

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA
LAND CASE APPEAL No. 40 OF 2020**

*(Arising from the decision of the District Land and Housing Tribunal of Chato District at Chato in
Land Case No. 30 of 2016)*

MWIJAGE JACKSON APPELLANT

VERSUS

ELIZABETH RWEGANWA 1ST RESPONDENT

MELESIANA RWEGANWA 2ND RESPONDENT

CHARLES BUZENGANWA 3RD RESPONDENT

JR PETROL SERVICE STATION 4TH RESPONDENT

CHATO DISTRICT COUNCIL 5TH RESPONDENT

GEORGE JABUTURI 6TH RESPONDENT

JUDGEMENT

14/04/2021 & 22/04/2021

W. R. MASHAURI, J;

This is a first appeal. It emanates from the decision of the District Land and Housing Tribunal for Chato at Chato in which appellants Mwijage Jackson sued the respondents for mult-ownership on 28 December, 2016 via Application No. 30 of 2016. The District land and Housing Tribunal decided in favour of the Respondents. The appellant aggrieved and he has appealed to this court against the decision of Hon, A.M. Kapinga Chairperson dated 6th day of July 2020.

He has come to this court on an appeal with eight grounds of complaint; namely:

1. That the honourable Chairperson erred in law and in facts to hold that the liabilities of act done by Biharamulo District Council cannot be carried by Chato District Council.
2. That the honourable Chairperson erred in law and in fact for relying its decision basing on the testimony of DW5 that there was an agreement between 1st Respondent and the Biharamulo District Council concerning the alleged survey of the suit land which testimony was not backed up by any documentary proof.
3. That the honourable Chairperson erred in law and in fact to enter a judgment in favour of the 4th Respondent without justifying as to when the 5th Respondent was established.
4. That the honourable Chairperson erred in law and in fact to enter a judgment in favour of the 4th respondent without taking into account that the 3rd Respondent did not have good title over the suit land to pass to the 4th Respondent.
5. That the honourable chairperson erred in law that the opinion of the assessors were not sought and properly recorded in the Tribunal proceedings in terms of Regulation 19(2) Of the land Disputes Courts (the District land and Housing Tribunal) Regulations, 2002 GN 174 Of 2003.
6. That the honourable chairperson erred in law and in fact to enter a judgment in favour of the 4th Respondent by departing with the findings or opinion of the tribunal assessors without assigning reasons.

7. That, the honourable Chairperson erred in law and in fact by entering judgment in favour of 4th Respondent without considering the strong evidence adduced by the appellant concerning the ownership of the land that he has been in occupation of the suit land since 2002.

8. That, the honourable chairperson erred in law and in fact for declaring the Respondent a lawful owner by relying on contradicting evidence of respondent.

Wherefore the appellant prays for this court to allow the appeal by quash and set aside the judgment of DLHT

When appeal was placed for hearing before me, parties appeared. On 11th October, 2020 order for filing written submission was granted and its schedule for parties.

In order to appreciate the foregoing contending arguments in the present appeal before me, I deem it fit to state the back ground of the case and is that, the Appellant was an owner of the Suitland which after its survey the Suitland was allocated to 3rd respondent who later sold the said land to 4th respondent.

After the brief of the background and before stepping into merit of this appeal, I visit the court record to ascertain whether all the requirements of trial and procedure were followed to establish a fair trial. I can say, it is bad luck my observation finds some omissions done by the trial Tribunal to be improper for the interest of justice. Having carefully gone through of the record especially proceeding I have noted that, in the trial court five (5) exhibits were tendered and admitted by

court all of them are documents as far as salutary principal is concerned documentary exhibit, I find all admitted exhibits were not read to parties upon being admitted as exhibits it is stated in before trial tribunal. The case of **Hassani Saidi Twalib Vs Republic Criminal Appeal No. 95 of 2019** unreported CAT at Mtwara that;

"it is settled law that, whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it can be read out. Failure to read out documentary exhibit is fatal"

I find and hold that it was pertinent for the contents of Exhibit PE1; sales agreement, PE2; letter dated 23/03/2016, PE3; letter dated 27/11/2016, PE4; Malalamiko, D1; tittle deed & sale agreement and D2; survey map to be read out in court as per the requirement of the law (**See Jumanne Mohamed &Two Others v. Republic**), Criminal Appeal No. 534 of 2015 (unreported)). Failure to read any admitted documentary Exhibit in trial tribunal is fatal and vitiates the proceedings of the trial Tribunal therefore I expunge Exhibit PE1, PE2, PE3, PE4 and D1 and D2 from the record of trial tribunal. Having expunged the Exhibits of the Applicant/Appellant and respondents, here I remain with the oral account of witnesses.

