

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

LAND APPEAL NO. 72 OF 2023

(Arising from Land Application No. 30 of 2022 of Kondo District Land and Housing Tribunal at Kondo)

FAUSTIN HOMA MARMO..... APPELLANT

VERSUS

HUSENI SHODA.....RESPONDENT

JUDGMENT

16th April, & 3rd May, 2024.

MUSOKWA, J:

In the District Land and Housing Tribunal for Kondo at Kondo (DLHT) in Land Application No. 30 of 2022, the respondent herein sued the appellant claiming ownership of the suit land, which is situated in Chukuruma Village at Chembe District within Dodoma Region. The brief facts which led to the institution of Land Application No. 30 of 2022 before the DLHT are summarized hereinafter: -

The respondent claimed ownership of the suit land measuring 8 acres against the appellant. On his part, the appellant averred that the land in dispute is 4.5 acres only. During the trial at the DLHT, the appellant



paraded two witnesses while the respondent called four witnesses. Eventually, the judgment was entered in favor of the respondent herein. The appellant being aggrieved by the judgment and orders thereof has knocked the doors of this court based on the following grounds: -

- 1. That, the honourable trial chairman erred both in law and facts by failing to analyse the evidence from both sides and ended up reaching a wrong conclusion.*
- 2. That, the honourable trial chairman erred in law for not giving weight documentary evidence mainly exhibits D1 and ended up with a wrong conclusion which contradicts the Law of Evidence Act, Cap. 6 R.E 2022, the Village Land Cap. 114 R.E. 2019 and the Land Act, Cap. 113, R.E. 2019.*
- 3. That, the proceedings of the Land Application No.30 of 2022 are tainted with illegalities.*
- 4. That, the 8 and 6 acres of the disputed land in the Land Application No. 30 of 2022 were never mediated before the Kimaha Ward Tribunal which is contrary to section 13 of the Land Disputes Courts Act, Cap. 216 R.E. 2019.*

On the hearing of this appeal, which was scheduled on 27th day of February 2024, the appellant was represented by Mr. Kong'oke, learned advocate, and the respondent appeared in person. Apparently, the records of the DLHT revealed that the assessors were not fully involved in the decision-making process, contrary to section 23 (2) of the Land Dispute Court Act, Cap. 216 R.E 2019.



Therefore, the parties were invited to address the court on the propriety or otherwise of the DLHT's records regarding the roles of the assessors in the conduct of the trial before the DLHT. This was an issue raised by the court *suo motu*. Notably, the issue raised by the court *suo motu* was heard on 27th February 2024, before going into the merits or otherwise of the appeal. However, on 15th March 2024, this court deemed it necessary to hear the grounds of appeal as well. As the result, on 16th April 2024, both parties were given an opportunity to submit for and against the appeal. Accordingly, the ensuing submissions by both parties covers the issue raised by the court *suo motu* as well as the grounds of appeal. The appellant prayed to the court to abandon the 2nd ground of appeal and it was marked so.

Addressing the issue raised by this court *suo motu*, Mr. Kong'oke, submitted that indeed, there was a contravention of Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal Regulations) G. N. No. 174 of 2003 (Land Regulations, 2003). The learned advocate referred the court to page 34 of the typed proceedings and stated that, Regulation 19 (2) provides that the Chairman of the DLHT before composing the judgment, shall require the assessors to provide their opinion in writing, and the same may be provided in Kiswahili. In the



entire proceedings, compliance with this requirement is not found. On page 34 of the typed proceedings, the chairman directed the assessors to write their opinion on 22/5/2023 at 9:00 am. The chairman further ordered that the judgment will be delivered on the same date, therefore on 22/5/2023 at 11:00 am; with the difference of two hours between the assessor writing his opinion and the delivery of the judgment. In the circumstances, Mr. Kong'oke, submitted that the opinion of the assessor was not recorded in the proceedings neither did such opinion form part of the judgment. The fact that the DLHT indicated the same date of both receiving the opinion of the assessor and delivery of judgment, is sufficient proof of the flawed process. Mr. Kong'oke further emphasized that failure by the DLHT to incorporate the opinion of the assessor to form part of the judgment renders the entire proceedings and the decision thereof, a nullity. The case of **Edina Adam Kibona Vs Absolam Swebe Civil Appeal No. 286 of 2017** was preferred in support of his submission. Consequently, Mr. Kong'oke prayed for an order to quash the proceedings, the corresponding decision and the matter to be remitted to the DLHT for retrial.

