

**IN THE HIGH COURT OF TANZANIA  
(BUKOKA DISTRICT REGISTRY)  
AT BUKOKA**

**LAND APPEAL No. 91 OF 2021**

*(Originating from Land Application No.103 of 2013 of Bukoba District Land and Housing Tribunal)*

**GOZBERT A. MUTASINGWA ..... APPELLANT**

**Versus**

**DIONEDES BYABATO ..... 1<sup>st</sup> RESPONDENT**

**JACKSON ALOYS KASHANGAKI ..... 2<sup>nd</sup> RESPONDENT**

**RULING**

*14.12.2022 & 17.02.2023*

**OTARU, J.:**

Mr. Gosbert A. Mutasingwa, the Appellant herein, is dissatisfied with the decision of the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 103 of 2013 which declared Dionesdes Byabato, the 1<sup>st</sup> Respondent, as the lawful owner of the suit land.

The Appellant engaged legal representation of Mr. Derick Zephryne learned advocate, the 1<sup>st</sup> Respondent was represented by Mr. Pauline Richard Rwechungura learned advocate, while the 2<sup>nd</sup> Respondent appeared in person. The court on its own motion noted changes in the composition of the trial tribunal without any explanation, and issues being framed more than once, thus; the court raised to the parties whether the procedure adopted was proper.

On the hearing day, learned advocate for the Appellant submitted that the procedure was not proper as the District Land and Housing Tribunal is duly constituted when held by a chairman and two assessors by virtue of Section 23(2) of the **Land Disputes Courts Act** (Cap. 216 RE 2019). Otherwise, the constitution of the tribunal is not proper and the resultant proceedings are vitiated. He stated that the trial chairperson framed issues twice in the absence of assessors (on 03/09/2014 and 04/07/2017) (pages 9 and 38 of the typed proceedings, respectively). Arguing that at the time, the tribunal was not properly constituted thus vitiating the proceedings. The learned advocate for the Appellant further submitted that there were changes of chairmen without stating reasons, a fact which vitiates proceedings of the trial tribunal. The learned advocate elucidated that on 08/11/2017 (page 39) Hon. Chairman E. Mogasa took over the matter from Hon. R.E. Assey without explaining why, contrary to Order XVIII Rule 10(1) of the **Civil Procedure Code** (Cap. 33 R.E. 2002).

Considering the possibility of the above anomaly being cured by the principle of *overriding objective* in the CPC, counsel for the Appellant vigorously contested and stated that the above requirement is mandatory, non-compliance of which affects the jurisdiction of the tribunal, thus cannot be cured by the overring principle. In support of his argument he cited the case of **Josephine M. Msema v The Registered Trustees of PEFA Kigoma**, Civil Appeal No. 490 of 2021 (CAT Tabora) (unreported) at pages 10-12 that;-

*'performance of obligation under Order XVIII Rule 10 (of the CPC) is mandatory and cannot be cured by the overriding principle'.*

Counsel further cemented his argument with the case of **Leticia Mwombeki v Faraja Safaradi**, Civil Appeal No. 133 of 2019, (CAT Dsm) (unreported), where the court nullified the proceedings because of change of chairmen without explanation. He urged the court to do the same in this case for proceedings from 08/11/2017 to 09/02/2021 (pages 39-98) which were chaired by Hon. E. Mogasa for want of reasoning for taking over from Hon. Assey.

Learned advocate for the 1<sup>st</sup> Respondent responded by explaining why it appears like issues were raised more than once. He argued that the first set of issues was framed by the parties in the absence of assessors but then the matter was dismissed for want of prosecution. That another set of issues was framed on 24/01/2017 after restoration of the case, in the presence of assessors Annamary and Bwahama. On 04/07/2017 the issues were repeated for the benefit of the new chairman Hon. Mogasa who took over from Hon. Kitungulu. He argued that framing of issues without assessors was not fatal as it is cured by the *overriding principle*, particularly so since no one's rights were prejudiced. He also insisted that in any case, the assessors did not give their opinions because their time had expired prior to delivery of the decision thus the case was decided in their absence under Section 23(3) of the **Land Disputes Courts Act** (Cap 216 R.E. 2002).

On the issue of not stating reasons for reassignment of the case to another chairman, the 1<sup>st</sup> Respondent agreed that there was such an omission. He however argued that no right of the Appellant had been prejudiced by that omission. He further argued that the *overriding principle* introduced through amendment of the **CPC** in 2018 requires the court to ignore technicalities that do not go to the root of the case, such as in the case at hand. Counsel also distinguished **Leticia's** case (supra) from this one arguing that when the new chairman took over the matter, he did not start the hearing afresh like in **Leticia's** case but continued from where his predecessor had left, thereby not prejudicing any party. He also added that Order XVIII Rule 10 of the **CPC** does not provide for the necessity of stating the reasons for reassigning cases.

