

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
MBEYA DISTRICT REGISTRY  
AT MBEYA  
MISC. LAND APPEAL NO. 25 OF 2018**

*(From the decision of District Land and Housing Tribunal for Rungwe in Land Appeal No. 33 of 2010 and Original Land Case No. 2 of 2010 Ipande Ward Tribunal)*

**MASUDI MWAMWAJA.....APPELLANT**  
**VERSUS**  
**JUBECK MWAKILUMA.....RESPONDENT**

**JUDGMENT**

***Date of last Order:***        09/04/2020

***Date of Judgment:***        08/05/2020

**NDUNGURU, J.**

This is the second appeal being preferred by the appellant. The appellant, Masudi Mwamwaja has been aggrieved with the decision of the District Land and Housing Tribunal for Rungwe in Land Appeal No. 33 of 2010 hence lodged this appeal. The matter started at Ipande Ward Tribunal (herein referred as the trial tribunal) in Land Case No. 2 of 2010. The respondent successfully sued the appellant claimed ownership of the disputed land and he was finally declared to be the lawful owner.

The appellant was dissatisfied with the decision of the trial tribunal, appealed to the District Land and Housing Tribunal for Rungwe in Land Appeal No. 33 of 2010 but he lost.

The appellant has brought three grounds of appeal in the petition of appeal presented:

1. That, the first tribunal erred in law and facts to uphold the decision of the trial tribunal while the tribunal was not properly constituted.
2. That, the trial and first tribunal erred in law and fact for failure to properly analyze and evaluate the evidence in reaching its decision,
3. That, the first appellate tribunal erred in law and facts when wrongly apply the doctrine of adverse possession reaching to unfair and unjust decision to the detriment of the appellant.

When the appeal was called on for hearing, Mr. Justine Mushokorwa learned advocate appeared for the respondent whereas the appellant appeared in person unrepresented. The matter was argued by the way of the written submissions following the order of this Court and both parties have adhered to the scheduled order save for the rejoinder submission which filed by the respondent out of time without leave of the Court.

Arguing the first ground of appeal, the appellant submitted that in the proceedings of the trial tribunal the names of members who involved

in the hearing the case were not indicated from the first date of the hearing up to the finality of the trial. He added that the names of members involved during the trial were only indicated in the judgment by initializing their first names, the gender of the members were not indicated at all. He cited Section 11 of the Land Disputes Courts Act (Cap 216 Revised Edition 2019) to cement his submission.

He further submitted that the effect of improper composition of the members of the trial tribunal render the whole proceedings and judgment to be nullity. He referred this Court to the case of **Venance Tengeneza vs. Kawawa** Mwapili, Land Appeal No. 13 of 2008 High Court of Tanzania at Iringa (unreported) to support his contention.

Explaining the second ground of appeal, the appellant submitted that the both lower tribunals failed to analyze the evidence on the record properly. He added that there was another person who instituted the suit at the trial tribunal as Jubeck against the appellant without locus standi. Therefore, the whole proceedings and judgment of the trial tribunal are nullity. Finally, he prayed for the Court to allow the appeal.

In rebuttal, Mr. Mushokorwa alleged that the appeal was brought out of time and even the petition of appeal was not signed or initialed by the appellant and ask the appellant to attach a copy of the exchequer. He

cited Section 44 of the Advocates Act (Cap 341 R.E. 2019) to support his argument.

He continued to submit that the law demand a maximum of three members of whom one a woman to constitute the composition of the Ward Tribunal as per Section 14 (1) of the Land Disputes Courts Act (Cap 216 Revised Edition 2019). He went on to submit that this omission is curable by the doctrine of overriding objective and also he contended that the cited decision of **Venance Tengeneza (supra)** is not binding is persuasive.

With regard to the second ground of the appeal, Mr. Mushokorwa replied that in all page of the trial tribunal, the respondent Jubeck Mwakiluma appear to have signed his testimony on different pages. In conclusion, he prayed for the Court to dismiss the appeal with costs. But if the Court thinks otherwise, may remit back the record of the Ward Tribunal with directives to indicate the first names of the assessors or to order retrial.

