

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**LAND CASE APPEAL No. 62 OF 2020**

*(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in  
Application No. 91 of 2011)*

**NURZHERAH R. VISRAM ----- APPELLANT**

**Versus**

<b>1. ARIF VISRAM</b> <b>2. SHABIR VISRAM</b> <b>3. NAUSHAD VISRAM</b>	}	----- <b>RESPONDENTS</b>
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**JUDGMENT**

**08.07.2021 & 08.07.2021**

**Mtulya, J.:**

Mrs. Nurzherah R. Visram (the Appellant) was dissatisfied with the judgment of the **District Land and Housing Tribunal for Kagera at Bukoba** (the Tribunal) in **Application No. 91 of 2011** hence preferred **Land Case Appeal No. 62 of 2020** (the Appeal) in this court. The drafter of the Appeal, Mr. Lameck John Erasto, learned counsel for the Appellant, drafted a total of five (5) grounds of appeal, and ground number one reads:

*That the proceedings of the lower tribunal was tainted with material irregularity rendering the judgment and the decree of no legal effects.*

According to Mr. Lameck the ground can be interpreted to mean that the Tribunal committed serious irregularities from the start to the end of the proceedings and violated section 23 of the **Land Disputes Courts Act** [Cap. 216 R.E 2019] which require the Tribunal to sit with Chairman and a pair of two (2) assessors.

To bolster his argument, Mr. Lameck cited the practice of the Court of Appeal on the subject in page 3 and 6 of the precedent in **Awiniel Mtui & Three Others v. Stanley Ephata Kimambo**, Civil Appeal No. 97 of 2015 arguing that assessors must participate in the conduct of proceedings of the Tribunal and that failure to participate assessors may renders the proceedings a nullity as it was stated in the decision of **Joseph Kabui v. Reginam** [1954-55] E.A.C.A. Vol. XX 1-2.

In substantiating the irregularities found in the proceedings, Mr. Lameck cited pages 46, 52, 57, 63, 69, 70 and 92 of the proceedings which show that: first, there were three (3) assessors, namely, Anamery, Bwahama and Mpanju, who were interchangeably appearing in the proceedings without

justification; second, in some occasions the assessors were not invited to participate in the conduct of the business of the Tribunal; and finally, the record is silent on assessors role. According to Mr. Lameck all this conduct prejudiced his client as the Tribunal decided in favor of the Respondent under Chairmanship of Mr. E. Mogasa, taking over the place of Chairman R.E Assey, who committed the errors hence the judgment was based on defects committed by the Tribunal.

This submission was protested by Mr. Kabunga who argued that; first, ground number one of appeal is vague and hide the issues of assessors; second, the ground violets the law in Order XXXIX Rule 2 of the **Civil Procedure Code** [Cap. 33 R.E 2019] (the Code); third, the cited irregularities do not go to the root of the matter and did not prejudice the parties as each registered evidences in support of his/her in the Tribunal; fourth substantive right under the provision of section 3A (1) of the Code may be invited by this court to cure the defects; and fifth, the cited precedent in **Awiniel Mtui & Three Others v. Stanley Ephata Kimambo** (supra) has been over-taken by event as the case was decided in 2016 before enactment of *oxygen principle* in section 3A (1) of the Code in 2018.

In brief rejoinder, Mr. Lameck contended that the proceedings in the Tribunal were tainted with irregularities which cannot be cured by either Order XXXIX Rule 2 of the Code or enactment of the *oxygen principle* in section 3A (1) of the Code as the ground number one in the Appeal is clear and covers from the entry of the proceedings to the judgment of the Tribunal and in every matter conducted in the Tribunal.

With the *oxygen principle*, Mr. Lameck argued that the principle cannot be invoked to prejudice right of litigants in civil matters. To his opinion, the record in the Tribunal is not clear on the roles and conduct of the assessors and Mr. Kabunga impliedly admitted the defects, but think that they are minor. Finally Mr. Lameck submitted that this court is creature of the law and must ensure proper application of the law in lower tribunals.

