

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

(LAND DIVISION)

AT IRINGA.

MISC. LAND APPEAL NO. 27 OF 2019

**(Originating from the judgment of District Land and Housing
Tribunal of Iringa in Land Application No. 26 of 2017).**

BENEDICT LUBAVA (As Administrator of the

Estate of the Late MOHAMED LUBAVA APPLICANT

VERSUS

JOHN MWIGUNE	1ST RESPONDENT
SEBION GENDE	2ND RESPONDENT
JAILOS MWENDA	3RD RESPONDENT
CHARLES KALINGA	4TH RESPONDENT
ELVIS YAMBA	5TH RESPONDENT

7/5/2020 & 29/7/2020

JUDGMENT

MATOGOLO, J.

The appellant one Benedict Lubava has appealed to this court after being aggrieved by the whole decision of the Iringa District Land and Housing Tribunal in application No. 27 of 2019.

Before that Tribunal, the appellant filed a suit as the administrator of the Estate of the late Mohamed Lubava who is said to have died on 2nd August, 1952 and the appellant was appointed as an Administrator of the Estate on 18th February 2016. The appellant claims the land located at Itulavanu Village Mufindi District with estimated value of Tshs. 8, 000, 000/=which he said the respondents have trespassed to it.

The case at the District Land and Housing Tribunal was decided in favour of the respondents. The appellant being aggrieved, he has come to this court with a memorandum of appeal with two grounds as follows;

1. That the Trial Tribunal did not evaluate and consider the Appellant's evidence on critical way and considered only the respondents' evidence hence reached to unfair decision.
2. That the trial tribunal erred in law in delivering a decision against the appellant basing on the opinion of single assessor while the opinion was not read out the parties.

The appellant prays before this Court for the following orders;

- a) That the decision and orders of the DLHT of Iringa be Quashed and set aside
- b) That the Appellant be pronounced as the legal owner of the said plot
- c) Respondents be ordered not to interfere with the Appellant property whatsoever.

d) Costs to this appeal follow the event.

e) Any other relief(s) this honourable court may deem just and fit to grant.

At the hearing, the parties were represented by advocates, the Appellant was represented by Mr. Stapha Yusto Oganga while the respondents were represented by Mr. Method A. Msokele.

The appeal was disposed by way of written submissions.

In his submission in support of the appeal, Mr. Oganga abandoned ground No.1 thus argued only ground No.2.

Mr. Oganga submitted that the Chairman of the Tribunal gave his decision basing only on purported opinion of one assessor Chalamila. But the said opinion of the assessor was not given out to the parties in their presence before the decision of the trial tribunal was rendered with a purpose of enabling them to know the nature of the said assessor's opinion.

He submitted further that the laws require that, opinion of the assessor to be given in the presence of the parties before the delivery of the judgment so that parties can know what assessors have opined in their case and whether the chairman did consider the opinion of the assessors. To bolster his argument he cited section 23(2) of the Land Disputes Courts Act (Cap 216 R.E 2002) and Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No. 174 of 2003.

He also cited Civil Appeal NO. 286 of 2017, ***Edna Adam versus Absolom Swebe (Sheli)***, CAT at Mbeya (unreported) at pages 4 to 6 of the typed judgment which cited with approval its previous decision in Civil Appeal No.287 of 2017, ***Tubone Mwambeta versus Mbeya City Council***, CAT at Mbeya (unreported).

He contended that failure of the assessors to give their opinion in the presence of the parties even if the opinion is in the records, renders such opinion to have no value and the decision to be a nullity as it is taken to mean that, the assessor never gave such opinion and never actively participated in hearing the proceedings but the chairman alone who does not constitute the tribunal.

Mr. Oganga submitted that in the case at hand , the same mistake was done by the tribunal, looking at the proceeding at page 54, shows that the case was closed and the order of the tribunal was coming for judgment on 25th September, 2018 hence the judgment was delivered on 22nd October , 2018.

He argued that there is nothing in the proceedings which show that the opinion of the assessors was given or read out to the parties as the law requires.

He said basing on the cited legal authorities, this court has to follow the positions above taken, nullify the proceedings, judgment and orders of the trial tribunal as this is fatal irregularity done by the trial tribunal which

occasioned the denial of the justice to the appellant. He thus prayed the appeal be allowed.

In reply Mr. Msokele submitted began by reproducing section 23(1)(2) of the Land Disputes Courts Act 2002 [Cap. 216 R.E. 2002] which governs the composition of the District Land and Housing Tribunal which provides;

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

(3) Notwithstanding the provisions of sub section (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".