In the course of composing judgment the Court faced a legal issue that is the involvement of the assessors during the hearing of the appeal at the first appellate tribunal. The Court suo motto required the parties to address it on the propriety of the trial pertaining the involvement of the

assessors and their role when the District Land and Housing Tribunal entertain appeal.

Address on the involvement and the role of the assessors, Mr. Mushokorwa submitted that it is true that the chairman did not involve and invite the assessors to give their opinion. He added that is an error of the law. He went on to submit that the only remedy is for the Court to nullify the proceedings and judgment and the file be remitted back for retrial.

On the side of the appellant, he submitted nothing rather stated that is a point of law.

At the outset, I wish to restate that, composition of the tribunal and the role of assessors is the creature of the law. Section 23 (1) and (2) of the Land Disputes Courts Act (Cap 216 Revised Edition 2019) provides as follows:

*"(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 duly be constituted when held by a chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.**"*

Therefore, it is the law which gives the assessors mandate to give opinion on the verdict before the chairman composes the decision. In

other words it is mandatory for the chairman of the tribunal to consult the assessors before he reaches the judgment.

Further the Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003 provides that:

*"Notwithstanding sub- regulation (1) the chairman shall, before making judgment, require every assessors present at the conclusion of the hearing to give his opinion in writing and the assessors may give his opinion in Kiswahili."*

As per the provision cited, it is a mandatory for the District Land and Housing Tribunal to seat with not less than two assessors. Their presence becomes valuable if they actively, affectively and full involve in the proceedings before opining at the conclusion of the trial.

However, the record of the trial tribunal at page 3 of the typed proceedings provides that:

**ORDER**

*1. Judgment on 05/10/2010*

*Sgd.*

*Antigon.J. Majengo*

*Chairman*

*05/10/2010*

The record does not reveal if the assessors were given opportunity to give their opinion as required by the law. The record of the proceedings show that the defence case was closed on 28/07/2010 but it is silent as to whether the chairman invited the assessors to give their opinion as required by law. What is in the record is their written opinion. It is doubtful as to how and when they found the way in the court record they are to be taken circumspectly.

In my understanding, the same being filed in the absence of the parties therefore it is not easy for the parties to know the nature of the opinion were given by the assessors and whether such opinion has been considered by the chairman in his judgment. The same position is well articulated by the Court of Appeal of Tanzania in the case of **Edina Adam Kibona vs. Absolom Swebe (Shell)**, Civil Appeal No. 286 of 2017 (Unreported) and the case of **Tubone Mwambete vs. Mbeya City Council**, Civil Appeal No.287 of 2017.

In my understanding the omission goes to the root of the matter and occasioned a failure of justice and there was no fair trial at all because the parties lack opportunity to know the opinion of the assessors at the conclusion of the trial before judgment.

Before I put off the pen, I feel profoundly duty to put clear that this Court cannot address on the issues raised by Mr. Mushokorwa concerning that the appeal is time barred and the petition of appeal was not signed by the appellant. I hold so because the counsel for the respondent brought those preliminary objections at the back door.

In the premises, I hold that the irregularity is incurable it goes to the root of the matter. Consequently, I hereby nullify the proceedings and judgment of the District Land and Housing Tribunal. I further order expedited retrial before the first appellate tribunal presided over by another chairman and new set of assessors if the parties are still interested on the matter.

I will not labor on the grounds of appeal as the above discussed irregularity has sufficed to dispose of the appeal. No order as to costs on the ground that the parties had no hands toward such irregularity committed by first appellate tribunal.

It is so ordered.



  
**D. B. NDUNGURU**  
**JUDGE**  
08/05/2020

**Date:** 08/05/2020

**Coram:** D. B. Ndunguru, J

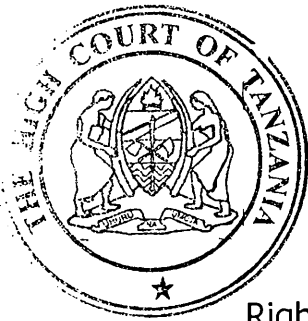
**Appellant:** Present

**Respondent:** Present

**For the Respondent:**

**B/C:** M. Mihayo

**Court:** Judgment delivered in the presence of the parties (in persons).



  
**D. B. NDUNGURU**  
**JUDGE**  
08/05/2020

Right of Appeal explained.