respondent as the sale was valid by involving clan members and finally allowed the appeal.

Hence the rationale of this second appeal but now being preferred by the two appellants herein among the three who were losers at the appellate tribunal coining four grounds as paraphrased here under;

- 1. That, the DLHT erred in law and fact to overturn the trial tribunal decision basing on the issue of time limitation without considering that the claimed land is clan land and ready to redeem the same.*
- 2. That, the DLHT erred in law and fact to overturn the trial tribunal decision without consideration that the appellants own the suit land for more than 26 years without any claim neither from the respondent nor any person.*
- 3. That, the DLHT erred in law and fact by quashing the proceedings and setting aside the judgment of the Trial Tribunal without considering that the necessary parties namely; Domitina Runwavu and Iman Laurean were not joined in the suit hence unfair decision.*
- 4. That, the DLHT erred in law and fact for failure to consider that the appellants were not involved in the sale transaction of the suit land.*

Wherefore, the appellants prayed for this court to allow this appeal with costs, uphold the decision of the Ward Tribunal, declare the appellants as lawful owners of the disputed land, issue an order restraining the

respondent from entering the suit premises and any other relief at the discretion of the court.

Parties opted to dispose this appeal by way of written submissions. Advocate Ibrahim Mswadick cheered for the appellants so do advocate Adalbert Kweyamba for the respondent. Both parties' submissions were promptly filed as per the scheduled order of the court. Ibrahimu Mswadick Advocate dropped grounds 1 and 3 and went on arguing grounds 2 and 4.

On the second ground which is the blame to the DLHT to have not considered the appellants being in suit land for 26 years, it was submitted that the appellants had alleged to have been in use of the suit land since 1996. In addition to that, the learned counsel contended that at the appellate tribunal, the "**Will**" was placed but was not considered. He argued that section 34 (1) (b) of the Land Disputes Courts Act (Cap 16 R. E 2019) empowers the Appellate tribunal to take more evidence which were not tendered at the trial ward tribunal. That the "**Will**" dated on 01/09/1980 which was produced at the appellate tribunal, if it was accorded weight, the decision would have favoured the appellants.

Submitting on the fourth ground, the learned counsel cemented that the appellants were not involved in the sale transaction. He added that the said sale contract was doctored to enable the respondent win the case.

Going beyond his grounds of appeal, the learned counsel tried to put this court to attention that there were points of law which warrant to be raised at any stage which are illegalities in the Ward Tribunal proceedings. He was fortified by the case of B.9532 **Edward Malima versus Republic, Criminal Appeal No. 15 of 1989, CAT at Mwanza (Unreported)**.

Exposing the said irregularity, he mentioned that the trial tribunal did not record the quorum (composition) of member each day of trial thus contravening section 11 of the Land Disputes Courts Act (Cap 216 R:E 2019). He cited the case of **Ane Kisanga versus Said Mohamed** Misc. Land Appeal No. 59 of 2009. To show that this irregularity cannot be cured by section 45 of Cap 216 (Supra), he cited the case of **Mariam Madali versus Hadija Kihemba** Misc. Case Land Appeal No.16 of 2019, HCT at Dar es Salaam (Unreported).

He quoted the holding in **Ane Kisanga's case** (Supra) which said that the names and gender of members participating in a case must be shown in order to ascertain its composition as well as their gender and to see if those who participated are those who wrote a judgment.

In the reply submission, Advocate Adelbert refuted the appellants' submission that they have owned the suit land for about 26 years upon being bequeathed by their father through a "**Will**". He was straight that it was a total lie. He wondered if at all their father died in 2000 and the dispute was filed before the trial tribunal in 2018 upon trespass incidence and appellants allege to have owned the disputed land from 1996 through inheritance, how is this possible inheriting the land while the owner is still alive. He was of the view that the appellants are making concoctions to ruin the respondent's rights over the disputed land.

In connection to that, the respondent's counsel responded on the issue of availability of the "**Will**" of the appellant's father and argued that the same was not tendered before the trial tribunal and there was no reason of not tendering it while it was in their custody. He went on that, they came later to annex the alleged "**Will**" to the petition of appeal at the appellate

tribunal which is not a procedure of tendering exhibits but of worse, the annexed "Will" was a photocopy.

The respondent's counsel contended that, it is from the above circumstances that he finds the appellants ground of appeal baseless by lacking merit and joined hands with decision of the appellate tribunal which scrutinized the adduced evidence as per legal requirement and the respondent proved his case to the balance of probabilities. He invited me to read the case of **Hemedi Saidi versus Mohamed Mbilu** 1984 TLR 113.

Responding on the 4th ground of appeal concerning an issue of non-involvement of appellants in the sale transaction, he reacted that the pieces of land were acquired by the respondent in 2004 and 2005 respectively as the first piece was bought in 2004 from Domitina Runwavu in the presence of appellants, being among clan members. That other clan members and Katabanga B Hamlet Chairperson being witnesses to sale as legally required during purchasing and all those witnesses signed the sale agreement which was tendered before the trial tribunal without objection.

He added that to prove the appellant's involvement in sale transaction, the respondent summoned his witnesses Pantaleo Muzalile being appellant's clan members appointed by clan members to oversee the properties of the late Runwavu after his death in 2000 and a clan chairman one Richald Kakuru being the appellants' clan secretary and one Razaró Kashaba being Katabanga B Hamlet. All these witnesses supported the respondent's version.

He contended that the appellants were all present at the hearing in trial tribunal but raised no any objection and did not cross examine any

witnesses who testified that they were involved despite the trial tribunal availing them such opportunity. He was fortified by the case of **Bomu Mohamedi versus Hamis Amri**, Civil Appeal No.99 of 2018, CAT at Tanga (Unreported) which held that; failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence.

