

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 199 OF 2021

(Originating from Kinondoni District Land & Housing Tribunal at Mwananyamala in Land Application No.497 of 2007)

KABULA NYOLOBI MABULA (suing as Administrator of the Estate of KAPINGU COSMAS KAPINGU).....**APPELLANT**

VERSUS

VICTOR MASYAGA NYAMHANGA..... RESPONDENT

Date of Last Order: 14.07.2022
Date of Judgment: 12.08.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by KABULA NYOLOBI MABULA as an Administrator of the estate of Kapingu Cosmas Kapingu. The appeal is against the decision of Kinondoni District and Land Tribunal at Mwananyamala (the **Tribunal**) in Land Application No. 497 of 2007 (Hon. L.R. Rugarabamu, Chairman).

The appellant was dissatisfied with the decision of the Tribunal thus filed this appeal with the following grounds of appeal as reproduced:

- 1. That the honourable trial Tribunal Chairman grossly erred in law and fact when he took over the case from*

Hon. Lung'wecha, Chairman who heard all the case and stated the case for judgment which was heard by more than one trial chairman without assigning reasons in accordance with the law.

- 2. That the honourable trial Tribunal Chairman grossly erred in law and fact when he failed to issue summons notifying the parties of the judgment day and proceeded to deliver judgment in absence of the parties.*
- 3. That the honourable trial Tribunal Chairman grossly erred in law and fact when he raised the issue of time limitation suo motto without affording the parties chance to addressed on it before he could compose and deliver the judgment which point formed the basis of the decision.*
- 4. That the honourable Chairman erred in law to dismiss the appellants case on account of being time barred while the same was not time barred, the appellant's cause of action was wrongly computed from the year 1992 while the same accrued when he discovered the respondent's fraudulent survey in the year 2007.*
- 5. That the honourable Chairman erred in law to dismiss the appellant's case while on the available evidence on record there exist overwhelming evidence to prove the allegations based on encroachment since both parties derived their land from the same seller – (DW1 Mr. Francis Nyamavuga).*

The appellant paryed for the following reliefs:

- (i) Judgment and decree of the lowe court be set aside.*
- (ii)The appeal be allowed, and the following orders be issued:*

- (a) *Declaration that the survey that was initiated by the respondent and done by the relevant authority wrongly included the disputed appellant's portion of land thus null and void.*
 - (b) *The respondent is ordered to re-survey his land by removing the appellant's portion of land from his certificate of Title No. 45635 and issue two certificates of title of which one in favour of the appellant at his expenses.*
 - (c) *That the respondents is declared a trespasser on the disputed land be ordered to pay damages in the form of mesne profits for all period the respondent has illegally occupied the land in dispute.*
- (iii) *Costs of the appeal be awarded to the appellant.*

With leave of the court the appeal was argued by way of written submissions. The appellant had the services of Mr. Daniel Haule Ngudungi, Advocate while the respondent was represented by Mr. K. Mwitta Waissaka, Advocate.

Submitting on the first ground of appeal, Mr. Ngudungi said that the records are clear that the matter was before Hon. Hemed, Chairman and, then it was later transferred to Hon. Lung'wecha, Chairman who heard the witnesses until when the parties closed their cases, and the matter was fixed for judgment. He said without notice they heard that judgment was delivered on 12/07/2021 and it was Hon. Rugarabamu

who composed the judgment. He said according to Order XVII Rule 10(1) of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) allows a successor judge or magistrate to proceed with the matter if the presiding judge or magistrate is prevented by death, transfer or other cause for finalising the matter. He cited the case of **Charles Chama & Others vs. Regional Manager, TRA & 2 Others, Civil Appeal No. 224 of 2018 (CAT-Bukoba)** (unreported) which quoted the case of **Kajoka Masanga vs. The Attorney General & Another, Civil Appeal No. 153 of 2016** (unreported).

Mr. Ngudungi said the provision cited requires the successor judicial officer to assign reason for the takeover of the file that was heard by another judicial officer. He said in the present case Hon. Rugarabamu had an obligation to assign reasons for the takeover of the file to compose the judgment whereas the matter was heard by Hon. Lung'wecha. He further cited the case of **Dimond Motors Limited vs. K-Group (T) Limited, Civil Appeal No. 50 of 2019 (CAT-DSM)** (unreported). He said with the omission the judgment delivered is a nullity as the successor Chairman who composed the judgment did not assign reasons for the takeover contrary to the law.

As regards the second ground, Mr. Ngudungi submitted that the judgment subject of the appeal was delivered on 12/07/2021 in the absence of the parties according to the typed judgement and decree. He said according to the Order XX Rule 1 of the CPC it is the requirement of the law that judgment has to be pronounced in the presence of the parties therefore notice has to be given to the parties or their advocates. If no notice is given, then the said judgment is a nullity. He cited the case of **Awadh Idd Kajass vs. Mayfair Investment Limited, Civil Application No. 281/17 of 2017** and he prayed for the judgment to be nullified and its pronouncement be in conformity with the law.

