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

**LAND CASE APPEAL NO. 26/2018**
(*Arising from land case application No. 145 of 2012 at the District Land and Housing Tribunal of Bukoba*)

**ELIAS ICHWEKELEZA.....APPELLANT**

***VERSUS***

**REV. WILLISON KYAKAJUMBA.....RESPONDENT**

**JUDGMENT**

*Date of last order 19/10/2020*
*Date of judgment 06/11/2020*

***Kilekamajenga, J.***

The owner of the disputed land, Constancia Tega, being a single old woman, lived alone before she relocated to the respondent who was a Pastor of a Church in the village. However, she went through some turbulence in her life including being attacked six times by robbers. The major reason for the attack was that she owned a piece of land which some people waited for her death to inherit it. Wicked people thought that God spared her life for a long time; she ought to have died for such heartless to take the land. Her life and life turbulences can be gleaned for the records of the will she left behind.

Before Costancia Tega met her death in 2010, she sold the piece of land which is the subject matter in this appeal. It is alleged that she invited some clan

members to witness the sale agreement of the disputed land to the respondent. The record available in court file shows that she sold the land on 10th August 2008. On 05th May 2009, she wrote a will stating that she sold the land; she however did not name the person who bought the land but simply said the sale agreement is attached to the will. She invited three clan members to witness the will. It is evident that she did not know how to write and read; so she sought assistance of Jasson B. Bake who drafted the will. Costancia Tega signed the will by writing her name and also punched her finger print to approve the contents of the will. As if that was not enough, she affixed her photo on the will. She thereafter took the will to the village chairman who signed and sealed it. Again, she took the will to the Ward Executive Officer of Biirabo Ward who also signed and sealed the same. She took the will to Nshamba Primary Court for safe custody where she paid for the services and she was issued with a receipt number 35236302 on 02nd June 2009.

Finally, Costancia Tega died on 19th October 2010. After about 89 days, the respondent, who seemed to know about the will, approached Nshamba Primary Court asking for the approval of the will which was attached with the sale agreement of the disputed land to him. The Primary Court was hesitant to grant the respondent's request and therefore ordered one of the deceased's relatives to appear and apply for administration of estates. In the Primary Court, the

respondent posed as the objector to the appointment of administration of estates while insisting the approval of the will. On the other hand, the appellant insisted that the deceased sold the land to George Katomero and Raphael Katomero before the death. The Primary Court remained content that the will was valid and the claims by the respondents were genuine. Finally, the Primary Court appointed the appellant to administrator of the deceased's estates. Immediately thereafter, that means in 2012, the respondent filed a complaint against the appellant (as an administrator of estates of Costancia Tega) seeking orders *interalia* the declaration that he is the lawful owner of the disputed land.

Before the trial District Land and Housing Tribunal for Kagera at Bukoba, the respondent (AW1) testified that he bought the disputed land from Costancia Tega in 2008 at the price of Tshs. 8.7 million. The sale agreement was witnessed by the clan head called Ferdinand Batuzi. He tendered the sale agreement which was admitted and marked as exhibit A1. He argued further that the sale transaction was also stated in the will left by the deceased (Costancia Tega). He tendered the will which was admitted and marked exhibit A2. The respondent further testified that the will was read at the funeral but the appellant caused violence and chaos; it was therefore difficult to read it. After the funeral, the appellant applied for the administration of estates at Nshamba Primary targeting to take the suit land. He tendered the judgment of the Primary Court which was

admitted and marked as exhibit A3. The evidence of the respondent was supported by the evidence of Ferdinand Batuzi (AW2) who testified that, being the clan head, he was informed by Costancia Tega about the sale of the land but none of the clan members was able to purchase it. The land was finally sold to the respondent.

On the defence, the appellant informed the trial tribunal that the deceased died in 2010 and his burial services were led by the respondent. After the funeral, the clan identified the properties left by the deceased. He further testified that the disputed land was sold to George Katomera and not to the respondent. He admitted to know Ferdinand Batuzi as one of the clan members. He alleged that the deceased's will was forged because the deceased did not know how to read and write. He refused to recognise the sale of the land to the respondent. He finally urged the trial tribunal to dismiss the application as the disputed land belongs to George Katomero.

During cross examination, the appellant admitted that the Primary Court declared the will to be valid though he did not appeal against that decision. On re-examination, he further confirmed that the whole land of Costancia Tega was sold to Raphael and George and not to the respondent.

The second defence witness (DW2) was Lazaro Samson Ichwekeleza who also testified that the deceased's land was sold to George Katomero and Raphael Katomero in 2003 and 2005 respectively. Therefore, the deceased had nothing to sell to the respondent.

