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

LAND APPEAL No. 32 OF 2022

(Arising from Misc. Land Case Appeal No. 43 of 2021 of the High Court of Tanzania at Bukoba, Misc. Land Application No. 36 of 2019 of the High Court of Tanzania at Bukoba, Misc. Land Application No. 69 of 2016 of the High Court of Tanzania at Bukoba, Misc. Application No. 54 of 2015 of the High Court of Tanzania at Bukoba, Originating from Application No. 116 of 2012 of the District Land and Housing Tribunal for Kagera at Bukoba)

GEORGIA MALANGIRWA ..... APPELLANT

VERSUS

1. **ARISTIDES PHILIPO**
2. **FIDELIS GEREON** **..... RESPONDENTS**
3. **JULIETH DIDAS**

JUDGMENT

27th April & 16th June 2023

OTARU, J.:

The Appellant **Georgia Malangirwa** was also Applicant in Application No. 116 of 2012 in the District Land and Housing Tribunal for Kagera at Bukoba. On 8th June 2015 when the matter was scheduled for hearing, she did not appear. The Application was therefore dismissed for her non-appearance. Aggrieved, she applied for restoration of the dismissed Application. The trial Chairman did not consider the advanced reasons to be 'good and sufficient to warrant restoration' thus, the Application was refused in November 2015. Aggrieved still, the Appellant filed this Appeal basing on five grounds of Appeal. It is significant to note that since 2015, the Appellant had prosecuted five other applications in a wake of seeking justice concerning very matter.

The Appeal contains the following grounds of Appeal;-

1. *That, the trial tribunal grossly misdirected itself in law and facts assessing and finally making a decision against the appellant while being improperly constituted,*
2. *That, the lower tribunal erred in fact by ignoring the tenable reasons for non-appearance advanced by the appellant,*
3. *That, the lower tribunal erred in law and fact by failure to consider overall conduct of the appellant herein before the trial tribunal,*
4. *That, the lower tribunal erred in law and fact by condemning the appellant unheard; and*
5. *That, the lower tribunal acted in contravention of the law by ignoring the fact that the 3rd Respondent had neither good nor paramount root of title in the suit premises.*

When the matter was set for hearing, the Appellant was represented by Ms. Erieth Barnabas, learned Advocate, through legal aid. The case proceeded *ex-parte* against the 1st Respondent and abetted against the 2nd Respondent, who died before the matter was heard. The 3rd Respondent enjoyed the services of learned Advocate Mathias Rweyemamu who also represented the Respondent in the trial tribunal. The matter was argued by way of oral submissions.

On the 1st ground of Appeal, the Appellant stated that the Application for restoration was dismissed by the trial chairman without the presence of the two

assessors who are required to give their opinions. She argued that sitting with assessors was mandatory under Section 23(1) & (2) of the **Land Disputes Courts Act** (Cap. 216 R.E. 2019). She argued that although Rule 22 of the **Land Disputes Courts (District Land and Housing Tribunal) Regulations** (GN No. 174 of 2003) provides for exceptions, none of them include the Application for restoration. She thus reasoned that, as the chairman contravened the law, even the decision reached was wrong.

Counsel for the Appellant consolidated grounds 2 and 3. She contended that since filing the Application in 2012, the Appellant has always been appearing as scheduled. That on 8th June 2015 the case was dismissed while she was within the premises of the tribunal. She contended that the Appellant did not hear the case being called and it was the only time that she did not appear on the scheduled date.

In addition to the above, counsel contended that since 8th June 2015, her client who at the time had no legal representation, had been tirelessly seeking to restore the dismissed Application, in vain. Not even once did her client relax. Counsel invited the court to consider the conduct of the Appellant and allow the Appeal. She relied on the case of **Romulus Msunga v Sukari Maribate,** Misc. Civil Application No. 107 of 2019 (HC Mwanza) (unreported) that *the conduct of the Applicant has to be taken into account*. Basing on this ground, counsel prayed for the court to allow the Appeal and set aside the dismissal order so that the matter is determined on merits.

On the 4th ground, counsel for the Appellant argued that, as the Application was dismissed for non-appearance, the Appellant was condemned unheard. Counsel thus prayed for the fundamental right to be heard to be given back to her client.

On the 5th ground, the Appellant argued that the 3rd Respondent had no good title to the suit land therefore she had no *locus standi.* In support of her argument, counsel cited the case of **Lujuna S. Balonzi v Registered Trustees of CCM** [1996] TLR 2003 that a person cannot bring proceedings or defend in court without having *locus standi.*

In conclusion, counsel prayed for the Appeal to be allowed with costs; the dismissal order be set aside; order the case to be heard on merits before the District Land and Housing Tribunal and any other order as may be deemed just to grant. She also contended that no right of the 3rd Respondent will be prejudiced if the Appeal will be allowed.

Rebutting the Appeal, Mr. Mathias Rweyemamu prayed to adopt the filed Reply to the Memorandum of Appeal. He further responded on each ground as argued by the Appellant's counsel. He maintained that the 1st ground of Appeal is misconceived because assessors were not required by law to be present at the hearing of the Application. Counsel argued that the dismissed Application being interlocutory fell within Rule 22(e) of the **Land Disputes Courts**

Regulations (supra) which did not necessitate presence of assessors at the hearing thereof. He thus urged the court to ignore that ground.

