

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(IRINGA DISTRICT REGISTRY)**  
**AT IRINGA**

**LAND APPEAL NO. 39 OF 2020**

*(Originating from Misc. Land Application No. 66 of 2017)*

**CHICO AND CRSG JOINT VENTURE ..... APPELLANT**

**VERSUS**

**DAUDI AMRANI MSALILWA ..... RESPONDENT**

Date of last Order 15/3/2021

Date of Ruling 24/5/2022

**JUDGMENT**

**MATOGOLO, J.**

The Respondent herein filed a suit before the District Land and Housing Tribunal (DLHT) for Njombe claiming that the Appellant has damaged his house located at Mangelenge Village within Wanging'ombe District. He stated that, on 06<sup>th</sup> July, 2017 the Appellant negligently damaged the Respondent's house when constructing the road. The suit house is estimated to be of the value of Tshs 40,000,000/= . After a full trial the case ended in favour of the Respondent, the court ordered the Appellant to pay the respondent Tshs. 40,000,000/= as specific damages for the suit house and Tsh. 10,000,000/= as general damages. He was

aggrieved with the whole decision, now he has come before this court with a total of five (5) grounds of appeal as follows:-

1. That, the trial Tribunal erred in fact and law in giving a judgment emanating from irregular proceedings.
2. That, the trial Tribunal erred in fact and law in awarding the Respondent's Specific damages which were not proved to the required standards.
3. That, the Trial Tribunal erred in fact and law in awarding general damages without having evidential basis for awarding the same.
4. That, the trial tribunal erred in fact and law in failing to evaluate evidence on record thereby arriving at erroneous decision.
5. That, the trial Tribunal erred in fact and law in failing to record the reason for transfer of a case file from one Chairperson to another.

The Appellant prayed for this appeal be allowed with costs and the decision of the trial Tribunal be quashed, its proceedings nullified and its orders set aside.

At the hearing of this appeal parties were represented whereby the appellant was represented by Mr. Frank J. Ngafumika the learned Advocate and Mr. Good Otto Mgimba represented the Respondent.

The appeal was argued through written submissions.

Submitting in support of the first ground of appeal that, the judgment given emanated from irregular proceedings, Mr. Ngafumika submitted that, the irregularity of the proceedings complained of is in respect of the following matters;

Firstly that, on 27<sup>th</sup> June 2018 when the Appellant stood up for defence one assessor Mr. Mwapinga was recorded to be on safari, but he participated in giving opinion while he did not take part in all stages of the proceedings.

Secondly is that, all evidence was recorded by one chairman and the judgment was composed by another chairperson. Mr. Ngafumika was of the considered opinion that, the law was violated as the law is to the effect that the one before whom evidence is given is at a better position to know the demeanor of a witness. He contended that, the chairperson who composed the judgment did not record any part of the evidence but proceeded to give judgment, to support his argument he referred the case of ***Kajoka Masanga versus The Attorney General and Another***, Court of Appeal of Tanzania at Mwanza, Civil Appeal No. 153 of 2006 (unreported).

The third irregularity is that, on 19<sup>th</sup> February 2020, there was a new set of assessors not the ones who participated in the proceedings from the beginning. He contended that, while the assessors to this case were

Mbwilo and Mwapinga, on that material date there was Mtwewe and Ngwinamila. This unexplained change of assessors vitiates the proceedings.

Mr. Ngafumika submitted that, as the judgment arose from irregular proceedings, it naturally follows that the resulting judgment however good it might have been is rendered a nullity for emanating from irregular proceedings.

As to the second ground of Appeal, he submitted that, the awarded specific damages were not proved to the required standards. He contended that, specific damages must be specifically pleaded and strictly proved. To support his argument, he cited the case of ***Stanbic Bank Tanzania Limited versus Abercrombie & Kent (T) Limited***, Civil Appeal No.21 of 2001 CAT at Dar es Salaam (unreported).

Mr. Ngafumika went on submitting that, through out the proceedings, it cannot be concluded that the awarded specific damages were strictly proved by the respondent. There was no valuation report to substantiate the value of the purported damaged house, there was no lease agreements to substantiate the existence of the said tenancy relations, neither bank statement nor tax payment records to prove that a certain amount of money was being earned yet still the bare assertion of the Respondent was taken as being a strict proof of specific damages.

