

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

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**LAND CASE APPEAL NO. 123 OF 2020**

*(Arising from Application No. 150 of 2017 of DLHT for Kagera at Bukoba)*

**DEUSDEDITH KALIKWIKYA.....APPELLANT**

**VERSUS**

**DINA JOHN** (*administratrix of estate of the late John M. Joel*)

.....**RESPONDENT**

**JUDGMENT**

10/2/2022 & 11/03/2022

**NGIGWANA, J.**

This appeal arises from the judgment and decree of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in Application No. 150 of 2017 where the Applicant, now Respondent Dina John being the daughter an Administratrix of the estate of the late John Mutazaa Joel sued the Appellant for encroaching into the land of the late John Mutazaa Joel located at Bugandika Ward within Misenyi District in Kagera Region, whose value is estimated to be TZS 10,000,000/=, claiming the following reliefs; **One**, that the suit land be declared that it is among the estate of the late John Mutazaa Joel. **Two**, the permanent injunction order be issued against the respondent for trespassing there at; And, **Three**, costs of the said be granted.

The brief back ground of the matter as can be gathered from the available records is to the effect that John Mutazaa Joel @ John Joel Mbakasinge who is the father of the respondent purchased the Suitland from Francis Bwato Kalikwikya who is the elder father of the Appellant on **25/04/1982** through sale agreement which was tendered at the trial tribunal.

On the other hand, it is gathered that the appellant was bequeathed the suit land by his late father one John Christostom Kalikwikya in 1995 and therefore his elder father one Francis Kalikwaya who is alleged to have sold the said land to the respondent's father (**John Mutazaa Joel @ John Joel Mbakasinge, deceased**) executed that will which was tendered as exhibit at the trial court and handed over the same to the appellant.

After the final determination of the said matter, the trial tribunal declared that the estate administrator owned the disputed land since there was a sale agreement evidencing the ownership. The appellant was therefore ordered to vacate the extent he encroached the land in dispute boundaries.

Being aggrieved, the appellant has now appealed to this court armed with five grounds of appeal;

- 1. That, the trial tribunal erred in law to proceed to hear and determine the Application without explaining to the parties the issues framed and require them to admit or otherwise.*
- 2. That, the trial tribunal Chairman erred in law and facts to determine the application contrary to the framed issues and without giving*

*reasons to the decision in line with each issue framed that resulted into miscarriage of justice.*

3. *That, the trial chairman of the tribunal grossly erred in law and on facts for failure to evaluate the evidence on record which had weight on the part of the appellant hence reaching on an erroneous decision defeating the ends of justice.*
4. *That, the Trial Chairman of the Tribunal grossly erred in law and facts to decide the case contrary to the evidence on record which proved the case in favor of the appellant as required by law.*
5. *That, the Trial Chairman of the Tribunal grossly erred in law and on facts for failure to consider the appellants evidence without any reasonable justifications.*

Wherefore, the appellant prays that the appeal be allowed with costs, and the Suitland be declared the property of the Appellant. On the other hand, the respondent duly filed the reply to the memorandum of appeal disputing the grounds of appeal.

In this appeal the appellant was represented by Mr. Frank Karoli, learned advocate while the respondent was represented by Mr. Alli Chamani, learned advocate. By consensus, the appeal was argued by way of written submissions.

Advocate Frank Karoli was the one who started to set the ball rolling. He opted to abandon ground No. 1 and argued ground No. 2 separately and finally argued grounds No. 3, 4 and 5 altogether. It was advocate Karoli's submission that the judgment of the trial tribunal does not qualify to be

termed as a judgment in the eyes of the law. He substantiated that the issues framed at page 3 of the judgment and Page 6 of the proceedings were five but the reasons for the decision and the point for determinations do not reflect on the framed issues. According to him, that is contrary to Order XX Rule 4 to the CPC.

The appellant's Advocate contended that, the said flaw leads to miscarriage of justice and is the serious illegality which vitiates the entire proceedings. He buttressed his stand with the case of **Kikundi cha Kashangula Tweyambe vs Georgia Kabwogi**, Misc. Land Case Appeal No. 88 of 2016 HC at Bukoba (unreported).

Reverting to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal which spells that the trial tribunal erred in law and facts for failure to evaluate the evidence on record, the learned counsel submitted that, it was clear such evidence totally showed that the respondent failed to prove her claims but at the end to his surprise, the decision came in her favor. That it was contrary to the burden of proof which she did not discharge as required under S. 110 (1) and (2) of Evidence Act, Cap. 6 R: E 2019.

