

**IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA**

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL No. 5 OF 2021

*(C/f Misc. Land Application No.11 of 2020 RM's
Extended Jurisdiction, Land Case Appeal No.12 of 2018,
Original Land Application No. 216- District and Housing
Tribunal at Moshi)*

NGALASONY KELELA.....APPELLANT

VERSUS

ELINAMI MTEY.....RESPONDENT


19th July & 13th August 2021

JUDGMENT

MKAPA, J.

This appeal emanated from the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal) in **Application No. 216 of 2016**. The parties' dispute related to a piece of land measuring four (4) acres located at Ngasenyi Village (previously Kisangesangeni) within Kahe Ward in Moshi District (the suit land).

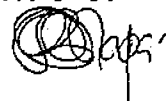
At the trial, the respondent established the fact that the suit land belonged to him after he had obtained the same from the Village Council through allocation in 1977. At the same time the appellant claimed to have inherited the same from her parent way back in the 1965. In the end the trial Tribunal decided in favour of the respondent. Aggrieved by the decision, the appellant filed **Land Case Appeal No. 12 of 2018**, but the same was not decided on merit for lacking valid judgment namely, statement of facts, summary of arguments decision of the tribunal and the reasons thereof. Thus this Court ordered the same to be re-written hence the current appeal in which the appellant challenges the trial tribunal's decision on the following grounds;

1. That, the trial chairman erred in law and fact in failing to require sitting assessors at the conclusion of the trial to give their opinion before judgment is composed as required under **Regulation 19 (2) of GN No. 174/2003**.
2. That, the trial chairman erred in law and fact in denying appellant's witnesses to testify instead he proceeded to enter judgment without closing defence case thus resulted into condemning the appellant unheard.
3. That, the trial chairman erred in law and fact in failing to properly evaluate the evidence. 

4. That, the trial chairman erred in law and fact in relying only on the fact that the respondent land is situated one and a half km from the appellant in proving ownership.

Hearing of the appeal proceeded by filing written submissions. Mr. Charles Mwang'wanyi learned advocate appeared for and represented the appellant while the respondent had the services Mr. Fustine Materu, also learned advocate.

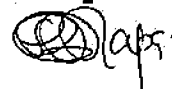
Supporting the appeal Mr. Mangwanyi submitted on the 1st ground that the trial chairman did not comply with the requirement of section 23 (1) and (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019 and Regulation 19 (1) and (2) of GN No. 174/2003 which requires sitting assessors' opinion given orally or in writing to be read to the parties before judgment is composed. In support of his contention he relied on the decision in the case of **Sikuzani Said Magambo and Another V Mohamed Roble, Civil Appeal No. 197 of 2018 CAT** at Dodoma (unreported) which underscored the need for assessors' opinion to be reflected in the proceedings before judgment is composed. The learned counsel for the appellant contended further that, in the instant appeal assessors' opinion was not reflected in the proceedings, failure of which rendered the proceedings and judgment a nullity.



Mr. Mwang'anyi submitted on the 2nd ground that, the trial chairman delivered a judgment before defence case was closed thus denied appellant's other witnesses to testify. He added that when the matter was scheduled for defence hearing on 27th November 2017, the appellant notified the trial tribunal that he intended to call four witnesses. However after his testimony, the trial chairman announced the date of judgment without hearing other witnesses and proceeded to close defence case. It was Mr. Mwang'anyi's view that, this amounted to condemning the appellant unheard. Furthermore, no reasons were given to that effect, contrary to Regulation 14 of Land Dispute Court Regulation, 2003 and Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which requires fair hearing.

Arguing ground number 3rd and 4th jointly, the learned counsel submitted that the trial tribunal did not properly evaluate the evidence hence reached an erroneous decision. That, the respondent claimed to have been allocated the suit land by the village authority but failed to adduce any evidence to that effect. He also claimed to have been aware of the fact that the appellant sold the suit land to another person (a buyer) yet he failed to join in the suit the buyer third party.

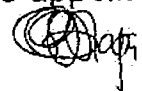
In support of the above submission he referred the Court to the decision in **Juma B Kadalla V Laurent Mnikande** [1993] TLR



103 which emphasized the importance of joining a third party to a suit of recovery of land disposed of to a third party. He finally prayed for this Court being the 1st appellate court to reassess the evidence of the trial tribunal and come up with its own findings thereafter, allow the appeal with costs, by quashing and setting aside the proceedings, judgment and decree of the trial tribunal so that the matter can be heard on merit.

In reply to the above submission made by the learned advocate for the appellant, Mr. Materu submitted in respect of the 1st ground of appeal the fact that, the trial chairman did consider assessor's opinion as seen at page 5 of the typed judgment though the same is not reflected in the proceedings of the trial tribunal. It was Mr. Materu's contention that such procedural irregularity was curable by remitting back the file and order the assessors' opinion to be recorded and read to the parties since this case had taken long time. He relied on the judgment of **Agnes Severine V Mussa Mdoe** [1989] TLR 164 in which the appellate court ordered the matter to be remitted back to the trial court for assessors' opinion instead of retrial.

With respect to the allegations that the appellant was denied the right to summon witnesses the learned counsel opposed the same to the effect that throughout the trial tribunal's proceedings the appellant was represented. After the appellant

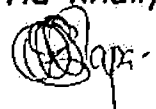


was done with his testimony, under guidance of his advocate he could have summoned other witnesses.

The learned advocate further argued that the trial chairman did properly evaluate the evidence before him and reached a fair decision. That, the respondent's side did prove its case that the respondent owned and developed the suit land since 1977 until 1994 when he left to a caretaker and shifted to another village. That, it was until 2015 when the appellant started claiming ownership of the suit land but failed to prove. It was Mr. Materu's view that the trial chairman did not err in declaring the respondent as a rightful owner of the suit land.

On the argument of joining the buyer as third party, Mr. Materu opposed it as misplaced since the court record is silent on the sale transaction. More so, at page 29 of the typed proceedings, the appellant denied to have sold the suit land to any person.

It was Mr. Materu's further submission in respect of the 4th ground that, it is undisputed that the respondent's land was situated 1 ½ km away from the appellant's land, yet he wanted to grab the former's land without any justification. He finally prayed for the Court to dismiss the appeal.



The appellant filed rejoinder wherein the contention of the respondent have been generally denied and the arguments of the grounds of appeal have been reiterated.

I have gone through parties' submission and carefully perused the record and I will proceed to determine the 1st ground of appeal only which I believe suffices to dispose of the appeal.

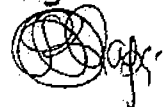
In the 1st ground, appellant had challenged the trial tribunal's proceeding and decision to the effect that the trial chairman did deny the assessors the right to give their opinion prior to composing his judgment.

The Law is plain clear under section 23 (11) and (2) of the Land Disputes Court Act which reads;

(1) The Land District and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before chairman reaches the judgment.

The aforementioned provision is read together with Regulation 19 (1) and (2) of GN. 174/2003 which provides;



- (1) *The tribunal may, after receiving evidence and submission under regulation 14 pronounce judgment on the spot or reserve judgment to be pronounced later,*
- (2) *Notwithstanding (1) the chairman shall, before making his judgment require every assessor present at the conclusion of hearing to give his opinion in writing and assessor may give his opinion in Kiswahili.*

It is plain clear from the above provisions of the law also numerous decisions of the Court of Appeal have emphasized on the need to comply with the above legal position. [See; the cases of **Tubone Mwambeta V Mbeya City Council**, Civil Appeal No. 286 of 2017, **Kiwengwa Stand Hotel V Abdallah Said Mussa**, Civil Appeal No. 13 of 2012, **Edina Adam Kibona V Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, CAT at Mbeya (unreported), and **Sikuzani Said Magambo** (*supra*). In the latter case when the Court of Appeal cited its earlier decision in the case of **Tubone Mwambeta** (*supra*) emphatically held that;

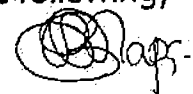
"In view of the settled position of the law, where the trial has been conducted with the aid of assessors, ... they must actively participate in the proceedings so as to make meaningful their

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 present appeal at page 29 of the trial tribunal's typed proceedings, after the re-examination of appellant's testimony on 7th December, 2017, the trial chairman proceeded to announce the date of judgment and the same was delivered on 22nd March 2018. However, as earlier on mentioned in the background leading to this appeal, the said judgment was nullified for lacking analysis and the Court ordered the same to be re-written as per the required standard.

It is on record in the trial tribunal's typed proceeding, the record ends on 22nd February, 2018. However, in the handwritten proceeding there is a coram dated 22nd May, 2018 in which the respondent filed Bill of Cost, thereafter followed by the following;

"Tribunal:-



The assessors' Opinion have been read to the parties

Sgd: J. Silas"

The above remarks which purported to have been read by the tribunal's chairman were followed by the handwritten Judgment signed on 20th February, 2020 by J. Silas, trial tribunal's chairman and the same was delivered by P.J. Makwandi Chairman on the same day.

I am of the considered view that, it is unsafe to assume the opinion of the assessors which was not on record by merely reading the acknowledgment of the chairman to the effect that

"the assessors opinion have been read to the parties"

In **Edina Kibona (supra)**, the Court of Appeal nullified the proceedings and decision of the lower courts and ordered retrial for interest of the parties as assessors' opinion was not given. The Court of Appeal observed;

"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 never read in the presence of the parties before judgment was composed, the same have no useful purpose."

In **Edina Adam Kibona** (supra) the Court of Appeal also cited its similar observation on the matter in the case of **Ameir Mbarak and Azania Bank Corp Ltd V Edgar Kahwili, Civil Appeal No. 154 of 2015** (unreported) where the Court held;

"Therefore in our 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 judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in preparation of the Tribunal's judgment and this was a serious irregularity"

Additionally it is on record that on 20th February, 2020 a judgment was composed and signed on the same day by the trial chairman Hon. Silla but it was Hon. Makwandi who delivered it without recording the reasons for the abrupt change.

I find it difficult to comprehend as to how it could have happened for Hon. Makwandi the chairman who had no judicial obligation, to deliver the judgment composed on the same day by Hon.

Silas, the trial chairman. This suggests that the trial chairman was present at the tribunal. I find it pertinent to refer the case of **Mariam Samburo (legal personal representative of late Ramadhani Abas) V Masoud Mohamed Joshi and 2 others, Civil Appeal No. 109 of 2016 CAT-DSM** (unreported) where the court held: -

"Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

In the present appeal it is plain clear that transparency was lacking in conducting the trial as evidenced in the manner assessor's opinion were handled.

On the basis of the foregoing analysis there can be no doubt that the omission to record opinion of assessors in the proceedings is incurably fatal which renders the proceedings invalid. Consequently, the judgment emanating from the said proceedings is a nullity.

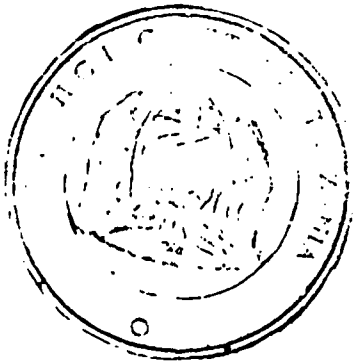
In the event, I hereby nullify the entire proceedings and decision of the trial tribunal and order retrial before another chairman and new set of assessors. Since the omission was occasioned by the trial tribunal, I give no order as to costs.



It is so ordered.



Dated and delivered at Moshi this 13th day of August, 2021.



Handwritten signature of S.B. Mkapa, consisting of a stylized, scribbled name.

S.B. MKAPA

JUDGE

13/08/2021