Submitting on the 1st ground of appeal, Mr. Kong'oke stated that it is the respondent himself who testified during the trial that he had been farming on the suit land for over 8 years. However, upon visiting the site, the



DLHT observed that the suit land was undeveloped, that it was a "*pori*". Further, there is no evidence of any development or cultivation of the suit land. This in itself was sufficient proof to the DLHT that the respondent's claims of title of the suit land were false and fabricated. Mr. Kong'oke submitted further that considering that this is the 1st appeal; this court has jurisdiction to analyze the evidence afresh and reach its own conclusion.

Regarding the 3rd ground of appeal, Mr. Kong'oke had similar submissions with those indicated while responding on the point raised by the court *suo motu* including reference to the case of **Edina Adam Kibona** (supra). However, Mr. Kong'oke, added that the DLHT contravened Regulation 12 of the Land Regulations, 2003 which requires the DLHT to read out the application to the applicant. Thereafter, the applicant is required to respond, clearly stipulating the facts which he does not dispute and those in dispute. The framing of the issues should then follow, and subsequently the hearing will commence. Mr. Kong'oke referred to pages 4 and 5 of the typed proceedings. According to Mr. Kong'oke, when the matter came for hearing, the DLHT immediately proceeded with the framing of issues and thereafter the hearing commenced without the prior reading of the application, contrary to the requirements of the law.



The 4th ground of appeal is that the dispute between the parties was not mediated before the Kimaha Ward Tribunal. The learned advocate further added that mediation is a prerequisite before commencement of a trial in the DLHT, as provided under section 13 of the Land Disputes Courts Act (*supra*). The section requires all applicants before filing a matter before the DLHT to resort to mediation first. Despite the fact that the dispute was entertained by the Ward Tribunal of Kimaha, according to the learned advocate, the process did not meet the requirements of a valid mediation process. The reason being that the dispute at the Ward Tribunal involved 4 acres of land, while the matter before the DLHT related to 8 acres of land. Ironically, the DLHT issued judgment involving 6 acres of land. Mr. Kong'oke submitted that this qualifies to be an irregularity on the face of the record. The learned counsel emphasized his prayer to nullify the proceedings and order for retrial.

In reply thereof, the respondent firmly disputed the arguments and submissions advanced by the appellant. The respondent submitted that mediation was conducted at the Ward Tribunal, however, upon failure of the mediation, the matter was properly instituted at the DLHT. Further, the respondent submitted that the DLHT conducted a site visit and was satisfied that the information he provided before the DLHT was nothing



but the truth. Equally, it was submitted that the size of the land bought by the respondent was 8 acres, however, the DLHT adjudicated over 6 acres of land. The respondent was satisfied with the decision of the DLHT despite the fact that the land determined by the DLHT was less compared to the land that he had acquired. Finally, Mr. Kong'oke had no rejoinder.

I will commence by addressing the issue as to whether or not the DLHT involved the assessor in the course of determining Land Application No. 30 of 2022. The law is clear regarding the composition of the tribunal, it requires the chairman of the DLHT to sit with not less than two assessors who shall be required to give their opinion before the judgment. This position is provided under section 23 (1) and (2) of the Land Disputes Courts Act (*supra*) in the following terms: -

- (1) *"The District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors.*
- (2) *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 judgement.**" [emphasis added]*

In addition, Regulation 19 (2) of the Land Regulations, 2003 requires assessors to give their opinion before the composition of the judgment by the chairman. The Regulation reads as follows: -



*"19 (2) 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 assessors may give his opinions in Kiswahili."*
[emphasis added]

Looking on the record, it is apparent from the proceedings of the DLHT that the chairman who presided over the matter between the parties herein sat with two assessors. The names of the said assessors appear in the proceedings as Mr. Yusufu Msalu and Bi Hidaya Hasan. Later, the chairman proceeded with only one assessor namely Yusufu Msalu. Seemingly, the chairman acted under section 23 (3) of the Land Dispute Courts Act which provides that: -

*"Notwithstanding the provision of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the chairman and the **remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.**"* *[emphasis added]*

The provision above is an exception to section 23(1) (2) of the same Act, which requires the composition of the tribunal to be the chairman, who shall sit with not less than two assessors. Therefore, in case of the



absence of one or both assessors the chairman may proceed notwithstanding such absence.

Evidently, if the chairman proceeds with only one assessor, as in the present case, the requirement to require an opinion from the single assessor is mandatory. The only situation whereby the chairman can proceed to compose a decision without the opinion of the assessors, is when the matter continued in the absence of both assessors.

