

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND APPEAL NO. 33 OF 2018

(Arising from Land Application No. 83 of 2016 of the District Land and Housing Tribunal for Tabora, Waziri M. H – Chairman dated 3/09/2018)

PASCHAL JOSEPH MAYENGO.....APPELLANT

VERSUS

SALUM SHABAN MAKISINZA.....RESPONDENT

.....

JUDGMENT

.....

Date of the Last Order: 11/02/2021

Date of Delivery: 5/03/2021

AMOUR S. KHAMIS, J.

Salum Shaban Makisinza sued Paschal Joseph Mayengo in the District Land and Housing Tribunal for Tabora for declaration that he was the lawful owner of a disputed land located at Ikomwa Village, Tabora Municipality.

It was also a prayer by Salum Shaban Makisinza that Paschal Joseph Mayengo be ordered to vacate from the disputed land.

Upon conclusion of pleadings, the suit proceeded to trial whereupon Salum Shaban Makisinza was declared the lawful owner and his counterpart a trespasser.

Aggrieved by the Judgment and Decree of the trial tribunal, Paschal Joseph Mayengo knocked the doors of this Court with four grounds of appeal contained in a Memorandum of Appeal filed on 18th September 2018.

On 15th September 2020, the appellant was granted leave to introduce an additional ground of appeal.

However, at a time of hearing, the appellant abandoned two of the grounds and remained with three grounds of appeal, namely:

1. That the trial chairman erred in law and in fact for failing to invite tribunal's assessors to give their opinion before judgment.
2. That the trial chairman erred in law by not giving reasons for departing from the opinion of tribunal's assessors.
3. That the trial chairman erred in law and fact by invoking the doctrine of adverse possession declaring the respondent herein as lawful owner of the land in dispute and the appellant as trespasser while the respondent lived thereon on a permission from the appellant's father.

During hearing of the appeal, the appellant was represented by Mr. Saikon Justine, learned advocate while the respondent appeared in person.

Following an order for written submissions, Ms. Winfrida Emmanuel Mrosso, learned advocate, took over the appellant's brief while advocate Lucas Ndanga, acted for the respondent.

In support of the first ground of appeal, Ms. Winfrida Mrosso contended that the trial chairman erred in law and fact for failing to invite tribunal's assessors to give their opinion before judgment.

She contended further that at page 4 of the impugned judgment, the chairman noted that assessors had unanimously opined in favor of Paschal Joseph Mayengo but failed to give reasons for departing from their opinion.

The counsel for the appellant faulted the trial chairman for fixing a date of judgment without inviting assessors to air views on the matter.

In Ms. Mrosso's view, the default violated Section 23 (2) of the Land Disputes Courts Act, (Cap. 216 R.E. 2019) read jointly with Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2002 G.N. NO. 174/2003).

In support of the contention, Ms. Mrosso cited EDINA ADAM KIBONA V ABSOLOM SWEBE (SHELI), CIVIL APPEAL NO. 286 OF 2017, wherein the Court of Appeal at page 6 thereof held that:

"We wish to recap at this stage that in trial before 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 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 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.”

The learned advocate capped her submissions with an assertion that the tribunal’s failure to invite assessors to opine before formulating a judgment rendered proceedings and judgment a nullity.

On the second ground of appeal, Ms. Mrosso averred that the trial chairman erred in law by not giving reasons for departing from the opinion of assessors.

She contended that at page 4 of the trial tribunal’s typed judgment, assessors unanimously opined for Paschal Joseph Mayengo but the chairman failed to have regard to it contrary to Section 24 of the Land Disputes Courts Act (Cap. 216 R.E. 2019) which reads, thus:

“In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion”.

Ms. Mrosso added that it was wrong for the trial chairman to declare Salum Shaban Makisinza as a lawful owner of the disputed land without assigning reasons for departing from the opinion of assessors in favour of Paschal Joseph Mayengo.

On the third ground of appeal, the appellant's counsel asserted that the trial chairman erred in law and fact by invoking the doctrine of adverse possession and declare Salum Shaban Makisinza as a lawful owner whereas he was a mere licensee having been licenced by Paschal Mayengo's father.

She submitted that as a licensee, Salum Shaban Makisinza was not entitled to claim adverse possession over the host.

In support of the contention, she cited MUKYEMALILA & THADEO V LUILANGA (1972) HCD 4 wherein it was held that an invitee cannot establish adverse possession against a host even if the invitee had made a permanent improvement.

Finally, Ms. Mrosso submitted that the appellant was a lawful owner of the property and implored this Court to declare him as such.

In reply, Mr. Lucas Ndanga for the the respondent made concession as regards to the first ground of appeal.

