

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

AT BUKOBA

LAND CASE APPEAL NO. 65 OF 2022

(Arising from the District Land and Housing Tribunal for Muleba at Muleba in Application No. 17 of 2016)

EDIPHONCE RUSENENE 1ST APPELLANT

ALISTIDES ANDREA 2ND APPELLANT

SIMEON SIMON 3RD APPELLANT

VERIUS KILIMUGISHA 4TH APPELLANT

VERSUS

ZEBADIA ZAKAYO RESPONDENT

JUDGMENT

Date of last Order: 25.07.2023

Date of Judgment: 28.07.2023

A.Y. Mwenda, J.

Before the District Land and Housing Tribunal for Muleba at Muleba Mr. Zebadia Zakayo (The respondent) filed Application No. 71 of 2016 against the appellants for trespass onto his land. At the end of the trial, the respondent was declared as the rightful owner of the land in disputed. Aggrieved the appellants filed the present appeal with three (3) grounds. The said grounds read as follows;

- 1) That, the learned chairman immensely erred in law by denying the appellant's rights of representation and hearing hence vitiated the proceedings and prejudiced his justices. (sic)*

- 2) That, the learned chairman even failed to guide the appellant to pursue the procedure for the leave to defend himself after having recording his presence during the proceedings. (sic)*
- 3) That, after even conducted the ex-parte (sic) the trial chairman misdirected himself by finally delivering the decision basing on the contradicting testimonies over the events that had transpired on the subject matter.*

During the hearing of the present appeal the appellants were represented By Mr. Lameck John Erasto, learned counsel while the respondent appeared in person without legal representation.

When invited to submit in respect of the grounds of appeal Mr. Lameck begun with the 1st and 2nd grounds where he submitted that the Hon. Chairman erred in law when he denied the appellants right of legal representation. He submitted that during the hearing of the said application the appellants were represented by Mr. Mjuni learned counsel. He said on 30.07.2021 the 1st respondent, now the 1st Appellant informed the tribunal that their advocate had an emergency, and the tribunal adjourned the matter for hearing on 27.08.2021 on the date fixed for hearing, the said advocate did not enter appearance, but the 1st appellant informed the tribunal the reasons which hindered their advocate from entering appearance. Despite the said information, the Hon. Chairman refused to adjourn the matter, instead, he ordered the hearing to proceed. The learned counsel submitted that the 1st appellant informed the Hon. Chairman that he

was unable to proceed with the hearing of the preliminary objection in the absence of his advocate strangely, the Hon. Chairman proceeded determining and dismissing the said preliminary objection. Having so dismissed the preliminary objection the hearing of the main application was fixed to 27.10.2021. The learned counsel was of the view that, by dismissing the preliminary objection in the absence of his advocate the appellants were denied their right to legal representation. To support this point, he cited the case of *ALCADO NTAGAZWA VS BUYOGELA BUNYAMBWA* [1997] TLR 242.

Regarding the 3rd ground of appeal, the learned counsel submitted that the role of assessors was not observed as Hon. Chairman recorded the assessors' opinion in a summary form. According to him, this was contrary to regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) G.N No. 174 of 1963 which requires Assessors to give out their opinion in writing and the same opinion be read before the parties in court. The learned counsel submitted further that when the said opinion was read out the 1st appellant was present but other respondents were not present. In support of his argument, he cited the case of *ELIBARIKI MALLEY VS SALIMU H. KARATA*, CIVIL APPEAL NO 67 OF 2022(CAT). Having said so he concluded his submissions by stating that the whole tribunal's proceedings is tainted with illegality. He then prayed this appeal to be allowed with costs.

Responding to the submissions by the learned counsel for the appellants, the respondent submitted that the Hon. Chairman was correct to order the

preliminary point of objection hearing to proceed because the appellants' advocate did not issue the notice of absence. According to him that was unnecessary delay.

Regarding involvement of assessors, he submitted that assessors were present and aired their opinion in writing although he doesn't know if the said opinion is in the tribunal's file. He then prayed this appeal to be dismissed.