Elias Ruyobya Sindano (DW3) also testified that the respondent is one of their clan members. He further testified that Ferdinand Batuzi is not the clan head and that when the deceased died, she had sold the land to Raphael Katomero and George Katomero. Therefore, she had no land to dispose of to the respondent. At some point, she alleged that the disputed land belonged to Saada who later bequeathed it to Joel. He further alleged that the witnesses to the sale transaction were not clan members. On cross examination, he insisted that the deceased did not leave behind any land because she had already sold it.

The last witness for the defence was George Steven Katomero who testified that he bought the land from Costancia Tega in 2003; another piece of land was sold to Raphael Katomero. The rest of the land remained in the hands of the deceased's family. He confirmed that he currently occupies the disputed land.

Finally, the trial tribunal decided in favour of the respondent. Being dissatisfied with the decision of the tribunal, the appellant preferred this appeal. The appellant advanced four grounds of appeal thus:

1. *That, the trial tribunal erred in law. It admitted and decided the matter on the basis of the will that offends the law. The vendor had already disposed of her inheritance to Raphael Katomero in 2001 and George Katomero in 2003. The vendor had nothing to bequeath thereafter.*
2. *That, the trial tribunal erred in law and in fact. The respondent wrote, kept in custody and never read the will before, during or after the burial ceremony. He purports there was chaos. But he was the one who conducted all the prayers. He revealed the will after 89 days on 17th January 2011 at the Nshamba Primary Court. While Costancia Tega had died on 19.10.2010.*
3. *That, the trial tribunal erred in law and on facts. The vendor, to wit Costancia Tega as well as the suit land belongs to Lukindi family tree. This family belongs to the Abahasha of Rwazi Kagoma. The suitland and the respondent do not belong to the Abahasha clan of Lwoloba, Bwaishe, Batunzi of Muzinga –Nshamba family tree.*
4. *That, the trial tribunal misdirected itself on law and in fact. The vendor never passed the title to the vendee – the respondent. The suit land belongs to Joel Ichwekeleza and not to the vendor, Constancia Tega. The purported vendor never sought nor obtained consent from the head of the Lukindi proximate paternal clansmen. The ultimate authority for sanctioning sale clan property and title is vested in the clan head and not in the vendor.*

When the appeal was fixed for hearing, the appellant was absent but enjoyed the legal services of the learned advocate, Mr. Bengesi whereas the respondent enjoyed the legal services of the learned advocate, Miss Erieth Kagemuro

Barnabas. During the oral submission, Mr. Bengesi argued that the chairman who decided this matter had no jurisdiction. He stated that the case changed hand from chairman Assey, to chairman Kitunguru and finally to chairman Mogasa and there were no reasons given. The case was partly heard by chairman Assey and later transferred to chairman Kitunguru. Also, chairman Mogasa did not assign any reasons for taking over the case from chairman Assey and Kitunguru. Under **Order XVIII, Rule 10(1) of the Civil Procedure Act, Cap. 33 RE 2019**, the chairman must assign reasons for taking over the case from the predecessor chairman. To buttress the argument, Mr. Bengesi cited the case of **Yono Auction Mart and Court Broker and Dar es salaam City Council v. Augusta John Ntiruka t/a Sanganiye and Food Supplies, Civil Appeal No. 92 of 2017**, HC at Dar es salaam.

The counsel for the appellant further argued that the trial chairman did not consider the evidence of DW4 on the fact that the disputed land was sold to George Katomero (DW4). The land sold to the respondent was not known to the appellant and the alleged deceased's will became known after the dispute arose.

On the third ground, Mr. Bengesi argued that the evidence of DW3 does not feature in the judgement of the trial tribunal. DW3 testified that the persons who witnessed the sale of the land to the respondent were not the residents of the appellant's village. Clan members of the disputed land were not involved in the

sale of the land. On the fourth ground, the counsel for the appellant submitted that the disputed land belonged to Joel Ichwekeleza and not Costancia Tega.

In response, the counsel for the respondent submitted that the argument advanced by the counsel for the appellant on jurisdiction is just an afterthought and therefore a foreign argument in this appeal. She cemented the argument with the case of **Makori JB Wassaga v. Joshua Mwaikambo and another [1987] TLR 88**. When responding on **Order XVIII, Rule 10(1) of the Civil Procedure Code, Cap. 33 RE 2019**, Miss Erieth argued that there is no requirement of giving reasons after taking over a case from a predecessor chairman. She further argued that the case of **Yono** (*supra*) is distinguishable to this case. Miss Erieth further argued that the deceased's will was valid and it was recognised by the Primary Court. She fortified the argument with the case of **Andrea Albert Makoi v. Maria Albert Makoi [2003] TLR 389**. Also, the reason for failing to read the will at the funeral is stated in the judgement (that chaos arose at the funeral). She further argued that the land belongs to the clan and procedures to redeem the clan land ought to be followed by the appellant as it was advised by the trial tribunal.