He submitted further that, in this case the assessment of the quantum of the awarded general is not shown to be based on any principle of law. No reason has been offered for the award of the general damages.

He contended further that the trial tribunal failed to make critical evaluation thereof thereby resulting into erroneous decision. He argued that, the trial tribunal concluded that, the respondent's house was negligently damaged by the Appellant because of heavy machines working nearby the Respondent's house. The findings were without legal basis. No specific Machine was seen or named as belonging to the Appellant which passed nearby the Respondent's house, he said that, the respondent's house is located along Tanzam Highway, where millions of vehicles, trucks and machineries pass on daily basis, how can it be concluded that it is the machine of the Appellant that caused damage without any proof of seeing the said machine, mentioning registration numbers, the day and time it caused the said damage.

He submitted further that, the Appellant's evidence was not considered at all. It has been repeatedly said that, there is no company known as CHICO AND CRSG JOINT VENTURE LIMITED but the trial tribunal kept silent on that significant piece of evidence and proceeded to make orders against a non- existent person. He submitted further that, CHICO is one independent company and CRSG is another independent company. Had the trial tribunal considered this piece of evidence, it would not have proceeded to grant a decree against a non- existent person.

He went on submitting that, while the law is clear in that the chairperson is not bound by the opinion of assessors in reaching decision, the law requires the chairperson to assign reasons for deviating from the opinion of assessors. He argued that, the reason which was assigned is a

strange reason as it emanates from extraneous matter. He contended that, at the last paragraph of the typed judgment, the chairperson concluded to say that she was differing with the opinion of the assessors because, although the Appellant finished to construct the road, it is still working within the country. No part of record ever shows this fact that the Appellant is still working in this country. One wonders where has this fact come from.

He submitted further that, the assessors' opinions also were not based on any piece of evidence. As there was no piece of evidence showing that, the purported Respondent Company has already finished the project has shifted to China. The whereabouts of the purported Respondent Company were not in question, therefore the assessors find the Respondent to have already shifted to China while the Chairperson finds that the purported Respondent had already finished the project but still working in the country. He argued that, throughout the records, there is no evidence showing any of the two positions.

Mr. Ngafumika concluded by submitting that, the cumulative effect of the shortcomings as exhibited in their submission is to have this appeal allowed by quashing the trial tribunal's decision, nullifying its proceedings and setting aside its resulting orders.

In reply Mr. Mgimba with regard to the first ground of Appeal he submitted that, the first irregularity alleged is that on the 27<sup>th</sup> June 2018, one assessor Mr. Mwapinga was recorded to be on safari hence he did not participate in the whole case, he submitted that, it is very unfortunate that

the counsel for the appellant claims irregularity of proceedings without citing any single provision of the law which has been contravened it's a cardinal principle of law that, there is no offense without law ""*Nullum delictum sine lege*". He went on submitting that, with that shortfall the aforementioned appellant claim remains baseless as their mere words without legal back up. He contended that, regulation 19(2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations, 2002, G.N. No.174, states that:-

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

He went on submitting that, Mr. Mwapinga the assessor was present at the conclusion of hearing and the law requires the chairman to allow every assessor present to view out his opinion.

To support his argument he referred section 45 of the Land Disputes Courts Act (Cap 216 R.E) which provides that:-

*"45.No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the or in*

*such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned failure of justice”.*

He also referred the case of ***Dr. Clemence Kalugendo versus Peter Andrew Athumani***, Civil Appeal No. 92 of 2018 Court of Appeal at Dar es Salaam (unreported)

He went on submitting that, the United Republic of Tanzania Constitution as well particularly at Article 107 A (2) (e) requires courts while in process of dispensing justice to not be tied up with legal technicalities which obstruct dispensation of justice. He argued that, the Appellant’s claim about the absence of assessors in one day, it does not go to the root of the case but rather a legal technicality employed by the Appellant at the expense of the Respondent. He contended further that, since the Appellant claim is not based on substantive justice rather mechanical justice the court should be guided by Article 107A (2)(e) of the United Republic of Tanzania Constitution 1977 as amended and section 45 of the Land Disputes Courts Act (Cap 216 R. E 2019) in determining this ground.

