

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

LAND APPEAL No.80 OF 2022

(Originating from Civil Appeal No. 76 of 2021 in the District Land and Housing Tribunal for Kagera at Bukoba, Arising from Land Case No. 02 of 2021 in Gera Ward Tribunal)

YUSUPH KAZIMILI.....APPELLANT

VERSUS

THEOBARD ALCHARD.....RESPONDENT

JUDGMENT

27th February & 24th March 2023

OTARU, J.:

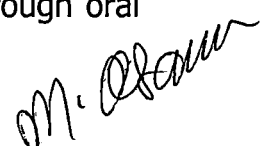
This is a second appeal by **Yusuph Kazimili**, the Appellant herein, who is aggrieved by the decisions of the lower tribunals to wit, the District Land and Housing Tribunal for Kagera at Bukoba in Land Appeal No. 76 of 2021 and Gera Ward Tribunal in Land Case No. 02 of 2021. Both decisions are in favour of the Respondent **Theobard Alchard**. The Appellant is praying for this court to quash and set aside the decisions and proceedings of both, the appellate and trial tribunals. He has also prayed for costs to be borne by the Respondent.

The background of this case is such that the Respondent sued the Appellant in Gera Ward Tribunal for encroaching on his land. To his surprise, the tribunal declared the Respondent as the lawful owner of the suitland. The Appellant's appeal to the District Land and Housing Tribunal was dismissed for lack of merits, hence this Appeal.

The Appellant filed five grounds of appeal which I have reproduced herein for ease of follow up:-

1. That, the appellate Tribunal's assessors were not fully involved and their opinions were not recorded before delivering the judgment.
2. That, the successor Chairman of the appellate Tribunal erred in law and facts for failure to adduce reason(s) for taking over of the proceedings from predecessor Chairman.
3. That, the appellate Tribunal erred in law and facts for failure to identify that the trial Tribunal while proceedings with the matter, was not properly constituted in accordance with the law.
4. That, the appellate Tribunal erred in law and facts for failure to identify that the trial Tribunal's proceedings are tainted with irregularities which make its judgment void in law.
5. That, the appellate Tribunal erred in law and facts for failure to identify that the trial Tribunal's purported Judgment is not a legal judgment for being bias, as it evaluated only the appellant's evidence and left that of Respondent totally untouched before declaring him lawful owner of the suit land .

When the case was called on for hearing, the Appellant was represented by Gildon Mambo, learned Advocate and the Respondent enjoyed the legal services of Samwel Kiura, learned Advocate. Hearing proceeded through oral submissions by the parties.



Counsel for the Appellant made his submissions basing on the grounds in the Petition of Appeal, except for the 5th ground which he prayed to abandon. On the 1st ground he submitted that in the appellate tribunal assessors were not properly involved because their opinions were not recorded as required under Section 23(2) of the **Land Disputes Courts Act** [Cap. 216 RE 2019] that at page 6 of the proceedings, on 2nd August 2022 the day for reading assessors' opinions, their opinions are not seen to be delivered, it only shows '*Maoni ya wajumbe leo. Hukumu itasomwa....*'. He thus argued that in the absence of assessors' opinions the proceedings are a nullity. In support of this ground counsel cited the case of **Edina Adam Kibona v. Absolom Swebe (SHELI)**, Civil Appeal No 286 of 2017 (CAT Mbeya) (unreported) at page 6 paragraph 2 where the court insisted on the importance of reading the assessors' opinions. He also cited the case of **Antudius Auston v. Martin Mutayoba**, Land Appeal No. 20 of 2022 (HC Bukoba), where the court went ahead to show how the same needs to be recorded. He thus prayed for the court to nullify the proceedings.

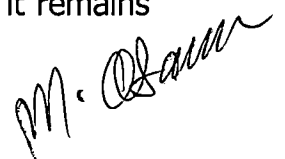
On the 2nd ground of appeal, the Appellant submitted that proceedings indicate that one chairman took over the matter from another without recording reasons for so doing. The proceedings indicate that the matter started before R. Mtei. On 02nd August 2022 P.J. Makwande took over. No reasons are recorded for taking over. Counsel referred the court to the case of **Interconsult Ltd v. Mrs. Nora Kasanga & Another**, Civil Appeal No. 267

1998 (CAT at Dsm) (unreported), where the Court of Appeal at page 23, held that it was irregular to take over proceedings without assigning reasons for so doing, otherwise the proceedings vitiate.

