

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY**

AT MUSOMA

LAND APPEAL NO. 34 OF 2019

*(Arising from the Land Appeal No. 109 of 2018 before the District Land
and Housing Tribunal of Mara at Musoma)*

BWIRE MTUNDI APPELLANT

VERSUS

MASATU EKONJO RESPONDENT

JUDGEMENT

9th and 31th March, 2020

KISANYA, J.:

The appellant, Bwire Mtundi was sued in Etaru Ward Tribunal for encroaching the respondent's land. The dispute ended in favour of the respondent. The appellant appealed to the District Land and Housing Tribunal for Mara at Musoma which upheld the decision of the Etaru Ward Tribunal (trial tribunal). Thus, the respondent was declared the lawful owner of the disputed land.

Still aggrieved, the appellant has approached this Court by way appeal. He has filed a petition of appeal with six grounds which can be summarized as follows:

1. That, the appellate tribunal failed to observe that the appellant was not afforded the right to be heard.

2. That, the appellate tribunal grossly erred in law and fact for not including the opinion of assessors in the judgement contrary to the law.
3. That, the appellate tribunal grossly erred in law and fact for failure to note that the respondent had no *locus standi* to entertain this matter.
4. That, the appellate tribunal grossly erred in law and fact for failure to observe that the appellant was the lawful owner of the disputed land.
5. That, the appellate tribunal grossly erred in law and fact for failure to analyse evidence on record.

At the hearing of this appeal, Mr. Kulwa Sanya, learned advocate, appeared for the appellant and Mr. Sifael Mguli, learned advocate appeared for the respondent.

Both learned counsels submitted on all grounds of appeal. However, for the reasons to be stated herein, I find that this appeal can be disposed of by addressing the second ground on failure to include opinion of assessors in the judgement. This ground goes to the root of the case, on composition of the appellate court in determining the matter.

It was submitted by Mr. Sanya that the opinion of assessors was not given in the presence of the parties and that the same is not reflected in the judgment of the appellate tribunal. Mr. Sanya argued that the omission contravened section 23(1) and (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, 2003. The learned counsel supported his argument by citing decisions of the Court of Appeal in **Edna**

Adam Kibona vs Absalom Swebe (Sheli), Civil Appeal No. 286/2017, CAT at Mbeya (unreported), **Tubone Mwambeta vs Mbeya City Council**, Civil Appeal No. 287 of 2017 CAT at Mbeya, (unreported) and **Sikuzani Said Mogambo and Kirioni Richard vs Mohamed Roble**, Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported).

In response, Mr. Sifael submitted that the appeal before the appellate Tribunal was heard in the presence of two assessors and that both assessors gave opinion which is reflected in the proceedings and judgement. The learned counsel was of the view that the judgement and proceedings of the District and Housing Tribunal had no defect.

Mr. Sanya rejoined by submitting that the proceedings of the appellate Tribunal do not show whether the opinion of assessors was given.

Having gone through the proceedings, judgement and submission by both parties, the issue is whether opinion of assessors was given. Composition of the District Land and Housing Tribunal is provided for under section 23 (1) and (2) of the Land Disputes Courts [Cap. 216, R.E. 2002]. Generally, it is composed by the Chairman and not less than two assessors. Each assessor is required to give his opinion before the Chairman composes the judgement. This provision is further elaborated in regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 as follows:

"(1) The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgement on the spot or reserve the judgement to be pronounced later;

(2) Notwithstanding sub-regulation (1) the Chairman shall, before making his judgement, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili"

The Court of Appeal has interpreted the provisions of section 23(1) and (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, 2003 to the effect that, the opinion of assessors should be given in the presence of the parties. Hence, the proceedings should indicate that the opinion of assessors has been read or taken in the presence of the parties as held by the Court of Appeal in **Tubone Mwambeta** (*supra*), that:

"In view of the settled position of the law, where the trial has been 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 requires 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."

Similar position was stated also stated by the Court of Appeal in **Edina Adam Kibona** (*supra*).

In the matter at hand, the respondent's closed his case on 10/05/2019. On the same date, the appellate Tribunal ordered that judgement would be delivered on 26/6/2019. It is on record that, judgement was delivered on 26/6/2019 as sheduled. Both parties were present on the date of judgement. The corum does not show whether the assessors were present. Although opinion of assessors is reflected in the judgement and written opinion filed in the file, the proceedings do not show whether the said opinion was taken in the presence of the parties or read over to the parties. In such a case, it is not known as to how and when the written opinion formed part of the proceedings. Opinion given contrary to the law cannot be considered as the same has no useful purposes. This position was stated in the case of **Edina Adam Kibona** (*supra*) that:

"For 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 District Land and Housing Tribunal purports to refer to them in his judgement. However, in view of the fact that the record does not show that the assessors were required 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 that they were not read in the presence of the parties before the judgement was composed, the same has no useful purpose."

Guided by the principle established in the above cases, I find that failure to read or take opinion of assessors in the presence of the parties contravened the above cited law. Consequently, the appellate Tribunal was

not properly constituted in determining appeal before it and the irregularity vitiated the proceedings before the District Land and Housing Tribunal.

In view of the foregoing, I exercise the revisional power conferred on the Court by section 43 of the Land Disputes Courts Act [Cap. 216, R.E. 2002] and hereby quash proceedings, judgement and decree of the District Land and Housing Tribunal. The appellant may, if still interested, institute a fresh appeal before the District Land and Housing Tribunal. In the event a fresh appeal is filed, the same should be heard by new Chairman and another set of assessors. Each party to bear its own costs because the irregularity was not caused by either party.

Order accordingly.

Dated at **MUSOMA** this **31st** day of **March, 2020**.


E. S. Kisanya
JUDGE
31/3/2020

Court: Judgement delivered in Chamber this **31th** day of **March, 2020** in the presence of Mr. Kulwa Sanya, learned advocate for the appellant, the appellant and the respondent present in person.




E. S. Kisanya
JUDGE
31/3/2020