

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

AT BUKOBA

LAND APPEAL NO. 15 OF 2021

(Arising from Application No. 101/2017 of the District Land and housing Tribunal for Kagera at Bukoba)

ALFREDINA ALPHONE..... APPELLANT

VERSUS

ALPHONCINA ALEX MABATI..... RESPONDENT

(Administrator of the estate of the late Alphoncina Alex Mabati)

JUDGEMENT

Date of Judgment: 05.04.2022

A.Y. Mwenda, J

Before the District Land and Housing Tribunal for Kagera at Bukoba the respondent filed Land Application No. 101 of 2017 claiming for the following orders/reliefs to wit;

- i. That, an order be issued that the first respondent had no legal title over the disputed property capable of being transferred to the 2nd respondent.
- ii. That, the respondent be declared a trespasser over the disputed property.
- iii. That an order be issued that the disputed property is part of the estate of the late Alphoncina Kokutaliza Mabati which is subject to distribution to her legal heirs.
- iv. That an order of vacant possession be issued against all respondents.

- v. That cost be granted.

Having heard the case to its finality and upon reaching its decision the Hon Chairman pronounced judgment in favor of the respondent.

Aggrieved by the said decision the appellant preferred the present appeal with the following grounds which are:

1. That, the trial tribunal erred in law and in facts by failure to show and analyze the Respondents evidences so as to prove her allegations.
2. That, trial tribunal erred in law and fact by composing a bad judgment that did not account for Appellant's testimonies hence failing to determine the framed issued.
3. That, the trial tribunal erred in law and facts as it failed to ascertain the Respondent's Administratrix henceforth proceeding with a person with no Locus Stand.
4. That, the trial tribunal was not well composed by failure to involve Assessors when arising (sic) to its final decision with, no proper assigned reason for that.
5. That, the trial tribunal erred in law and fact by condemning the Appellants to pay costs while Respondent's substantive claims were not proved.
6. That, the trial tribunal erred in law and facts by making un-executable decree for want of proper description of the property.

When this appeal came up for hearing the appellant was represented by Mr. Victor Brasio, learned counsel while the respondent enjoyed the services of Mr. Joseph Bitakwate, learned counsel.

When he was invited to take the floor, Mr. Victor Brasio learned counsel for the appellant informed this court that they wish to abandon the 3rd and 6th grounds of appeal thereby remaining with 4 grounds of appeal. He also informed the court that he is going to argue 1st, 2nd and 5th together and the 4th ground separately.

With regard to the 1st, 2nd, and 5th ground of appeal, the learned counsel submitted that the respondent sued the appellant before District Land and Housing Tribunal for trespass on a piece of land which she bought from one Kassim Athuman Kajwangwa (1st respondent).

He said, the issues raised before the District Land and Housing Tribunal were (i) who is the rightful owner between 2nd respondent and the late Alphonsina Kokuteleza Mabati and (ii) whether 2nd respondent had good title over disputed land.

The learned counsel submitted that under Section 110(1) of evidence [Act Cap 6 RE 2019] he who alleges must prove. He said, the respondent failed to prove that the land was the property of Alphonsina Mabati. Further to that, he said that the respondent alleged there was a WILL but Hon. Chairman did not analyze the respondent's evidence and instead he ended up attacking the appellant's evidence

especially on its weakness and not the strength. The learned counsel said it trite principle that a party with heavier evidence shall win and he cited the case of **Hemed Said vs. Mohamed Mbilu, Civil Appeal No. 31(B) of 1984** to support this position. He also said that the Judgment by Hon. Chairman has no qualities of a good judgment. He cited the case of **Conrad Hubart Ishengoma vs. Gaudence C. Kato and Two Others Misc. Land Case Revision No. 09/2020** (unreported) to support this point.

The learned counsel submitted further that DW3 Joseph Mabati testified that he distributed the deceased's properties and that the land in dispute was not touched. He said, the Hon. Chairman did not consider this evidence and failure of which the District Land and Housing Tribunal condemned the appellant to pay costs.