On the part of the 2<sup>nd</sup> Respondent, he submitted that the fact that assessors were not present has affected him because he did not get his right. He also added that the act of successor chairman not adducing the reasons for taking over the case has prejudiced him. He thus prayed to join hands with the Appellant's learned advocate that the matter should be nullified and start *de novo* in Muleba District Land and Housing Tribunal.

In his brief rejoinder, the Appellant underlined that the 1<sup>st</sup> Respondent has not disagreed that assessors were not present at the time when issues were framed thereby affecting the composition of the tribunal and vitiating the proceedings the thus urged to court to nullify the proceedings.

In determining the instant appeal, I have cautiously considered rival submissions, the record before me as well as the law. The record of proceedings in the trial tribunal indicates that on 03/09/2014 under the chairmanship of R.E. Assey, issues were framed by the parties in the absence of assessors (page 9). On 24/01/2017 issues were framed again under the chairmanship of E. Kitungulu, but this time no parties were present but their advocates and assessors Annamary and Bwahama (page 32). On 01/03/2017 an order to maintain status quo was issued by E. Kitungulu in the absence of assessors (page 33). On 29/03/2017 another interlocutory order was issued by R.E. Assey without assessors (pages 34-35). On 26/04/2017 E. Kitungulu ordered the vacation of issues raised by him sitting with assessors Annamary and Bwahama (page 35). On 04/07/2017 issues were framed again under the chairmanship of R.E. Assey in the presence of the parties but absence of assessors (page 38). On 20/09/2017, the chairman appears to be R.E. Assey with assessors Mpanju and Muyaga (page 39). On 03/07/2018 the chairman was E. Mogasa who presided with assessors Muyosa and Rutabanzibwa (page 43). They continued with the hearing. It is further on record that on 20/01/2020 (page 63) the tenure of assessors expired so the matter proceeded without assessors under Section 23(3) of the **Land Disputes Courts Act** (Cap 216 R.E. 2002). On 21/08/2020 hearing of the matter proceeded under the chairmanship of E. Mogasa (page 73). On 01/03/2021 chairman R. Mtei took over the proceedings (page 98). When Hon. Mtei took over the proceedings, he explained the reasons for taking over. That was the first-time explanation was given for change of composition of the tribunal.

The issue for determination by this court is whether the omission to record reasons for succession of chairmen did vitiate the trial and the resultant judgment. I have confined myself with chairmen because assessors' tenure expired before conclusion of the case.

The **CPC**, which is applicable to land cases pursuant to Section 51(2) of **Land Disputes Courts Act** (supra), governs succession of judicial officers under Order XVIII Rule 10(1) which stipulates that;-

*'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 provision of the law has been interpreted in a number of cases including the case of **Leticia** (supra) and **M/S Georges Centre Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (CAT Dsm) (unreported), where the Court held that:-

*'A general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on*

*record why he/she has to take up a case that is partly heard by another'.*

About the 1<sup>st</sup> Respondent's contention that the omission to record the reasons for taking over the case can be cured by the *overriding objective* principle, the answer can be found in the **Leticia's** case where the court held that;-

*'In view of the unknown circumstances in which the case file found its way before the successor Judge, she had no jurisdiction to proceed with the partly heard case. Thus, we decline Mr. Mrindoko's invitation to invoke the overriding objective principle to remedy a fatal omission which cannot be glossed over as it goes to the root of the matter and occasioned a failure of justice.*

The same is again found in the case of **Josephine M. Msema** (supra), that performance of obligation under Order XVIII Rule 10 of the CPC is mandatory and cannot be cured by the overriding principle. The matter at hand had been held not only by different chairmen but also by different assessors. In the case of **B.R. Shindika t/a Stella Secondary School v Kihonda Pitsa Makaroni Co.**, Civil Appeal No 128 of 2017 (CAT Dsm) (unreported) at page 12 the court held *that once trial commences with a certain set of assessors, no changes are allowed.*

In the instant case as already stated above, there were changes of not only chairmen but also of assessors without recording reasons for so doing. It goes without saying that by so doing, both, the proceedings and the decision of the trial tribunal were vitiated.

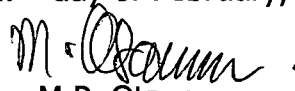
Consequently, I shall follow the steps taken by the courts in the above cited cases and nullify the entire proceedings and judgment of the District Land and Housing Tribunal for Kagera at Bukoba. The resultant order is set aside. If parties are still interested, an expedited fresh hearing before another chairman and a new set of assessors may be commenced in the tribunal with the requisite jurisdiction.

Since the irregularities giving rise to this outcome were caused by the trial tribunal's errors and the matter was raised *suo moto*, each party will bear own costs.

It is so ordered.

**DATED at BUKOBA** this 17<sup>th</sup> day of February, 2023.




  
M.P. Otaru  
**Judge**

**Court:-** Ruling delivered this 17<sup>th</sup> February 2023 in the presence of the parties and the counsel for the Appellant, Mr. Derick Zephryne.

The right of appeal is explained to the parties.



  
M.P. Otaru  
**Judge**  
17/02/2023