

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 47 OF 2019
(Originating from Application NO. 55 of 2017 of the
District Land and Housing Tribunal for Mbeya)**

**FRED NICODEMAS MWASENGA.....APPELLANT
VERSUS
GODFREY JAPHET.....RESPONDENT**

EX-PARTE JUDGMENT

Date of last order: 06/08/2020
Date of Ex-parte Judgment: 17/09/2020

NDUNGURU, J.

In the District Land and Housing Tribunal for Mbeya the appellant Fred Nicodemas Mwasenga sued the respondent one Godfrey Japhet over a land parcel and landed property located at kiwanda, Mlowo Mbozi District, claiming that he is the lawful owner of the land and landed property as he purchased the suit land from Theresia Kasingapo Musyani who acquired it following division of matrimonial property.

In the trial tribunal the appellant was represented by learned Advocate Mwabukusi and the matter was heard ex-parte, where the appellant testified that he purchased the suit premises from Theresia

Kasingapo Msyani on 16/07/2016 for Tshs. 10,500,000/=(ten million and five hundred shillings) and the vendor assured him of her title over the suit land by showing him a written declaration by her husband stating that he has built the house for his wife Theresia Kasingapo Msyani.

He further testified that there after he took steps to register it in his name after making application for transfer of Right of Occupancy to the District Land office, the appellant prayed the tribunal to declare him the lawful owner of the suit premises.

After a full trial, the tribunal found that the applicant failed to prove his case as the evidence was contradictory hence the application was dismissed.

The appellant being dissatisfied with such decision, failed to contain her breath he filed an application for extension of time to appeal out of time which was granted on 27/07/2019, thereafter he lodged the present appeal armed with three(3) grounds of appeal namely:

1. That the honourable Chairman erred in law and in fact by failure to comply with the mandatory dictates of the law by failure to invite assessors to give their opinion.

2. That the honourable Chairman erred in law and in fact by failure to consider, analyse and evaluate the evidence before him to the standard required by law.
3. That the honourable Chairman erred in law and in fact by the serious failure to analyse and evaluate issues of principle regarding inconsistency and contradiction of witness testimony thus arriving into a wrong decision.

The appellant prayed before this court for the following orders:

- (i) The appeal be allowed.
- (ii) The judgment of the trial tribunal be quashed and set-aside.
- (iii) Any other relief this honourable court deems fit and just to grant.

When the appeal was fixed for hearing on 03/07/2020, Ms. Rose Kayumbo, learned counsel from (**BAK MWABUKUSI & CHAMBERS ADVOCATES**) for the appellant told the court that they have failed to secure the whereabouts of the respondent hence prayed service be done by publication.

By order of the court the service was ordered be done by publication in the local newspapers (Swahili) and hearing was scheduled on 06/08/2020.

On 06/08/2020 Mr. Ezekiel Mwasumbi learned Advocate for the appellant told the court that they have complied with the order of publication in Mwananchi newspapers hence prayed for hearing date.

The court ordered the case to proceed ex-parte against the respondent after the fact that the summons to the respondent has been published in Mwananchi newspapers dated 1st August, 2020.

By prayers of the learned counsel for the applicant, it was agreed the appeal be disposed off by way of written submission.

In support of the memorandum of appeal, the appellants counsel written submission abandoned 2nd and 3rd grounds of appeal instead argued only the first ground where he submitted that for the tribunal to be properly constituted it has to comprise of one chairman and set of not less than two assessors in accordance with the provision of Section 23 (1) of the Land Disputes Courts Act, Cap 216 R:E 2002 Which provides among other things that:

"The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors."

It was the learned counsel submission that the law makes it a mandatory requirement for the assessors to give out their opinion

before the chairman concludes his judgment, this finds support from the provision of Section 23(2) of the Act (supra) which provides that:

"the District Land and Housing Tribunal shall be dully constituted when held by one chairman and two assessors who shall be required to give out their opinion before the chairman reaches a judgment."

He further submitted that with the aid of Regulation 19 (2) of the land disputes courts (the district land and housing tribunal) Regulation G.N No. 174/2002 it has been a mandatory compliance that assessors present at the conclusion of the hearing must give their opinion, he invited this court to the case of **Tubone Mwambeta vs. Mbeya City Council, Civil Appeal No. 287 Of 2017, Court of Appeal of Tanzania** (unreported).

