

TANZANIA / JUDGMENT

charles buchwa vs ally abdu mabaraza 2023 tzhc 17725 6 june 2023

COURT
TZHCDECIDED
6 June 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF BUKOBA AT BUKOBA LAND APPEAL NO. 60 OF 2022 (Arising from Land Application No.
103/2019 District Land and Housing Tribunal for Bukoba) CHARLES
BUCHWA..... APPELLANT VERSUS ALLY ABDU
MABARAZA..... 1st RESPONDENT JONAS
CHARLES..... . 2nd RESPONDENT

JUDGMENT

30th May and 6th June, 2023 BANZI, J,: The Appellant has preferred this appeal against the judgment of the District Land and Housing Tribunal for Bukoba (DLHT) in Application No. 103 of 2019. In that application, the Appellant who was the Applicant, sued the Respondents claiming to be a lawful owner over a piece of land located at Mafumbo street, Kashai ward ("the suit land") which he contends to have purchased from his sisters; Aulelia D. Buchwa and Dorotea D. Buchwa on 30/08/2005. After purchasing it, he erected Kiosk and gave it to his son, the 2nd Respondent. Then he left to Mwanza to nurse his sick mother. On his return in 2018, he was astonished to find it in possession of the 1st Respondent who contended to have bought it from the 2nd Respondent. The 1st | Page case was heard ex-parte against the 2nd Respondent after he had failed to enter appearance despite being served through publication. In his defence, the 1st Respondent contended to have purchased the suit land from the 2nd Respondent on 18/11/2010 who gave him a copy of sale agreement showing that, he bought it from Aulelia D. Buchwa and Dorotea D. Buchwa on 30/08/2015 and the Appellant was one of the witnesses to the said sale agreement (Exhibit Di). After a full trial, the DLHT decided in favour of the 1st Respondent, declaring him the lawful owner of the suit land. The Appellant was ordered to give vacant possession. Aggrieved with that decision, the Appellant, through the services of Candid Attorneys lodged this appeal with five grounds thus;

1. That, the Trial Chairman misdirected himself in Law and in fact when he failed to evaluate evidence on records leading to a conclusion against the weight of evidence on records.

2. That, the Trial Chairman misdirected himself in Law and in fact in not recognizing that the Respondent had no any title of ownership of the disputed piece of land. That the appellant believes that the said Landed property located at Mafumbo, Kasha! within Bukoba municipality belongs to him as he possesses all valid documents for the ownership. 2 | Page
3. That, the Trial Chairman misdirected himself in Law and in fact for basing his judgment on a mere conjunction, personal opinion, and extraneous matters not supported by any apparent evidence on record.
4. That, the trial Chairman erred in law and in fact to disregard the opinions of the Assessors without giving well-built reasons for his move.
5. That, the Trial Tribunal erred in law and facts to deny the Appellant herein an opportunity to call his witnesses who were very crucial to testify on who exactly bought the disputed land from the original owners. At the hearing, the Appellant was represented by Mr. Gerase Reuben, learned counsel whereas, Mr. Niyikiza Seth, learned counsel appeared for the 1st Respondent. As it was at the DLHT, the 2nd Respondent, despite being served by substituted service via Mwananchi Newspaper dated 15th April, 2023, he did not enter appearance. Therefore, pursuant to Order XXXIX Rule 17 (2) of the Civil Procedure Code [Cap. 33 R.E 2019], the appeal was proceeded ex-parte against him. When he was invited to submit on the grounds, Mr. Reuben prayed to abandon grounds 1, 2, 3 and 5 and remained with the 4th ground, which, according to him, suffices to dispose of the appeal. Submitting on that ground, Mr. Reuben raised two complaints. First and foremost, the opinion of two assessors, Dora Rutainulwa and Jenista Rugakingila despite being read over in the presence of parties but the Chairman did not record the same in the proceedings. According to him, this is a fatal irregularity which vitiates the entire proceedings. He supported his point by citing the case of Amelr Mbarak and Another v. Edgar Kahwili, Civil Appeal No. 154 of 2015 CAT at Iringa (unreported) which underscored that, absence of assessors' opinion on the record vitiates the entire proceedings. His second grievance was that, the Chairman violated section 24 of the Land Disputes Courts Act [Cap, 216 R.E. 2019] ("the Land Disputes Courts Act") because in his judgment, he differed with the opinion of assessors without giving reasons. Basing on the alleged anomalies, he urged this court to quash the proceedings and judgment and set aside order. He also prayed for the matter to be remitted to the DLHT to be heard afresh before another Chairman with new set of assessors. In his reply, Mr. Seth strongly opposed the prayer by Mr. Reuben to remit the file to the trial tribunal for retrial because by doing so, it will be a third trial before the tribunal as it was already taken there twice but decided on technicalities. He further submitted that, the opinion was prepared in writing as required by law and the same was read over to the parties on 4 | Page 18/05/2021 as indicated at page 28 of the typed proceedings. He added that, in the judgment although the Chairman differed with such opinion but he did so after evaluated the same. According to him, if there was any error pertaining to assessors' opinion, he left it for the court to issue orders as it seems fit. In a brief rejoinder, Mr. Reuben stated that acknowledgement of the opinion in the judgment did not suffice if the opinion was not recorded in the proceedings.

