

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPEAL NO. 42 OF 2022

(Arising from Application No. 44 of 2015 of Bukoba District Land and Housing Tribunal (R. Mtei-Chairman))

JONES JOHN.....APPELLANT

VERSUS

SEMFORIAN SEVERIN.....1ST RESPONDENT

DICKSON BONIPHACE.....2ND RESPONDENT

JUDGMENT

13 & 17/02/2023
E. L. NGIGWANA, J.

This appeal stems from the decision of the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No.44 of 2015 dated 15/06/2022 whereby the appellant herein sued the respondents on allegation that the respondents had encroached into his land which he purchased on 16/06/2011 at **Tshs. 2,000,000/=** from one Cyridon K. Berenard (now deceased). The said land situates at Bushaga Street, Nshambya Ward within Bukoba Municipality and its estimated value is **Tshs. 7,500,000/=**

On the other hand, the first respondent denied the allegation claiming that the land in dispute belongs to him after he had inherited it from his deceased father one Severian Shamba. On his side, the 2nd respondent alleged that

the disputed land belongs to his brother namely; Pius Salvatory, therefore, he was not the right party to be sued.

Upon trial, the DLHT decided the matter in favour of the 1st respondent Semforian Severian. In other words the, the 1st respondent was declared the lawful owner of the disputed land. The appellant, being aggrieved by the decision of the DLHT, appealed to this court by way of memorandum of appeal with seven (7) grounds of appeal as follows;

1. *That, the trial Chairman erred in law and procedure after finding that the 1st respondent has sold the suit land to Sulait Suleiman, then declare the suit land to be of the 1st respondent instead of ordering the said current purchaser to be one of the parties in the proceedings, otherwise the said Sulait Suleiman has impliedly lost his alleged purchased land to the 1st respondent without being heard thereto;*
2. *That, the learned Chairman erred in law for not recording the assessors' opinion in the court record thus the said reference of the assessors' opinion were not part of the record hence extraneous matters;*
3. *That, the Chairman erred in law to visit the locus in quo without accompanying the assessors who are part of the court's corum;*

4. *That, the procedure for paying a visit to the locus in quo was not properly followed by recording some facts thereat in the court record apart from referring them in the judgment, thus the alleged evidence thereto were an extraneous matters, hence the tribunal did not observe fair trial;*
5. *That, the learned Chairman erred in law for failure to record the assessor's opinion in the court proceedings apart from referring them in the judgment;*
6. *That, the Chairman (Mtei) further erred to rehear the evidence of the appellant whereby he had testified on 16.11.2017 before E. Mogasa, then without assigning the reason, the current Chairman again heard the appellant on 30.7.2020.*
7. *That, the decree was delivered against the weight of evidence.*

Wherefore the appellant prays to this court to allow this appeal with costs, declare him as the rightful owner of the disputed land. *Alternatively:* to quash the proceedings, judgment and decree of the trial tribunal, and order re-trial before another Hon. Chairman and a new set of assessors.

At the hearing of this appeal, the appellant had the legal services of Mr. Alli Chamani, learned advocate whereas the respondents had the legal services

of Mr. Dastan Mujaki, learned advocate. Prior to the hearing of this appeal, Mr. Chamani prayed to merge the 2nd and 5th grounds of appeal into a single ground of appeal that reads: **That, the trial tribunal erred in law for not involving assessors in the hearing of the matter as per the law**". He did so believing that, if argued, will suffice to dispose of this appeal. The prayer was supported by the respondent's advocate, and I supported their position as well.

Arguing the herein above ground, Mr. Chamani briefly submitted that failure to effectively involve assessors in the hearing and determination of land matters vitiates the proceedings. He added that in the case at hand, assessors' opinions were not reflected in the trial tribunal proceedings, and when the tribunal visited the locus in quo, assessors were not involved. He added that the omission is fatal as per the case of **Rev. Peter Benjamin versus Tumaini Mtazamba@Mwema**, Land Appeal No.69 of 2019 HC-Bukoba where the proceedings were nullified, judgment and resultant orders were quashed and set aside for improper involvement of assessors in the hearing and determination of a land matter. He urged this court to be guided by its previous decision and maintain the same position.

In reply, Mr. Mujaki submitted that where assessors have been involved in the proceedings continuously and finally invited to give their opinion in writing and filed them in court, and duly read to the parties, and marked in the proceedings that they were read to the parties, the omission to record them in summary in the proceedings is curable. He added that, it is unfortunate that in the present case, the trial tribunal visited the locus in quo without assessors, and the proceedings in relation to the visit in quo formed the base of the tribunal decision, thus, as a matter of law no way those proceedings and the resultant judgment and orders can be allowed to stand.

He added that, since the court is not so sure whether the witnesses who testified in this case as well as assessors and the Hon. Chairman are still there, it is not safe to nullify the proceedings in relation to locus visitation and quash and set aside the judgment and orders thereto only. He added that the interest of justice demands for the nullification of the whole proceedings, quash and set aside the judgment and resultant orders of the DLHT and order a re-trial.

