IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND APPEAL NO. 29 OF 2021

(Originating from Land Appeal No. 139 of 2017 of Kigoma District Land and Housing Tribunal for Kigoma Before Hon. F. Chinuku, Chairperson and Land Dispute No. 5 of 2017 of Gwanumpu Ward Tribunal, Kakonko)

MSIGWA SEZOYA RUKAZAGALA..APPELLANT

VERSUS

YOSHUWA SEHOMA SEKISHAHU..RESPONDENT

JUDGMENT

29th March & 20th April, 2022

F. K. MANYANDA, J.

The Appellant Msigwa Sezoya Rukazagala after successfully obtaining extension of time by this Court (Hon. Mlacha, J.) on 16/11/2021 lodged this appeal challenging the decision of the Kigoma Land and Housing Tribunal, hereafter referred to as "the DLHT". He has raised four grounds of appeal.

1. *That, the District Land and Housing Tribunal for Kigoma grossly erred in law and fact when it determined the matter without evaluating the*

evidence as it was adduced by the Appellant and his witnesses at the trial ward Tribunal. Hence nullity judgment.

2. *That, the trial District Land and Housing Tribunal for Kigoma grossly erred in law and fact when it composed the judgment without opinion of the assessors being read before the parties as the law enjoin. Hence nullity judgment.*
3. *That, since the Appellant inherited the suit shamba from his parents, the trial District Land and Housing Tribunal grossly erred in law and fact when it held that the Appellant had no locus standi while the same had no locus standi to prosecute the case over the suit land which belongs to his parents.*
4. *That, could the trial District Land and Housing Tribunal for Kigoma consider the evidence as it was adduced by the Appellant the same could upheld the decision of the trial Ward Tribunal.*

The background of this matter is that the said Appellant sued the Respondent, Yoshuwa Sehoma Sekishahu, at the Gwanumpu Ward Tribunal hereafter referred to as "the trial ward tribunal" for ownership of a shamba measuring about five (5) acres.

The trial tribunal neither awarded the Appellant nor the Respondent, instead it portioned the shamba into two halves so that each party takes one half.

This decision aggrieved the Respondent who appealed to the DLHT which decided in his favour. The Appellant was distressed by that decision, hence the instant appeal.

With leave of the court hearing of the appeal was disposed by way of written submissions.

The submissions by the Appellant were drawn and filed by Ms. Sylvester D. Sogomba, learned Advocate and those of the Respondent were drawn and filed by Ms. Elizabeth Twakazi, learned Advocate.

Mr. Sogomba submitted in support of the appeal by combining grounds 1 and 4 together and argued grounds 2 and 3 seriatim.

In respect of grounds one and four, the counsel submitted that the DLHT failed to evaluate the evidence adduced by the parties at the Ward Tribunal. He was of the views that since there is no evaluation of the evidence in the judgement, then the same is no judgment in law. The Counsel pointed that section 35(2) of the Land Dispute Court Act, [Cap. 216 R.E 2019] requires a judgment to contain reasons. He cited the cases of **Stanslaus Rugaba Kasusula and Another vs Phares Kabuye Kasusula Kabuye** [1982] TLR 338 in which it was held that the judgment is defective if it leaves contested material issues of fact unresolved.

The court of Appeal in that case went on stating that: -

"The material issue at the appeal stage was the appellate court to evaluate the evidence as it was adduced by parties failure to evaluate the evidence implies that the appeal was not heard on merit".

The Counsel also cited a case of this Court of **Stanford Kabogo vs Athuman Amauruti Mrisho (As Administratore of the Estate of Late Zubeda Mauruti Mrisho,** Land Appeal No. 6 of 2021 (unreported) in which a judgment of the DLHT was nullified for want of evaluation of evidence.

Regarding ground two, Mr. Sogomba referred this Court to Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN No. 174 of 2003 which require the Chairman to record the assessor's opinion which they have to give in writing. He also cited the case of **Adam Kibona vs Absolom Swebe (Sheli)** Civil Appeal No.286 of 2017 (unreported) which stresses on the same position of law on requirement of the Chairman to indicate in the record the opinion of assessors and endorse that the same was read out aloud in court.

