

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

MISCELLANEOUS LAND APPLICATION No 99 OF 2020

(Arising from Land Appeal 145/2019 at District Land Housing Tribunal Musoma, original application No 04/2019 Mosongo ward tribunal)

NCHAGWA MWITA ITUMBO.....APPELLANT

Versus

CHIRARI MAKURU RESPONDENT

JUDMENT

2nd Feb. & 20th March, 2021

Kahyoza, J.

Nchagwa Mwita Itumbo sued **Chirari Makuru** before the ward tribunal for trespass and lost. Aggrieved, **Nchagwa Mwita Itumbo** appealed to the District Land and Housing Tribunal (**DLHT**). Unfortunately, he again lost the appeal. Dissatisfied, **Nchagwa Mwita Itumbo** through the services of Mr. Mligo, learned advocate has instituted a second appeal to this Court.

The appellant raised three grounds of appeal, abandoned two and argued one ground of appeal; that the tribunal erred in law for deciding the matter without the assessors' opinions contrary to the requirement of the law.

The issue is whether the chairman of the DLHT did take opinion and consider the opinion of the assessors in his the judgment.

A brief account of the facts of this case is that: the appellant and the respondent own adjacent plots of land. It is not disputed that the

appellant's piece of land belonged to the respondent. The respondent sold that piece of land to one person called George (Joji) who in turned sold it to the appellant. The dispute is centred on the boundary between the two. The parties' dispute had a fetched history. The dispute arose in the past and the village leaders settled the matter as exhibited by the evidence of Chacha Marwa Chacha, which was not contradicted. Although there is evidence that the dispute was over a different plot. The appellant also instituted criminal proceedings against the respondent for trespass.

The appellant's advocate submitted that DLHT heard the appeal and fixed the matter to come on the 17th March, for reading the opinion of the assessor. On that day, the appellant's advocate submitted that the parties were not present. He contended that the law is clear, it demands the opinion of the assessors to be given in the presence of the parties. To buttress his argument, he referred this court to section 23(2) of the **Land Disputes Courts Act**, [Cap. 216 R.E. 2019] and Regulation 19(2) of the **Land Disputes Courts Act (District Land and Housing Tribunal) Regulations**, 2002 G.N. 174/2003. He also cited the case of **Edina Kibona v. Absolom Swebe** Civ. Appeal No. 286/2017.

The appellant's advocate prayed the judgment of the DLHT to be nullified and to direct the DLHT to re-hear the appeal.

The respondent opposed the appeal. He submitted that the decision of the ward tribunal was based on the evidence on record. He added that assessors where present from the first day until the matter came to an end. He also stated that the appellant has raised new grounds of appeal, which were not raised before the DLHT.

As pointed above, the issue is simple whether the **DLHT** considered the opinion of the assessors in determining this matter. I examined the record and found that the **DLHT** entertained the appeal and set the date for taking the opinion of the assessors. On 17th March, 2020 when the matter was set for reading the opinion of the assessors, the *coram* of the tribunal shows that the assessors were absent. It also showed that the **DLHT** read the opinion of the assessors and delivered the judgment in the absence of the assessors. The Coram reads-

"17/3/2020

coram

chairman: Kitungulu, E

Appellant: Present

Respondent: Present

Court: Opinion read over to the parties. Judgment at 01:00PM today.

Sgd: Kitungulu, E

Chairman

17/3/2020"

It is settled position of the law as stated by the Court of Appeal in **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) that **it was very important for the Chairman to call upon the assessors to give their opinion in writing and read the same to the parties.** The Court of Appeal stated as follows: -

"In view of the settled position of the law where the trial has to 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 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.***"

In yet another case of **Edina Adam Kibona V Absolom Swebe** (supra) which the appellant's advocate cited to this Court the Court of Appeal re-affirmed its position that failure to call upon the assessors to give opinion and to 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, in terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal 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 to the parties before the judgment is composed.***

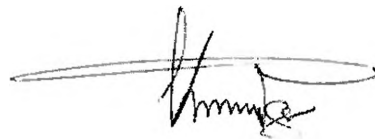
For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors 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 that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose."

In the present case, the chairman of the tribunal directed the assessors to give their opinion and to read the same on the 17th March, 2020. On that date, the record shows that there were no assessors in attendance. The DLHT recorded that the opinion of the assessors read to the parties. It raises eyebrows whether the opinion of the assessors was at all read to the parties. The record must speak for itself. I agree with the appellant's advocate that failure to call upon the assessors to unveil their opinion in the presence of the parties amounts to a trial without assessors. For that reason, the tribunal not only violated the clear provisions of the law but also the established principle in the decisions of the Court of Appeal discussed above. Consequently, I set aside the judgment of the DLHT and direct the tribunal to set a date when the assessors should read their opinion. I further order the chairman to compose the judgement and read the same to the parties.

No order as to costs. Each party shall bear its own costs as none of them is to blame but the **District Land and Housing Tribunal**.

It is so ordered.



J.R. Kahyoza

JUDGE

5/3/2021

Court: Judgment delivered in the presence of the parties via video link.
B/C Catherine.



A handwritten signature in black ink, appearing to read "J.R. Kahyoza".

J.R. Kahyoza

JUDGE

5/3/2021