

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

LAND CASE APPEAL NO. 124 OF 2020

(Originating from the District Land and Housing Tribunal in land application No. 26 of 2019)

FINCA MICROFINANCE BANK.....APPELLANT
VERSUS
JULIETHA ZACHARIA.....1ST RESPONDENT
VEDASTO KAJUNA.....2ND RESPONDENT

JUDGMENT

17th November & 19th November 2021

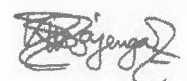
Kilekamajenga, J.

In this case, the 2nd respondent is the husband of the 1st respondent. It is alleged that, the appellant advanced a loan to the 2nd respondent who also offered his house as collateral to secure the loan. The 2nd respondent failed to pay back the loan and the appellant wanted to realise the loan from the mortgaged house. The 1st respondent stepped-in and sued both the appellant and 2nd respondent alleging that the house was mortgaged without her consent. After the full trial of the case, the trial tribunal concluded that, the 1st respondent was the lawful owner of the mortgaged house as she jointly acquired it with the 2nd respondent; and that, the said house was mortgaged without the consent of the wife (1st respondent). The appellant, being disgruntled with the decision of the District Land and Housing Tribunal appeared before this court armed with five grounds of appeal. Due to the reason(s) stated below, I see no reason to reproduce the grounds of appeal in this judgment.



Determined to argue the appeal, the appellant hired professional legal services of the learned advocate, Mr. Steven Kaswahili whereas the 1st respondent appeared in person and without representation. The 2nd respondent was absent and according to the information from the 1st respondent, his whereabouts is not known even to his wife (1st respondent). The court ordered the appeal be heard in absence of the 2nd respondent. However, before the hearing commenced, I invited the parties to address me on the absence of assessors' opinions in the proceedings of the trial tribunal.

In response to the above noted irregularity, Mr. Kaswahili for the appellant also informed the court about the irregularity. He submitted that, when the case was scheduled for assessors' opinions on 17th September 2020, the assessors did not give their opinions. The case was later scheduled for assessors' opinions on 30th September 2020. On that date, the names of the assessors do not appear in the coram though the trial chairman recorded that the assessors' opinions were read. The case was immediately scheduled for judgment on 21 October 2020. Unfortunately, the assessors' opinions do not appear on record as per the requirement of **Regulation 19(2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003**. Mr. Kaswahili argued further that, on page 6 of the judgment, the trial chairman acknowledged the assessors' opinions though such opinions are not on record. He urged the court to consider the case of **Edna Adamu Kibona v. Absolom Swebe (Sheli)**,



Civil Appeal No. 286 of 2017, CAT at Mbeya (unreported). He argued that, the irregularity renders the proceedings and decision of the trial tribunal a nullity. He urged the court to quash the proceedings and decision of the trial tribunal and leave the matter for any interested party to file a fresh suit.

On her part, the 1st respondent who was a layperson did not realise that there was an irregularity and urged the court to allow the parties to follow-up the assessor's opinions. Thereafter, there was no substantial rejoinder.

Before I venture into the discourse on this irregularity, I should express my unhappiness on the repeated mistakes done by the District Land and Housing Tribunal on the issue of putting assessors' opinions on record. The Court of Appeal of Tanzania has developed a vast jurisprudence on this area of the law which I should also insist. The composition of the District Land and Housing Tribunal is fully constituted when chaired by a chairman and not less than two assessors. **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019** provide thus:

"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 dully constituted when held by a chairman and two assessors who shall be required to give-out their opinion before the chairman reaches the judgment".

The emphasis is also provided under **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** thus:

"19 (1) The tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;

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

I have stated in a number of cases that, the presence of assessors during the trial was not meant to increase the number of members but ensure participatory decision making in land matters which seem to touch the community. The requirement is also meant to ensure that justice process involves the community which are stakeholders of the dispute. Assessors, who come from the community where the dispute arose, assist the chairman in reaching a judicious decision. Though the chairman is not bound with the assessors' opinion, he/she cannot opt-out the requirement of recording their opinions before composing the judgement. Also, the departure from the assessors' opinion leads to another requirement of giving reasons for the departure. For clarity, I wish to revisit **section 24 of the Land Disputes Courts Act** which provides that:

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

After the hearing of the witnesses, the chairman must schedule the case for *recording* of assessors' opinion. I decide to use the word '*record*' with the view of insisting that such opinion should appear in the proceedings. The procedure is, when an assessor is reading his/her opinion in the presence of the parties, the chairman should record such opinion. Therefore, it is not sufficient for the chairman to simply state that, the opinion of assessors' opinion read, without writing them down in the proceedings. If such opinions do not feature in the proceedings, their acknowledgment in the judgment has no merit.

The Court of Appeal of Tanzania has insisted in different cases. Let me consider just a few of them: In the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported)**, the Court of Appeal observed that:

"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was

not availed and read in the presence of the parties before the said judgment was composed".

Also, in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** and the Court of Appeal of Tanzania had the following to say:

"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 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."

Similarly, in the case of **Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported)**. The Court of Appeal of Tanzania reiterated the above stance of the law that:

"...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."

The Court of Appeal further stated that:

*"...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinions before the determination of the dispute. As such, **their opinion must be on record.**"*(emphasis added).

See also, the cases of **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil appeal No. 286 of 2017, CAT at Mbeya (unreported); **General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa**, Civil Appeal No. 13 of 2012; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali**, Civil Appeal No. 70 of 2017.

In my view, on the date of recording the assessors' opinion, the proceedings may read as follows:

Date: 10th August 2021

Coram: S. J. Mashaka – Chairman

T/c: Magoma

Members: T. J. Kashisha and J. N. Ndoma

Applicant: Present in person

Respondent: Present in person

Tribunal: *The case is coming for assessors' opinion.*

Applicant: *I am ready for the opinion*

Respondent: *I am ready too.*

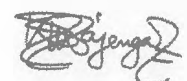
Assessors' opinions:

1st assessor – T. J. Kashisha:

Maoni yangu ni kwamba.....

.....

2nd assessor – J. N. Ndoma:



Katika kesi hii maoni yangu.....

Tribunal:

Assessors' opinion read before the Tribunal in the presence of the parties.

Order: Judgment on 20th August, 2021

Sgd: S. J. Mashaka

Chairman

10th August, 2021

In the case at hand, on the date when the case came for assessors' opinions, the court did not even indicate the names of assessors in the coram. Later, the tribunal wrote that, assessors' opinion read. However, such opinions do not appear on record though the chairman acknowledged them in the judgment. I find this to be an irregularity which vitiated the proceedings and decision of the trial tribunal. I hereby quash the proceedings and set aside the decision of the trial tribunal. I leave the matter for any interested party to institute a fresh suit. No order as to costs. It is so ordered.


DATED at BUKOBA this 19th day of November, 2021.


Ntemi N. Kilekamajenga.
JUDGE
19/11/2021



Court:

Judgement delivered this 19th November in the presence of the 1st respondent and in the absence of the appellant and 2nd respondent. Right of appeal explained to the parties.


Ntemi N. Kilekamajenga.
JUDGE
19/11/2021