Finally the applicant submitted that since the first ground of appeal is very fundamental as to legality of the decision, they don't find a reason to argue the rest grounds of appeal, therefore they prayed this honourable court be pleased to quash and set aside the trial tribunal decision.

Since the matter was heard ex-parte, I am going to resolve the first ground of appeal by going through submissions made by the appellant and the records of the trial tribunal, as rightly argued by the

learned counsel for the appellant, having reviewed the entire records of the trial tribunal I found that the chairman of the trial tribunal did not invite the assessors to give their opinion.

On 17/07/2018 at page 10 of the typed proceedings of the trial tribunal the applicant closed its case and the chairman proceed to order ex-part judgment date, there is nowhere in the trial tribunal proceedings the wise assessors were invited to give their opinion but the chairman merely made reference to them in his decision though those opinions are not featured in the entire proceedings.

It be noted that the role of the assessors is the creature of law under Section 23 (1) (2) of the Courts (Land Disputes) Settlement Act and Regulation 19 (2) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003.

To make more clarity, I find it sensible to reproduce the two cited sections. To start with Section 23 (1) (2) (supra) which reads as follows:

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 chairman and two assessors who **shall be required to give out their opinion before the chairman reaches the judgment.***

Whereas, Regulation 19 (2) of the G.N No. 174 imposes a duty to the chairman, to order every assessor present at the conclusion of hearing to give his opinion in writing before making his judgment.

The cited regulation reads as follows:

"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."

In the foregoing, the law is steady and well settled. It is the law which gives the assessors mandate to give their opinion on the verdict before the chairman composes his decision. The trial tribunal records indicates that two assessors aided the trial during the entire pendency of the suit, these assessors are **Kangele** and **Sarah** but their opinions are not featured anywhere in the proceedings.

In my view, failure by the presiding chairman to ensure that the assessors opine on the suit and that opinion be read to the parties before judgment, quantify into a fundamental defect that goes to the root of the subject matter.

What was at issue in this appeal was also an issue in **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017

Court of Appeal of Tanzania (unreported) where the court has the following observation at page 11:

"in view of the settled position of the law ,where the trial has to be conducted with the aid of assessors, they must actively and effectively participate in the proceedings so as to make meaningfully their role of giving their opinion before the judgment is composed...since Regulation 19(2) requires every assessors present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the present of the parties so as to an able them to know the nature of the opinion has been considered by the chairman in the final verdict."

In this case, the court asserted the need to require every assessor to give his opinion and their opinion be on records.

To accord more weight, see also the cases of **Edina Adam Kibona vs. Absalom Swebe (sheli)**, Civil Appeal No. 286/2017 Court of Appeal of Tanzania (unreported) and **Sikuzani Saidi Magambo and Another vs. Mohamed Roble**, Civil Appeal No. 197/2018, Court of Appeal of Tanzania at Dodoma (unreported).

Since the above discussed ground of appeal holds water, in the premises I hold that the ground of appeal discussed has merit as the irregularity is incurable as it offends the dictates of the law.

The fact that the appellant abandoned the 2nd and 3rd grounds, and since the above discussed ground of appeal sufficed to dispose off the appeal, consequently, I hereby allow the appeal, nullify the entire proceedings and judgment of the trial tribunal. The application deserve to be tried afresh before another chairman and new set of assessors if the parties are still willing to pursue the matter. I order the application to be tried de novo by another chairman and new set of assessors.

Since the irregularity has been prompted by the District Land and Housing Tribunal and the respondent never appeared in the trial tribunal and in this court, it would be highly unwarranted for the parties in this matter to bear responsibility, in the circumstances of this case therefore, the eyes of justice dictate this court to refrain from awarding costs, each part shall carry its own cost.

It is so ordered.



A handwritten signature in blue ink, appearing to read "D. B. Ndunguru".

D. B. NDUNGURU
JUDGE
17/09/2020

Date: 17/09/2020

Coram: D. B. Ndunguru, J

Appellant: Absent

For the Appellant: Mr. Mbise holding brief of Rose Kayumbo advocate

Respondent: Absent

B/C: M. Mihayo

Mr. Mbise Fredrick – Advocate:

We are ready for judgment.

Court: Judgment delivered in the presence of Mr. Fredrick Mbise holding brief of Ms. Rose Kayumbo and in the absence of the respondent.



D. B. Ndunguru
D. B. NDUNGURU
JUDGE
17/09/2020

Right of Appeal explained.