

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 14 OF 2018

**JUMA S. KIBAYASI (Administrator of the Estate of
MARIAM J. KIBAYASI alias
MARIAM ABDUL SALIMAPPELLANT**

VERSUS

- 1. JOB HOSEA (Administrator of the Estate of
MARIAM ABDUL SALIM1ST RESPONDENT**
- 2. MOHAMED SEIPH KILONGO.....2ND RESPONDENT**
- 3. MOROGORO MUNICIPAL COUNCIL..... 3RD RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam).**

(Kente, J.)

**dated the 30th day of March, 2016
in
Land Appeal No 55 of 2015**

JUDGMENT OF THE COURT

24th August & 16th September, 2021

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania, Land Division in Land Appeal No. 55 of 2015, Kente, J (as he then was). In that decision, the court declared the first respondent a rightful owner of Plot No. 2 and 3 Block A. 2 Kiwanja cha Ndege Area within Morogoro Municipality (henceforth "the suit property").

Formerly, the appellant lodged an application before the District Land and Housing Tribunal of Morogoro (the Tribunal). Before the Tribunal, the appellant claimed that the suit property belonged to her late daughter Mariam Juma Kibayasi who is also known as Mariam Abdul Salim after the same was surrendered to her by one C. M. Kapilima on 12th February, 1987. It was further claimed that on 9th October, 2008, the first respondent fraudulently sold the suit property to the second respondent whereas the third respondent blessed the said transfer.

On the other hand, the first respondent denied the claim and evidenced that the suit property was legally owned by the late Mariam Abdul Salim who later lawfully sold it to the second respondent. In the end, the Tribunal found that the suit property was lawfully owned by the second respondent after having been sold to him by the late Mariam Abdul Salim. This decision was upheld by the High Court on first appeal.

The appellant is before this Court on a second appeal with the following five grounds of appeal:

- 1. That the High Court erred in law by upholding the judgment of the District Land and Housing Tribunal for Morogoro at Morogoro by Hon. P. J. Makwandi, Chairman based on speculations.*

- 2. That the High Court erred in law and in fact by making a finding that the appellant had fraudulently obtained the Certificate of Title in respect of the suit property without assigning reasons.*
- 3. That the High Court erred in fact by making a finding that the late Mariam Abdul Salim had legally sold the suit property to the second respondent contrary to evidence on record.*
- 4. That the High Court erred in fact and in law by approving the judgment and decree of the District Land and Housing Tribunal for Morogoro despite serious irregularities in the procedure and the resulting judgment before the Tribunal.*
- 5. That the High Court erred in law and in fact by failure to properly re –evaluate evidence given by parties before the District Land and Housing Tribunal for Morogoro.*

During the hearing of the appeal, the appellant was represented by Mr. Mohamed Tibanyendera, learned advocate whilst; the first and second respondents enjoyed the services of Ms. Patricia Pius Mbossa and the third respondent was represented by Mr. Elikarim Samuel Tyea, Senior State Attorney.

The respondents opposed the appeal and for the reasons to be shown in the course of the judgment we shall only reproduce the learned counsel's submission in respect of the fourth ground of appeal.

In his submission in respect of the fourth ground of appeal, Mr. Tibanyendera argued that the judgment of the Tribunal was given in total disregard of the law under Regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (GN. No. 174 of 2003) (henceforth "the Regulations"). He contended that the judgment was delivered out of time about a year later contrary to ninety days provided in law. Further, the opinion of the assessors did not feature in the record. Additionally, the chairperson contravened section 23 of the Land Disputes Courts Act [CAP 216 R.E. 2019] (the Act) as he did not sit with assessors during the hearing of the case but only composed the judgment. In support of his argument, the learned counsel referred us to the Court's decisions in **Ameir Mbaraka and Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 and **Sikuzani Said Magambo and Another v. Mohamed Roble**, Civil Appeal No. 197 of 2018 (both unreported).

