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

LAND CASE APPEAL No. 09 OF 2022

(Arising from the Applications No.56 of 2017 from the District Land and Housing Tribunal of Kagera at Bukoba)

SIMON KAJUGUSI BANDAULA.....APPELLANT

VERSUS

CYPRIAN KASHANGAKI.....RESPONDENT

JUDGMENT

19th May & 23rd June 2023

OTARU. J.:

The Appellant **Simon Kajugusi Bandaula** sued his nephew the Respondent **Cyprian Kashangaki** in the District Land and Housing Tribunal of Kagera at Bukoba over ownership of land located at Kishao-Kyelima Village, within Ishunju Ward, Missenyi District in Kagera Region (the suitland). The Appellant claimed that the suitland was *Abagabo's* clan land which should be handled to him as clan appointed caretaker thereof. He challenged the Respondent's possession of the suit land bestowed upon him by one Mukasaizi Rutwe, whom he claimed to have had no power to do so, so the Appellant prayed to the court to expel the Respondent from the suit land.

It is on record that Mukasaizi Rutwe was the wife of Rutwe Bandaula who had three daughters and two sons. The sons are Joshua Rutwe and Sospeter

Rutwe. Each son had a piece of land, whereby, the suitland was Joshua's. In 1964 Joshua left for Uganda and is yet to come back. He left his mother Mukasaizi on his land, which she decided to bequeath upon the Respondent through a Deed of Gift. Rutwe Bundaula also had two brothers, Nkonjelwa and Kajugusi. The Appellant is a son of Kajugusi, while the Respondent is a son of one of Nkonjelwa's daughters.

At the trial, the Appellant called four witnesses to prove that the land was *Abagabo's* clan land and that he was given the duty to bring it back within the clan. The Respondent on his side called two witnesses. At the end of the trial, reasoned that the suit land was not clan land but family land belonging to Rutwe Bandaula and his wife Mukasaizi; such that Mukasaizi, as the land owner had mandate and power to transfer the suit land to the Respondent. The tribunal held that the Appellant did not have ***locus standi*** to claim the suit land. It declared the Respondent a lawful possessor of the same while dismissing the Appellant's claim. Aggrieved, the Appellant filed this Appeal at the High Court containing ten grounds of Appeal.

The Appeal was heard by way of written submissions. Submissions for the Appellant were drafted by Mr. Pereus Mutasingwa Sarapion, learned Advocate while the Respondent's were drafted by Mr. Lameck John Erasto, learned Advocate as well.

The Appellant grouped and argued his grounds of Appeal as three grounds. The first ground was about there being two conflicting Decrees from the same decision. The second ground was that the suit land is the land of the *Abagabo* clan and; third, that the tribunal was not properly constituted.

On the first ground, the Appellant strongly submitted that there were two Decrees extracted from the same decision. That one of the Decrees declared him the winner. The other declared the Respondent. He strongly contended that the one declaring him the winner was the correct one and that the other one was merely confusing. The Appellant cited a number of authorities in support of his arguments.

On the second ground, the Appellant submitted that the trial tribunal misdirected itself while there was ample evidence that the suit land was *Abagabo* clan's land. He referred to the proceedings of the tribunal and challenged the Deed of Gift produced by the Respondent; arguing that according to the rites of Haya tribe, a woman has no power to dispose or redeem clan land. In support of this argument, he cited relevant Government Notices as well as the case of **Evarister Kajuna v. Thereza Jacob** [1973] TLR 10.

On the third ground, the Appellant submitted that the tribunal was not properly constituted because assessors' opinions were not recorded as per requirement under Section 23(1) and (2) of the **Land Disputes Courts Act**

(Cap. 216 R.E. 2019). He claimed that lack of assessors' opinions was a fatal omission vitiating the proceedings. He thus prayed for the trial proceedings to be nullified for that reason.

In response the Respondent submitted that; on the first ground, there was only one decision of the tribunal and one Decree. The Decrees appear to have been two because the first had wrongly declared the Appellant as the winner thus had to be corrected and re-extracted to declare the Respondent the winner thereby reflecting the reasoning and the order in the Judgment.

On the second ground, the Respondent insisted that the Appellant had no *locus standi* to claim the suit land which is a family land and not the *Abagabo* clan land. He insisted that without *locus standi* one cannot sue or claim anything for lack of interest therein. He cited the cases of **Petro Misalaba v. Mabula Sanane** Misc. Land Appeal No. 21 of 2020, **Julius Mganga v. Robert Malando,** HC Civil Appeal No. 112 of 2004, **Zuhura Bakari Mnutu v. Ali Athumani,** HC Misc. Civil Application No. 09 of 2015.

The Respondent also maintained that the land was legally bequeathed upon him by Mukasaizi through the Deed of Gift. That the trial tribunal rightly held that Mukasazi had powers of bequeathing the land to him. In support of his argument he cited the case of **Lusius Kapungu v. Conrad Challe Kapungu** Misc. Land Application No. 526 of 2021.