The counsel for the respondent further argued that there were contradictions in the evidence of the appellant. She supported the argument with the cases of **Mwakatoka and 2 others v. R [1990] TLR 17** and **Michael Hashi v. R**

**[1992] TLR 92**. She insisted that the disputed land belonged to Costancia Tega who later sold it to the respondent in 2008. To buttress the argument, she referred the Court to the case of **Hemed Said v. Mohamed Mbiru [1984] TLR 113**. She finally urged the Court to dismiss the appeal with costs.

When rejoining, the counsel for the appellant argued that a point of law may be raised at any stage. He insisted that the appellant's evidence, especially the evidence of DW3 and DW4, was not considered by the trial tribunal. Costancia Tega had no title over the land because she sold it to George Katomero before her death. He finally reiterated the prayer to allow the appeal.

After considering the submissions from the parties, the grounds of appeal and the evidence adduced before the trial tribunal, it is pertinent at this stage to determine the merits of the grounds of appeal advanced by the appellant. In the oral submission, the counsel for the appellant raised the question of jurisdiction which was not among the grounds stated in the memorandum of appeal. He argued that the file kept on changing hands from one chairman to the other without assigning reasons. I have carefully perused the court file and found out that, before the hearing commenced, the file moved between chairman R.E. Assey and Chenya and there was no reason given for that change.

The issues in the case were framed by Chairman R.E. Assey and hearing commenced before him. The first witness for the complainant was heard before Chairman R.E. Assey and the assessors were Makwaya and Mpanju. The case was later adjourned. The second applicant's witness was heard by Chairman R.E. Assey in the presence of only one assessor (Mpanju) who continued to hear the case until the defence case opened. On 22nd November 2017, the case shifted to chairman E. Mogasa and there were no reasons assigned to the change of chairman. Furthermore, the only assessor who was present was Mpanju. In the judgment, the Chairman E. Mogasa seemed to subscribe to the views of the assessors but in fact there is opinion from only one assessor called Mpanju. There are no reasons stated why the other assessor was dropped.

In relation to the above anomaly, I have considered **Order XVIII, Rule 10(1) of the Civil Procedure Code, Cap.33 RE 2019** which was cited by the counsel for the appellant during oral submission. The order provides thus:

> *10.-(1) 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 above provision of the law is not new in the judicial interpretations. For instance, in the case of **M/S Georges Limited v. Honourable Attorney General and Another, Civil Appeal No. 29 of 2016** (unreported) the Court observed that:

> *'The general premise that can be gathered 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 a 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 witnesses 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.'*

The District Land and Housing Tribunal is strictly bound by the above provision of the law. See, sections 49 and 51(2) of the Land Disputes Courts Act, Cap. 216 RE 2019 and section 180 of the Land Act, Cap. 113 RE 2019.

One may quickly ask, how the appellant was affected by failure to record the reasons for the transfer of the case from one chairman to the other and whether the popular principle of overriding objection may cure such a defect. The Court of Appeal of Tanzania was also confronted with the same argument in the case of **Mariam Samburo (Legal Representative of the Late Ramadhani Abas v. Masoud Mohamed Josh and 2 Others, Civil Appeal No. 109 of 2016** (unreported) and had the following observation:

> *'The above quoted extract provides for a clear 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 the successor judge. This means failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtanga, cannot be cured by the overriding objective principle as suggested by Dr. Lamwai.*

Therefore, assigning reasons for taking over a case from the predecessor judge, magistrate or chairman is a mandatory requirement. According to the above judicial interpretation of the Court of Appeal of Tanzania, failure to do so vitiates the proceedings. In the instant case, as earlier stated, the file kept on bouncing from one chairman to the other without any justifiable reasons something which is against the law.

On the other hand, I have closely considered the composition of the tribunal in terms of **section 23 of the Land Disputes Courts Act, Cap. 216 RE 2019**. The section provides:

> ***23****.-(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.*

As stated above, the case commenced hearing under the chairmanship of R.E. Assey; the assessors were Makwaya and Mpangu. Later, the case was transferred to Chairman E. Mogasa and only one assessor seemed to appear all the time. There are no reasons recorded about the whereabouts of the other assessor. In line with the above provisions of the law, the trial tribunal was not fully constituted and therefore lacked jurisdiction to determine the case to its finality. This serious error therefore renders the whole proceedings of the trial tribunal a nullity.