For her part, Ms. Mbossa argued in respect of this ground, firstly that, the delay to deliver the judgment was caused by the fact that the

contract of employment of the predecessor chairperson had expired hence the matter had to wait for re-assignment to the successor chairperson.

In respect of the alleged contravention of section 23 of the Act, Ms. Mbossa argued that the appellant's counsel did not sufficiently explain the omission as to when the chairman did not sit with assessors between composition of the judgment and its delivery. However, she argued that the Tribunal was composed by two assessors and a chairperson during the hearing of the case.

Mr. Tyea, on the other hand, did not have much to say as he only concurred with the submission by the appellant's counsel. In rejoinder, Mr. Tibanyendera did not have anything to say in respect of this ground.

Before we decide this appeal, we would like to state that the trial of this case before the Tribunal was not a smooth one. The same was handled by three different chairpersons. While K. C. Ngonyani, Chairperson heard all four applicant's witnesses; R. A. Givay, Chairperson heard six defence witnesses; and a year later P. J. Makwandi, Chairperson only composed and delivered the judgment.

Back to the appeal, we have dispassionately considered the submissions by the counsel for the parties. The issue to decide is whether the assessors were properly involved during the hearing and conclusion of the case before the Tribunal. In the circumstances of this case, we would like to deal with the complaint in relation to non-compliance with Regulation 19 (2) of the Regulations. According to this provision, assessors are required to give their opinion in writing before the chairman reaches the judgment. It provides thus:

"Notwithstanding sub-regulation (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."

This provision states clearly that at the conclusion of the hearing, the chairman is obliged to require every assessor present to give his opinion in writing. Now, upon perusal of the original record of appeal, we have found that when the hearing was closed on 25th August, 2014, the chairman did not require the assessors to give their opinion and instead he fixed the date of judgment to be 11th September, 2014. However, the judgment was not delivered on that date but the chairman noted that the assessors had not recorded their opinion. He fixed the

judgment date to be 29th September, 2014. The record is silent as to what happened since then until the judgment was composed and delivered on 22nd April, 2015 by another P. J. Makwandi, Chairperson. Neither in the record of appeal nor the original record is there assessors' opinion in writing as required under the cited regulation. However, in his judgment, the chairman indicated that he had considered the opinion of assessors and even quoted some passages. There is further no record to show that the opinion was made to be known to the parties before the judgment was delivered.

In a similar situation like the instant case, in the case of **Ameir Mbarak and Another** (supra), the Court stated thus:

"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 acknowledgment 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."

[See also **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported)].

Similarly, in the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) where the opinion of assessors was not reflected in the record but only referred in the judgment of the Tribunal, the Court stated thus:

"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, as earlier intimated, they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed. Unfortunately, this did not happen in this case. 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."

See **Zubeda Hussein Kayagali v. Oliva Gaston Luvakule and Another**, Civil Appeal No. 312 of 2017 (unreported).

Eventually, on the strength of the law and the cited authorities, we find that the failure by the Tribunal chairperson to involve the assessors in reaching the decision vitiated the proceedings and

judgment of the Tribunal which we hereby nullify and set aside the judgment. Likewise, the proceedings of the High Court which emanated from null proceedings and judgment, are also nullified and the judgment set aside.

As to the way forward, for justice to be done, we order a retrial of the case before a different chairperson and a new set of assessors. Since the omission was not caused by any of the parties, we make no order as to costs.

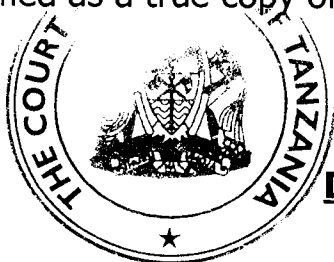
DATED at DAR ES SALAAM this 10th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 16th day of September, 2021 in the presence of Mr. Mohamed Tibanyendera, learned counsel for the Appellant and Mr. Patricia Pius Mbossa, learned counsel for the 1st & 2nd Respondents and also holding brief of the 3rd Respondent is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL