

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA

LAND APPEAL NO. 125 OF 2021

*(Originating from Land Application No. 159 of 2020 of the District Land and Housing
Tribunal for Mara at Musoma)*

SAMWEL CHARLES MOGENGE **APPELLANT**
(Administrator of the Estate of the Late
Charles Mogenge Kerindo)

VERSUS

MASIMA BARU MARO **RESPONDENT**

JUDGMENT

29th & 30th August, 2023

M. L. KOMBA, J.:

On 04/11/2020 appellant lodged a land complaint against the respondent, Land Application No. 159 of 2020 (the application) at the District Land and Housing Tribunal for Mara at Musoma (the Tribunal), claiming that the respondent trespassed into his land which was formally owned by his late father (**Charles Mogenge Kerindo**) and that respondent asked the late for a favour of using the disputed land. Being among the family member, the late Charles Mogenge conceded and allow respondent to use the disputed area. Charles Mogenge owned the said land way back since

Operation Vijiji. In 2015 appellant demanded the area but respondent refused to surrender claiming that the land belongs to him. Appellant prayed the Tribunal to pronounce him as the lawful owner and restrain respondent from trespassing over the said land. He also prayed the Tribunal to order vacant possession over the disputed land.

After a full trial Chairman was of the finding that the appellant failed to prove his claims that the disputed land once was owned by his late father Charles Mogenge Kerindo and proceed to pronounce the respondent the lawful owner of the disputed land. Unsatisfied by that decision, the appellant lodged the present appeal with three (3) grounds of appeal.

When the appeal was set for hearing this court noticed irregularity of which needed to be rectified. In cherishing rights to be heard, parties were invited to address this court in irregularity noticed that the claim form which was filed in the tribunal did not indicate the size and demarcation of the disputed land and the Hon. Chairman did not append his signature after recording testimony of witnesses.

Both parties appeared in person, without any representation. The appellant was the first one to address this court and he decided to start with his

second ground that the presiding Chairman of the Tribunal changed before the matter was determined and they were not informed of the reason for that change. Naming the Chairmen who handled his case, he started with Hon. Kaare, J. T who heard the case from beginning and heard all witnesses and later on judgement and assessors' opinion were delivered by Hon. Kitungulu E. He lamented that Hon. Kitungulu did not hear the parties but he prepared judgment and prayed this court to allow his appeal.

On the issue of size of the disputed land he submitted that, the area was not measured but it is estimated to be like 25 acres. He informed this court that the trial Tribunal visited the locus in quo but it did not take measurements. Appellant being a lay person he had nothing to submit on the signing of witness testimony.

Respondent on the other side he informed this court that he doesn't know the size of the land which he disputing with the appellant, what he remembers is that the Chairman visited that disputed area. On the change of the chairmanship, he submitted that the presiding Chairman was Kaare then changed to another Chairman who handled the case. Again, he has nothing to say about signing after completion of each witness testimony.

From the above parties' submissions, both noted the change of presiding Chairman. Reading proceedings, from admission of the claim form on 04/11/2020 to hearing of witnesses till closing of the defence case on 22/02/2021 the Tribunal was chaired by Hon. Kaare, J. T. For some reasons not apparent on the record, on 25/3/2021 appeared Hon. Kitungulu, E. who ordered assessors opinion to be read on 16/04/2021 which was read under his presence and informed the Tribunal of the judgement date which was 15/06/2021. When he took over, Kitungulu E. did not record any reason of doing so but he proceeded. Record shows the judgment was prepared by Hon, Kitungulu, E. and was delivered on 15/06/2021.

I wish to state at the outset that, the law is settled in regard to the succession of judges, magistrates or chairman as the case at hand. It gives them power to deal with the evidence taken before another judge or magistrate where the predecessor judge, magistrate or chairman is prevented by reason of death, transfer or other cause from concluding the trial of a suit. For clarity, Order XVIII rule 10(1) of the CPC provides as follows:

*'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.'* [Emphasis added].

