

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOB DISTRICT REGISTRY
AT BUKOBA

LAND APPEAL CASE NO. 20 OF 2019

(Arising from Application No. 2 of 2017 of Ngara District Land and Housing Tribunal)

RAMADHANI MARTONE SIBOMANA..... APPELLANT

VERSUS

EUSTACE BENWA(*Adm of the estate of the late Benwa Bampiga*)..RESPONDENT

RULING

06/09/2021 & 10/09/2021

NGIGWANA, J.

Being dissatisfied with the judgment and decree of Ngara DLHT delivered on 29th March, 2019, the appellant registered an appeal to this court with three grounds as quoted verbatim hereunder:

- 1. THAT, the learned Chairman grossly erred in law and misdirected himself by his deliberate refusal or concurring with the assessors' observations who have fully heard the respective testimonies of the litigants before opining the views in favour of the Appellant.*
- 2. THAT, in delivering the judgment the learned chairman miserably omitted to take into consideration of the documentary evidence that was tendered by the appellant to support his lawful ownership of the suit land.*

3. THAT, the Trial Chairman had wrongly approached the matter in contention and thus determined the decision contrary to the weight of the adduced evidence.

The appellant prayed the appeal be allowed with costs with an order of reversing the judgment of the trial tribunal and declaring that the suit land is the property of the appellant.

At the hearing. Lameck John Elasto, Advocate stood for the appellant so did Advocate Laurent for the respondent.

In opening his oral submission, Advocate Lameck brought this court into attention that he had prepared his grounds of appeal basing on the judgment only but when he came later to be supplied with the trial court proceedings, he discovered a gross irregularity which touches on the issue of assessor's involvement at the trial.

Advocate Lameck submitted that looking at page 8 of the trial tribunal proceedings dated 29/01/2018 there was one Assessor namely **Ester** while under section 23 of Land Disputes Courts Act Cap. 216 R:E 2019 the Chairman is required to sit with not less than two assessors. He was of the view that the mandatory provision was offended.

That on 29/03/2018 assessors were **Ester** and **Hellen** but only one assessor was recorded to have asked questions but later on at page 32, two +assessors **Hellen** and **Justice** appeared which shows that there was change of assessors. Mr. Lamek further submitted that there are several cases which have set the position to be followed, one of them being the

case of **Edina Adam Kibona v Absolom Swebe (Sheli)** Civil Appeal No. 286 of 2017 which explains the role of assessors.

Mr. Lameck further submitted that another flaw was for the order of visiting the *locus inquo* before the witnesses had finished giving evidence, instead the trial chairman ordered that they would have testified at the locus inquo. The learned counsel faulted such a procedure and coined that the best practice negates that the witness cannot testify at the suit land before adducing their evidence in the Tribunal. He buttressed his stance with the case of **Nizar MH Ladate vs Gulam Trausad** (1980) T.L.R 29.

Mr. Lameck pin pointed further that the assessor's opinion was neither given in writing nor read before parties in court. He invited this court to refer pages 34-35 of the tribunal proceedings that there were conflicting orders on assessors' opinions hence offended regulation 19(2) of GN 174 OF 2003 which requires each assessor to give a written opinion. He prayed to this court to quash the entire proceedings and order that if parties are still interested should file the matter in the competent tribunal.

In reply, Advocate Lawrent outrightly conceded with the observations advanced by the appellant's counsel on involvement of assessors. He complimented that the irregularities of not involving assessors as observed by Mr. Lameck cannot be cured by overriding objective principle as they occasion failure of justice. He contended that section 24 of Cap. 16 requires the Chairman of the tribunal to consider opinions of assessors and where there is any disagreement the chairman must give reasons for departure. That the Hon. Chairman invoked section 23 of Cap 216 but indeed he had

no power to invoke it. He added that advocates have a duty in assisting the court to do justice. As irregularities were caused by the court, he prayed a waiver for costs.

I had an ample time to peruse keenly the entire record of this appeal. Accordingly, I have considered the unanimous submissions of both parties. The task before me is to determine whether the observed irregularities are fatal to the extent of quashing the entire proceedings of the trial tribunal?

The all flaws raised by both parties boil down the issue of involvement of assessors. On this area I feel obliged to reproduce the provision of Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which also the Respondent's counsel referred to me.

"Notwithstanding sub-regulation (1) the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili".

Both sided learned counsels are in agreement that there is no opinion given by assessors and read before parties in court. That when the matter started being heard only one assessor Ester was present but herself never gave opinion.

I was therefore compelled to peruse the entire record and finally came up with the one hand Kiswahili written document I further cross-checked to see how it was introduced in the record I found no corresponding order of the Chairman requiring it to be given and no record in the proceedings as to

how it was introduced and who introduced it. Bad enough Mr. Justice K. Muyongoro who wrote such document did not hear the case from the beginning. Worse enough it is for only one assessor. In this regard it cannot be said that the assessors' opinions were legally given.

In this stance, I am also fortified with the case of **Ameir Mbarak and another vs Edgar Kahwili** Civil Appeal No.154 of 2015 CAT at Iringa (Unreported) viz:

"In this regard we are not in agreement with Mr. Mushokorwa, because the law mandatorily require assessors to give their opinion which in our view must be on record so as to ascertain if the Chairman did consider such opinion in preparing the Judgment. Besides, where the Chairman differs with the opinion of the assessors, he must record reasons. 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 the preparation of the Tribunal's judgment and this was a serious irregularity."

Concerning with the issue of visiting the locus inquo before the witnesses had finished testifying, I am in agreement with both counsels that it was fatal and incurable. The reason which necessitated the tribunal to visit the locus inquo with the witnesses who had not yet testified is not genuine as it is seen in the below quoted tribunal order:

"Tribunal: That is all for that witness. The other two witness to testify at the locus in quo since the respondent has asked for the tribunal to visit the locus in quo."

What is observed at the locus in quo should confirm what witnesses had testified in Court and not witnesses to testify after they have been influenced by the discussion and observation at the locus in quo. In **Avit Thadeus Massawe vs Isidory Assenga**, Civil Appeal No. 6 of 2017, CAT at Arusha (Unreported), the Court of Appeal of Tanzania discussed of the rationale in visiting the locus in quo that is to confirm the evidence given by witnesses to all those facts, if they are relevant and the court only refers to the notes in order to understand or relate to the evidence in court given by witnesses. In the case at hand, it was therefore fatal to have ordered witnesses who had not testified in court to accompany the Chairman at the locus in quo for the purpose of testifying over there.

In the event, the irregularities tainting the entire proceedings are fatal and cannot therefore be cured by the overriding objective principle and therefore the trial proceedings and the resultant judgment and decree are hereby quashed and set aside.

I have no any other possible order than ordering a retrial before another competent Chairman with different set of assessors which should be determined so expeditiously.

As the flaw was caused by the trial tribunal, I give no order to costs.

Order Accordingly.

Dated at Bukoba this 10th day of September, 2021.

 
E.L. NGIGWANA
JUDGE
10/09/2021

Ruling delivered this 10th day of September, 2021 in the presence of both parties in person and Mr. E.M. Kamalaki, Judge's Law Assistant.

 
E.L. NGIGWANA
JUDGE
10/09/2021