On the third ground, concerning lack of assessors' opinions; the Respondent submitted that assessors' opinions were not there because their tenure had expired before the case was concluded. He made reference to page 9 of the Judgment where the chairman stated that *'shauri halina maoni ya wajumbe kwa kuwa mikataba ya Annamary na Bwahama ilikwisha wakati kesi/shauri linaendelea'.*

In rejoinder, counsel for the Appellant insisted that the two varying Decrees do not contain clerical and arithmetic corrections as permitted by Section 96 of the **Civil Procedure Code** (Cap. 33 R.E. 2019). That the correction of the Decrees will require alteration of the whole Judgment, rendering the whole trial a nullity.

Lastly the Appellant prayed to this court to allow the Appeal and invoke the provisions of Section 43(1)(a)&(b) of the **Land Disputes Courts Act** (supra) and Rules 32 and 33 of Order XXXIX of the **Civil Procedure Code** (supra) by quashing and setting aside the said Judgment and proceedings in the trial tribunal and declare the suit land as the property of *Abagabo* clan belonging to Joshua Rutwe.

Having carefully considered the rival arguments by the parties and having examined the record of Appeal as well as the relevant law, the issue this court is invited to consider is *whether the Appeal has merits.*

On the issue of there being two conflicting decisions and Decrees; without taking much time on this, there is only one decision delivered by the trial tribunal. There is also one Decree extracted from that decision. The first degree contained a clerical error whereby it erroneously named the Appellant as the winner, contrary to the holding in the Judgment. As correctly submitted by the Respondent, the Decree was then corrected to reflect the Judgment. Thus, the Decree that names the Respondent as the winner reflects the substance of the Judgment. This ground therefore lacks merits and collapses.

On the second ground, the Appellant continued to persist that the suit land belonged to Abagabo clan tracing back to their grandfather Bandaula and beyond. However, none of the witnesses was able to show that the suit land was within the clan for more than two generations, the reason the tribunal held that it belonged to Rutwe Bandaula and his wife Mukasaizi as first owners. The land was handed over to their son Joshua Rutwe in 1937. When Joshua left for Uganda in 1964, the land was left under the care of his parents, which then passed over to Mukasaizi upon the death of Rutwe. Mukasaizi having grown old needed to be cared for, but Joshua did not leave any known children behind. It was fortunate that the Respondent cared well for his grandmother. As a sign of appreciation, she decided to bequeath the suit land upon him until/unless Joshua comes back.

In the case of **Lujuna Shubi Ballozi v. Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203 it was held that;

> *'In order to maintain proceedings successfully, a plaintiff or an applicant must show that not only the court has power to determine the issue, but* ***also he is entitled to bring the matter before the court.****'*
> (Emphasis mine)

The Court of Appeal cemented on the said principle in the case of **Godbless Jonathan Lema v. Musa Hamisi & 2 others,** Civil Appeal No. 47/2012 that the issue of *locus standi* goes to the root of the case. The Appellant has not been able to show that the land was within the clan for generations such that it could qualify to be clan land. Therefore, the position as declared by the trial tribunal remains unchanged. The suit land is family land rather than clan land. It was therefore properly gifted to the Respondent by his grandmother who had the requisite power and authority to do the same to whoever she wished.

Due to the fact that the suit land is not *Abagabo* clan land, the Appellant lacks *locus standi* to sue or claim on behalf of the *Abagabo* clan. Neither can he sue on behalf of Joshua Rutwe because he has not been able to show that he was given such mandate by Joshua. Having said so, this ground fails as well.

On the third ground, concerning lack of assessors' opinions; although assessors' opinions need to be given as per Section 23(1) and (2) of the **Land**

Disputes Courts Act (supra), the opinions are lacking because their tenure had expired before the case was concluded. This is explained by the Respondent that the chairman of the tribunal in the proceedings as well at page 9 of the Judgment, in clear terms has stated that assessors' tenure ended before the trial was concluded. Section 23(2) and (3) of the **Land Disputes Courts Act** (supra), provide as follows;-

S. 23(2) The district land and housing 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.

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.

By virtue of Section 23(2) of the **Land Disputes Courts Act** (supra), assessors' opinions are a necessary requirement before Judgment is composed. However, such requirement may be dispensed with if any or all assessors are absent. Please see Section 23(3) above. The trial tribunal having explained the absence of the assessors is exempted from such a requirement under Section 23(3) of the **Land Disputes Courts Act** (supra). As such, the composition of

the tribunal has not been affected by the absence of the assessors' opinions. This ground therefore fails as well.

In the final analysis, as all grounds of Appeal have failed, the question as to whether this Appeal has merits is answered in the negative. Consequently, the Appeal is hereby dismissed for lack of merits. Each party to bear own costs.

It is so ordered.

DATED at **BUKOBA** this 23rd day of June 2023.

M.P. Otaru
Judge

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

M.P. Otaru
Judge
23/06/2023