Having considered the oral submissions advanced by the learned advocates and upon my careful perusal of the proceedings of the DLHT, the issue for

determination is whether failure by the DLHT to effectively involve assessors in the hearing and termination of land Application No. 44 of 2015.

Section 23 (2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], provides that;

*"The District Land and Housing Tribunal shall be constituted when held by a chairman and two assessors **who shall be required to give out their opinion before the chairman reaches the judgment.**"*

Regulation 19 (2) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations, 2003 also imposes a duty upon the Chairman to require every assessor present at the conclusion of the hearing, to give his or her opinion in writing. The same provides;

*"Notwithstanding subsection (1) **the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.**"*

Reading the herein above provisions of the law, we learn that the law requires that;

- (a) *The Hon. Chairman/Chairperson must sit with not less than two assessors;*
- (b) *The Hon. Chairman must require every assessor present at the conclusion of the hearing to give his opinion.*
- (c) *The assessors' opinion must be writing;*
- (d) *The assessors' opinion must form part of the court record;*
- (e) *Assessors' opinions must be read to the parties to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict.*
- (f) *The proceedings must reflect that (a), (b), (c), (d) and (e) above have been duly complied with.*
- (g) *The Hon. Chairman must consider the opinion of assessors in the judgment, but shall not be bound by it, but where the Chairman disagrees with the opinion of assessors, he must assign reasons.*

It is wrong to make change of assessors in the course of the hearing of the suit or appeal but **also it is wrong to allow the assessors who did not hear the suit or appeal to its finality to opine it.** See the case of **Ameir Mbaraka and Another versus Edger Kahwili**, Civil Appeal No.154 of 2015 CAT (Unreported), **Bubi Mulilo and Two others versus Shimba Jikonoka**, Land Appeal No.22 of 2021 HC Kigoma and **Johansen M.**

Timanywa versus Godfrey Muganyizi, Land Appeal No.80 of 2021 HC-Bukoba.

In the case at hand, as submitted by Mr. Alli Chamani and conceded by Mr. Dastan Mujaki, page 80-82 of the DLHT typed proceedings revealed that assessors namely; **Annamary** and **Jenister Rugakingila** were not involved at all in the locus in quo proceedings conducted on 03/06/2022. However, they were finally invited to give their opinions and each opined infavor of the appellant herein but the Chair person differed with them.

Since the said assessors were not involved in the locus in quo proceedings and since the said proceedings formed part and parcel of the tribunal proceedings and since they were considered in the judgment and formed the base of the decision the proceedings, the resultant judgments and orders are nothing but a nullity because the tribunal was not properly constituted. Page 10 of the typed judgment reads:

"Baraza hili lilipotembelea eneo la mgogoro lilionna kwamba siyo kweli kwamba eneo la mgogoro lina ukubwa wa ekari 5 kama alivyosema mwombaji bali lilikua na ukubwa wa nusu (1/2) ekari kama alivyosema mjibu maombi wa kwanza. Hata hivyo Baraza lilipotembelea eneo la mgogoro, na kwa mujibu wa maelekezo ya mwombaji, ni kwamba sehemu anayoishi

mwombaji (Makazi ya Mwombaji) alinunua kutoka kwa Sylinidion Bernado mwaka 2011. Sehemu hii anayoishi mwombaji ambayo alinununa kutoka kwa Sylinidion haina mgogoro. Pamoja na kwamba sehemu hiyo anayoishi Mwombaji ikiwa ni makazi na biashara (ambayo aliuziwa na Sylinidion) hakupima wakati baraza lilipotembelea eneo la mgogoro inawezekana ikawa ni sehemu ya hizo ekari tano (5) alizosema"

With no doubt the omission noted in the matter at hand vitiates the locus in quo proceedings, and for that matter, the resultant judgment and orders cannot stand.

It appears that the proceedings before the order of the visit have no problem, but since the court is not sure as stated by Mr. Mujuki whether the witnesses who testified in the trial tribunal, assessors who sat with the Chairman and the Chairman himself are still there, the only safe way is to nullify the whole proceedings, quash and set aside the judgment and resultant orders of the DLHT and order a re-trial.

In the event, I am constrained to invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Courts Act, [Cap 216 R.E 2019] to nullify the proceedings of the DLHT, quash and set aside the judgment and orders thereto.

For avoidance of doubt, Application (Plaint) and the Written Statement of Defence (W.S.D) in respect of Land Application No. 44 of 2015 remain intact. The case file is remitted to DLHT to be assigned to another Chairman and new set of assessors. Given to the fact that the anomaly was caused by the Tribunal, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 17th day February, 2023.




E. L. NGIGWANA

JUDGE

17/02/2023

Court: Judgment delivered this 17th day of February, 2013 in the presence of the Appellant in person, 1st respondent, Mr. Mujaki, learned counsel for the respondents, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Sophia Fimbo, B/C.




E. L. NGIGWANA

JUDGE

17/02/2023