Reacting on what was submitted by the appellants' counsel outside the grounds in the petition of appeal of what was termed as point of law or irregularities, he submitted that the Ward tribunals under section 15 (1) (2) of the Ward Tribunals Act are mandated to be regulated with their own procedure and are not bound by strict adherence to the rules of evidence and procedure applied to ordinary courts. He was fortified by the case of **Abdi M.Kipoto versus Chief Arthur Mtoi**, Civil Appeal No.75 of 2017, CAT at Tanga (Unreported).

He finally expressed that on the second appeal the court has to look matters which came up in the first appellate court and were decided. He added that this court has no jurisdiction to decide on matters which were not raised and decided by the first appellate court. His stance was backed up by the case of **Halid Maulid versus Republic**, Criminal Appeal No.94 of 2021, CAT at Dodoma (Unreported).

Having seen the grounds of appeal, records of the lower court, submissions and cited authorities, the major issue for determination is whether this appeal has merit.

I would like to start with the second ground. The appellants believe that it was an error in law and fact to overturn the trial tribunal decision without consideration that the appellants own the suit land for more than 26 years without any claim neither from the respondent nor any person. I

need not be detained in this ground. First of all, this was a new ground which was not even raised at the appellate tribunal and as well this court lacks jurisdiction to determine it. See **Halid Maulid vs Republic**, Criminal Appeal No.94 of 2021, CAT at Dodoma (Unreported). The appellate tribunal cannot be blamed for the matter which was not placed before it to be litigated.

The appellants connected this ground with issue of "**Will**" which was raised in the appellate tribunal. It was un-procedural to have annexed a photocopy of a purported "**Will**" to the petition of appeal which was not tendered before the trial tribunal and expect the appellate tribunal to treat it as exhibit and accord weight on it.

The fact that the appellant had the "**Will**" but failed to tender it at the trial court without any reason and later chose to annex it on the petition of appeal at the appellate level is doubtful and afterthought which negates their proposition that they were bequeathed the suit land through "**Will**". There was no procedure of additional evidence within the meaning of section 34 of Cap 216 hence this provision cannot arise here.

More so, even if it is assumed that this ground was raised in the appellate tribunal, still the record of the trial tribunal depicts nowhere the appellants stated to have been in land in dispute for 26 years.

I am thus in line with the respondent's formed doubt that if it is true as the appellants allege to have been bequeathed the suit land by their father who died in 2000, how comes to have owned the same land over 26 years since 1996 while their father who bequeathed them was still alive. I therefore dismiss this ground without hesitation.

I proceed to determine the fourth and last ground. On this ground, the appellate tribunal is blamed to have not considered that the appellants

were not involved in the sale transaction of the suit land. If this is their only complaint of non-involvement on the sold land of which they believe was a clan land, I think they would have opted another cause of action different from the instant one because the law on customary law is very clear that where the clan land is sold without involving the clan members the remedy is not to declare the sale void, instead is to apply for redemption proceedings to have the same redeemed subject to limitations of 12 years.

However, since the respondent had proved before the trial court of which I agree with the appellate tribunal that the suit land was sold in 2004 and 2005 respectively and the appellants came to disturb his rights in 2018 which was above 12 years, the appellants' right to claim or redeem had legally expired.

Conversely, I agree with the appellate tribunal on its findings that the appellants were involved as clan members in the sale transaction. I also agree on its reasoning that the witnesses who testified at the trial tribunal that the appellants were involved in the sale transactions some were clan members in the same clan of the appellants, hence credible witnesses whose story ought to be believed and as the appellate tribunal observed, the appellants did not even attempt to cross examine them when accorded that opportunity as explained in **Bomu Mohamedi versus Hamis Amri** (supra). I find nothing to disturb in the finding of the appellate tribunal. I find no merit in this ground and I dismiss it.

There were issues raised in the appellant's written submission and therefore outside the petition of appeal termed as points of law. They were complaining on the irregularities alleged to have been committed by the Ward Tribunal during the hearing of the case, that the coram, gender

and names of members each day they appear. I agree with the submission from the respondent that the Ward Tribunal enjoys the freedom under section 15 of Ward Tribunals Act of not being bound by ordinary rules of evidence and procedure as they have their own rules to expedite the matter. See **Abdi M. Kipoto versus Chief Arthur Mtoi** (Supra) as also relied by the appellant's counsel. It should also be known that every case has to be decided due to its peculiarity. The appellants' counsel did not tell this court how the appellants were prejudiced with such irregularity. With the advent of overriding objective, not every irregularity will vitiate the proceedings. **Justus P. Mutakyawa versus Bernadetha Kanyankole** Land Case appeal no. 54 of 2019 HCT at Bukoba (unreported). Hence the irregularity is curable and cases cited by the appellants are distinguishable but also do not bind this court.

In the event, I find no merit in this appeal, the judgment of the appellate tribunal is upheld and this appeal is consequently dismissed with costs. I so order.

Dated at Bukoba this 28th day of October, 2022.

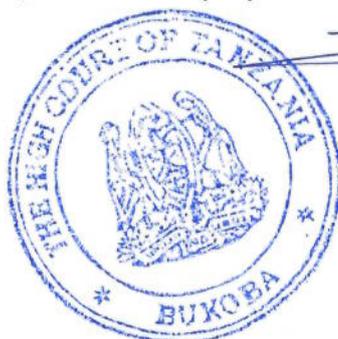



E. L. NGIGWANA

JUDGE

28/10/2022

Court: Judgment delivered this 28th day of October, 2022 in the presence of all parties in person, Hon. E.M. Kamaleki, Judge's Law Assistant, and Ms. Sophia Fimbo, B/C.




E. L. NGIGWANA

JUDGE

28/10/2022