However, he contended that despite of the trial chairman's failure to give reasons for departing from the opinion of assessors, the omission was not harmful in law and did not occasion a miscarriage of justice.

Mr. Ndanga sought protection under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 which provides that:

“In delivering decision in matters of civil and criminal nature in accordance with the laws, the Court shall observe the following principles that is to say (e) to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice”.

Mr. Ndanga further asserted that where parties claimed rights before a Court of law, stake holders of justice should always deal with substantive justice in line with a decision in the case of MWALIMU PAUL JOHN MHOZYA V ATTORNEY GENERAL (1996) TLR 229.

Furthermore, Mr. Ndanga submitted that the points raised by the appellant were too weak to challenge the trial tribunal's decision.

The learned counsel for the respondent urged this Court to dismiss the appeal with costs and uphold the trial tribunal's judgment.

I have considered the rival arguments advanced by the parties' counsel, scanned the trial tribunal's records and gathered the applicable law.

In so doing, it became apparent that the main issues of contention are non - involvement of assessors at a conclusion of trial and the tribunal's failure to give reasons in departing from the alleged opinion of assessors.

For the purpose of convenience, I will determine the grounds of appeal cumulatively in the context of the following two questions, thus:

- i) *Whether or not the trial tribunal offended the mandatory provisions of Section 23 (1) and (2) of the Land Disputes Courts Act and Regulation 19 (2) of the Government Notice No. 174 of 2003.*
- ii) *In case the first issue is answered positively, then the second issue will be, what are the legal consequences for such omissions.*

Starting with the first question posed above, Section 23 (1) and (2) of **THE LAND DISPUTES COURTS ACT, CAP 216, R.E 2002** provides that composition of the District Land and Housing Tribunal is the chairman and not less than two assessors who are required to give opinion before the chairman reaches a judgment.

Regulation 19 (2) of **THE LAND DISPUTES COURTS (THE DISTRICT LAND AND HOUSING TRIBUNAL) REGULATIONS 2003**, provides that before composing a judgment, the chairman shall require every assessor present at the conclusion of hearing to give written opinion.

In answering this issue, I exhaustively perused records of the trial tribunal in line with the legal position stated in **HALFANI SUDI V ABIEZA CHICHILI [1998] TLR 527** thus Court records are presumed to be serious and genuine transcripts on what transpired

in Court and cannot be easily impeached, unless there is evidence to the contrary.

In page 19 of the trial tribunal's typed proceedings, the trial chairman in Proceedings of 22/06/2018, did not require assessors present to give opinion. This fact is also vindicated by the original handwritten proceedings.

At page 4 of the typed judgment, the trial chairman paraphrased the opinion of assessors who allegedly opined in favour of the present appellant.

Thereafter, the trial Chairman generally stated that he differed with that opinion "*as per the elaboration adduced herein*". It is not clear what that elaboration was being referred to.

Owing to such omission, I am inclined to find that the tribunal's failure to invite assessors to give written opinions at the conclusion of trial violated the mandatory legal requirements reproduced above.

Further, the trial chairman's failure to give reasons for departing from the opinion of assessors equally violated the mandatory legal requirements.

On the legal effect for such irregularity, there is a long line of precedents showing that the omission renders relevant proceedings a nullity.

In **SABASABA ENOSI V REPUBLIC, CRIMINAL APPEAL NO. 135 OF 2015** (unreported), the Court of Appeal asserted that the rationale of continued presence of assessors in a case is to enable

them hear the whole evidence which will enable them make informed or rational opinions.

In **AMEIR MBARAK & AZANIA BANK CORP LTD V EDGAR KAHWILI, CIVIL APPEAL NO. 154 OF 2015** (unreported), the Court of Appeal at page 7 of the typed judgment, observed that where involvement of assessors in proceedings is unclear, the trial is rendered a nullity.

In **SAIDI KIPENGELE V SALAMA HASSANI, CIVIL APPEAL No. 9 OF 1988** (unreported), this Court seating at Dar Es Salaam held that the record ought to show clearly what each assessor said or did in the course of trial and failure to do so was fatal to the proceedings.

In **TUBONE MWAMBETA V MBEYA CITY COUNCIL, CIVIL APPEAL NO. 287 OF 2017** (unreported), which was also cited by the appellant in this case, the Court of Appeal seating in Mbeya addressed the role of assessors in the District Land and Housing Tribunal and capped that:

“...Therefore, it is important to bear in mind that, the chairman alone does not constitute the tribunal. The involvement of assessors as required under the law also gives them mandate to give opinion before the chairman composes the decision of the tribunal.

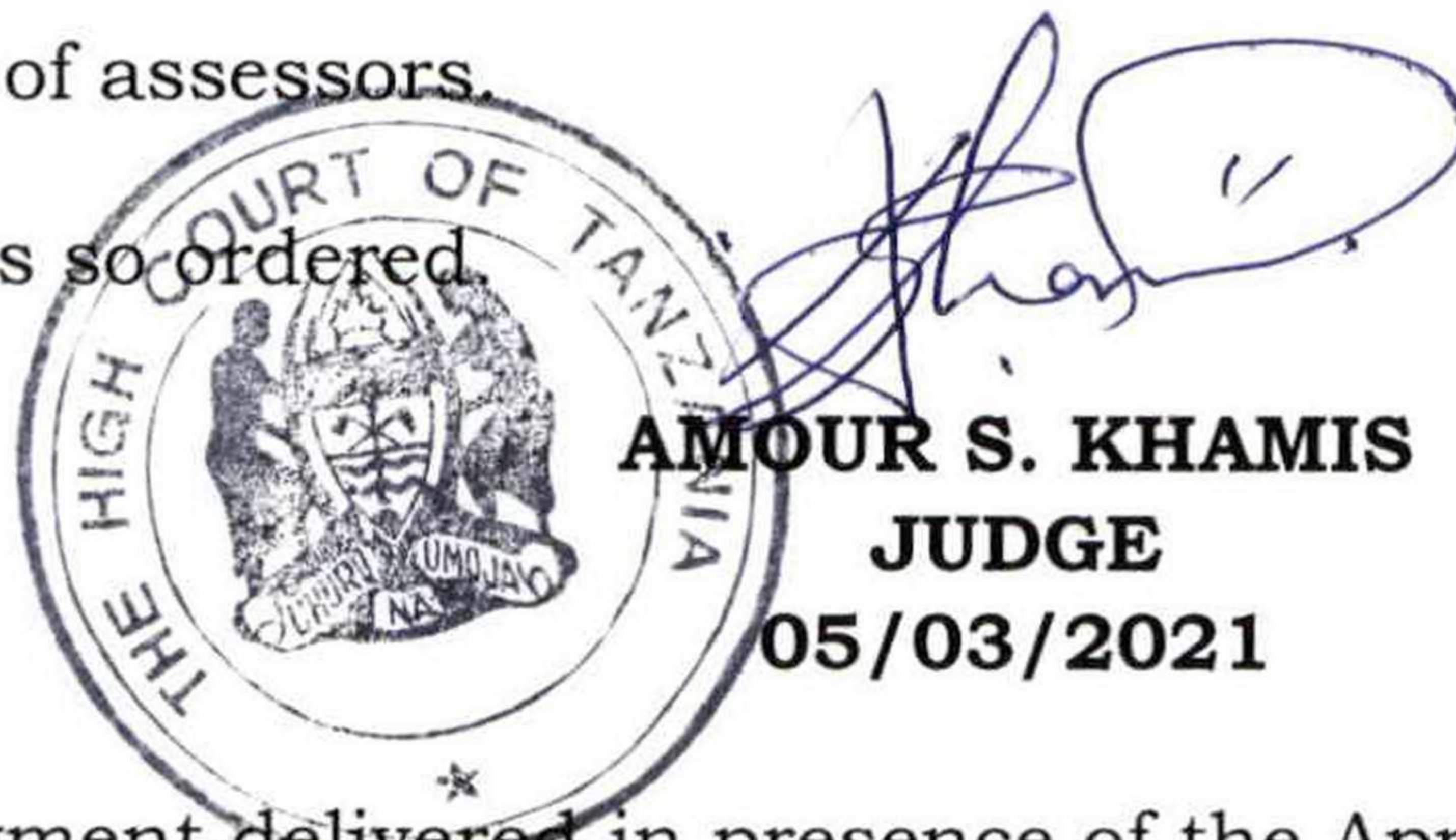
The role of assessors will be meaningful if they actively participate in the proceedings before giving their opinion at the conclusion of the trial and before judgment is delivered...”

In the context of the legal position reflected in the outlined cases, the defects stated are sufficient to dispose of the entire appeal.

Consequently, I hereby nullify the trial tribunal's proceedings, quash its judgment and set aside the orders made.

In the upshot, relevant records are remitted to the District Land and Housing Tribunal for retrial before a different chairman and a new set of assessors.

It is so ordered.



Judgment delivered in presence of the Appellant and his counsel Saikon Justine as well as the respondent, in the open Court.

Right of appeal fully explained.

G.P. NGAEJE
AG. DEPUTY REGISTRAR
5/3/2021