

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MBEYA)**  
**AT MBEYA**

**LAND APPEAL NO. 52 OF 2019**

*(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land  
Application No. 61 of 2009)*

**THE REGISTERED TRUSTEES OF ASSEMBLIES OF GOD.....1<sup>ST</sup> APPELLANT**  
**ALPHONCE KASONGWA.....2<sup>ND</sup> APPELLANT**  
**KIBETI MWANJOKA.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**LUPAKISYO MWAKIBINGA.....1<sup>ST</sup> RESPONDENT**  
**THE REGISTERED TRUSTEES OF NEW APOSTOLIC CHURCH.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

Date of Last Order : 26/03/2020  
Date of Judgement: 06/05/2020

**MONGELLA, J.**

Aggrieved by the decision of the District Land and Housing Tribunal for Mbeya (Tribunal) the appellants under the representation of Mr. Mika Mbise, learned advocate have appealed to this Court on seven grounds of appeal to wit:

1. *The learned Honourable Chairman made a grave error on his failure to record truly, the names of the parties and their learned advocates who appeared before him and what they submitted.*
2. *The learned Chairman did not consult any of the assessors and no assessors were there to give their opinion before the judgment was composed.*
3. *The judgment issued offends the serious way mandatory requirements of Regulation 20 of the Land Disputes Court (The District Land and Housing Tribunal) Regulations, 2003 (GN 174 of 2003)*
4. *The learned Chairman did not at all consider the 7 issues framed at commencement of the hearing of the application in his judgment.*
5. *The impugned judgment is not at all based on the testimonies of the 6 witnesses on record of proceedings.*
6. *The learned Chairman decided the application on the basis of imported evidence.*
7. *The learned Chairman erred in writing a judgment which is vague, incapable of implementation that did not conclusively resolve the dispute between the parties to that application.*

The appeal was disposed by written submissions that were filed by the parties as per the scheduled orders. Mr. Mbise, in his written submissions

abandoned the rest of the grounds and argued on the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal.

Arguing on the 2<sup>nd</sup> ground of appeal, he submitted that Application No. 61 of 2009 was heard in the Tribunal whereby after losing the case, the respondents herein appealed to the High Court. A legal issue was raised regarding the participation of assessors and the High Court ruled that assessors were not fully involved and thus nullified the judgment and ordered for a proper judgment to be construed by another chairman and the set of assessors who attended the case. He argued that the proceedings that followed the order of the High Court show that the matter was before Hon. T. Munzerere as the Chairman. That, the proceedings show that the matter was called for the first time on 08/01/2019 and was adjourned for several times, that is on 14/01/2019 then to 17/01/2019 and then to 22/01/2019. He argued that in all these dates the chairman appears to have sat alone in the Tribunal.

Mr. Mbise submitted further that on 22/01/2019 the Chairman while sitting alone, gave two orders whereby the first was mention on 05/02/2019 and second parties to appear and opinion be filed by assessor who heard the matter. He said that, however there was no mention of the name of that assessor. He added that the Tribunal record is silent as to what took place from 22/01/2019 up to 07/05/2019 whereby from nowhere the learned Chairman emerged with orders that: *"Judgment on 06/06/2019; Parties to appear. Opinion ready; and Summons issued."* He added that the record is silent as whose opinion the Hon. Chairman was referring to and as to what transpired on 06/06/2019. Then the matter came for another time on

18/06/2019 whereby the Hon. Chairman sat alone again. He argued that on this date the Hon. Chairman noted that the applicant and the respondent were present however, it is not known who among the two applicants and or the three respondents was present as the records are silent to that effect. On that date, the record indicates that the Hon. Chairman gave orders that: *"Mention on 24/06/2019; Parties to appear; Opinion by tribunal members read, parties informed accordingly; and judgment on 31/07/2019."* He contended that there is confusion in the orders of the Hon. Chairman as he set separate dates for mention and judgment at the same time. But more confusing and problematic, the Hon. Chairman in his judgment at page 9 wrote:

*"That said, I agree to advice by both tribunal assessors who advised that the suit land belongs to applicants."*

Mr. Mbise cited two cases from this Court being: ***Yus Izeck Sikaponda v. Mbozi District Council & 3 Others***, Land Appeal No. 79 of 2016; and that of ***Tom Atufigwege Mwakyelu v. Palkep Kurpash***, Misc. Land Appeal No. 46 of 2016 which relied on CAT decisions in ***Edina Adam Kibona v. Absalom Swebe (Sheli)***, Civil Appeal No. 286 of 2017 and that of ***Tubone Mwambeta v. Mbeya City Council***, Civil Appeal No. 287 of 2017 (both unreported). In these cases the Courts ruled that each of the assessors have to state his/her opinion in the presence of the parties.