The Counsel argued that failure by the DLHT to record the assessors opinion, and to read the same aloud is fatal.

Regarding ground three, Mr. Sogomba argued that both the Appellant and the Respondent lack *locus standi* because their evidence indicate that they instituted the claims basing on their parents' rights to land.

The Counsel was of the views that since the evidence shows that the land in dispute belonged to their parents who are dead, then they ought to pursue their parents' rights after obtaining letters of administration.

He cited the case of **Ndamo Kulwa vs Salum Mihangwa**, Land Appeal No. 30 of 2011 HC Tabora (unreported) where it was held that mere appointment by family members is not sufficient to confer capacity to sue as an administrator of the estate of the deceased person. He prayed the appeal to be allowed.

On her side, Ms. Twakazi for the Respondent also canvassed the grounds of appeal in the same order the Appellant's counsel had done.

Ms. Twakazi argued in respect of grounds one and four that the DLHT dully evaluated the evidence and its judgment is sound in law. She demonstrated the piece of the judgment at page one paragraph two where the Chairman made a reference to the Respondents testimony.

The Counsel distinguished the cases of **Stanslaus Rugaba Kasusula** (supra) and that of **Stanford Kagobo** (supra) arguing that in those cases

there was no evaluation of evidence while in the instant appeal the chairman evaluated the evidence.

In regard to the second ground of appeal, Ms. Twakazi submitted that the chairman considered the opinion of the only assessor who managed to go through to the end of the case one Mama Kasongo. She argued that the judgment shows that her opinion was in writing and was read out to the parties.

She distinguished the case of **Adam Kibona vs Absolom Swebe (Sheli) (supra)** arguing that unlike in that case, in the instant matter the chairman complied with Regulation 19 of GN No. 174 of 2003.

In respect of ground three, Ms. Twakazi submitted that the Respondent had *locus standi* to pursue his rights while the Appellant had none.

She argued that the Appellant's evidence shows that he was claiming land which belonged to his father the late Sezoya. He could not stand in court on behalf of his demised father; it was contrary to sections 24 (1) and (2) and 33 (1) of the Probate and Administration of Estates Act, [Cap. 352 R.E 2022].

The Counsel argued that the evidence by the Respondent that he was using the land with her parents continuously since 1984 until 2017 when the Appellant disturbed him implies that his demised parent gave the land in

dispute to him during their life time. She cited the case of **Shabani Nassoro vs Rajabu Sibma (1967**) HCD N... however, as she didn't complete citation of the case she cited and this court will not consider it.

Those were the submissions by the counsel for both parties. I am thankful to the Bar. Both counsel with the usual zeal and eloquence argued their positions well. It is now my turn to determine the controversy.

I will start with ground three in which the complaint is on *locus standi* that both the Appellant and the Respondent lack locus standi in pursuing the claims. The counsel for the Appellant argued that since they are suing on claims for their parents who dead, then they lack locus standi due to absence of letters of administration appointing them to act as such.

The counsel for the Respondent, however, opposed that clam arguing that the Respondent was rather given the land by her parents.

In the first place I agree with the counsel as to the position of the law on *locus standi* for a person to sue on claims of the estate of a dead person as was spelt by this court (Hon. Ndika, J as he then was) in the case of **Ndamo Kulwa vs Salum Mihangwa** (supra) by holding as follows: -

> *"I take it as a basic rule of law that following the death of a person, no person other than the person granted probate or letters of administration has power to sue or*

prosecute any suit or otherwise act as a representative of the deceased until such probate or letters have been revoked or annulled (see section 71 of the Probate and Administration of Estates Act, Cap. 325 R.E 2002).

The Court went on stating that: -

> *A person purporting to have been nominated by the clan members or the family of the deceased to represent the deceased's estate can only do so if he is subsequently granted probate or letters of administration. It is needles to say that the capacity to act as the representative of the deceased takes effect upon the grant of the probate or letters of administration and so it cannot have a retrospective effect".*

In the instant matter, however, the situation learnt from the evidence adduced by the parties is different. The Appellant in his testimony before the trial tribunal testified that the land in dispute belongs to him after inheriting it from his parents; and that he is the only heir who inherited the land in dispute.

