

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

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**MISC. LAND APPEAL NO.63 OF 2022**

*(Arising from the decision of the District Land and Housing Tribunal for Kagera in Land Appeal No. 62 of 2021 Originating from Land Case No. 12 of 2021 Kasharu Ward Tribunal)*

**AUDAX GABRIEL..... APPELLANT**

**VERSUS**

**PETER MATUNDA..... RESPONDENT**

**JUDGMENT**

20<sup>th</sup> February & 8<sup>th</sup> March, 2023

**BANZI, J.:**

This is a second appeal which traces its root from Kasharu Ward Tribunal (trial tribunal) where the Appellant sued the Respondent for trespassing into their clan land and cut 150 trees of pines. The Respondent denied the allegations claiming to be a lawful owner of the disputed land after he purchased it from Faustine Gabriel. After receiving the evidence from both sides, the trial tribunal decided in favour of the Respondent by declaring him a lawful owner of the disputed land.

Aggrieved with that decision, the Appellant appealed before the District Land and Housing Tribunal for Bukoba, (appellate tribunal) which dismissed the appeal with costs after nullifying the proceedings of the trial tribunal and

ordered the Respondent to continue to use the disputed land. Still aggrieved, the Appellant lodged his appeal before this Court.

When the appeal was called for hearing, the Appellant was represented by Mr. Joseph Bitakwate, learned counsel whereas, the Respondent enjoyed the services of Mr. Geoffrey Rugaimukamu. Initially, Mr. Bitakwate filed memorandum of appeal containing four grounds, but at the hearing, he prayed to abandon three grounds and remained with the first ground to wit:

*"That, the Chairman of the District Land and Housing Tribunal erred in law in ordering costs against the appellant, without the aid of assessors and allowing the respondent to develop the suit land in a trial before Kasharu Ward Tribunal which was improperly constituted, contrary to the law making all proceedings and the decisions thereof a nullity."*

Addressing the Court, Mr. Bitakwate submitted that, their grievances on the first ground are that; the appellate tribunal erred to order the costs against the Appellant as well as to allow the Respondent to continue to use the disputed land and that both trial and appellate tribunals were improperly constituted. Clarifying his point, he stated that, for ward tribunal to be properly composed under 11 of the Land Disputes Courts Act [Cap 216 R.E. 2019] ("the Land Disputes Courts Act), it shall consist of not less than four nor more than eight members of whom three shall be women. Also, the presiding members shall be reflected in the record. But in the matter at hand,

the trial tribunal, save for the first and last date, there is no coram of members who sat on 26/07/2021 and 16/08/2021. Thus, it is not clear if the members who heard the evidence were the very ones who delivered the decision which is an irregularity that renders the proceedings and decision nullity. To support his submission, he cited the case of **Francis Kazimoto v. Daglas Mkunda**, Misc. Land Appeal No. 123 of 2016 HC Land Division (unreported). He added that, the proceeding of the appellate tribunal does not contain the opinion of assessors. It was his contention that, it is not enough to state that, the opinion was read over but, such opinion should be reflected in the proceedings as it was stated in the case of **Edina Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 CAT (unreported). Since the appellate tribunal was not properly constituted, the entire proceedings and subsequent orders are nullity. In that regard, he prayed for this Court to invoke its revisionary powers under section 43 (1) (b) of the Land Disputes Courts Act and nullify the proceedings of both tribunals. On the way forward, he opined that, parties should be left at liberty to file a fresh suit if still interested. He also prayed that, under the prevailed circumstances, each party should bear its own costs.

On his side, Mr. Rugaimukamu conceded to the irregularity concerning composition of the trial tribunal. However, on the issue of opinion of assessors at appellate tribunal, he submitted that, there was no irregularity

because the written opinion of the assessors is in the record and the proceedings indicate that, the same was read over to parties. On the issue of costs ordered by the appellate tribunal against the Appellant, he submitted that, the Appellant in Land Appeal No. 143 of 2016 was ordered by the same appellate tribunal to join one Faustine Gabriel but he went back to the trial tribunal and filed a fresh case against the Respondent alone which is a total disregard of tribunal's order. Under those circumstances, it was proper for him to be condemned to pay costs. He therefore prayed for appeal to be dismissed with costs.

In his short rejoinder, Mr. Bitakwate submitted that, if learned counsel has conceded that the proceedings of trial tribunal were nullity, then the proceedings of the appellate tribunal had no legs to stand. On the issue of opinion of assessors, he stated that, in the cited case of **Edina Adam Kibona**, the Court of Appeal insisted that, although there was written opinion in the file, but what was read to the parties must be reflected in the proceedings. Thus, he reiterated his prayer in his chief submission.