He argued that in the proceedings on the initial case held by Hon. Hatson, the Chairman sat with two assessors being one Mr. Kangele and Mrs. Sarah. However, during defence/respondent's case, Mr. Kangele was absent thus the Chairman preceded with Mrs. Sarah. He argued that

under the requirements of section 23 (3) of the Land Disputes Courts Act, Cap 216 R.E. 2002 read together with regulation 19 (2) of G.N. 174 of 2003, it is only Mrs. Sarah who was supposed to give her opinion and not the other assessor. Following these defects, Mr. Mbise argued that the proceedings by Hon. T. Munzerere are fatally irregular and ought to be quashed.

The respondents were represented by Mr. Justinian Mushokorwa, learned advocate. In his submission in reply to Mr. Mbise's submission, Mr. Mushokorwa somehow conceded to the defects seen in the Tribunal proceedings regarding active participation of assessors. However, he argued that the orders by this Court did not nullify the proceedings and may not have meant both assessors, but only one who was present as well on the defence case. He agreed with Mr. Mbise that it was contrary to section 23 (3) of Cap 216, for the Tribunal Chairman to invite Mr. Kangele to give his opinion and urged the Court to expunge that opinion from the record. He distinguished the case of **Tubone Mwambeta** (supra) saying that in that case the Chairman did not invite the assessors to give their opinion and the opinion was not pronounced before the parties unlike in the case at hand whereby the opinion of assessors was read to the parties on 18/06/2019. He argued that even though the records do not show which assessors was present the law was complied with.

I have considered the arguments by both counsels. The initial record clearly shows that among the two assessors, one of them, that is, Mr. Kangele never sat with the Tribunal to the end. Under section 23 (3) of

Cap 216, the Tribunal is permitted to proceed with one assessor where the other is not present. It states that:

*"Notwithstanding the provisions 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."*

As per the dictates of this provision and as argued by Mr. Mbise, the assessor who was supposed to give her opinion was Mrs. Sarah, being the one present to the end. Though the names of assessors present is not indicated in the proceedings, the Chairman noted that both assessors were to give their opinion and in his judgment he stated to agree with the opinion of both assessors. Mr. Mushokorwa, argued that this situation is not fatal as the court can expunge the opinion of one of the assessors. In my considered view however, the act of including in the judgment the opinion of an assessor who was not present till the end of the hearing makes the whole judgment a nullity and the same cannot be cured by expunging the said opinion.

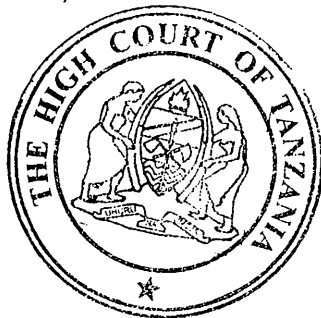
The proceedings of the case as held by Hon. Munzerere show that the assessors were never present in the Tribunal as their names do not appear anywhere in the proceedings. I disagree with Mr. Mushokorwa that this is not a fatal irregularity. It is the proceedings that tell what transpired in court and an appellate court cannot assume that the assessors were present while they do not appear in the proceedings. In addition, the

position of the law as it has been decided in a number of cases is that when the opinion of assessors is being given, a summary of the said opinion has to be recorded in the proceedings. The proceedings indicate that on 18<sup>th</sup> June 2019 the opinion of assessors was read. The Chairman wrote: "*Opinion by tribunal members read, parties informed accordingly.*" In my settled view it does not suffice to only state that the opinion has been read. The Tribunal has to go further to write a summary of the opinion in the proceedings. See: **Ameir Mbarak & Azania Bankcorp Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015; **Andrew Ramadhani v. CRDB Bank PLC & Another**, Land Appeal No. 22 of 2019 (HC at Mbeya, unreported) and **Ruben Daudi Mwakiholano v. Shukrani Nkenja**, Misc. Land Appeal No. 03 of 2019 (HC at Mbeya, unreported).

As ruled in the above cited cases and many others, the non-active participation of assessors in Tribunal proceedings has the effect of vitiating the whole proceedings. Therefore the proceedings and judgment of the Tribunal in Land Application No. 61 of 2009 are hereby nullified. I order the matter to be remitted to the Tribunal to be re-tried before another chairman and a new set of assessors. Since the appeal has been determined on a ground of procedural mistake by the Tribunal, I make no orders as to costs. Appeal allowed.

Order accordingly.

Dated at Mbeya on this 06<sup>th</sup> day of May 2020



*L. M. Mongella*  
**L. M. MONGELLA**  
**JUDGE**

**Court:** Judgement delivered in Mbeya in Chambers on this 06<sup>th</sup> day of May 2020 in the presence of both parties and Mr. Ezekiel Mwampaka, learned advocate holding brief for Mr. Justinian Mushokorwa and Mr. Mika Mbise, learned advocates for the parties.

  
**L. M. MONGELLA**  
**JUDGE**