He argued that throughout the hearing, the trial tribunal was properly constituted in all sessions of the trial District Land and Housing Tribunal and before judgment one assessor Chalamila gave out his opinion as provided for under section 23(3) because the other assessor one Magoha

died before the conclusion of the matter as shown at page 5 of the typed judgment.

He argued further that at pages 5 to 7 of the composed judgment it shows the opinion of the assessor one Z. CHALAMILA which indicate that it was written on 15/08/2018 and at page 54 of the proceedings it shows that, the judgment was delivered on 22/10/2018 which means the opinion of assessor was out before the judgment was composed as required by the law.

Mr. Msokele also cited Regulation 19(1) (2) of the District Land which provides;

- (1) " The Tribunal may, after receiving evidence and submissions under regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;*
- (2) 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"*

He contended that in the tribunal's proceedings and judgment it is clear that, the assessors participated in the trial actively and effectively and the opinion of one assessor was given in writing before the chairman composed the judgment.

He argued that the trial Tribunal was properly constituted in the course of hearing of the matter then one assessor died before conclusion of the matter and one assessor Chalamila gave out his opinion in writing before composing the impugned judgment as required by section 23(3) of the Act. He contended that on the typed judgment at page 8 it shows very clear that, the trial Chairman considered the opinion of single assessor after the death of another assessor, that did not occasion any failure of justice to the appellant.

He cited section 45 of the Courts (Land Disputes Settlements) Act, 2002 (Cap 216 R.E 2002) which requires the court to alter a decision of the Lower Court where the omission or commission of a procedural irregularity occasioned failure of justice which is not in the case at hand. The provision provides;

45. "No decision or order of a ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned of failure of justice"

He further cited the case of ***Yakobo Magoiga Gichere versus Peninah Yusuph***, Civil Appeal No. 55 of 2017 (CAT) at Mwanza at page 13 to 14 of its judgment the court held;

"With the advent of the principle of Overriding objective brought by the written Laws (Miscellaneous Amendments)(No.3) Act, 2018 [Act No. 8 of 2018] which now requires the Courts to deal with cases justly, and to have regard to substantive justice; section 45 of the Land Disputes Courts Act (which prohibits reversing decision on account of errors which do not occasion failure of justice), should be given more prominence to cut back on over reliance on procedural technicalities....."

He argued that the original record shows the opinion of single Assessor one Chalamila which is in writing and was given out as required by the law. He contended that basing on opinion of single assessor was done after the death of another assessor as shown on the typed judgment at page 5, which is allowed in law and this did not occasion any failure of justice to the appellant.

He submitted that on the strength of the foregoing submissions, the respondents prays this Court to be pleased to dismiss this appeal with costs for lack of merit and uphold the decision and decree of the trial tribunal.

Having read the respective submissions by the parties and having perused the trial tribunal records, to my opinion the issue for determination before this court is whether this appeal has merit before this court.

Mr. Oganga complains that, the trial tribunal chairman gave its judgment basing only on purported opinion of the assessor one Chalamila, and the said opinion of the assessor was not read out to the parties in their presence before the decision of the trial tribunal was rendered with a purpose of enabling them to know the nature of the said assessors opinion.

The counsel for the respondent argued that, throughout the trial tribunal was properly constituted in all sessions of the trial District Land and Housing Tribunal and before judgment one assessor Chalamila gave out his opinion as provided for under section 23(3) because the other assessor one Magoha died before the conclusion of the matter. He submitted that, basing on the opinion of single assessor after the death of the other assessor, did not occasion any failure of justice to the appellant, He contended that the opinion of single assessor one Chalamila which is in writing and was given out as required by the law.

According to section 23(1) of the Land Disputes Courts Act (Cap 216 R.E. 2019) The District Land and Housing Tribunal is composed of a Chairman and not less than two assessors

Furthermore **regulation 19(2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations, 2002, G.N. No.174**, The regulation states that;

"Notwithstanding subsection (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give opinion in writing and the assessor may give his opinion in Kiswahili"

In the case of ***Tubone Mwambeta versus Mbeya City Council, Civil Appeal No.287 of 2017(unreported)***, the Court of Appeal of Tanzania held that;

"In the view of the settled position of the law where the trial has be conducted with the aid of the assessors, 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 since Regulation 19(2) of the Regulations require 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"

The trial tribunal records reveal that the assessors involved in the hearing were Magoha and Chalamila, but one Magoha died before giving his opinion and one Chalamila gave his opinion in writing. Now the issue is

whether the opinion of the said assessor was read over to the parties as required by the Law.