In rejoinder the learned counsel for the appellant averred that the respondent seems to be unaware as to whether assessors aired their opinion or not. According to him what seems to be their opinion did not come from their mouths. He thus concluded his rejoinder by reiterating to his submissions in chief and prayed this appeal to be allowed.

Having gone through the Court's records and the submissions by both parties, the issue for determination is whether this appeal is meritorious.

In the present appeal the appellant filed 3 grounds of appeal but this court decided to deal with the 1st ground only as the said ground is capable of finalizing this matter. The said ground is in respect of denial of the right of legal representation to the appellant.

At the outset it is important to note that the right to legal representation, which applies to both civil and criminal proceedings, is fundamental part of human rights and guaranteed by Article 13 (6) (a) of the Constitution of United Republic of Tanzania (as amended from time to time) under the umbrella of the right to

fair trial or fair hearing. This position has been stated by this court in the case of SIBONIKE ANYINGISYE MWASALEMBA VERSUS TEOFILO KISANJI UNIVERSITY (TEKU), MISC. CIVIL APPLICATION No. 02 OF 2020

In the matter before the District Land and Housing Tribunal, the appellants hired and had the legal services of one Mr. Mjuni, learned advocate. His name was recorded from the proceedings dated 19.03.2021. From the records, it is clear that the appellants raised a preliminary point of objection and the same was set for hearing on 30.07.2021. On that date, the learned advocate did not enter appearance. The trial Tribunal was informed that he was indisposed. Having gotten such information, the tribunal adjourned the matter to 27.08.2021 where, upon being informed by the 1st appellant that again the appellant's advocate had an emergence, the Hon. Chairman ordered the 1st appellant to proceed with the hearing of the preliminary objection by himself. He replied that he was told by him that he was unable to proceed in absence of his advocate, the Hon. Chairman dismissed the preliminary objection and went on fixing the hearing date for the main application.

This court is mindful of the powers by the Hon. Chairman to order a party to proceed with the hearing by himself **when his advocate default appearance for no good cause**. The court is also mindful of the power by the Hon. Chairman to dismiss the matter **upon refusal by the party to proceed with the hearing by himself for no good cause**. These powers are covered

Regulation 13(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation G.N. No. 174 of 2003 which reads as follows,

"Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal the tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the tribunal may make an order that the application be dismissed or make such other orders as may be appropriate."

In the present matter, before issuing an order to the 1st Appellant to proceed with the hearing of the Preliminary objection by himself, the Hon. Chairman ought to have inquired on the nature of the said emergence to determine as to whether the advocate's absence was grounded on good cause or not. He however did not do so. Also, regarding the 1st appellant ought refusal to proceed with the hearing of the preliminary objection without his lawyer, such refusal to be weighed by the Hon. Chairman to again, satisfy himself on whether such refusal was justifiable as good cause or not. Had he considered that, he would have noted that since what was before the tribunal at that time was a point of law, then the 1st appellant, being a layman, wouldn't be able to proceed with its hearing by himself. In the said circumstances, the Hon. Chairman was expected, for interest of justice to have ordered the said preliminary objection to either be adjourned or issue an order for it to be disposed by a way of written

submission. Failure to do so lead to no conclusion other than a denial to the appellants rights to legal representation.

On that basis, this court finds merits in this appeal, and it is hereby allowed. The proceedings from a point where the Hon. Chairman ordered the 1st appellant to prosecute the preliminary objection by himself dated 30.07.2021 are nullified and its subsequent judgment is set aside. This file is remitted before the District Land and Housing Tribunal for hearing of the preliminary point objection with immediate effect and the same shall be heard before another Hon. Chairman. Each party shall bear its own costs.

It is so ordered.

A.Y. Mwenda
Judge
28.07.2023

Judgment delivered in chamber under the seal of this court in the presence of the Appellants and in the present of Mr. Zebadia Zakayo the Respondent.

A.Y. Mwenda
Judge
28.07.2023