However, according to the proceedings as recorded from page 30 to 48 (typed proceeding), PW2, PW3, DW1, DW2, DW3, DW4 and DW5 all of them were cross examined by assessors. I wish to say, the irregularity concerning the manner of questioning by the assessors. It is common ground that some DLHT (like we have) allowed the assessors to cross-examine the witness as their questioning to the

witnesses was recorded as cross-examination by the common prefix "XXD" as the trial chairman did. It has been stated on many occasions by this Court and our Court of Appeal of Tanzania that the statutory mandate of the assessors is not to cross-examine but to put questions to witnesses in line with the terms of section 177 of Law of Evidence Cap 6 R: E 2019, see, for instance, the following unreported decisions of this Court in **Mathayo Mwalimu and Another v Republic**, Criminal Appeal No. 147 of 2008; **Elias Mtati @ Ibichi v The Republic**, Criminal Appeal No. 65 of 2014;

I think that, the DLHT erred to give an opportunity to the assessors to cross-examine the witnesses. Crucially, I am of the view that the cross-examination made by the assessors, at times, went beyond simply seeking clarification on matters raised in the evidence in chief. It prejudiced the party whose witness was subjected to improper cross-examination. On this base, the trial was irredeemably vitiated.

As regards to the issue of assessors again, the failure by the chairperson of the Tribunal to accord the opportunity to the assessors to make their opinion, is contrary to the provisions of section 23 (1) and (2) of the Land Dispute Court Act, Cap 216. The said section provides that:

*"23(1) The District Land and Housing Tribunal **established** under section 22 shall **be composed of one Chairman and not less than two assessors**;
and*

*(2) The District Land and Housing Tribunal shall be duly **constituted** when held by a **Chairman and two assessors who shall be required to give***

out their opinion before the Chairman composed the judgment".
[Emphasis supplied].

In addition, **Regulation 19 (1) and (2)** of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (the Regulations) imposes a duty on a chairperson to require every assessor present at the conclusion of the trial of the suit to give his or her opinion in writing before making his final judgement on the matter. The said Regulations 19 (1) and (2) provides that:-(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"**[Emphasis added].*

The above provisions have been considered and interpreted by Court of Appeal of Tanzania in several occasions. See for instance cases of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015; **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017; and **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017.

Specifically, in **Ameir Mbarak and Azania Bank Corp** (supra) when the Court noted that the record of the trial proceedings did not show if the assessors were accorded an opportunity to give their opinion as required by the law, but the chairperson only made reference to them in his judgment as in the current case, the CAT observed that:

*"Therefore, in our own considered view, **it is unsafe to assume the opinion of the assessor which is not on the record** by merely reading the acknowledgement of the Chairman in the judgement. In the circumstances, we are of a considered view that, **assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity.**"*

[Emphasis added].

Likewise, in **Tubone Mwambeta** (supra) in underscoring the need to require every assessor to give his opinion and the same recorded and be part of the trial proceedings, this Court observed 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.**"*

In the matter at hand, as I have vividly demonstrated above, the chairperson of the Tribunal, upon closed the defence case, as to the record there is nowhere the chairperson required the assessors to give their opinion as required by the law. It is also on record that, though, the opinion of the assessors was not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore my considered view that, since the record of the Tribunal proceeding does not show that the assessors were accorded the opportunity to give opinion, it is not clear as to how and at what stage the said opinion found

their way in the Tribunal's judgement, it is also my further considered opinion that the said opinion was not availed and read in the presence of the parties before the said judgement was composed. On the strength of the previous decisions cited above (Ameiir Mbaraka & Tubone Mwambeta (supra)), I am satisfied that the pointed omissions and irregularities amounted to a fundamental procedural error that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings of the entire trial before the Tribunal, as well as those of this appellate court.

In my view, without wasting much of efforts and court's gracious time these pitfall points suffice to dispose of the matter and I find that it is not necessary to dwell on discussing the remaining irregularities found in the Tribunal's judgement and proceeding. Suffice, to point out that even the decree emanated from the said judgement is non-executable for being contravention of the procedure by the trial tribunal.


In the event, I hereby nullify the entire proceedings and quash the judgements of the tribunal and subsequent orders thereto.

I order that the said suit should be tried de-novo with another chairperson and a new set of assessors.

I make no order as to costs.

Order accordingly.




W. R. MASHAURI
JUDGE
22/04/2021

Date: 22/04/2021

Coram: Hon. W. R. Mashauri, J

Appellant:

Respondent: 1st, 2nd, 3rd, 4th, 5th, and 6th

B/c: Elizabeth Kayamba

Court: Judgment delivered in presence of Mr. Masanja learned counsel for the appellant and Mlingwa counsel for Chato District Council this 22/04/2021 and Mr. Felix advocate for 3rd respondent this 22/04/2021. Right of appeal explained.




W. R. MASHAURI
JUDGE
22/04/2021