The record does not show whether the opinion of the said assessor was availed and if it was read before the parties. In the case at hand, the chairman remained with a single assessor, therefore it was mandatory to abide with the requirement of the law. Upon visiting the suit land, the chairman of the DLHT fixed the judgment date. For ease of reference, the relevant proceedings are reproduced hereunder: -

Baraza limehitimisha zoezi la kutembelea Eneo la ardhi gombaniwa.

*R.S. Mandari
Mwenyekiti
05/05/2023*

AMRI: -

- (i) Maoni kutolewa na mjumbe wa Baraza na kusomwa kwa wadaawa tarehe 22/5/2023 saa 3:00 kamili asubuhi.*
- (ii) Hukumu 22/5/2023 saa 5:00 kamili Asubuhi."*



The above proceedings of the DLHT do not indicate whether the assessor gave his opinion before the composition of the judgment by the chairman as required by the law. The reason being that the written opinion of the assessor is missing in the proceedings of the DLHT. The law is clear that the opinion given by the assessor sitting in the DLHT has to be recorded regardless of whether the chairman agreed or disagreed with it. Section 24 of the Land Dispute Courts Act provides that: -

*"In reaching decisions, the chairman shall take into account the opinion of assessors but shall not to be bound by it, **except that the chairman shall in the judgement give reasons for differing with such opinion.**" [emphasis added]*

Notably, the judgment issued by the DLHT acknowledges the opinion of the single assessor. However, despite such acknowledgment in the judgment it is unsafe to presume that the opinion of the assessor was in fact received prior to the composition of the judgment. Further, it does not justify failure by the chairman, in the present case, to record the proceedings of the 22/5/2023 at 9:00am, being the time when the opinion of the assessor was scheduled to be received. In the case of **Ameir Tubone Mwambeta vs Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) the Court of Appeal of Tanzania (CAT) citing the case



of **Ameir Mbaraka and Azania Bank Corp. Ltd vs. Edgar Kahwili**,

Civil Appeal No.154 of 2015 stated on page 11 that: -

*"Therefore in our considered view, **it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the Chairman in the judgment.** In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity". [emphasis added]*

The Court of Appeal proceeds to state that;

*"...**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." [emphasis added]*

On page 12, the CAT stated further that: -

*"...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinion before the determination of the dispute. **As such, their opinion must be on record.**" [emphasis added]*

Likewise, in the case of **Peter Makuri vs. Michael Magwega**, Civil

Appeal No. 107 of 2019 (unreported) at page 7, the CAT observed that: -

"Failing to request, receive, read out to parties, and consider the assessors' opinion in the



*tribunal decision as is the case in the instant case, regardless whether the chairman agreed or not with the opinion, is a **fatal omission that goes to the root of the matter, consequently vitiating the proceedings.***"
[emphasis added]

Moreover, in the CAT case of **Edna Adam Kibona vs. Absalom Swebe** (Sheli) Civil Appeal No. 286 of 2017 (unreported) at page 5, it was partly held that: -

*"Adverting to the case at hand, when the chairman closed the case for the defence, **he did not require the assessors to give their opinion as required by the law.** On the authorities cited above, **that was fatal irregularity and vitiated the proceedings.**"*
[emphasis added]

Based on the cited authorities above, this appeal suffers the consequences of failure to record the opinion of the single assessor as required by the law.

Regarding the question of mediation, this issue does not detain me. Indeed, the appellant admits that mediation between the parties herein was done by the Ward Tribunal of Kimaha. The only issue raised by the appellant is on the variation of the size of the suit land recorded at the Ward Tribunal and the DLHT; be it 4, 6 or 8 acres of the suit land. In addition, the records of the DLHT contain a certificate of mediation in that



regard. In the circumstances, I am of the view that mediation was properly done in compliance with the law. The difference on the size of the suit land depends largely on the evidence tendered by parties during the trial as opposed to the mediation proceedings. For the purpose of mediation, the variation of the size of the suit land between the Ward Tribunal and the DLHT is immaterial.

Having said so, I am of the settled view that failure to request and record the opinion of the single assessor, suffices to dispose the matter at hand. Thus, I do not see a pressing need to determine other issues raised by Mr. Kong'oke, learned counsel. I therefore quash the proceedings, judgment, decree and orders of the DLHT in Land Application No. 30 of 2022. In addition, I order an expedited retrial before another chairman with a different set of assessors. No order as to costs.

It is so ordered.

DATED at DODOMA this 3rd day of May, 2024.




I.D. MUSOKWA
JUDGE

Ruling delivered in the presence of the appellant and his advocate, Mr.

Pastor Kong'oke learned counsel; and in the presence of the respondent.



A handwritten signature in black ink, appearing to read "I.D. Musokwa".

I.D. MUSOKWA

JUDGE