

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

LAND CASE APPEAL NO. 58 OF 2021

(Originating from Application No. 30 of 2014 in the District Land and Housing Tribunal for Kagera at Bukoba)

BENEDICTO LUKWEMBE----- APPELLANT

VERSUS

DESDERY NGAIZA-----1ST RESPONDENT

ANETH MSAFIRI-----2ND RESPONDENT

JUDGMENT

Date of Last Order: 21/06/2022

Date of Ruling: 22/06/2022

A. E. Mwipopo, J.

The appellant namely Benedicto Lukwembe sued Desderry Ngaiza and Aneth Msafiri who are respondents herein for trespassing in the suit premises located at Katoke Village within Muleba District in Kagera Region in the Land Application No. 30 of 2014 at the District Land and Housing Tribunal for Kagera at Bukoba. The said application was not successful and the application was dismissed. The appellant was aggrieved and he filed this appeal against the decision of the trial Tribunal. The Memorandum of Appeal filed by the appellant

contains four grounds of appeal as provided hereunder:-

- 1. That, the District Land and Housing Tribunal grossly erred in law and facts to hold that the appellant failed to establish that respondents trespassed on this land;*
- 2. That, the Hon. Chairman grossly erred in law and fact to dismiss the application while the appellant rightly proved his case on the required standard of law;*
- 3. That, the trial Hon. Chairman erred in law and facts for failure to take into account opinion of the assessors and give reasons for differing with such opinion which was in favour of the appellant;*
- 4. That, in totality the trial Chairman erred in law and facts for failure to hold in favour of the appellant and allow the application.*

All parties were present in person on the hearing date and the appellant had the representation of Mr. Geraz Ruben, Advocate. Hearing of the appeal proceeded.

The counsel for the appellant in his submission abandoned the first, second and fourth grounds of appeal found in the Memorandum of Appeal and submitted on the third ground of appeal only. He said that the trial Hon. Chairman erred in law and facts for failure to take into account opinion of the assessors and give reasons for differing with such opinion which was in favour of the appellant.

It was his submission that the proceedings of the trial tribunal shows that

the tribunal framed issues on 01/07/2014 in the presence of assessors namely Anamery and Kawegere. On 25/02/2016 the hearing of the matter commenced in the presence of assessors namely Bwahama and Kawegere. The hearing proceeded on 22/08/2016 where assessors were Anamery and Bwahama. There is no reason provided for the change of assessors during those hearing dates. He went on to say that on 29/01/2018 the defense case commenced and assessors who were present were Muyenga and Fortunatus which formed a completely new pair. Thereafter, the case was fixed for judgment on 17/7/2018 where the trial Chairman delivered judgment without affording assessors chance to provide their opinion. For that reason the whole proceedings of the trial tribunal was invalid. The same position was stated by Court of Appeal in the case of **Emmanuel Oshoseni Munuo vs. Ndemael Rumishaeli Massawe**, Civil Appeal No. 272 of 2018, CAT at Arusha, (unreported).

In reply, the 1st Respondent said that the assessors from the beginning of the case to the end were two, one male and one female. There was change of a female assessor when the case proceeded. As a party to the case, he has nothing to do to stop the irregularity which was done by the trial Chairman. It was the duty of the trial Chairman to make sure that assessors does not change. On the issue that assessor did not give their opinion, the 1st respondent said that this is not true as assessor were consulted by trial Chairman regularly.

The 2nd respondent said in her reply that she know nothing about the case

as she is not concerned with the case. She said that it was not the duty of the parties to question the change of the assessor during hearing of the case. For that reasons parties should not be blamed for the error of the trial Chairman of the tribunal.

From the submission, the only issue for determination is whether or not the assessors were properly involved in the hearing of the case before trial Tribunal.

The Land Disputes Courts Act, Cap. 216 provides under section 23(2) that the District Land and Housing Tribunal is duly constituted when held by a chairman sitting with two assessors who shall be required to give out their opinion before the Chairman reaches the judgment. The chairperson has duty to require every assessor present at the conclusion of the trial of the suit to give his or her opinion in writing and read it to the parties before drafting the final judgment. This is provided under Regulation 19 (1) and (2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003. The said regulation states as follows, I quote:-

"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 hearing to give his opinion in writing and the assessor may give his opinion in

Kiswahili."