According to him, the dispute is on ownership of the disputed land. He mentioned his parent as a way on which he came into ownership of the disputed land.

On the other hand, also the Respondent's evidence he led in the trial court is that the land in dispute belongs to him because he inherited the same

from his demised parents. Like the Applicant, he too contends that he is the only heir. Part of his relevant testimony states as follows: -

> *"Baada ya kurudi nyumbani nilikuta Baba na Mama bado wanalima shamba hilo 1994 nilifunga ndoa, 1998 mzazi wangu ambaye ni mama mzazi akafariki dunia. Toka nyakati hizo nimeendelea kulima eneo hilo mpaka nimezaa Watoto. Sikuwahi kupokea lalamishi lolote kuhusu shamba hilo hata kabla wazazi wangu wangali hai 10/5/2015 Baba alifariki".*

Literally means, after returning back he found his parents still using the land and that he too continued using the land in dispute until he married and got children, then both of his parents passed away leaving him with the land.

As it can be seen both parties claim ownership of the land by themselves, not ownership of the land by their parents who passed away leaving them as the only heirs.

In my firm opinion each sued in his personal capacity as owners of the land, not their parents' land. They were not suing for inheriting the suit land but they already inherited it. The issue to be addressed therefore is on ownership not administration of the estate.

However, before I dwell into that issue, there is a legal issue need to be addressed first because it touches the jurisdiction of the appellate tribunal. This is the complaint in the second ground of appeal that it composed a judgment in disregard of the opinion of assessors. I agree with the Counsel, that there is no record of reading opinion of assessors to the parties.

It is provided under section 23(1) of the Land Disputes Courts Act, [Cap. 216 R. E. 2019] that the DLHT is composed of a chairman and not less than two (2) assessors. Regulation 19(2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations, GN No. 174 of 2003 provides as follows: -

> *"Not withstanding sub regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili".*

The superior court of our land, the Court of Appeal of Tanzania has interpreted that Regulation to mean that the chairman must invite the assessors to read out their opinion aloud in court and the record must show so. The rationale is to let the parties know the opinion of the assessors.

In the case of **Edina Adam Kibona vs Absolon Swebe,** Civil Appeal No. 286 of 2017 (unreported) the Court of Appeal of Tanzania stated as follows:-

> *"We wish to recap at this stage that the trials before the DLHT, as a matter of law assessors must fully participate and at the conclusion of evidence in terms of Regulation 19 (2) for the Regulations, the chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed".*

The court of Appeal went on to state that: -

> *"For avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the chairman of the DLHT purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record.*
>
> *And further in view of the fact that they were not read in the presence of the parties before the*

judgment was composed, the same have no useful purpose"

On the strength of the authority stated above and other cases including the case of **Tubone Mwambeta vs Mbeya City Council,** Civil Appeal No. 287 of 2017 (unreported) where the Court of Appeal said it was very necessary for the chairman to call upon the assessors to give their opinion in writing and read the same to the parties in order to enable them know the nature of their opinion and whether the chairman considered them in the final verdict; I am of the findings that this omission and irregularity is serious one.

As held by Court of Appeal of Tanzania in the case of **Sikuzani Saidi Magambo and Another vs Mohamed Roble**, Civil Appeal No. 197 of 2018 that such omissions and irregularities amounted into fundamental procedural errors that occasioned miscarriage of justice to the parties and vitiated the proceedings and entire decision.

Now, having found that the entire proceedings and the judgment were vitiated hence a nullity, I find no need of dealing with the other grounds of the appeal because they emanated from a nullity.

Consequently, I do hereby quash the proceedings of the DLHT in its appellate jurisdiction and quash its purported judgement. In lieu thereof,

I do hereby order the DLHT to rehear the appeal before it, afresh before a different chairman.

As the matter has not yet been concluded on merit, I make no order as to costs, this means each part will bear its own costs. It is so ordered.

Sgd: F.K. Manyanda

Judge

20/4/2022