With regard to the 4th ground of appeal regarding composition of the tribunal, the learned counsel for the appellant submitted that the Assessors did not issue their opinion. He said, the Hon Chairman recorded in a copy of the judgment that there is no opinion of assessors because their tenure has expired. The learned counsel stressed that this was not a good reason and in support he cited the case of **Bukoba Municipal Director and Another vs. Godwin Muganda, Consolidated Land Case Appeal No. 48 and 55 of 2018**, HC. He said this is a fatal irregularity which vitiates the proceedings and he prayed the proceedings to be quashed and decree to be set aside. He then concluded by praying this appeal to be allowed with costs.

In response to the submission in support of the 1st, 2nd and 5th grounds of appeal, Mr. Joseph Bitakwate, learned counsel for the respondent submitted that these grounds touch the evidence which was adduced before District Land and Housing Tribunal. He said the Hon. Chairman in his judgment said there is no dispute that the land belonged to Alex Mabati but the issue before him was whether there was disposition from Alex Mabati to any other person. The learned counsel said, in his analysis the Hon. Chairman said there was no evidence that there was any disposition. He said Hon. the Chairman analyzed the appellant's evidence where he discussed PW2's evidence. The learned counsel said in totality, the evidence on record is that Alex Mabati never disposed the land in question and according to him this is visible from Alfredina Alphonse's (DW1's) (the appellant) evidence when she said she is not sure if the said Alex disposed the land. Also he said the 1st respondent said Alex Mabati disposed the land to a SACCOS but when crossed examined he said he was not present when the said SACCOS was allocated the said land. According to him this is also visible when DW6 said after the death of Alex Mabati, his wife remained and occupied the land.

The learned counsel further submitted that in support of the respondent's case, PW2 testified that Athuman Kajwanga encroached the land in dispute in 2016 where he built a house and according to the learned counsel, this evidence do not show that Alex Mabati disposed/allocated his land to anybody.

The learned counsel submitted further that the respondents (before District Land and Housing Tribunal) attempted to enter into a contract for sale of land but misunderstanding ensued between them and a suit No. 2/2016 was filed before Kanyigo Ward Tribunal. He said this case was received as exhibit D1 before District Land and Housing Tribunal. In that case the appellants alleged Kassim Kajwaga sold the land to her but refused to demarcate it. In that case the tribunal ordered Kassim to demarcate the land in question. For that matter, the learned counsel said, Kassim did not accomplish the exercise as the present respondent saw them and intervened by suing them. The learned counsel said that Kassim did not say if he had a title to sale it. In support to this argument he cited the case of **Farah Mohamed vs. Fatuma Abdallah, [1992] TLR Page 2015** where it was held that

"he who does not have legal title to land cannot pass good title over the same to another".

The learned counsel concluded in this part by submitting that the respondent's case was heavier than that of appellants' and as such the District Land and Housing Tribunal was justified to decide in the respondent's favor as Joseph Mabati testified that there was no document to handle the land to the SACCOS.

With regard to 4th ground of appeal regarding composition of the tribunal and involvement of assessors the learned counsel for the respondent submitted that under 23(3) of the Land Disputes Courts Act [Cap 216 RE 2019] the tribunal may

proceed with the hearing and determination of a case regardless of their absence. He said, in the typed proceedings (page 36), the Hon. Chairman recorded that the tenure of Hon. Members expired on 20/01/2020 and an order to proceed under S. 23(3) of Cap 216 RE 2019 was issued. Also at page 5 of the judgment, he said, the Hon. Chairman stressed that there is no opinion of assessors as their tenure expired and this is the reason he advanced as to why the case was concluded without assessors' opinion and for that matter this ground is baseless because what was done was in line with the guidance provided under the law. The learned counsel said that the case of **Bukoba Municipal Director and Another vs. Godwin Muganda, Consolidated Land Case Appeal No. 48 and 55 of 2018, HC.** cited by learned advocate for appellant is distinguishable as it was not known as to why the assessors did not participate. He said in the present matter reasons are clear and are reflected in the proceedings and for that matter he prayed this appeal to be dismissed with costs.