He therefore prayed for the appeal to be allowed with costs. Having carefully considered the record of the DLHT and the remaining ground of appeal in conjunction with the submissions of learned counsel for both parties, the issue for determination is whether there is irregularity concerning the assessors' opinion. It is prudent to underscore that, for the District Land and Housing Tribunal to be properly constituted in terms of section 23 (1) (2) of the Land Disputes Courts Act, the Chairman must sit with at least two assessors who are mandatorily required to give out their opinions before the chairman composes the judgment of the tribunal. The manner upon which the assessors are required to give their opinion is governed by regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 ("the Regulations") which provides that: 5|Pa g e "Notwithstanding sub-regulation (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 KiswahHh "(Emphasis supplied). According the extract above, it is the requirement of the law for Chairman to require every assessor to give his opinion before the judgment is composed. It is also the requirement of the law for such opinion to be in writing and the same be read over to the parties. The requirements of regulation 19 (2) of the Regulations were discussed by the Court of Appeal of Tanzania in the case of *Edina Kibona v. Absolom Swebe* (Shell)

[2018] TZCA 310 TanzLII and held as follows: 'We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing, It may be in KiswahiiL That opinion must be in the record and must be read to the parties before the judgment is composed. ^ (Emphasis added). 6 I Page It is apparent from the extract above that, before the Chairman composes the judgment, he must comply with the following requirements; one, he must require every one of the assessors to give his opinion; two, such opinion must be in writing and three, the same must be read over to the parties. The rationale behind the reading of opinion to the parties was underscored in the case of *Tubone Mwambeta v. Mbeya City Council*

[2018] TZCA 392 TanzLII where it was stated that: 'We are increasingly of the considered view that, since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as 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. " The same position was also stated in the case of *Zubeda Hussein Kayagali v. Oliva Gaston Luvakule* arid Another [2021] TZCA 162 TanzLII where it was held that: "Moreover, in order for the trial to be taken to have been effectively conducted with aid of assessors, the Chairman ought to require each assessor present to give his 7 | Pa g e or her written opinion and the same be read over to the parties for them to know the nature of the opinion which would be considered by the Chairman in the judgment/" Reverting to the case at hand, the record shows that, after closure of defence case, learned counsel