Arguing the 2nd and 3rd grounds of Appeal, the 3rd Respondent contended that the Appellant lied about not being called on the day the matter was dismissed. He contended that the application was rightfully dismissed by the trial tribunal because the Appellant was absent. That her application to set aside the dismissal order was denied because the same lacked convincing reasons. He continued to pray for dismissal of the Appeal on this ground as well.

Concerning the fundamental right to be heard under ground 4 of Appeal, counsel for the 3rd Respondent vehemently submitted that the said right is not automatic but has limitations subject to the laws of the land. The law has set specific procedure for specific purpose which the trial tribunal followed as required.

On the 5th ground of Appeal, counsel for the 3rd Respondent submitted that the 3rd Respondent had a right over the suit land because it was the property of her clan. In conclusion, counsel was firm that the grounds had no merits and therefore they should be dismissed in their entirety. He therefore prayed that the Appeal be dismissed with costs.

Having heard the rival submissions, I have considered the parties' arguments, the law as well as the court record. I am thus of the view that the question before this court is whether the Appeal has merits or otherwise.

M. Obaun

On the 1st ground, concerning the composition of the tribunal, as correctly submitted by both parties, Section 23 of the **Land Disputes Courts Act** (supra) is relevant. As a general rule, the law requires that the District Land and Housing Tribunal be composed of a chairman and two assessors. Regulation 22 of the **Land Disputes Courts Regulations** (supra), provides for exceptions to the general rule. The provision reads as follows;-

Regulation 22. *The Chairman shall have powers to determine:-*

(a) preliminary Objections based on points of laws;

(b) applications for execution of orders and decrees;

(c) objections arising out of execution of orders and decrees;

(d) ***interlocutory applications***

According to Mr. Rweyemamu, the order of the trial tribunal dated 30th November 2015 was interlocutory order, which under Regulation 22 (supra) can be determined by the chairman without the aid of assessors. An interlocutory order as defined in the case of **Junaco (T) Ltd & Another v Harel Mallac (T) Ltd**, Misc. Civil Application No. 473 of 2016 (CAT Dsm) where the Court of Appeal of Tanzania quoted with approval the statement of Lord Alverston in the case of **Bozson v Altrincham Urban District Council** (1903)1 KB 547 who stated at page 548 that;-

'does the Judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it

ought to be treated as final order. But if it does not,
it is then, in my opinion an interlocutory order.

The impugned order has not determined the rights of the parties. Therefore, as correctly submitted by the Respondent, the Application fell within the ambits of Regulation 22(d) of GN No. 174 of 2003 (supra), which does not require the aid of assessors at the hearing. Accordingly, this ground has no merits and is therefore dismissed.

In considering the 2nd and 3rd grounds of Appeal concerning the reason for non-appearance of the Applicant on the scheduled date as well as her conduct after the dismissal, as contended by the Appellant's counsel, the Appellant has been consistent that the reason for her absence was not hearing the case being called while within the tribunal's premises. The day of the dismissal was the only day she did not appear before the chairman. Then the Appellant's conduct after the dismissal had been striving to set aside the said decision. Counsel for the Respondent stated that the Appellant lied about not being called. I have not seen anywhere on record where the Appellant said so. What the Appellant stated was that she did not *hear* the case being called. This is different from the case not being called. The Appellant has always been attending her case save for the day of the dismissal. After the dismissal, the Application to set aside the dismissal order was filed promptly, albeit unsuccessfully. There are five Applications filed by the Applicant in the High Court in relation to the case at hand. All of them were filed in an attempt to get

an opportunity of being heard. As such, basing on the case of **Romulus Msunga v Sukari Maribate** (supra), I am persuaded to consider this ground positively as the conduct of the Applicant has always been consistent in seeking for justice. I therefore find this ground to have merits. This in turn leads us to the 4th ground of Appeal.

On the 4th ground of Appeal; none of the parties disputed about the right to be heard being a fundamental right of the parties. However, I agree with the Respondent, that right is not absolute. It has its limitations subject to applicable laws. The trial tribunal is mandated by law to dismiss matters for non-appearance of Applicants, which he did. Therefore, this ground lacks merits and is hereby dismissed.

The 5th ground of Appeal is questioning the title of the 3rd Respondent over the suit land. This is the very subject of the dispute in the trial tribunal, yet to be determined to finality. This issue requires evidence to be adduced by both parties, hence it cannot be part of the Application before this court. As such, I have no mandate to decide upon it. I leave it to the trial tribunal to decide.

In the final analysis, this Appeal succeeds basing on the 2nd and 3rd grounds of Appeal. Consequently, the Appeal has merits and is hereby allowed. The decisions and Orders dated 8th June 2015 and 30th November 2015 in Land Application No. 116 of 2012 in the District Land and Housing Tribunal for Kagera

at Bukoba are hereby quashed and set aside. The matter to proceed on merits before the trial tribunal. Each party to bear own costs.

DATED at **BUKOBA** this 16th day of June, 2023.

M. P. Otaru
Judge

Court: Judgment is delivered in court in the presence of both, the Appellant and the 3rd Respondent in person.

The right of appeal is duly explained to the parties.

M.P. Otaru
Judge
16/06/2023

THE HIGH COURT OF TANZANIA
BUKOBA