

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND CASE APPEAL NO. 85 OF 2022

(Arising from the District Land and Housing Tribunal for Bukoba, Land Application No. 43/2021)

ZELIDA CHARLES..... APPELLANT

VERSUS

STEVEN KANYANKOLE..... RESPONDENT

JUDGMENT

30th November & 14th December, 2023

BANZI, J.:

Before the District Land and Housing Tribunal for Bukoba (the trial tribunal), the respondent instituted a suit against the appellant and Alfredina Robert who is not a party to this appeal claiming that, the appellant invaded his land located at the street and ward of Ijuganyondo, Bukoba Municipality (the suit land) which he acquired by way of purchase from Adrian Kasigwa in the year 2015 and 2017. The appellant apart from denying the claim, she also contended to be the legal owner of the suit land through purchase from Adrian Kasigwa in 2013.

After receiving the evidence of both sides together with documentary exhibits, the trial tribunal decided in favour of the respondent and declared

him as the lawful owner of the suit land. The decision of the trial tribunal did not impress the appellant who through Mr. Lameck John Erasto, learned counsel filed this appeal on two grounds. However, at the hearing, Mr. Erasto raised two irregularities on the proceedings before the trial tribunal. Mr. Joseph Bitakwate, learned counsel who appeared for the respondent conceded to the irregularities.

According to Mr. Erasto, the appellant through his learned counsel was denied with opportunity to cross-examine SU2 who was the second respondent before the trial tribunal which is contrary to the dictates of the law under section 147 (1) of the Evidence Act [Cap. 6 R.E. 2022]. The same irregularity was committed by denying SU2 to cross examine SU1. He further submitted that, this irregularity is fatal and vitiates the proceedings of the trial tribunal. In addition, Mr. Erasto raised another irregularity concerning failure to record the opinion of assessors in the proceedings. He added that, this omission through a number of cases was held to be fatal to the extent of vitiating the proceedings. He cited cases of **Y. S. Chawalla & Co. Ltd v. Dr. Abbas Teherali** [2019] TZCA 23 TanzLII, **Peter Makuri v. Michael Magwega** [2022] TZCA 54 TanzLII and **Sikuzani Saidi Magambo and Another v. Mohamed Roble** [2019] TZCA 322 TanzLII to support his

argument. He therefore prayed for the proceedings to be nullified and the matter be remitted before the trial tribunal for retrial.

On his side, Mr. Bitakwate conceded to both irregularities. Expounding further, he stated that, learned counsel for the appellant/first respondent was not given opportunity to cross-examine SU2 which amounts to denial of right to be heard. Concerning the second irregularity, he further conceded that, the opinion of assessors is not reflected in the proceedings and that goes to the root of the matter. In Sikuzani's case, such irregularity was held to be improper which vitiated the proceedings. Thus, he prayed for the proceedings to be nullified and each party to be left at liberty to institute a fresh suit under current position of the law.

I have carefully considered the submissions of learned advocates for both sides in respect of the irregularities intimated above. Starting with the first one concerning denial of right to cross-examine witness, it is important to underscore that, where there is more than one party in a particular case, each one must be given the opportunity to cross-examine the witness including to cross-examine each other unless otherwise, such party has refrained to exercise his right. It is also established principle that, the right to cross-examine is a fundamental one to any judicial proceedings and thus

the denial of it will usually vitiate the proceedings and resulting into the decision being overturned. This was stated in the case of **EX-D.8656 CPL Senga Idd Nyembo and Others v. Republic** [2020] TZCA 381 TanzLII, where the Court of appeal emphasised on the right of accused person to cross-examine witness and co-accused. The Court went on and held that:

"Unless, a party has waived his right to cross examine the witness, the testimony of a witness cannot be taken as legal evidence unless it is subject to cross-examination. Consequently, the testimony affecting a party cannot be the basis of decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of cross- examination."

In the matter at hand, learned advocates of both sides were in consensus that, before the trial tribunal, SU1 (the appellant) through her learned advocate was denied with the right to cross-examine SU2. Likewise, SU2 was denied her right to cross-examine SU1. The proceedings from page 23 reveal that, the appellant/first respondent was the first witness for the defence as SU1. It should be noted that, the appellant/first respondent was represented by Mr. Lameck John Erasto, learned counsel whereas, the second respondent who testified as SU2 appeared in person unrepresented.

It is clear at page 28 of the proceedings that, after SU1 completed her chief testimony, learned counsel for the respondent/applicant was given opportunity to cross-examine her. However, the second respondent was not given opportunity to cross-examine SU1. Equally, at page 32 to 33 of the proceedings, learned counsel for the appellant/first respondent was denied with his right to cross-examine SU2. Failure of the learned Chairman to give each respondent the opportunity to cross-examine each other, breached the principle of right to be heard which is a fundamental constitutional right in Tanzania by virtue of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. In the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 CAT (unreported) it was emphasised that, denial of right to be heard, vitiates the proceedings and the decision thereof. Moreover, in **EX-D.8656 CPL Senga Idd Nyembo and Others v. Republic** (supra) it was stated that:

"Indeed, there was no procedural fairness to the parties in the proceedings as it is evident in the record of appeal. Granting each party any opportunity to be heard in the proceedings embraces the principles of natural justice and addresses every question of fairness of the procedure or

due process. Thus, granting some parties the right to be heard while denying others such right may be broad enough to include the rule against bias, since a fair hearing must be unbiased.

It follows that where there is no fair procedural hearing like in this case, the proceedings are vitiated. To emphasize this point, in The Director of Public Prosecutions v. Sabinus Inyasi Tesha and Raphael J. Tesha (1993) TLR 237, it was held that a denial of a right to be heard in any proceedings would definitely vitiate the proceedings” (Emphasis is added).

Since in our case, one party was given opportunity to be heard but SU1 and SU2 were denied such right as intimated above, there is no way the proceedings of the trial tribunal can survive. It is the considered view of this Court that, such irregularity vitiates the proceedings and cannot be cured by section 45 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] (the Land Disputes Courts Act) because it is about denial of right to be heard which touches on the fairness of the trial. This in itself, suffices to dispose of the appeal and I do not see any need to discuss the second irregularity.

That being said, I hereby invoke revisional powers under section 43 (1) (b) of the Land Disputes Courts Act and nullify the entire proceedings of

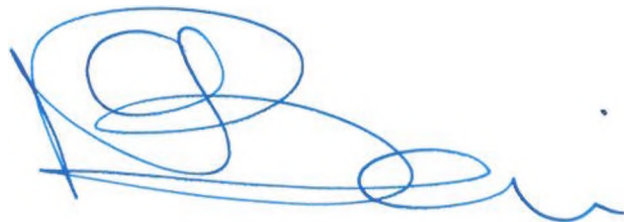
the trial tribunal. Consequently, I quash the judgment, set aside the decree and remit the case file to the trial tribunal for expeditious retrial before another Chairman and a new set of assessors. Since the irregularity was caused by the trial tribunal, I make no order as to costs.

It is so ordered.



I. K. BANZI
JUDGE
14/12/2023

Delivered this 14th day of December, 2023 in the presence of the appellant and her advocate, Mr. Lameck John Erasto, learned counsel who is also holding brief of Mr. Joseph Bitakwate, learned counsel for the respondent. Right of appeal duly explained.



I. K. BANZI
JUDGE
14/12/2023