In rejoinder the learned counsel for the appellant submitted that the judgment of the Hon. Chairman is not in line with how a judgment is supposed to be in the case of **Conrad Hubert Ishengoma (supra)**. He said respondent's advocate talked about page 3 of judgment last paragraph that it was the analysis of the case but to him that alone does not constitute analysis of the evidence. On top of that he said the respondent's mother did not testify how she acquired the said land.

With regard to disposition by Alex Mabati, the learned counsel said it was by way of gift to SACCOS. Joseph Mabati Administrator of estate of Alex did not allocate the said land as it was already allocated to the SACCOS and that the respondent was allocated different piece of land.

With regard to 4th ground of appeal on involvement of assessors the learned counsel for the appellant submitted that they are not in dispute that the Hon. Chairman can proceed upon advancing reasons but in our case, there are no good reasons and he concluded that this appeal be allowed with costs.

Having summarized the submissions by learned counsels for both parties, and having gone through the records of this appeal, the issue for determination is whether the present appeal is meritorious.

To do so, this court found it prudent to begin with pointing out the legal principle governing proof of civil cases which is he who alleges must prove. This principle finds its genesis from Sections 110 and 111 of the Evidence Act, [CAP 6 R.E. 2019].

These sections reads and I quote:

"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on the person who would fail if no evidence at all were given on either side."

Emphasizing the duty of proof under Section 110 and 111 of the Evidence Act, [Cap 6 RE 2019] the court of appeal in **Barelia Karangirangi vs. Asteria Nyalwambwa, Civil Appeal No. 237 of 2017** (Unreported) held:

"It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each is on balance of probabilities."

In the same case the court of appeal while citing a case of **Anthony M. Masanga vs. Penina (Mama Ngesi) and Another, Civil Appeal No. 118 Of 2014** held:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened"

That principle being reproduced it is high time for this court to deal with the appellants grounds of appeal.

In respect of the 1st, 2nd and 5th ground of appeal the learned counsel for the appellant complained that the Hon. Chairman failed to show and analyze the respondent's evidence so as to prove her allegation. He said the Hon. Chairman

attacked the appellant's evidence despite failure by the respondent to prove her case. This court went through the records and noted, as was rightly submitted by Mr. Brasio that two issues were raised, that is one, who is the rightful owner between 2nd respondent and the late ALPHONSINA KOKUTELEZA MABATI and two whether the 2nd respondent had good title over disputed land. The records also show that instead of dealing with each issue which was raised, the Hon. Chairman skipped the 1st issue by stating that the evidence by both parties reveal one major fact that the land was owned by Alex Mabati. It is true that the land in question was once owned by Alex Mabati but the issue before him (1st issue) was meant to respond as to how the said land changed hands from the late Alex Mabati to the late Alphonsina Kokuteleza Mabati. Instead, he went on discrediting the appellant's evidence. This is a serious anomaly and the judgment he prepared lacked the qualities of a good judgment as was stated by this court in the case of **Conrad Hubart Ishengoma vs. Gaudence C. Kato and Two Others Misc. Land Case Revision No. 09/2020**. However as opposed to the conclusion reached in the cited case, due to distinguishable circumstances surrounding the present case and following guidance of the court in the case of **Kulwa Kabizi, Paulo Sindano Balele & Suleiman Mlela** [1994] TLR 210 CA, cited in **Ramadhan Salim V. Elizabeth Zabibu, PC. CIVIL APPEAL NO. 09 OF 2019**, HC, this court is going to consider the evidence put forward before the trial Tribunal and deliberate on

the right of the parties accordingly. In the said case Kulwa Kabizi, Paulo Sindano Balele (supra) it was held that:

"Where a Trial Magistrate wrongly rejects certain evidence (as it was in this case) it is the duty of the appellate court in the circumstances of the case, to arrive at its conclusion upon a consideration of the whole of the evidence properly admissible and available on records."

