

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MZIRAY, J.A.)

CIVIL APPEAL NO. 94 OF 2016

1. RASHID TWALIB MAKONYORA

(As administrator of estate of

Late **TWALIB MAKONYORA**1ST APPELLANT

2. AHMAD K. MWILIMA.....2ND APPELLANT

3. JUJU HILALI3RD APPELLANT

VERSUS

SALIM TWALIB MAKONYORA

(Minor) suing through

ASHURA HAMIS (next friend)RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Tabora)**

(Rumanyika, J.)

**Dated 13th May, 2015
in**

Land Appeal No. 28 of 2013

RULING OF THE COURT

20th & 24th October, 2016

MBAROUK, J.A.:

When the appeal was called on for hearing on 20th October, 2016, the Court wanted to satisfy itself as to whether the proceedings in the District Land and Housing Tribunal for Kigoma in Application No. 28 of 2013 were properly conducted. That prompted us to raise *suo motu* two

questions, namely, **one**, whether it was proper for an assessor who did not participate in hearing the evidence of the applicant (PW1) and that of the Respondent (DW.1), DW.2 and DW.3 but joined when DW.4 gave his evidence to participate in determining the trial. **Two**, whether it was proper for the Chairman of the Tribunal to have proceeded writing Judgment without taking the opinions of assessors in writing.

As for the first question raised by the Court, the record shows that at page 68 when the applicants' case resumed on 28-11-2012 two assessors namely Mzee Msechu, and Madame Hope appeared and participated in the hearing of the evidence of the applicant (PW1). Later on 29-11-2012 the same set of assessors participated in the hearing of the evidence of the Respondent (DW.1), DW.2 and DW.3. However, later on 23-1-2013 when the case was called on to proceed with the respondent's case in taking the evidence of DW.4, it appears that another different assessor, Col. Dongwe (rtd) joined to hear the evidence though he was not among the first set of

assessors who have heard PW1, DW1 DW2 and DW3. We are of the opinion that when the Tribunal allowed an assessor who did not hear the evidence of PW.1, DW.1. DW.2 and DW.3 that was an irregularity.

Secondly, the record shows that the requirements under Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (the Regulations) and section 23(2) of Land Disputes Courts Act, Cap. 216 R.E. 2002 (the Act), were not complied with. This is for the reason that the assessors opinions appeared to have not taken in writing before the Chairman composed his judgment. Regulation 19 (2) of the Regulations provides that:-

"Notwithstanding sub regulations (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."[Emphasis added].

Whereas on the other hand, section 23(2) of the Act also put the same emphasis and provides that:

"(2) The District Land and Housing Tribunal shall be duly constituted when held by a chairman two assessors who shall be required to give out their opinion before the chairman reaches judgment."

[Emphasis added].

The omission on the part of the Chairman of the Land District Tribunal to require the assessors to give their opinion in writing at the conclusion of hearing, it renders the decision null and void.

In this appeal, Mr. Kamaliza Kamoga Kayaga, learned advocate who represented the appellants readily conceded to the defect raised by the Court.

Whereas on the other hand, Ashura Hamisi who appeared as a next friend of the respondent, a minor, had nothing useful to submit as she was not knowledgeable to the

points of law raised by the Court. She therefore left the Court to decide.

Expounding further on the first question raised by the Court as it appears above, this Court in the case of **Mariam Ally Ponda v. Kherry Kissinger Hassan** [1983] TLR2, held that:

"(i) An assessor who has absented himself for part of the trial cannot afterwards be permitted to participate in the determination of the proceedings."

As shows earlier, in the instant case, the assessor by the name of Col. Dongwe (rtd) did not participate in hearing the evidence of several witnesses. He took part when taking the evidence of DW.4 as the last witness in that case. We are of the opinion that, such an assessor cannot effectively give his opinion in determining the case. We are further of the opinion that by allowing such an assessor to participate at that late stage of the proceedings was improper and irregular. This

Court in the case of **John Masweta v. General Manager MIC (T) Ltd**, Civil Appeal No. 113 of 2015 (unreported) stated as follows when it encountered the same situation:

"We are of the view that it was wrong to allow an assessor who had not heard the testimonials and observe the demeanor of previous witnesses who testified earlier in a trial".

Secondly, as far as the record clearly shows that the Chairman of Land District Tribunal failed to comply with the requirements of Regulation 19(2) of the Regulations and section 23(2) of the Act, that omission renders the proceedings in that trial a nullity.

We are increasingly of the view that, the above mentioned irregularities are fatal and render the proceedings before the District Land and Housing Tribunal Application No. 61 of 2011 and the subsequent proceedings before the High Court Land Appeal No. 28 of 2013 a nullity. In the event, we accordingly invoke our revisional jurisdiction conferred upon

us under section 4(2) of the Appellate Jurisdiction Act and nullify and quash the entire proceedings before the District Land and Housing Tribunal at Kigoma in Application No. 61 of 2011 together with the subsequent proceedings before the High Court in Land Appeal No. 28 of 2013.

We consequently order a trial *de novo* before another Chairman and another set of assessors with no order as to costs as the matter was raised by the Court *suo motu*. It is so ordered.

DATED at TABORA this 21st day of October, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSITCE OF APPEAL

I certify that this is a true copy of the original.


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL