

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

**(BUKOBA DISTRICT REGISTRY)**

**AT BUKOBA**

**MISCELLANEOUS LAND APPEAL NO. 03 OF 2021**

*(Originating from Application No. 183 of 2011 in the District Land and Housing Tribunal for Kagera at Bukoba)*

**RUTH RUGOMOLA----- APPELLANT**

**VERSUS**

**KITARUKA PRESERVATION AND CONSERVATION**

**ASSOCIATION (KPCA) ----- RESPONDENT**

**JUDGEMENT**

**Date of Last Order: 10/03/2022**

**Date of Judgment: 25/03/2022**

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

Ruth Rugomola, the appellant herein, filed the present appeal against the decision of the District Land and Housing Tribunal for Kagera at Bukoba in Application No. 183 of 2011. The appellant and another person namely Imelda Rugomola filed a suit in the District Land and Housing Tribunal against the respondent namely Katuruka Preservation and Conservation Association (KPCA) for trespassing in the suit land. The trial Tribunal heard the evidence from both sides and delivered its judgment on 23<sup>rd</sup> February, 2011 in favour of the

Respondent. The Appellant was aggrieved by the decision of the trial Tribunal and filed the present appeal.

The Appellant's Petition of Appeal contains four (4) grounds of appeal provided hereunder as follows:-

- 1. That, the successor trial Chairman one R. Assey had no jurisdiction to proceed and decide the matter as he never gave reasons for taking over the suit from the predecessor Chairman one R. Leonard which is contrary to the law.*
- 2. That, the Trial Tribunal erred in law for admitting, continuing and deciding in favour of the respondent who was not a legally registered juristic personality contrary to the law.*
- 3. That, the trial Tribunal misdirected itself in law by illegally admitting the twin memorandum of understanding and memorandum of agreement which offended the maxim scriptum predictum non est factum suum.*
- 4. That, the trial Tribunal made a non-direction in law by wrongly deciding in favour of the respondent. The respondent failed to make the applicant as partner. The respondent admitted to forget to pay any consideration to the applicants. The respondent contrary to the law never sought no obtained the leave to run the business from the local and national leaders since 1969 up to now.*

On the hearing date, the appellant was represented by Mr. Bengesi, Advocate, whereas the respondent was absent. The Court allowed hearing of the appeal to proceed in absent of the respondent who was served summons through substituted service in Citizen Newspaper dated 18<sup>th</sup> September, 2021.

Mr. Bengesi said the first ground of appeal is on procedural irregularity before the trial tribunal and the remaining three grounds of appeal are on substantial matters.

It was submitted by the counsel for appellant on the first ground of the appeal that the successor trial Chairman did take over the case without providing the reason. The case before trial Tribunal was presided over by 3 Chairmans. The first one was Hon. Chenya, then it was presided by Hon. Bantulaki and the last one is Hon. R.E. Assey. Hon. Bantulaki and Assey did not provide the explanation or reason for taking over the case from the previous trial Chairman. This procedure is according to rule 15 (1) of Order XVIII of the Civil Procedure Code Act, Cap. 33 as amended in 2021. Hon. Chenya, Chairman heard party some witness and Hon. Assey, Chairman took over the trial and proceeded to record remaining witnesses of the defence case and delivered the judgment. Hon. Assey who took over the case did not give reason for taking over the case. The court of appeal said in the case of **Meli Mashea v. Republic**, Criminal Appeal No. 227 of 2016, Court of Appeal of Tanzania at Mwanza, (Unreported), that propriety of the procedure is to give the jurisdiction to the successor Magistrate.

The counsel submitted further that also the composition of the trial Tribunal during trial was not proper. It was said that Section 23 (1) and (2) of the Land Disputes Act, Cap. 216, R.E 2019 provides for composition of the District Land and

Housing Tribunal. This is read together with regulation 19 (2) of District Land and Housing Tribunal Regulations, 2003. The trial tribunal framed issues in absence of any assessors. Hearing commenced with assessors at page 21 of typed proceedings. The assessors keep on changing during the trial. In some of the days during trial the Chairman did sit with one assessor only. In **Sikuzan Said Magambo and Another v. Mohamed Roble**, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania at Dodoma, (Unreported), it was held that the changing of assessors is a gross error of the trial Tribunal. The assessors has to make their opinion in writing and read it over to the parties. These omissions and irregularities amounted to a fundamental procedural errors that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal. The same position was stated in **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017, Court of Appeal of Tanzania at Mbeya, (unreported). The said omission and irregularities are not curable. The opinion of the assessors must appear in the proceedings.

In the second ground of appeal the counsel said that there is no evidence to prove that the respondent was properly registered. The appellant proved before trial Tribunal that consideration for taking appellants land was not satisfied by the respondent the act which is against the memorandum of understanding.

After hearing submissions from the appellant, this court is invited to determine the merits of the present appeal.