Mr. Frank further elaborated that the respondent at page 3 when she was cross-examined she said that she was not there when the sale transaction was taking place only that she was told by his father, deceased that he bought the land from one Francis Bwato Kyalikwikya and on page 35 she asserted that there were eucalyptus trees but her mother PW2 while being examined in-chief and on cross-examination never mentioned the existence

of eucalyptus trees in the disputed land the fact that confirm that the respondent never knew the suit land that was sold to his deceased father.

The appellant's counsel contended that had the trial tribunal evaluated properly the evidence, he would have reached to different verdict.

The appellant's counsel further stated that there was another testimony from the respondent that her late father bought the suit land in 1982. The counsel contended that the appellant's testimony should be believed because at page 44 of the proceedings, he repeated stating that he was given the suit land he inherited from his father by the elder father one Francis Bwato Kalikwikya in 1995 who is also alleged to have sold the suit land to the respondent's father.

Mr. Frank further elaborated that, the appellant inherited the suit land from the late Francis Bwato Kalikwikya through the will that was tendered and received as exhibit D.1. The advocate wonders that if at all, he had already sold the Suitland how could he handover the same by will to the appellant in 1995.

Substantiating further, the advocate argued that, the respondent alleges that the suit land was bought in 1982 but the wife of the seller DW2 Maria Francis testified that she was married to the seller in 1980 and when she was married, her late husband showed her the land that he sold to the Respondent's father which had banana Plantations, coffee trees and the house therein and is not the disputed land. That the wife testified that if at all the sale transaction was concluded in 1982, then she could have seen it because she was married in 1980. In that regard the Appellant's advocate

concludes that the said fact confirms that, the suit land was never sold to the respondent's father.

Mr. Frank went on that DW2 went further and testified at page 54 of the proceedings that the land which was sold to the respondent's father is still there and now it has turned into a bush after being abandoned and that the suit land belongs to the appellant after being bequeathed the same in 1995 by his husband the late Francis Bwato Kalikwikya.

He further contended that when the suit land was handed over to the appellant, the respondent's father one John Mbakasinge was present and never complained and that is why the respondent's mother when she filed a case over the same suit land and Bugandika Ward Tribunal, she lost the case. According to Mr. Frank, the appellant's advocate, all these facts reveal that the suit land belongs to the appellant and not the respondent and that the respondent sued the appellant in different land from that of the respondent's father.

The appellant's counsel therefore concluded that the facts and evidence on record suggest that the respondent never knew what the land she was complaining of as she was not present when the sale was conducted. That DW2 the wife of the seller who was shown the land that was sold to the Respondent's father by his late husband who told the tribunal that it is not the suit land and that the suit land belongs to the appellant.

In reply, Mr. Chamani responding on the blame thrown by the appellant's counsel that there was no judgment before the tribunal so to be called, he

said that the appellant's counsel did not specifically point out which matter was not complied with by the trial tribunals judgment. The said trial court judgment which was referred in the case of **Kikundi cha Kashangula Tweyambe** (supra) is quite distinguishable since the trial judgment in this case complied to the law as it did not leave any contested material issues of fact as it was held in **Stanslaus Rugaba Kasusura vs Phares Kabuye** (1982) T.L.R 338 at 340.

To show that the contested issues were answered by the trial court, the respondent's counsel referred page 4 of the typed judgment where the trial Chairman declared that;

*"The applicant (now the respondent) as the administrator of the estate owns the same and he (sic) should be handed over the same as per the sale agreement.* He therefore counted that the said judgment of the trial tribunal has communicated the decision with reasons that the late father of the respondent had purchased the Suitland as per sale agreement tendered.

Having paid due consideration to the records and arguments in the submission for both sides, this court is now called upon to determine whether this appeal has merit.

It is trite that the stage of framing issues in civil cases is an important one in as much as on that day, the scope of the trial is determined by laying the path on which a trial would proceed excluding diversions and departures therefrom. The correct decision of a civil case largely depends on the correct framing of issues correctly determining the real point of

controversy which need to be decided. Issues are framed after going through all the pleadings in the matter. The Court of Appeal of Tanzania in the case of **Mohamed Masoud Abdala and 42 others versus Tanzania Road Haulage (1980) Ltd**, Consolidated Civil Appeal No.150 and 158 of 2019 (Unreported) held that;

*"The purpose of framing issues is to narrow down the matter in controversy so that the parties may lead evidence confined to issues on which the right decision of the case would depend."*

It should also be noted that omission to frame issues is fatal unless it results in the failure to decide properly the point in controversy. See **Norman versus Overseas Motor Transport (1959) AE 13** and **Tuongane Workshop versus Audax Kamala [1978] LRT No.21**