On my part, I visited the proceedings of the Tribunal and noted the following issues:

1. Page 46 of the proceedings conducted on 17<sup>th</sup> May 2015, one assessor is displayed, namely Anamery and at page 52 is recorded to ask a clarification questions on the status of Appellant's husband and house;

2. Page 57 of the proceedings conducted on 19<sup>th</sup> September 2017 shows two assessors Anamery and Mpanju were present as is shown at page 63. However, they were not recorded to have participated in the conduct of the businesses of the Tribunal; and

3. Page 69 of the proceedings conducted on 14<sup>th</sup> June 2018 Anamery and Bwahama appeared as assessors. No reason of change was recorded and at page 70 conducted on 18<sup>th</sup> June 2018, the record is silent on presence of assessors. However, the two (2) assessors Anamery and Bwahama appear to have asked questions of clarification at page 92 of the proceedings.

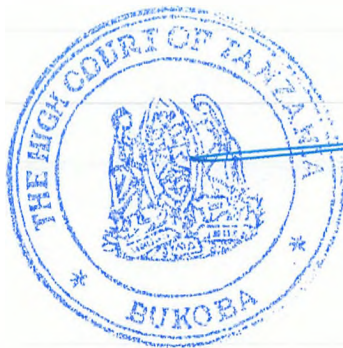
Proceedings of this kind test the application of section 23 of the Act. It is fortunate that the section has already received interpretation of this court in **Elia Alphonse v. Idrisa Salim**, Misc. Land Case Appeal No. 36 of 2012 and this court abided by its *ratio decidendi* in the precedent of **Josephat Galeba v. The Right Bishop Dr. Benson Bagonza & Three Others**, Land Case Appeal No. 105 of 2020, for purposes of certainty of the decisions in this court. The position is now certain and settled in our superior court (see: **Awiniel Mtui & Three Others v. Stanley Ephata Kimambo**

(supra); **Ameir Mbarak & Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 and **Samson Njarahi & Another v. Jacob Mesoviro**, Civil Appeal No. 98 of 2015). The wording in **Awiniel Mtui & Three Others v. Stanley Ephata Kimambo** (supra) case are to the effect that the record ought to have clearly stated the participation of each assessor in asking questions whereas the precedent in **Ameir Mbarak & Another v. Edgar Kahwili** (supra) is to the effect that unclear involvement of assessors in proceedings renders such proceedings a nullity (see: **Joseph Kabui v. Reginam** (supra)).

As there are Court of Appeal decisions on the subject, this court cannot invite any other interpolations on interpretation of section 23 (2) of the Act or Regulation 19 (2) of the **Land Disputes Court (District Land and Housing Tribunal) Regulations of 2003, GN. No. 74 of 2003** (the Regulations). This is a court of law and bound by precedents of our superior court in judicial hierarchy, the Court of Appeal. Again, this court is currently in Civil Session Cases hearing and cannot entertain every argument brought before it. In any case, there are vivid irregularities in the record of this appeal and this court is mandated to ensure proper application of the law in lower

tribunals and cannot close its eyes and invite oxygen or any other principle in rescuing defective proceedings of the Tribunal (see: **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed**, Civil Appeal No. 262 of 2017).

As the consequences are clear from the practice of the Court of Appeal in unclear proceedings on conduct of the assessors in tribunals, I have no reason to depart from the directives of our superior court. Having said so, I have formed an opinion to nullify the proceedings of the Tribunal in the Application, as I hereby do. I therefore allow the appeal with usual consequences of costs. Any interested party may institute fresh and proper suit in an appropriate machinery entrusted in resolving land disputes.



F.H. Mtulya

**Judge**

08.07.2021

This judgment was delivered in Chambers under the seal of this court in presence Appellant's learned counsel Mr. Lameck Erasto John and in the presence of learned counsel Mr. Aaron Kabunga for the Respondent.



F.H. Mtulya

**Judge**

08.07.2021