Regarding the second complained of irregularity that, the successor Chairman did not record any evidence but proceeded to give judgment. Mr. Mjimba submitted that, our laws is very clear that the judge/Magistrate



who started to record evidence once is prevented by the reasonable reason another judge/ Magistrate can take over the matter and continue with it to the end, the importance thing here is that the succeeding adjudicator must record on proceedings as to why the file landed on his lap. He argued that, in our instant case the successor chairman has recorded on the proceedings as to why she took over the file at page 21 of the typed proceedings where she has stated very clear that the presiding chairman has been transferred unto other duties so he will continue to hear the defence case.

With regard to the case of ***Kajoka Masanga versus The Attorney General and Another*** (supra), he said that, the case is distinguishable and irrelevant and in no circumstance that case can be useful in our case, because in that case the proceedings were nullified on the reason that the successor Judge did not record on the proceeding as to why the case came unto his lap.

With regard to the allegation that, there was a new set of assessors not the ones who participated in the proceedings, he submitted that, the assessors which the appellant complains were not involved in anything as the case was adjourned because of the appellant absence and the case did not proceed, it was just mentioned. He contended that, no way they can be faulted for doing nothing in this case apart from only being mentioned, unless if they could have been involved in the hearing the case.

As to the second ground of Appeal, Mr. Mgimba submitted that, the respondent in our instant case in his application at the trial tribunal he

pleaded to be awarded specific damages at paragraph 7 (a) so the first precondition has been adhered. He went on submitting that, it is surprising that, the matter not disputed at the trial tribunal is brought at the appeal stage, to support his argument he cited the case of ***Dar es Salaam Water and Sewage Authority (Appellant) versus Didas Kameka and 16 Others***, Civil Appeal No. 233 of 2019 CAT. It was clearly pronounced by the Court of Appeal that matters not raised at the trial court cannot be raised at the appellate court for it could be unfair to blame a trial Judge for something which he did not deal with it at the hearing stage.

He went on submitting that, the Respondent has clearly clarified on how he has suffered the specific damages he claims by showing that, he has two tenants who one of them was paying Tshs. 150,000/= the one with Mpesa shop and the other one was paying Tshs. 400,000/= the one who rented the house for saccoss business and the respondent himself was getting Tsh. 400,000/= with his business of charging customers phones and lastly he has clarified that the value of the suit house is Tsh. 40million and all these was proved by the applicant's witnesses brought in trial tribunal.

He went on submitting that, the Respondent's at the hearing of the case he managed to strictly prove the damages he claim to be genuine by calling all the two tenants to testify one Edwin Lunanilo Ngilangwa who testified in favour of the respondent on the 25<sup>th</sup> day of January 2018 as can be seen at page 10, the second tenant brought is Hilda Stanley Mtili who as well testified in favour of the respondent on the same date as

shown at page 11 of the typed proceedings and on 31/08/2020 the trial tribunal visited the locus in quo in order to see the damage of the suit house and the counsel for the Respondent was the one who asked before the trial tribunal to visit locus in quo, although the appellant advocate nor his representative never showed up. He went on contending that, the appellant's claim that the specific damage was not proved to the required standard are baseless since the respondent proved to the satisfaction of the court.

With regard to the case cited by the counsel for the Appellant, Mr. Mgimba was of the considered opinion that, the same is distinguishable, since the cited case the trial judge failed to separate between specific damages and general damages, something which is not a matter in our case at hand because here the trial tribunal categorically have separated the two, so the case cited by the appellant counsel might be a good one but it serves nothing in our case, it has been used at a wrong forum.

Regarding the complaint that, the general damages awarded by the trial tribunal not in compliance with principles of law, although those principles he claims that, they're not complied with, have not been provided in his submission, so this claim is left hanging with no enough clarity. He submitted further that, general damages are awarded at the discretion of the trial court and appellate court cannot interfere with the assessment of damages by the trial court.