Generally, the two grounds above are sufficient to allow this appeal because they are significant and at best, go to the root of the case. However, I wish to address some pertinent issues in this case. **One**, on the validity of the deceased's will. As stated earlier, the deceased left a will. The same was approved by the Primary Court and it became apparent that it was valid. The deceased who did not know to read and write assigned Mr. Jasson to draft the

will. The deceased, tried to write her name but she finally endorsed it by punching her finger print. The same will was signed by three witnesses. The person who prepared the will also signed it. The deceased took further steps by taking the will to the village chairman for endorsement. The chairman signed and sealed it. The deceased went further seeking endorsement from the Ward Executive Officer who signed and sealed the will. Thereafter, the deceased took the will to the Primary Court for safe custody; the same was received and kept. Generally, the same will bears about seven signatures apart from that of the deceased. In my view, it complied with the requirement of being endorsed by witnesses.

**Two**, the other contested issued is whether the respondent bought the disputed land from the deceased. The will stated that, after a number of attacks by people who wanted to inherit the land, she sold it. However, the will does not state that she sold the land to the respondent. She only stated that she sold the land and that the sale agreement was attached to the will. In his evidence, the respondent argued that the land was sold to him and the sale agreement attached to the will is the one he entered with the deceased in 2008. However, I am hesitant to believe the respondent's allegation because of the following reasons. **First**, when the deceased was too old to support her own life, she relocated to the respondent who was a Pastor. The deceased stated that she will be living with

the respondent because there was no one to care for her. Until her death in 2010, the deceased stayed with the respondent. The respondent led the deceased's burial services and was all the time present at the funeral. This fact is undisputable by both parties. For that reasons therefore, the respondent had access to the documents left by the deceased. However, it is not clear whether the respondent knew about the will before or after the deceased' death. But what is evident is, the will was not communicated to the relatives of the deceased during the funeral or immediately after the burial services. When the respondent was questioned about this fact, he alleged that there was chaos at the funeral and it became impossible to read it. However, the will was revealed by the respondent about 80 days after the deceased's funeral.

**Second**, the respondent who was not a close relative to the deceased went to the Primary Court calling it to approve the will. He insisted that the deceased stated in the will that she sold the land to him. The Primary Court was hesitant on the respondent's prayer hence it decided to summon one of deceased's brother (appellant) for determination on the validity of the will. The Primary Court which also had a copy of the will did not hesitate to approve the will and went further to grant letter of administration to the appellant so that he can administer the deceased's estates. During the hearing of the case, the respondent did not inform the trial tribunal about the fact that he was the one

who asked the court to approve the will and not the appellant. In his evidence, he kept on insisting that the appellant applied for administration of estate in order to distribute the land that he bought from the deceased. This information was actually hinted by one of the appellant's witnesses and confirmed by the respondent before me. Now, the major question is, if the respondent was the lawful owner of the disputed land, which is currently occupied by George Katomero and Raphael Katomero, why did he approach the Primary Court to approve the will? If the respondent had no hidden agent on the disputed land, he could have informed the deceased's relatives about the presence of the will. In my view, it was unjustifiable for the respondent to remain with the will without informing the deceased's relatives.

**Third**, the persons who witnessed the will were the same persons who witnessed the sale agreement between the respondent and the deceased. It is as if the respondent summoned them to witness the will and the sale agreement. In fact, from the beginning, I was hesitant to believe that an old woman who was believed to be over 80 years and who did not know to read and write could have sought approval of the will from the village chairman, Ward Executive Officer and send it to the Primary Court for custody. I tend to believe that all these schemes were devised by the respondent. It is very unfortunate the all these fishy things

happened in the hands of a Pastor who was expected to display integrity and honesty in the community.

**Fourth**, the respondent consistently insisted that the land was sold to him in 2008, the will was written in 2009 and the deceased died in 2010. However, he stayed for two years before the death of the deceased without attempting to take possession of the land which was, all the time, occupied by George and Raphael Katomero. Even after the death of the deceased in 2010, the respondent did not attempt to possess the land. Instead, he pushed the Primary Court to approve the will. After the appointment of the appellant as the administrator of the estates, the respondent filed a case against him claiming for ownership of the disputed land. The respondent actually never bothered to sue George Katomero and Raphael Katomero who possessed the land. He possibly wanted to use the court processes as a shield owner the land illegally.