Order XIV Rule 1 (5) of the Civil Procedure Code Cap 33 R: E 2019 provides that;

*"At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, **and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend**" (Emphasis added).*

In the case of Sheikh **Ahmed Said versus the Registered Trustees of Manyema Masjid [2005]** TLR 61 the Court of Appeal was held that,



*"It is an elementary principle that of pleading that each issue framed should be definitely resolved one way or the other. It is necessary for trial court to make a specific finding on each and every issue frame in a case, even where some of the issues cover the same aspect".*

From the herein above decision, it is apparent that, as a general rule, the *trial* court has the duty to make a specific finding on each and every issue frame in a case, even where some of the issues cover the same aspect.

However, every general rule has its own exceptions. Order XX rule 5 of the Civil Procedure Code Cap 33 R: E 2019 states that,

*"In suits in which issues has been framed, the court shall state in its findings or decision, with a reason therefore, upon each separate issue **unless the finding upon any one of the issues or more of the issues is sufficient for the decision of the suit**" (Emphasis supplied).*

The bolded words shows the exception the said general rule.

In the persuasive decision of the court of Appeal of Nigeria in the case of **Nyawen versus Badon and Others (YL82 OF 2014) 2016 NGCA9 (28 June 2016)** it was held that;

*"The law is settled that a court is required at all times required to consider all issues and pronounce on them, **save in clearest cases. The judgment is flawed, sometimes fatally if a vital issue in the case is left unresolved. (Emphasis added)***

*In the matter at hand, when composing judgment, the trial Chairman produced the issues which were framed and agreed upon by the parties;*

1. *Whether the suit land is among the estate of the late John Mutazaa Joel or is the respondent's entitlement.*
2. *Who among the applicant and the respondent is the right full owner of the disputed land.*
3. *Whether or not the respondent trespassed into the disputed land*
4. *Reliefs, if any the parties are entitled.*

It is worth noting that, judgment writing is an art it differs from one judge or Magistrate or Chairman to another, there is no hard and fast rule on the judgment should be written, but the law gives guidelines about the contents of a judgment.

Regulation 20 (1) (a) (d) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (G.N No.174 of 2003) provides guidance on how or what a judgment should entail in land matters brought before the trial tribunal. The same states;

*"The judgment of the tribunal shall always be short, written in simple language and shall consists (a) a brief statement of facts, (b) finding on the issues, (c) a decision and (d) reasons for the decision".*

The trial court revealed that this was among the **clearest cases**, and reading the pleadings of the parties filed before the trial tribunal, the issue of controversy was "**Ownership**", even the issues framed, though they appear to be four, the vital issue which needed to be resolved by the trial tribunal was ownership. Reading the trial court judgment, it is apparent that the Tribunal determined the issue of ownership according to law therefore, no vital issue was left unresolved.

The judgment of the tribunal was composed as per guidance stated herein above. It is short, written in simple language. It contained brief statement of the facts, finding on the issue of ownership, decision and reasons for the decision, thus it is a judgment in the eyes of the law. The judgment communicated the decision with reasons that the late father of the respondent had purchased the Suitland as per sale agreement tendered, for that matter, it is among the estate of the late John Mutazaa Joel, thus ordered to be handed over to the respondent as the administratrix of the estate of her late father John Mutazaa Joel. In that respect, the 2<sup>nd</sup> ground of appeal fails.

I now turn to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal. What is ostensibly disputed by the appellant's counsel in his entire submission is that the land in dispute as described by the respondent is not the one which was sold by the late Francis Bwato Kyalikwikya to the respondent's father one **John Mutazaa Joel @ John Joel Mbakasinge** (now a deceased). The appellant, in that regard, does not dispute that the late John Mutazaa Joel never bought the land from Francis Bwato Kalikwikya. **Therefore, the defense of the appellant has been that the land in dispute belongs to him as he was bequeathed by will in 1995.**

To prove that the land in dispute is the one encroached by the appellant, the respondent, at the trial court, tendered exhibit P1 which is the sale agreement which exhibits that the respondent's father bought the said land in 1982 from the late Francis Bwato Kalikwikya. On the other hand, to counter such evidence the appellant tendered the will as exhibit D2 to

show that he was bequeathed the said land by his late father John Chrizostom Kalikwikya and the same person (Francis Bwato Kyalikwikya) who had sold the land in dispute to the respondent's father is the one who executed the will by handing over the same land to the appellant in 1995.