The DLHT records particularly on 10/08/2018 the case was adjourned for Judgment on 22nd October, 2018, I Have carefully perused the Trial Tribunal records there is nowhere the Trial chairman recorded that the case was fixed for the assessor to give their opinion. Also the DLHT is silence on whether the written opinion of assessor was read in the presence of parties.

In this case the trial tribunal chairman considered the opinion of assessor one Chalamila in the judgment.

This court,in the case of ***Anna Busuro versus Amari Mwita, Miscellaneous Land Appeal No. 41 of 2019 HC at Musoma, Kahyoza, J.*** at page 3 the Court held that;

"DLHT failed to actively involve the assessors in the determination of the appeal. It failed to cause the written opinion of the assessors to be read in the presence of the parties. Thus the DLHT heard the appeal without aid the assessors in violation of the clear provisions of the section 23 of the Land Disputes Courts Act, Cap 216 (R.E 2019) and Regulation 19 of the Land Disputes Courts (District Land and Housing Tribunal)

Regulation(supra). The omission is an incurable defect and it renders the proceedings a nullity”

The same position was maintained by the Court of Appeal of Tanzania in the case of ***Edina Adam Kibona versus Absolom Swebe, Civil Appeal No. 286 of 2017 CAT (unreported)*** the Court recapitulated its position that failure to call upon the assessors to give opinion and let the parties to know the contents of the assessors opinion was a ruinous defect. The Court of Appeal stated;

" We wish to recap at this stage that the trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, it terms of Regulation 19(2) of the Regulations, the Chairman of the DLHT must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed.

For the avoidance of doubt, we are aware that in the instant case, the original record has the opinion of assessors in writing which the Chairman of the DLHT purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them,

we fail to understand how and at what stage they found their way in the court record. And in further view of the fact they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose"

Mr. Msokele submitted that, section 45 of the Land Disputes settlement) Act, (supra) requires the Court to alter a decision of the lower Courts where the omission or omission of a procedural irregularity occasioned failure of justice which is not in the case at hand. He cited the case of ***Yakobo Magoiga Gichere versus Peninah Yusuph***, Civil Appeal No.55 of 2017 (CAT) the court held that;

"With the advent of the principle of overriding objective brought by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018[Act No. 8 of 2018] which now requires the Courts to deal with cases justly, and to have regard to substantive justice, section 45 of the Land Disputes Courts Act(which prohibits reversing decisions on account of errors which do not occasion failure of justice), should be given more prominence to cut back on over reliance on procedural technicalities....."

I'm aware of the above principle of overriding principle but the same was not meant to enable parties to circumvent the mandatory rules of the court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case" see the case of ***SGS Societe Generale de Surveillance SA and another Versus VIP Engineering and Marketing Ltd and another (Civil Appeal No.124 of 2017) (unreported)***.

From the above cited authorities it is my considered opinion that DLHT failed to actively involve the assessor in the determination of the case , the act of the DLHT not to cause the written opinion of the assessor to be read in the presence of parties is a violation of the clear provisions of section 23 of the Land Disputes Courts Act and Regulation 19 of the Land Disputes Courts (District Land and Housing Tribunal) Regulation G.N No. 174/2003, the omission is an incurable defect and it renders proceedings nullity.

This appeal has merit, the same is allowed, the trial tribunal proceedings and the judgment are hereby quashed and set aside. The case to be heard *denovo*, but before another chairman and with a new set of assessors.

It is so ordered.


F.N. MATOGOLO

JUDGE

29/7/2020.

Date: 29/07/2020
Coram: Hon. L. M. Chamshama AG - DR
Appellant: Absent
1st Respondent: Absent
2nd Respondent: Absent
3rd Respondent: Absent
4th Respondent: Present in person
5th Respondent: Deceased
C/C: Gloria M.

COURT:

Judgment delivered today in the present of the 4th Respondent and the absence of the Appellant, 1st, 2nd, 3rd and 5th Respondent.



L. M. CHAMSHAMA
AG- DEPUTY REGISTRAR
29/07/2020

Right of Appeal fully explained.



L. M. CHAMSHAMA
AG- DEPUTY REGISTRAR
29/07/2020