I have considered the arguments of both sides together with the records of trial and appellate tribunals. It is prudent to underscore that, according to section 11 of the Land Disputes Courts Act, the ward tribunal is duly constituted if it is composed of not less than four and not more than eight members of whom three shall be women. It is also worthwhile noting

here that, in order to ascertain if the ward tribunal is properly constituted, the names of members who constituted the tribunal on each date must be disclosed in the proceedings. Short of that, it is an error which affect the jurisdiction of the said tribunal.

In the matter at hand, learned counsel of both sides conceded that, the trial tribunal was not duly constituted for want of names of members in two consecutive date. I have thoroughly examined the proceedings of the trial tribunal. As correctly pointed out by Mr. Bitakwate, on the first day when the Applicant/Appellant was heard, the names of the members which constituted the tribunal were disclosed in the proceedings. However, on two consecutive dates of hearing, the names of members were not disclosed at all. In other words, there was no coram which contains the names of members on 26/07/2021 and 16/08/2021 when witnesses of the Appellant and Respondent with his witnesses testified. Thus, in the absence of names of members in the proceedings, it is difficult to ascertain if the persons whose names appeared in the judgment are the very ones who presided over the trial. In the case of **Ane Kisunga v. Said Mohamed**, Misc. Land Appeal No. 59 of 2009 HC Land Division (unreported) it was stated that:

*"...the names and gender of the members participating in a case in the Ward Tribunal must be shown in order to ascertain its composition as to whether it is in compliance with the law. Those members who participated during the*

*trial, their names and gender must be recorded on Coram on each day the trial takes place up to the stage of Judgment. Failure to follow proper procedure it is difficult to know as in this instant case, the members who participated to compose the Judgment were the same as those who appeared during trial".*

In the case of **Francis Kazimoto v. Daglas Mkunda** (*supra*) when this Court was confronted with similar situation it had this to say:

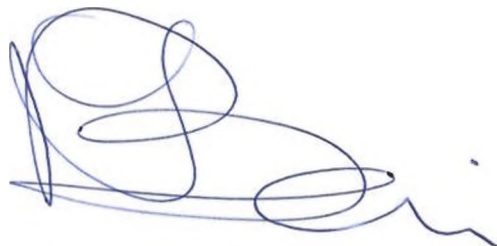
*"The jurisdiction of the ward tribunal is only available if it is duly constituted. It would follow therefore that, the omission to reflect the names of the persons who constitute the ward tribunal during trial is an error which affects the jurisdiction of the same. It is no doubt that an incurable irregularity which vitiates the judgment and proceedings of the trial tribunal.*

Basing on the position of the law as extracted above and since the proceedings in the matter at hand are silent on the membership composition on two consecutive dates of hearing, it is apparent that, both the proceedings and judgment are nullity. Under these circumstances, the appeal in the appellate tribunal had no legs to stand because it was a result of nullity. Apart from that, assuming that the proceedings and judgment of the trial tribunal were valid, yet still the proceedings before the appellate tribunal are nullity for want of opinion of assessors. It is a settled law that,

the opinion of assessors shall be in writing; the same shall be read over in the presence of parties and such opinion shall be reflected in the proceedings. See the case of **Edina Kibona v. Absolom Swebe (Sheli)** (*supra*). In the matter at hand, although there is written opinion of both assessors in the file, but what was read over in the presence of parties is not reflected in the proceedings which vitiates the proceedings, judgment and subsequent orders.

From the foregoing reasons, I find the appeal meritorious and I allow it. Consequently, the proceedings, judgments and decree of both trial and appellate tribunals are hereby quashed and set aside. Any party who is still interested may file the fresh suit subject to the requirements of section 13 of the Land Disputes Courts Act as amended by section 45 of the Written Laws (Miscellaneous Amendments) (No. 3) Act 2021. In the circumstances, each party shall bear its own costs.

It is accordingly ordered.



**I. K. BANZI**  
**JUDGE**  
**08/03/2023**

Delivered this 8<sup>th</sup> day of March, 2023 in the presence of the Appellant  
and the Respondent both in person.



A handwritten signature in blue ink, appearing to be "I. K. Banzi", written in a cursive style.

**I. K. BANZI**  
**JUDGE**  
**08/03/2023**