Regarding the third ground of appeal, Mr. Ngudungi submitted that according to the typed judgment at pages 11 and 12, the Chairman raised issues of law that the suit was time barred and proceeded to determine it before affording an opportunity to the parties to address the issue. He said this contrary to the law and he relied on the cases of **M/S Flycatcher Safaris Limited vs. Hon. Minister for Land & Human Settlement Development & The Attorney General, Civil Appeal No. 142 of 2017** which quoted with approval the case of **Marguu Ero & 2 Others and RSA Limited vs. Hanspaul**

Automechs Limited & Govinder Senthil Kumal, Civil Appeal

No. No. 179 of 2016. He said reading the whole judgment there is nowhere the parties were accorded opportunity to address the matter and this, according to Mr. Ngudungi, is against the rule of natural justice and vitiates the whole judgment and decree.

Mr. Ngudungi submitting on the fourth ground said the matter was dismissed on account of being time barred while it was not. He said the appellant's cause of action was wrongly computed from 1992 while the same accrued when the appellant discovered the respondent's fraudulent survey in 2007. He said the Chairman said the cause of action arose in 1992 while the record and pleadings of the parties and evidence on record reflect otherwise. He said the appellant discovered trespass in the year 2007 when he wanted to develop the land and that is when the respondent came and chased the appellant claiming that the land in dispute was his land he has surveyed the land and obtained a Certificate of Title. He said the cause of action arose in 2007 and he relied on section 5 of the Law of Limitation Act CAP 89 RE 2019. He observed that it was wrong for the Chairman to compute time limit from when the respondent unlawfully obtained the survey of the land rather than reckoning the

period at the time the respondent chased the appellant from the suit land.

As for the fifth ground, Mr. Ngudungi said according to the available evidence on record there exists overwhelming evidence to prove the allegations of encroachment of the respondent in the suit land. He said the land originally belonged to Francis Nyamvugawa and he sold it to the respondent and Janet Dangio Kapella who later sold the land to the appellant. He alleged that the seller Francis Nyamuvugwa testified to have sold land independent of the other and the whole land including that of the appellant was fraudulently surveyed by the respondent in 1992 and was issued with the Letter of Offer. He said there is overwhelming evidence to prove that the land of the appellant has been encroached and surveyed by the respondent. In conclusion Mr. Ngudungi prayed for the prayers as reflected in the Memorandum of Appeal.

In his reply to the first ground Mr. Mwita Waissaka submitted that the court is best placed to peruse the record and satisfy itself as to the veracity of the appellant's submissions. He said in any case there was

no injustice that was occasioned in the considered judgment of the Tribunal.

As for the second ground, Mr. Waissaka said he does not know with certainty whether summons was issued or not as asserted by the appellant because they do not have the full record of the case file of the Tribunal. He prayed for the court to peruse the record and satisfy itself whether summons was issued or not. He said the cases cited are distinguishable as the same dealt with different set of facts. He nevertheless submitted that the judgment and decree in the instant matter is sound and judicious.

Mr. Waissaka on the third ground submitted that according to the proceedings it is crystal clear that in the pleadings and during the hearing the issue of time bar was referred several times. He thus said it was erroneous for the appellant to allege that the Chairman raised the issue of limitation suo mottu. He said the cases cited are therefore out of context.

As for the fourth ground Mr. Waissaka said the contention that the cause of action was wrongly computed is a non-starter. He said the

pleadings and the evidence on record clearly establishes that the cause of action accrued in 1992. He said it was a mystery why the appellant never disputed this fact during hearing and when the pleadings were made. He said since pleadings and hearing commenced way back in 2007 and this piece of evidence was never controverted by the appellant he is now estopped from doing so at this stage. He said the original litigant Kapingu Cosmas who was witness in the case and other witnesses are now deceased, the allegation at this stage are simply a clever ploy by the appellant to bamboozle the court and obtain unfair advantage.

Mr. Waissaka said the appellant's submissions on the fifth ground does not raise anything worthy for consideration by this court rather it is simply a fishing expedition. He said the allegations that the respondent obtained the land through a "*fraudulent survey*" is astounding because the evidence clearly shows that all procedures by the land authorities in surveying the land and issuing the certificate of title to the respondent cannot be faulted. In conclusion, Mr. Waissaka prayed that the appeal to be dismissed with costs for lack of merit.

In rejoinder Mr. Ngudungi said learned Counsel on the first ground has impliedly admitted that Hon. Lung'wecha did not compose nor deliver the judgment without giving a reason and that is contrary to the law. He said succession of the file has occasioned injustice resulting to the chairman to entertain matters that were not addressed during the trial.

On the second ground Mr. Ngudungi said the issue of summons is not only a matter traceable in court file but rather the parties. He said the respondent could have disputed the fact if he was not in possession of the summons. Otherwise, both the appellant and respondent were not summoned on the date of the judgement which was delivered in absentia contrary to the law.