Gerase Reuben who was representing the Applicant/Appellant prayed for the date for assessors' opinion. The Chairman ordered the original file to be placed before the assessors for preparation of their written opinion. Also, it set 19/04/2021 as the date for assessors to give such opinion. On 19/04/2021, the opinion was not given on the reason that, it was not ready. Then it was re-scheduled to 18/05/2021. The record further reveals that, on 18/05/2021, the assessors gave their opinion which was read over to parties (the Appellant and the 1st Respondent). For ease of reference, I wish to quote what transpired on that date: "Tarehe: 18.05.2021 Akidi: R. Mtei- Mwenyekiti K/B: Mizambwa Wajumbe: Jenister, Dorah Rutainuiwa Mwombaji: Yupo Wajibu Maombi: 1- Yupo, 2- Hayupo Baraza: Shauri Hnakuja kwa ajiH ya maoni. Wadaawa: Tupo tayari kupokea maoni. 8 | Page Baraza: Maoni yamesomwa kwa wadaawa. Saini: R. Mtei Mwenyekiti 18.052021 Amri: Hukumutarehe 25.05.2021 Saini: R. Mtei Mwenyekiti 18.05.2021" It is evident from the proceedings above that, on the date the opinion was read over to the parties, both parties were present and heard the opinion before the judgment was composed. The parties or their counsel have not disputed if the assessors did not give their opinion by reading the same to the parties. By giving the assessors the opportunity to give their opinion to parties, the Chairman complied with regulation 19 (2) of the Regulations. Apart from that, in the original record, there is written opinion of Dorah Rutainulwa and Jenister Rugakingila duly signed by them as required by law and underscored by the Court of Appeal in the cited cases Of Edina Kibona, Tubone Mwambeta and Zubeda Hussein Kayagali. I had an opportunity of perusing the cases of Edina Kibona, Tubone Mwambeta and Zubeda Hussein Kayagali. In all three cases, the 9 | Page proceedings were nullified not because the Chairman failed to record the opinion of assessors in the proceedings. Both in Edina Kibona and Tubone Mwambeta although the original records contained the opinion of assessors in writing but the record did not show that, Chairman invited the assessors to give their opinions as required by regulation 19 (2) of the Regulations. In that regard, the Court failed to understand how and at what stage such opinion found its way in the court record. Worse enough in Tubone Mwambeta even the parties themselves were not aware of the existence of such opinions. The same situation appeared in the case of Zubeda Hussein Kayagali where the proceedings were nullified because after closure of hearing, the Chairman did not require the assessors to give their opinion and instead he fixed the date of judgment. Even in the case of Ameir Mbarak relied by counsel for the Appellant, the proceedings were nullified because one, there was change of assessors from the commencement of trial to the end; two, the written opinion of assessors was missing on the record and three, the chairman failed to assign reasons for differing with the assessors' opinion. Nonetheless, the circumstances in those four cases are different with circumstances in the case at hand and hence distinguishable because, first 10 | Page and foremost, in this case there were written opinions in original record. Second, after closure of defence case, the Chairman required the assessors to give their opinions by setting the date. Third, the assessors gave their opinion by reading the same in the presence of parties and fourth, the provisions of section 24 of the Land Disputes Courts Acts were complied with because looking closely at the judgment in question, it is

apparent that, the chairman analysed the evidence on record and gave the reasons for his decision before arriving into conclusion by declaring the 1st Respondent as lawful owner of the suit land. After such conclusion, he stated that: "Kwa sababu zote nilizozitaja hapo juu ninatofautiana na maoniya wazee wa Baraza hili..." From the extract above, it cannot be said that the Chairman failed to give reasons for differing with opinion of assessors because such reasons were disclosed in the course of analysis of evidence which formed the basis of decision. Therefore, the contention by learned counsel for the Appellant that, there was an err as the opinion was not recorded in the proceedings is a misconception because despite not being the requirement of the law, I don't think if that is the correct interpretation of Regulation 19 (2) of the Regulations made by the Court of Appeal in the cited cases above. Thus, 11 | P a g e both the first and the second grievance by learned counsel for the Appellant to wit; failure to record opinion of assessors in the proceedings and non- compliance of section 24 of the Land Disputes Courts Act lack merit. That being said and since the Appellant through his advocate abandoned the first, second, third and fifth grounds, I find no speck of merit on this appeal and it is hereby dismissed. Each party shall bear its own costs. It is accordingly ordered. I. K. BANZI JUDGE 06/06/2023 Delivered this 6th day of June, 2023 in the presence of the Appellant in person and in the absence of the Respondents. Right of appeal duly JUDGE 06/06/2023 12 | P a g e

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