To decide on that controversy, the chairman of the trial tribunal did not find any hardship to decide that since the sale agreement with descriptions about the land in dispute tendered by the respondent was not disputed, it was true that the respondent's father bought and owned a piece of that land as per the description pegged to the said sale agreement. On account of that reasoned decision, I see no reason whatsoever to disturb the judgment of the trial tribunal and I am thus inclined to agree with its findings due to the reasons I endeavor to advance, and by so doing I will be reacting to parties argument's and submission as I hereby do under: **One**, Exhibit P1, the sale agreement which was tendered by the respondent and which satisfied the trial tribunal that the respondent's father bought the land in dispute was for the year 1982 which indicates that the respondent's father was the first to possess through purchasing that land before the appellant was bequeathed in 1995. The sale agreement had fully described the land in dispute pertaining its boundaries, marks and the neighbors surrounding the said land unlike **exhibit D2, the will** which mentions the locations different from that of the sale agreement.

It is trite law that where the terms of a contract, grant or **any disposition of property have been reduced to a form of a document, no evidence shall be given in proof of the terms of the contract but**

**the document itself or secondary evidence of its contents.** See section 100 (1) of the Evidence Act, Cap 6 R: E 2019 and the case of Tanzania **Fish Processors Ltd versus Christopher Luhanyula**, Civil Appeal No. 21 of 2010 CAT (Unreported).

Since respondent's father had purchased the land in dispute in 1982, from **Francis Bwato**, it cannot be said that the **John Christom Kalikwikya** had no good title over the land which enabled him to bequeath to the Appellant and therefore, the exercise by Francis Bwato Kalikwikya as the administrator of the estate of John Chrisostom Kalikwikya to hand over the disputed land to the appellant was a nullity. It is trite that nobody can give what he/she does not have or possess (***Nemo dat quod non habet***)

**Two**, the argument by the appellant's counsel that the respondent said the land was with eucalyptus plants and that PW2 (respondent's mother) said nothing about eucalyptus trees on the land does not hold water as the evidence from the respondent's side was clear that the respondent (PW1) and respondent's mother (PW2) did not witness the sale agreement and besides at page 31 of the trial tribunal typed proceedings PW1 described eucalyptus as boundary but did not refer the said plants to exist in the entire land in dispute and as well this cannot deprive the ownership which is already proved. **Three**, the argument by the appellant's counsel that the appellant testified that the land which was bought by the respondent's father was bought in 1979 (at page 45) and not 1982 and that it is not the disputed land before the trial court, does not hold water as the appellant did not prove whether there was another sale agreement ever entered in 1979 so as to discredit that of 1982 tendered by the respondent. **Four**, the

appellant's counsel argued that since the wife of the seller DW2 Maria Francis had testified that she was married to the seller in 1980 and when she was married her late husband showed her the land that he sold to the Respondent's father which had banana Plantations, coffee trees and the house there in and is not the disputed land that on account of that evidence she would have known if at all the respondent's father would have sold the land in dispute in 1982. I do not subscribe to this argument ,first as it appears DW2 is the one who did not know the land which was sold to the respondent's father as she herself stated at pg.53 of the trial proceedings that she was not present when Francis Bwato Kalikwikya sold the land to the respondent's father, secondly, as per exhibit D2 (the will) which the appellant alleges to have been bequeathed that land to him is the one which talks to contain the house therein contrary to the features described on the sale agreement tendered by the respondent which does not talk on the existence of a house built in, the fact which confirms that the appellant encroached the suit land of the respondent. **Five**, the appellant's counsel had also submitted that respondent's mother when she filed a case over the same suit land at Bugandika Ward Tribunal, she lost the case. With due respect to Mr. Frank, this argument is of no assistance as the appeal before the DLHT over Ward Tribunal came with the result that the respondent's mother had no locus stand hence the matter was not decided on merit.

Generally, the appellant's counsel threw the blame to the trial tribunal judgment that it embedded no reason. In my view, the said judgment of the trial tribunal answered the framed issues and as well contained the

reasons that the late father of the respondent had purchased the Suitland as per sale agreement tendered and thus left no issues unanswered as rightly submitted by the respondent's counsel.

In the upshot and for the afore stated reasons, I find no way I can disturb the trial tribunal decisions and orders. This appeal therefore bounces as I find no merit in it. I therefore dismiss it with costs.

Order accordingly.



E.L. NGIGWANA

JUDGE

11/03/2022

Judgment delivered this 11<sup>th</sup> day of March 2022 in the presence of appellant and his advocate, Mr. Frank Karoli, Respondent in person, Mr. E. M. Kamaleki, Judges Law Assistant and Tumaini Hamidu, B/C.



E.L. NGIGWANA

JUDGE

11/03/2022