On the 3rd ground of Appeal, the Appellant argued that the trial tribunal was not properly constituted as from the very beginning the record is irregular. Coram has not been recorded on every sitting of the tribunal. It was recorded only twice, on the hearing day and when the suit land was visited. Counsel argued that it was contrary to Section 11 of the **Land Disputes Courts Act** (supra). Counsel also cited the case of **Abdallah Ramadhan v. Joyce Balige**, Misc. Land Appeal No. 46 of 2022 in which the Court of Appeal, at page 7 held that '*coram needs to be recorded in every sitting of the tribunal, failure to do so vitiates the proceedings.*' He thus prayed for the court to nullify the proceedings of the tribunal for this ground as well.

On the 4th ground of Appeal, counsel argued that the proceedings of the trial tribunal did not contain dates, except on the day the suit land was visited which too vitiates the proceedings. He thus prayed that this court allows the appeal, quashes and sets aside the proceedings and judgments of both lower tribunals.

The Respondent on his part begun with the 4th ground of appeal whereby he agreed that coram did not indicate the dates. He however argued that the Appellant has not cited any authority to support his argument thus it remains



to be a mere opinion as neither parties' rights have been prejudiced. He invited the court to consider Section 45 of **Land Disputes Courts Act** (supra) which is to the effect that *no decision of the tribunal shall be reversed on account of proceedings unless it has occasioned injustice.*

On the 3rd ground, the Respondent did not dispute the positions of the cited cases. He however argued that the Appellant has not shown specifically on what dates the coram was not recorded. From the 1st day, coram shows 4 members were there of which one of them was a female member as required by the law. He therefore prayed for this ground to be dismissed.

On the 2nd ground of Appeal, counsel for the Respondent did not dispute the position of the law cited by the Appellant. Counsel however invited the court to consider the circumstance of each case. He argued that in this case, the proceedings of the appellate tribunal was of Hon. Mtei, but then the next following day of 30th June 2022 was a mere mention thus taking over by another chairman was not fatal. He distinguished the case of **Interconsult Ltd** (supra) from circumstances of this case and prayed for the court to consider the normal practice of mentioning of matters on the first day of taking over by the new chairman. Counsel also invited the court to follow the steps taken by the Court of Appeal in the case of **Josephine Mangala Msema v. Registered Trustees of PEFA Kigoma**, Land Appeal No. 25 of 2014 (CAT Tabora) (unreported), where the Court did not nullify the whole proceeding but only

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from where the successor Judge took over without assigning the reasons for taking over the case.

Lastly, on the 1st ground of Appeal, on the assessor's opinions not being reflected in the proceedings of the appellate tribunal, counsel submitted that the same are reflected at page 5 of the Judgment but not the proceedings where they are indeed not reflected. Counsel was however quick to add that Appellant's rights were not prejudiced by this omission which he prayed for the court to consider it as a minor error. Counsel invited the court to apply the *overriding objective principle* to cure this matter. Counsel also referred this court to the case of **Josephina Mangala** (supra) where the Court held that assessors may be called to give their opinion and the procedure may be rectified from where there is such a defect. He thus prayed for the appeal to be dismissed for lack of merits. In the alternative, in respect of the 1st and 2nd grounds counsel prayed that only the defective proceedings be quashed for rectification but not the whole proceedings.

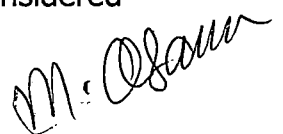
In rejoining, the Appellant stated that on the 4th ground of appeal, it is the practice of the courts that records have dates, for reasons of transparency. He also submitted that Section 45 of **Land Disputes Courts Act** (supra) cannot cure this omission and reiterated his arguments on the 1st and 3rd grounds. On the 2nd ground counsel replied that the irregularities are fatal and cannot be cured thus should be nullified as per the case of **Halfan Sudi v.**

M. Sudi

Eliezer Chichiri [1998] TLR 527. He finally reiterated his prayer of allowing the Appeal with costs.

Having followed the rival parties' submissions, consulted the relevant legislation as well as the case law, the question before me is whether the Appeal has merits. I have considered the submissions on all four grounds submitted by the rival counsel.