**Fifth**, I find it difficult to believe that a piece of land measuring 99 times 28 footsteps could be sold at the price of Tshs. 8,700,000/ in the rural villages of Muleba in 2008. In my view, the price was raised to attract a handsome pay in case clan members wanted to redeem the land.

**Sixth**, the alleged sale agreement believed to dispose the land to the respondent was not approved by the village council or any leader of the village. I

wish to reiterate that, under the law, the grant and management of customary right of occupancy is entrusted to the village council. A person wishing to have a customary right of occupancy may apply for it to the village council. See, **section 22 of the Village Land Act, Cap. 114 RE 2019**. In my view, despite the fact that customary right of occupancy may be in a form of a certificate, the village council is still not excluded from the management of deemed right of occupancy because customary right of occupancy includes both the one given in a form of certificate and the deemed right of occupancy. In addition, **Section 8(1) of the Village Land Act**, imposes an obligation to the village council to manage all village land. The section specifically provides that:

> *'The village council shall, subject to the provisions of this Act, be responsible for the management of all village land.'*

The power of the village council on disposition of customary right of occupancy is further emphasized by **section 34 of the Village Land Act** which provides that:

> *'Unless otherwise provided for by this Act or regulations made under this Act, a disposition of a derivative right shall require the approval of the village council having jurisdiction over the village land out of which that right may be granted.'*

Furthermore, **section 147(1) of the Local Government (District Authorities) Act, Cap. 287 RE 2002** empowers the village council to manage the affairs and business of a village. The section provides:

> *'A village council is the organ in which is vested all executive power in respect of all the affairs and business of a village.'*

As may be gleaned from the above provisions of the law, the village council has power over the customary right of occupancy including the deemed right of occupancy. It is therefore inappropriate and illegal to disregard the approval of the village council whenever selling customary right of occupancy. The Court of Appeal of Tanzania was also confronted with a dispute similar to this in the case of **Bakari Mhando Swanga v. Mzee Mohamedi Bakari Shelukindo and 3 others, Civil appeal No. 389 of 2019**, CAT at Tanga (unreported) and had the following to say:

> *'Even if we assume that the purported sale agreement was valid, which is not the case, then the same was supposed to be approved by the village council...'*

The Court of Appeal went on stating:

> *'Under normal circumstances, it was expected for the appellant after he had executed the purported sale deed with Khatibu Shembilu, to present the document to the village council of Kasiga to get its blessings...The observation we make here is that there is no due diligence on the part of*

*the appellant in the whole process of executing the purported deed of sale. In our view, he ought to have consulted the village council before embarking on the transaction.'*

A sale agreement on customary right of occupancy without the approved of the village council lacks authenticity and such disposition may be ineffectual. In my view, the sale of customary right of occupancy should take the following form: The seller after reaching an agreement with the buyer shall approach the village council. Members of the village council, the seller and purchaser shall identify the neighbours to the land and set-up boundaries. It is always prudent to have standardised form for sale contracts which may be in the custody of the village council. At the end, the sale agreement may be signed by the seller, purchaser, neighbours to the land; it may also be signed and sealed by the hamlet leader (Mwenyekiti wa Kitongoji), the Village Chairman and the Village Executive Officer. If the land belongs to the clan, the clan head must approve the sale agreement as it was stated in the case of **Paulo Alfred v. Gervas Maricianus [1981] TLR 33**. In absence of the clan head, the clan may approve the sale of the clan land. See, the case of **Leonance Mutalindwa v. Mariadina Edward [1986] TLR 120**.

The advantages of involving major stakeholders in the sale of customary right of occupancy are legion. Apart from lessening land disputes, the village council may also earn an income by taxing such land transactions. The village council is well positioned to deter unscrupulous persons who may wish to sell the land to more than one person. Also, when neighbours are involved, conflicts which may arise after the sale of the land may be minimised.

As already indicated above, the trial tribunal proceedings are marred with irregularities. I am also convinced that the respondent never bought the disputed land from the deceased (Costancia Tega). Hence, I allow the appeal with costs. I quash the proceedings of District Land and Housing Tribunal and set aside the decision and decree thereof. Order accordingly.


**Ntemi N. Kilekamajenga**
**Judge**
**06th November 2020**

**Court:**

Judgment delivered in the presence of the counsel for the appellant, Mr. Bengesi and counsel for the respondent, Miss Erieth Barnabas. The appellant was absent and the respondent present in person. Right of appeal explained to the parties.


**Ntemi N. Kilekamajenga**
**Judge**
**06th November 2020**