From above cited law, the involvement of assessors is crucial in the hearing of the proceedings before the tribunal where their opinion must be availed in the presence of parties so as enable them to know the nature of the opinion and whether the same has been considered in the judgment. It is settled law that where the trial has been conducted with the aid of the assessors they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed. This was stated by the Court of Appeal in the case of **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017, Court of Appeal of Tanzania at Mbeya, (unreported).

From this settled position of the law, the District Land and Housing Tribunal was supposed to involve the assessors actively in the determination of the case from the beginning. Active involvement of the assessors includes the presence of the same pair of the assessors from the commencement of the trial to the end. In the case of **Emmanuel Osheni Muno vs. Ndemaeli Rumishaeli Massawe, (supra)**, the Court of Appeal stated at page 6 that:

"The assessors who sat with the Chairman in the present matter for unknown reasons did not sit throughout. They had been interchanging and thus their participation was not fully, a fact which we think, contributed to their failure to give opinion as required by the law."

The above cited decision made the position clear that failure of assessors

to sit throughout the trial makes their participation not fully. In the present case the record of proceedings shows that on 01.07.2015 five issues were framed in the presence of assessors namely Anamery and Kawegere. When witnesses for the parties were testifying the assessors namely Bwahama and Anamery were present. This means that one of the assessor namely Bwahama who was not present when the issues were framed proceeded to hear the testimony of witnesses. After the defense case was closed, the trial Chairman proceeded to deliver the judgment without affording opportunity to assessors who were present to provide their opinion. However, the judgment of the trial Tribunal contain opinion of assessors. It is not known how the said opinion found its way in the judgment as the record shows that assessors were not afforded chance to provide their opinion. Further, there is no written opinion of assessors in the record. In the case of **Sikuzani Said Magambo and Another vs. Mohamed Roble**, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania, at Dodoma, (unreported), it was held that:-

"It is also on record that, though the opinion of the assessor were not solicited and reflected in the Tribunals' 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 to give the said opinion, it is not clear how and at what stage the said opinion found their way in the

Tribunal's Judgment."

In another case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, Court of Appeal of Tanzania at Mbeya, (Unreported), it was observed that:-

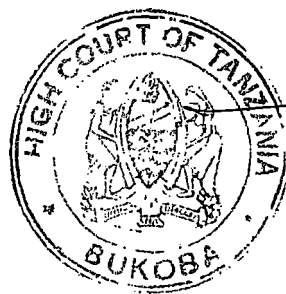
"For the avoidance of doubt, we are aware that in the instant case the original record has the opinions of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors 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 not read in the presence of the parties before the judgment was composed, the same have no useful purpose."

Thus, the fact that in the case at hand the opinion is found in the judgment without knowing how and at what stage the said opinion found its way in judgment is against section 24 of the Land Disputes Courts Act read together with regulation 19 (2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003, which requires the chairman before making his judgment to afford every assessor present at the conclusion of hearing to give his opinion. The said opinion must read over in the presence of the parties as it was stated in **Edina Adam Kibona vs. Absolom Swebe**, (supra).

For that reason the proceedings and entire trial before the Tribunal are vitiated. The Consequences of this serious irregularities is to render such trial a

nullity as it was held in **Samson Njarai and Another vs. Jacob Mesoviro**, Civil Appeal No. 98 of 2015, Court of Appeal of Tanzania at Arusha, (Unreported) and in **Awiniel Mtui and 3 Others vs. Stanley Ephata Kimambo and Another**, Civil Appeal No. 97 of 2015, Court of Appeal of Tanzania at Arusha, (Unreported).

Therefore, the proceedings of the trial District Land and Housing Tribunal is quashed and its the judgment is set aside. The matter is remitted back to the District Land and Housing Tribunal for Kagera at Bukoba where the trial has to start afresh before another chairman and a new set of assessors. In the circumstances of this case, each party has to take care of his own cost. It is so ordered accordingly.



A.E. Mwipopo

Judge

22/06/2022