Concerning the 1st ground on the issue of assessors not being properly involved in the appellate tribunal because their opinions were not recorded as required under Section 23(2) of the **Land Disputes Courts Act** (Cap 216 R.E. 2019); I wish to make reference to the relevant provision for reasons of clarity. The Section provides that '*the tribunal shall be duly constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment*'. This requirement is amplified under Regulation 19(2) of the **Land Disputes Courts (the District Land and Housing Tribunal)** Regulations, 2003 which imposes a duty on the chairman before making his judgment, to require every assessor present to give his opinion. By not giving their opinions, the assessors were not fully involved as correctly submitted by the Respondent and conceded by the Appellant. The effect of not involving assessors as required by law has been held to be a fatal irregularity, vitiating the proceedings (see the case of **Interconsult Ltd** (supra)). As to the prayer by the Respondent that the omission be considered

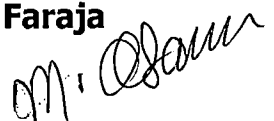


as minor and curable by the overriding principle, the answer is such that *'performance of obligation is mandatory and cannot be cured by the overriding principle* (see the case of **Josephine M. Msema v The Registered Trustees of PEFA Kigoma**, Civil Appeal No. 490 of 2021 (CAT Tabora) (unreported) at pages 10-12. This has also been the trend followed in the cases of **Edina Kibona** (supra) and **Josephine Msema** (supra), among others. I find this ground to have merits and therefore sustained.

On the 2nd ground of appeal, the issue for determination of this court is whether the omission to record reasons for succession of chairmen vitiates the proceedings and the resultant judgment. The **Civil Procedure Code**, which is applicable to land disputes by virtue of Section 51(2) of **Land Disputes Courts Act** (supra), under Order XVIII Rule 10(1) governs succession of judicial officers. The provision provides 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 legal provision has been interpreted in a number of cases including the cases of **Interconsult Ltd** (supra) **Leticia Mwombeki v Faraja**

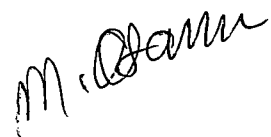


Safaradi, Civil Appeal No. 133 of 2019, (CAT Dsm) (unreported) and **M/S Georges Centre Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (CAT Dsm) (unreported), that:-

'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 Respondent's contention that the successor chairman took over the matter on the mention date does not hold water because the proceedings clearly indicate that the matter had been chaired by Hon. Mtei then at some point the proceedings were taken over by Hon. Makwande to the very end. Interestingly the Judgment contains two names. Mtey is at the top of the page while at the end, there is the name of Hon. Makwande. This by itself is a fatal defect. Nevertheless, the omission to record reasons for taking over the matter can be found in **Leticia's** case (supra) 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

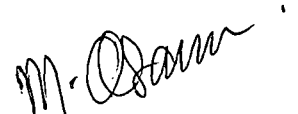


the root of the matter and occasioned a failure of justice.

From the above analysis, this ground is sustained, as failure to fully involve assessors is an incurable omission. The remedy for which is to nullify the proceedings, Judgment and order(s).

I wish to combine the 3rd and 4th grounds on the issue of the trial tribunal not recording the coram at every sitting nor writing dates. The position of the law is clear that coram should be recorded in every sitting as per Section 11 of the **Land Disputes Courts Act** (supra). Also, the case of **Abdallah Ramadhani** (supra) is relevant. In that case, as cited by the Appellant, it was held that '*coram needs to be recorded in every sitting of the tribunal, failure to do so vitiates the proceedings.*' Coram has not been recorded on every sitting of the tribunal. It was recorded twice only. But then as the dates do not appear in the proceedings, it is difficult to follow them and know when the coram should have been recorded. Without doubt, the Appellant was prejudiced by the way the proceedings in the tribunals below were conducted. Consequently, these grounds succeed as well.

Counsel for the Appellant prayed for the court in case it finds the proceedings to have been defective instead of nullifying whole proceedings, to only nullify the defective part. I have thoroughly considered this prayer, however, from the above analysis, the whole proceedings of the trial tribunal are a nullity. This being the case, proceedings based on nullity are also a nullity.

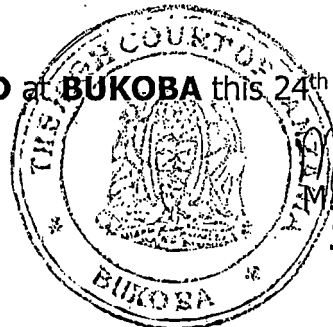


Therefore, I do not see any other option than nullifying the proceedings of both tribunals below. Therefore this Appeal has merits.

In the final analysis, the Appeal is allowed. The proceedings of both lower tribunals are hereby quashed and set aside for being a nullity. Due to circumstances of the case, no order as to costs is given.

It is so ordered.

DATED at **BUKOB** this 24th day of March, 2023.



M. P. Otaru
M.P. Otaru
Judge

Court:-Judgement delivered this 24th March 2023 in the presence of the parties, Mr. Gildon Mambo counsel for the Appellant and Mr. Samwel Kiula counsel for the Respondent.

The right of appeal is explained to the parties.



M. P. Otaru
M.P. Otaru
Judge
24/03/2023