It is in this regard that, in **National Microfinance Bank vs. Augustino Wesaka Gidimara T/A Builders Paints & General Enterprises**, Civil Appeal No. 74 of 2016 (unreported) the Court of Appeal quoted with approval its decision in **M/S Georges Limited vs. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) where it was held as follows with regard to the above provision:

*"The general premise that can be 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.** There are number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial*

*officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. **Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised.*** [Emphasis added]

The interpretation and the rationale behind existence of Order XVIII Rule 10(1) of the CPC in the effect that, recording of reasons for taking over the trial of a suit by a judge is a mandatory requirement as it promotes accountability on the part of successor judge/magistrate or chairman. This means failure to do so amounts to procedural irregularity. For it is upon assignment when a judge or magistrate is clothed with authority to entertain a particular matter. Therefore, change of successor chairman in the Land Application No. 159 of 2020, reasons for the re-assignment and take over were of most important to be indicated.

In the circumstances, it is settled that, failure by the said successor chairman to assign reasons for the re-assignment made him to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity. See **Mariam**

Samburo (Legal Personal Representative of Late Ramadhani Abas) vs. Masoud Mohamed Joshi and two Others (Representative of the Estate of Late B. G. Vaghela), Civil Appeal No. 109 of 2016 CAT at DSM. I shall not proceed to the way forward for this irregularity for reasons I will adduce at the end of my analysis.

Further, although I called the parties to address this court on the requirement of Order XVII Rule 5 of the Civil Procedure Code Cap 33 [R.E 2019] (the CPC), they did not. Being laypersons in law, I understood them. But the same should not be left unattended. Having carefully perused the proceedings of the trial Tribunal I am not hesitating to state that, the learned trial chairman did not comply with the provisions of Order XVII Rule 5 of the CPC. The said provision provides for the manner of recording the evidence of the witnesses in trials before a magistrate. For purpose of clarity, I find it appropriate to reproduce the respective section hereunder:

*" 5. The evidence of each witness shall be taken down in writing, in the language of the court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and the judge or magistrate **shall sign the same.**"*

From the above position of the law, it is mandatory for the trial magistrate and in the case at hand, the chairman to sign the evidence of each witness he records. The record show Hon. Chairman did not sign after evidence of all witnesses, this is not the law. Signing of the evidence is among the proof that what was recorded was actually adduced in court, otherwise lacks authenticity and the same is enough to nullify the proceedings at the part of taking evidence.

On the issue of boundaries, it is noticed that both parties agree that during trial they did not disclose the size and demarcation of disputed land. I find this is among the requirement of the law that the disputed area should be define by size and demarcation. Appellant was supposed to state the size of the land he owns and the extent of trespass or if the whole area was trespassed, he was supposed to indicate so. That was the gist of regulation 3(2) of GN. No. 174 of 2003 made under the Land Disputes Courts, Cap 216. See **Martin Fredrick Rajab vs. Ilemela Municipal Council and Synergy Tanzania Company Limited**, Civil Appeal No. 197 Of 2019 CAT and **Hashim Mohamed Mnyalima (Administrator of the Estate of the late Mwamtumu Shehe Mashi) vs. Mohamed Nzai and 4 others**, Land Appeal No. 18 of 2020 HC Tanga that the land disputes registered in

our tribunal or courts must identify specific size, location and demarcations. Short of that the claim is said to be not properly instituted. So far as the claim form did not comply with the requirement of law as per regulation 3(2) of GN. No. 174 of 2003 therefore, at this stage the appeal will not be dismissed as it was not heard on merit neither it be ordered trial *denovo* as the foundation of it, a claim form, was defective. However, the irregularity which has been noticed, cannot be left in court record. See **Hassan Rashid Kingazi & Another vs. Serikali ya Kijiji cha Viti**, Land Appeal no. 12 of 2021.

In exercising revisional powers under section 43(2) of the Land Dispute Courts Act, Cap 216 R.E 2019, I hereby quash the judgment and set aside proceedings of the District Land and Housing Tribunal in land Application No. 159 of 2020. I proceed to struck out this appeal as it originates from nullity proceedings. Any interested party in the dispute may initiate fresh and proper suit in competent forum in accordance to laws regulating land matters. Considering the issue that dispose the case raised by this court *suo motto*, I make no order as to costs.

It is so ordered.




M. L. KOMBA

Judge

30 August, 2023

Judgement Delivered in chamber in the presence of both parties who appeared in person.


M. L. KOMBA

Judge

30 August, 2023