

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

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

CIVIL APPEAL NO. 98 OF 2015

**SAMSON NJARAI.....1ST APPELLANT
LEAH NJARAI.....2ND APPELLANT
VERSUS
JACOB MESOVIRO.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Arusha)**

(Massengi, J.)

Dated 26th day of September, 2013

in

Land Appeal No. 1 of 2013

RULING OF THE COURT

22nd & 25th February, 2016.

MBAROUK, J.A.:

When the appeal was called on for hearing, the Court wanted to satisfy itself as to whether the appeal is proper. That prompted us to raise two questions *suo motu*, **firstly**, whether it was proper for the District Land and Housing Tribunal to commence the proceeding with one assessor, and proceed to hear the applicant (PW1) and then one of the assessor left the Tribunal and replaced with another assessor and the Tribunal proceeded to hear the

application to its conclusion. **Secondly**, whether it was proper for the Tribunal not to indicate in the proceedings that one of the assessors was given a chance to raise a question to a witness. The record shows that on 22-9-2010, the proceeding were conducted in the presence of two assessors, one was E. D. Maingu and another one was M. M. Kilucha. Whereas the record of appeal at page 13 shows that it was only one assessor by the name of Maingu who was given an opportunity to ask questions. Also at pages 18, 19B and 22 the same error was repeated again.

Mr. John Materu, learned advocate for the appellants, readily conceded to the defects raised by the Court. In his response to the first point, Mr. Materu submitted that as far as the initial assessor left after hearing a key witness (PW1), it was wrong for the trial Tribunal to replace him with another assessor who was not present when PW1 testified. Mr. Materu further submitted that, he is very much aware of section 23 (3) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 that notwithstanding the provisions of subsection (2)

if in the course of any proceedings before the Tribunal either or both assessors of the Tribunal who were present at the commencement of proceedings is or are absent, the chairman and the remaining assessor may continue and conclude the proceedings notwithstanding such absence. He was of the view that the trial Tribunal should not have allowed the replacement, instead it should have continued and concluded the proceedings with the remaining assessor till the end.

In his reaction to the second point, Mr. Materu submitted that the record of appeal at pages 13, 18, 19B and 22 have not shown how one assessor participated in asking questions in respect of the testimony of PW1 at page 13, PW2 at page 18, RW1 at page 19B and RW5 at page 22. He said, it is only at page 21 of the record of appeal where both assessors have shown clearly that Assessor Maingu asked a question and Assessor Athumani was clearly recorded NIL which means he was given a chance to ask a question and he had none.

Mr. Materu was of the view that, participation of assessors in Land Disputes is very important, and as in this case the record has shown that there were instances where the Chairman of the Tribunal failed to indicate that one of the assessor was given an opportunity to ask questions, that renders the proceedings not to have been conducted with the aid of assessors, hence null and void.

On his part, Mr. Asubuhi John Yoyo, learned advocate for the respondent initially forcefully argued that the defects cannot render the proceedings a nullity. He relied on the presence of section 23 (3) and 45 of the Land Disputes Court Act. He was of the view that the defects raised by the Court were not fatal and have not occasioned any failure of justice. He therefore prayed for us to proceed with the hearing of the appeal.

In his rejoinder submission Mr. Materu maintained that section 23 (3) of the Land Disputes Courts Act does not apply in this case. He said reading section 23 (3) it implies that, where two assessors have started and when one of them leaves the trial in

between, the other assessor can proceed in the absence of the other one who left. However, he said, in this case after the first assessor heard the evidence of PW1 who was a key witness, he left and another assessor took his position without the knowledge of what have been testified by PW1. He was of the opinion that it was wrong to replace the assessor who left. He further submitted that taking into account the position that the District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors, there should have been no substitution after the first assessor had left.

In view of that irregularity, Mr. Materu then urged us to nullify the proceedings of the trial Tribunal and its judgment together with the Judgment of the High Court and its decree and thereafter order a retrial by invoking section 4 (2) of the Appellate Jurisdiction Act.

Looking at the two issues raised by the Court earlier on, we are of the view that they boil down to the issue of the importance of the assessors in participating in Land Dispute cases. In the instant

case, we are of the view that there was no need to replace the first assessor, the trial Tribunal should have continued with the remaining assessor to the end and thereafter deliver its judgment.

In the case of **Mariam Ally Ponda v. Kherry Kissinger Hassan**

[1983] TLR 2 it was held that:-

"Where an assessor is present at the commencement of any proceeding and is subsequently unable to continue to perform his functions as an assessor, the magistrate may continue to hear and determine the proceeding with the remaining assessor"

Apart from that it is our considered opinion that section 23 (3) of the Land Disputes Act referred by Mr. Yoyo is just a saving provision, hence we rely on the position we have already stated above.

Secondly, one among the assessors was not given opportunity to ask questions to witnesses. For example the proceedings on 22-

9-2010, where there were two assessors, E. D. Maingu and M. M. Kilucha but the record shows that it was only Maingu who participated by asking a question. We are of the view that even if the assessor Kilucha had no question to ask, the proceedings should have shown his name and mark NIL. That would have shown that he was offered opportunity but he did not ask. This Court in the case of **The General Manager Kiwengwa Stand Hotel v. Abdallah Said Musa**, Civil Appeal No. 13 of 2012 (unreported) stated that:-

"...Such conditions include (but not restricted to) the active and effective participation of assessors in the proceedings and giving of their opinion at the conclusion of the trial and before the judge delivers his judgment/ruling or order."

In the circumstances, we are increasingly of the view that such irregularity is fatal. In the event, we declare the entire trial in

Civil Application No. 73 of 2010 and the subsequent proceedings before the High Court Land Case No. 1 of 2013 a nullity. We therefore quash them and 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. It is so ordered.

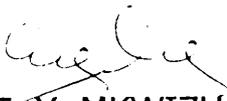
DATED at **ARUSHA** this 24th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL