

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

LAND APPEAL NO. 29 OF 2021

***(Originating from Land Application No. 180 of 2019 in the District
Land and Housing Tribunal for Mbeya at Mbeya)***

- 1. THE REGISTERED TRUSTEES OF PENTECOSTAL HOLINESS
ASSOCIATION MISSION TANZANIA 1ST APPLICANT**
- 2. NERBART SAMSON SIMBEYE 2ND APPELLANT**

VERSUS

- 1. ANTHONY SAMSON SIMBEYE 1ST RESPONDENT**
- 2. JOHN ANTHONY SIMBEYE 2ND RESPONDENT**

JUDGMENT

A.A. MBAGWA, J.

This is an appeal against the judgment and decree of the District Land and Housing Tribunal for Mbeya before Hon. T. Munzerere, Chairman.

The appellants herein were dissatisfied with the decision of the trial Tribunal hence filed to this Court a memorandum of appeal containing five grounds as follows;

1. That the trial Tribunal erred both in law and fact to consider that the land in dispute was family land without considering the heavy and strong evidence adduced by the appellant to the contrary.
2. That the trial Tribunal erred both in law and fact when it failed to address the real issue in dispute resulting to unfair and unjust decision
3. That the trial Tribunal erred both in point of law and facts when it failed to consider and determine the counter claim as raised by the 1st appellant



4. That the trial Tribunal erred both in point of law and facts when it dealt with extraneous matters not pleaded by the parties to the case nor testified during hearing.
5. That the trial Tribunal erred in law and facts for failure to properly analyse evidence in records resulting to unfair decision to the detriment of the appellant.

When the matter was called on for hearing, all parties appeared and prosecuted the appeal in person. The 1st appellant, being a legal entity, was represented by one of the trustees namely, Abiniei Zefania.

The appellants faulted the decision of the trial Tribunal on the grounds indicated above whereas the respondent resisted the appeal insisting that the Tribunal's decision was right.

In the course of composing the judgment, I came across an error of law in judgment to wit; the judgment does not reflect the opinion of assessors. Consequently, I summoned the parties on 27th day of December, 2021 to address the Court on this pertinent legal issue. Both appellants and respondents admitted that, in the judgment, the trial Chairman does not seem to have considered the opinion of assessors. With regard to the way forward, both parties left it to the Court to decide.

Throughout the record, it is clear that the trial Chairman sat with two assessors namely, Musa Mwasapili and Vivian Chang'ombe. Also, the record tells it well that on 15th day of October, 2020 the assessors submitted their written opinion and the same was read to the parties.

Nonetheless, the Chairman did not consider the assessors' opinion while making decision. This is because, throughout the judgment, there is nowhere the trial Chairman indicated whether he took into account the assessors' opinion and whether he concurred with or differed with them.

In my considered view, this was contrary to the dictates of Section 24 of the Land Disputes Court Act which provides thus;

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

From the foregoing provision, it is my view that the trial Chairman, though not bound by the opinion of assessors, was duty bound not only to take it into account the assessors' opinion but also to indicate in the judgment whether he concurred or differed from the assessors' opinion. In the case of **Zubeda Hussein Kayagali vs Oliva Gaston Luvakule & Another**, Civil Appeal No. 312 of 2017, CAT AT Tabora, the Court of Appeal at page 10 held that in order to comply with section 24 of the Land Disputes Court Act, the Chairman should receive the opinion of assessors and consider it in the judgment.

The judgment under scrutiny is silent on this aspect. It does not tell whether there was opinion of assessors nor does it reflect that the Chairman concurred or differed with their opinion. In the circumstances, I find that the impugned judgment contravenes the mandatory dictates of section 24 of the Land Disputes Court Act. As such, the judgment is defective.

Having found the judgment defective, the next issue for consideration is the appropriate course to be taken. It is not in dispute that the trial was conducted with the aid of two assessors. It is also common cause that the two assessors gave their written opinion and the same was read in court as reflected in the proceedings dated 15th day of October, 2020. Further, the written opinion was duly filed in the Tribunal and they are



available in the court file. The only irregularity is in the judgment which, as indicated above, did not comply with the mandatory requirement under section 24 of the Act. This court therefore cannot determine the appeal on merits which emanates from a defective decision (judgment). Since the irregularities are only in the judgment, I find it undesirable to order a retrial.

Consequently, I hereby order that this case file be remitted to the trial Tribunal for trial Chairman to compose judgment according to the law particularly by complying with the requirements of section 24 of the Act. Once the Chairman has composed the judgment in accordance with the law, an aggrieved party may take appropriate course to challenge the decision.

Since the ground upon which this appeal has been decided was raised suo motu by the Court, I make no order as to costs.

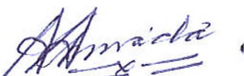
It is so ordered

Right of appeal is explained.



A.A. Mbagwa
Judge
28/12/2021

This judgment has been delivered in the presence of both the appellants and the respondents this 28th day of December, 2021



A.A. Mbagwa
Judge
28/12/2021