As I have stated earlier, the Sections 110 and 111 impose the evidential burden on the person who assert and the standard in each is on balance of probabilities. In our case therefore that burden lies on the respondent who alleged that the land in dispute belonged to the late ALPHONCINA KOKUTALIZA MABATI and that she was given that land by her late husband. During her testimony she failed to support her argument by any documentary evidence let alone other evidence from clan or family members. She also failed to state as to when exactly was the said land given to the appellant. On her part, the appellant testified that she bought the land in dispute from the so called SACCOS in 2015. Having bought the land she flipped the house which was built on it. She called witnesses to support her case and of essence is DW3 one JOSEPH MABATI. This witness is a relative to the deceased ALEX MABATI. He said in evidence that the land in dispute was given as a gift to the SACCOS in consideration of Obuhaisa (a token consideration in return of gift)

of Tshs. 600 and that he was present. He further stated that the said land was, after Alex Mabati's death, left un allocated to any of his heir as it was already allocated. He categorically said that, that land was not the property of ALPHONCINA KOKUTALIZA MABATI as she was allocated another piece of land which is to date, still there. Again, the judgment in civil suit No. 2 of 2016 Kanyigo Ward Tribunal between the appellant and the then 1st respondent and Chairman SACCOSS was tendered as exhibit P2. This case was filed following the 2nd respondent's failure to demarcate the area which the appellant bought. This piece of evidence also proves that the appellant bought the suit land. On his part, the learned counsel for the respondent was of the view that the filing of that case entails the transaction was not complete and for that matter the appellant had no good title. With due respect to the submission by the learned counsel, this court is of the view that that is not the case. Even if that was the case, the same cannot make the respondent the lawful owner of the land in dispute without exercising her legal and evidential burden. The respondent being the pleader, she was required to prove, on the balance of probabilities that the land in question belongs to the late ALPHONCINA KOKUTALIZA MABATI. By putting the appellant's and the respondent's evidence on the scale it is evident that the appellant's evidence is heavier than the respondent's. That being said this court finds merits on ground 1, 2 and 5 of the appeal.

With regard to composition of tribunal it is true that at the beginning the Hon. Chairman was assisted by H. Muyaga and F. Rutabanzibwa from 18.09.2019 when issues were framed to 15. 10. 2019 when applicant's case took off. After that they never appeared again. In the copy of judgment, the Hon. Chairman stated that there was no opinion of assessors as their tenure expired. Mr. Victor Brasio was of the view that this is illegality as the said chairman ought to have appointed new set of assessors in order to take over and proceed with the matter.

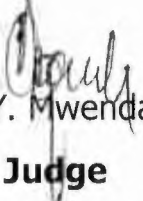
With due respect this court is not in agreement with Mr. Brasio's argument. As it was rightly pointed out by Mr. Bitakwate, learned counsel for the respondent, what the chairman did is backed by the law which is Section 23(3) of the Land Dispute Court Act [CAP 216 R.E 2019]. The case of ***Bukoba Municipal Director and Another V Godwin Mugande (Supra)*** which was cited by Mr. Brasio cannot apply in the circumstance of this case as it is distinguishable. On top of that the said case is persuasive. That being said therefore this court finds no merit with this ground.

In the upshot and in the totality of the analysis above this court is satisfied that this appeal is meritorious and it is hereby allowed and the Appellant is declared the rightful owner of the disputed land. That being said, the judgment of the District Land and Housing Tribunal in Application No. 101 of 2017 is hereby

quashed and any order emanating therefrom are hereby set aside and the respondent shall pay costs.

Ordered accordingly.



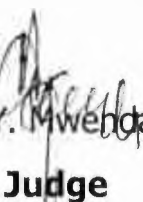

A.Y. Mwenda

Judge

05.04.2022

This Judgment is delivered in chamber under the seal of this court in the presence of the appellant Alfredina Alphonse and in the absence of the respondent.




A.Y. Mwenda

Judge

05.04.2022