Mr. Ngudungi reiterated what he submitted in the main submissions in respect of the third, fourth and fifth grounds. He emphasized that it is time for this court to evaluate the contentious submissions and decide especially where the respondent as a neighbour to the appellant was not involved in the survey. He prayed for the reliefs in the Memorandum of Appeal be granted with costs.

I have gone through the submissions by Counsel for the parties. The main issue for consideration is whether the appeal has merit. The grounds of appeal are divided into two; those grounds dealing with irregularities on the procedure at the Tribunal and the rest deals with law and analysis of the evidence as a whole.

As standard practice requires, I will first deal with the procedural irregularities that Counsel for the appellant Mr. Ngudungi has pointed out. The first ground addresses the irregularity on change of the Tribunal Chairmen without assigning reasons. Order XVII Rule 10(c) of the CPC states:

"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."

The provision above is clear that a successor judge or magistrate may take over and proceed to hear a matter to its conclusion where another judge or magistrate has been prevented to proceed on account of death, transfer or any other cause. This principle also covers other judicial officers including Chairpersons at the Tribunal as

was elaborated in the case of **M/S Flycatcher Safaris Limited** (supra) where the Court of Appeal stated:

"In essence the law is well settled on succession of judicial officer. Successor judicial officers are empowered to deal with the evidence taken before another presiding judicial officer where the predecessor judicial officer is prevented from concluding the trial or suit by reason of death, transfer or other cause."

(see also the cases of **MS. Georges Centre Limited vs Attorney General & Another** (supra) and **Kajoka Masanga vs. Attorney General & Another** (supra).

The rationale behind Order XVIII Rule 10(c) of the CPC and the case the cases cited was well illustrated in the case of **Leticia Mwombeki vs. Faraja Safarali & Others, Civil Appeal No. 133 of 2019 (CAT-DSM)** (unreported) where the Court of Appeal stated:

"The essence of the cited order is to ensure that trial commenced by the trial judge or magistrate is completed by the same presiding judicial officer and in case he/she is unable, it is incumbent on the successor judicial officer to assign reasons for the continuation of the trial of a partly heard case. The rationale behind is that the one who sees and hears the witness is better placed to assess the credibility of such witness which is crucial in the determination of the case before the court and furthermore, the integrity of judicial proceedings hinges on transparency without which justice may be comprised."

As for the application at the Tribunal, indeed it was handled by several Chairpersons that is Hon. Hemedi, Mbilinyi, Lungw'echa and Rugarabamu. There is on record by Hon. Mbilinyi that the matter would commence before Hon. Lung'wecha as they have come to assist. In other words there was a special session and the matter was assigned to Hon. Lungw'echa where he took all evidence from 17/08/2016 to 24/07/2020 and ordered for the opinion of the assessors and judgment which was scheduled for 11/09/2020. From there the record is silent until on 26/02/2021 when Hon. Rugarabamu took over and ordered a judgment date which was delivered on 12/07/2021. The record does not show reasons for Hon. Rugarabamu taking over the matter at the last minutes. It is therefore clear as complained by Mr. Ngudungi that there was a procedural error by the successor taking over the case without assigning any reasons contrary to Order 10(c) of the CPC. In respect thereof, the proceedings were thus not proper. This ground of appeal is therefore meritorious.

The other ground on procedure was that the parties were not notified of the date of judgment as required by the law. It was Mr. Ngudungi's

submissions that failure to issue notice is contrary to Order XX Rule 1 of the CPC which states:

"The court after the case has been heard shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates."

(See: the case of **Awadhi Idd Kajass vs. Mayfair Investment Limited** (*supra*))."

In the present case when Hon. Rugarabamu took over and ordered judgment on 12/03/2021 the parties were absent, and the matter was then called on 09/07/2021 and 12/07/2021 when judgment was delivered. And in all these dates the parties were not present and there is no proof that summons was ever issued to the parties. The absence of the parties on the date of delivery of the judgment can easily be confirmed by the decree which does not indicate who were present at the time the Chairman delivered the judgment. Consequently, the delivery of the judgment in the absence of the parties and without notice, makes the said judgment invalid and ineffective in terms of Order XX Rule1 of the CPC. This ground also has merit.

What are the consequences of having improper proceedings and invalid judgment? In the cases of **Leticial Mwombeki** (supra) and **Awadhi Idd Kajass** (supra) the Court of Appeal nullified the proceedings to a certain extent, the judgment and also the decree.

In a similar vein, the proceedings by the successor Chairman Hon. Rugarabaramu from 12/03/2021 to 12/07/2021 are nullified. The judgment, decree and any subsequent orders are also nullified. The file is hereby returned to the Tribunal to compose a fresh judgment before a different Chairman in accordance with the law.

Since these two grounds on procedural irregularities sufficiently disposes the appeal, I shall not endeavour to determine the remaining grounds. The appeal is allowed to the extent stated above, with no order as to costs considering the circumstances of the appeal.

It is so ordered.

V.L. MAKANI
JUDGE
12/08/2022

