THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 50 OF 2019
(From the decision of the District La nd and Housing Tribunal for Mbeya in Application No. 47 of 2017)

JOHN MOFAT MWASHITETE.....APPELLANT
VERSUS
FALEX HICKSON MWASHITETE (As administrator of the estate of the late Hickson Mwashitete).....1st RESPONDENT

HELEN STEPHANO MWASHITETE (As administrix of the estate of the late Stephano Mwashitete).....2nd RESPONDENT

JUDGMENT

Date of last order: *10/07/2020*
Date of Judgment: *29/09/2020*

NDUNGURU, J.

Before me is an appeal emanate from the judgment and decree of the District Land and Housing Tribunal for Mbeya (herein referred to as trial tribunal) in Application No. 47 of 2017 where the appellant's suit was dismissed with costs by the trial tribunal on the ground that the appellant (who was the applicant at the trial tribunal) has failed to prove his case on the balance of probabilities.

For better understanding of the essence of the appeal, I find it pertinent to briefly narrate the background. The appellant, John Mofat Mwashitete sued the respondents one Falex Hickson Mwashitete and

Helen Stephano Mwashitete over a piece of land located at Mtega hamlet within Utengule village in Mbeya District. At the trial, the appellant testified that, he was given the suit land by his late father in 1967. Again, he told the trial tribunal that, his father was passed away in 1995.

Also, the record revealed that, the respondents invaded the suit land in 2002. Further, he testified that, he was doing cultivation on the suit land and he is legal owner of the suit land.

During the defence case, the respondents' side strongly disputed the appellant's allegation. Also, the second respondent herein told the trial tribunal that, the suit land belonged by their late father Stephano Mwashitete. Again, she told the trial tribunal that, in 1997 their late father divided the same amongst all his 13 children including the second respondent and the appellant's father.

Having heard the evidence adduced by the parties, the trial tribunal found out that, the appellant's application was not proved on the balance of probabilities and therefore dismissed it with costs. The appellant was not happy with the judgment and decree of the trial tribunal.

Believing the decision of the trial tribunal was not correct, which was in favour of the respondents, the appellant lodged this appeal on

four grounds of complaint seeking to assail the decision of the trial tribunal. The grounds as follows:

1. That, the trial tribunal erred in law by holding in favour of the respondents despite the common fact that the suit was in long opposed occupation and use of appellant.
2. That, the trial tribunal grossly and seriously erred to rule out that the respondent is lawful owner of the suit land without inviting assessors to give their opinions after closing defence case.
3. That, the trial tribunal erred in law and fact by holding that the appellant failed to specify boundaries of the disputed land while the trial tribunal did not visit the locus in quo.
4. That, the trial tribunal erred in law in its evaluation and analysis of evidence, hence reaching to wrong decision.

When the appeal was fixed for hearing before me, the appellant appeared in person and without legal representation whereas Mr. Isack Chingilile, learned advocate appeared for the respondents. The appeal was argue by the way of the written submissions and the parties were correctly filed the same.

Arguing to the first ground of appeal, the appellant submitted that, the trial tribunal erred in law by holding in favour of the respondents despite the common fact that the suit land was on the hands of the

appellant for over 12 years without any opposition from the respondents.

To buttress his submission he cited of **Bhoke Kitang'ita vs. Makuru Mahemba,** Civil Appeal No. 222 of 2017 Court of Appeal of Tanzania (unreported).

On the second ground of appeal, the appellant contended that, the wise assessors were not invited to give their opinion after closure of defence case. He added that, only one assessor was present while the other one who participated during the hearing of the suit from the beginning did not give opinion.

Also, he cited Section 23 (1) and (3) of the Land Disputes Courts Act (Cap 216 R.E. 2019) and the case of **Sikuzani Said Magambo and another vs. Mohamed Roble**, Civil Appeal No. 197 of 2018 Court of Appeal of Tanzania and **John Filmon and others vs. Sikujua Ismail Lusinde**, Land Case No. 132 of 2018, High Court at Dar es Salaam (Land Division) (both unreported) to support his contention.

In relation to the third ground of appeal, the appellant argued that, given the circumstances of this case, it was necessary for the tribunal to visit the locus in quo. He added that, although to visit the locus in quo is discretion of the tribunal or Court but each case must be treated according to its facts.

Regarding to the fourth ground of appeal, the appellant argued that, the trial tribunal failed to evaluate and analyze well the evidence hence reached to a wrong decision. Finally, he prayed for the Court to allow this appeal and order retrial before another chairman with a different set of assessors.

In rebuttal, Mr. Chingilile submitted that, the evidence of the respondents is very clear and reliable that the late Stephano Mwashitete was the owner of the disputed land who disposed it to her daughters including the second respondent and appellant's father. He added that, there is no evidence which support the appellant.

On the second ground of appeal, Mr. Chingilile argued that, the opinion of one assessor was given out to the parties of the case as required by the law. He added that, the trial tribunal complied with the Section 23 (3) of the Land Disputes Courts Act (Cap 216 R.E. 2019).

With regard to the third ground of appeal, Mr. Chingilile replied that, the purpose of visit a locus in quo is to eliminate minor discrepancies as regard the physical condition of the land in dispute. He added that, the appellant had to state in pleading specific boundaries of the disputed land.

To cement his argument he cited the case of **Sospeter Kahindi vs. Mbeshi Mashini**, Civil Appeal No. 56 of 2017, Court of Appeal of

Tanzania (unreported). In conclusion, he prayed for the Court to dismiss this appeal with costs.

I have labored much to go through record of the trial tribunal , grounds of appeal presented and the submissions filed by the parties in this Court, the issue calling for consideration is whether this appeal has merits or not.

I see it is very crucial to start with the second ground of appeal on the issue of assessors, subsection (2) of the Section 23 of the Land Disputes Courts Act (Cap 216 R.E. 2002) provides that:

> "(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."

However, the record of the trial tribunal at page 41 of the typed proceedings provides that:

ORDER

1. *Judgment on 10/7/2019*

Sgd.
A. Mapunda
Chairman
25/5/2019

The record does not reveal if the assessors were given opportunity to give their opinion as required by the law. It is silent as to whether the chairman invited the assessors to give their opinion as required by the law. What is in the record is the written opinion of the one assessor. 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 assessor 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 (Sheli)**, Civil Appeal No. 286 of

2017 (Unreported) and the case of **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017.

Since the proceedings of the trial tribunal do not show that if the assessors full participated at the trial that was an irregularity which is fatal and cannot be cured at this stage. It is therefore not safe to rule out that, justice was done. Under the circumstance, the proceedings and judgment of the trial tribunal are nullified.

In that event, I find this appeal has merit. It is further ordered that the case must be remitted back to the trial tribunal for retrial; the matter should be heard by another chairman with a new set of assessors.

Again I will not labour on the other grounds of the complaint as the above discussed irregularity has sufficed to dispose of the appeal. No order as to costs.

It is so ordered.

D. B. NDUNGURU
JUDGE
29/09/2020

Date: 29/09/2020

Coram: D. B. Ndunguru, J

Appellant: Present

1st Respondent: Present

2nd Respondent: Present

For the Respondent:

B/C: M. Mihayo

Court: The case is for judgment. The same is delivered today this 29th day of September, 2020 in the presence of the parties in persons.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
29/09/2020

Right of Appeal explained.