In the first ground of the appeal, the appellant said that there was irregularities in the proceedings of the trial District land and Housing Tribunal for failure of the successor Chairman who recorded evidence to give reason for taking over the case and the composition of the said trial tribunal was not proper. As it was submitted by the counsel for the appellant, it is a general law that when the case is partly heard by a Magistrate, the successor Magistrate has to record the reason for taking over the case in order to have jurisdiction to try the case. This procedure is according to rule 10 (1) of Order XVIII of the Civil Procedure Code Act, Cap. 33, R.E. 2002. The said Rule 10 (1) of Order XVII provides that:

*10.-(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.*

The above cited provision requires that reason be laid down to show why the predecessor magistrate could not complete the trial. In the absence of any such reasons, the successor magistrate lacked authority and jurisdiction to proceed with the trial. The reason is to avoid chaos in the administration of justice as it

was held by Court of Appeal in the case of **Said Sui v. Republic**, Criminal Appeal No. 266 of 2015, Court of Appeal of Tanzania at Dodoma, (unreported). Consequently, all such proceedings before successor Magistrate becomes a nullity.

In the present, the trial Tribunal typed proceedings reveal in page 15 that Hon. Chenya, who is Tribunal Chairman, framed issues and recorded testimony of PW1 and PW2. The typed proceedings shows that on 29.01.2016 Hon. R.E. Assey presiding over the case and without recording any reason for taking over the case proceeded to record testimony of PW3 and defence witnesses as it shown from page 44 to 54. This proves that the successor trial Chairman took over the case without recording any reason for taking over.

The second limb of the irregularities in the trial Tribunal record stated by the appellant counsel is that the composition of the Tribunal during trial was not proper. The relevant law providing for the composition of the District Land and Housing Tribunal is section 23(2) of the Land Disputes Courts Act, Cap. 216, R.E. 2019. The section provides that the District Land and Housing Tribunal is duly constituted when held by a chairman sitting with two assessors who shall be required to give out their opinion before the Chairman reaches the judgment. The involvement of assessor during trial is crucial and the assessors must provide their opinion in the presence of parties so as enable them to know the nature of the opinion and whether the same has been considered in the judgment. This was

stated by the Court of Appeal in the case of **Tubone Mwambeta V. Mbeya City Council**, Civil Appeal No. 287 of 2017, at Mbeya, (unreported).

In the present case, the trial Tribunal typed proceedings reveal in page 15 that Hon. Chenya, who is Tribunal Chairman, framed issues in absence of the assessors. Hon. Chenya recorded testimony of PW1 on 13.08.2013 in the presence of assessors namely Makwaya and Annamery but the witness did not complete her testimony as it is shown in page 21 to 30 of the typed proceedings. The witness completed her testimony on 30.08.2013 where the assessors present were Nyakato and Mpanju. This means that the assessors who started to hear PW1 testifying changed and another set of assessors were present when the said witness continued with her testimony on 30.08.2013. When PW2 was testifying on 09.06.2014 the assessors were Annamery and Kawegere. When PW3 and defence witnesses were testifying on 29.01.2016 there was one assessor only namely Bwahama. Thereafter the Chairman proceeded to deliver judgment without recording assessors' opinion as page 54 of the typed proceedings shows. Even the judgment of the trial Tribunal says nothing about assessors' opinion.

The assessors' being part and parcel of the District Land and Housing Tribunal has to be involved throughout the trial and before judgment they must provide their opinion by reading it over to the parties and the said opinion must be reflected in the judgment of the tribunal. It is expected for the assessors who





heard all witness testifying to provide their opinion after trial was finished before the Judgment is drafted.

In conclusion, all above discussed omissions are fatal and they vitiate the trial. This position was stated in the case of **Samson Njarai and Another V. Jacob Mesoviro**, Civil Appeal No. 98 of 2015, Court of Appeal of Tanzania, (Unreported); and in **Awiniel Mtui and 3 Others V. Stanley Ephata Kimambo and Another**, Civil Appeal No. 97 of 2015, Court of Appeal of Tanzania, (Unreported).

Therefore, I find all above discussed irregularities has vitiated the trial before District Land and Housing Tribunal. Accordingly, I proceed to quash the proceedings and the judgment of the trial Tribunal and the orders made therefrom are set aside. The matter is remitted back to the District Land and Housing Tribunal to start afresh before another chairman and a new set of assessors. As the first ground of appeal has disposed of the case, I'm not going to determine the remaining grounds of appeal. In the circumstances of this case, each party has to take care of his own cost.



  
A.E. Mwipopo  
**Judge**

25/03/2022

The Judgment was delivered today, this 25.03.2022 in chamber under the seal of this court in the presence of the appellant and appellant's counsel and in absence of the respondent.



  
A. E. Mwipopo  
**Judge**

25/03/2022