To support his argument he cited the case of ***Sylivester Lwegira Bandio & Another versus National Bank of Commerce Limited*** Civil

Appeal No. 125 of 2018 CAT, the Court of Appeal insisted that general damages are awarded at the discretion of the trial court no appellate court can interfere with those findings unless it's clearly shown that the damages were awarded on wrong principles or in disregard of the same.

Regarding the complaint that, the trial tribunal failed to make a critical evaluation of evidence as a result it arrived into erroneous decision. Mr. Mgimba submitted that, this ground is baseless since evidence of both parties were vigorously examined, finally it was found that it is the appellant machines that caused damages and not any other, because the house was built in 1985, it remained stable all the way until on the 06/07/2017 when the appellant started to construct a diversion road which is very close to the respondent's house something which caused cracks and finally fall of the house. And its not true the respondent house is close to a high way, the house is far away, its 30 meters away and it's not on road reserve, no way the vehicles and trucks that are passing through the high way can cause any damage to the house is not close to the road. He went on submitting that, on 25/01/2018 one witness called Hilda Stanly Mtili who testified in favour of the Respondent said on 06/07/2017 she was there when the Appellant Machines were constructing a diversion road nearby the respondent house and said it's the appellant trucks that caused damage into the house this fact was never disputed by the appellant counsel in cross-examination so the assertion by the appellant counsel that there was no enough proof to implicate the appellant with the damages is of no legal basis since evidence and testimony of eye witness were brought

to testify and that is enough to be relied upon in absence of different testimony.

Regarding the complaint that, the Appellant's evidence was not considered regarding the issue that there is no Company known as CHICO AND CRSG JOINT VENTURE LIMITED, Mr. Mgimba submitted that, this fact is shocking because the appellant counsel has been representing this case from the trial tribunal and to the appeal stage and now he says the company is not existing, the question is if that company is non- existing where did he get instruction to defend this case/ and why it was not raised at the trial tribunal? He submitted further that, the truth is that these companies exist and they are within our country dealing with construction as seen at page 13 of the typed proceedings particularly on the testimony of one Regan Israel who he said he is a public relation officer of CRSG which construct road from Nyigo to Igawa. This ground has no legs to stand and has no merit.

With regard to allegation that, the assessor's opinion are extraneous and the reason by the trial chairman as to why she departs from those opinions is strange. He contended that, the law which gives mandate to assessors to view out their opinion it does not provide which kind of opinion they should provide, it's their opinion as per their perception never otherwise so it's not correct for the Appellant advocate to try to dictate someone's opinion. He contended that, the appellant fault the trial chairman for clarifying as to why she is departing from the assessor's opinion, while the law is very clear despite the assessor's opinion not being

binding to the trial chairman but if he is dissenting with their opinion he should give out reasons for the same. He went on contending that, what the chairman did of assigning reasons why he is not accepting assessor's opinion is within the ambit of our laws. He submitted further that, the case was decided in the Tribunal according to the evidence tendered by both parties the judgment is very explanatory in that respect and never otherwise as the appellant tries to mislead this Court.

He went on contending that, the appellant's ground are baseless, since what is discovered from both their memorandum of appeal together with their submission, the appellant is not contesting about the substance part of the case which is causing damage to the respondent house which has left the respondent homeless, and the tenant at his old age, but their main arguments is just trying to play legal technicalities hence obstruction of justice at the expense of the Respondent who he has and continues to suffer irreparable loss, he prayed to this court to deal with this matter basing on substantive justice so that not only justice can be done but seen to be done. To that he cited the case of ***Seleman Nassoro Mpele versus Republic***, Criminal Application No. 68/01 of 2020 CAT at Dar es Salaam, it was held that:-

*"No judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of*

*this or that kind, and generally no, judgment can be, beyond criticism”.*

He contended that, by that principle in the case cited its clear now that no judgement that can be without defects what should be considered most is whether those defects in fact touches the root of the case. Mr. Mgimba concluded by praying before this court to upheld the decision of the trial tribunal and dismiss this appeal with costs.

In Rejoinder Mr. Ngafumika reiterated what he submitted in submission in chief and I don't see the reason of repeating the same.

Having carefully read the respective submissions by the parties and having passed through the trial tribunal records, the crucial issue to be determined here is whether this appeal has merit.

As to the first ground of appeal the complaint here is that, the trial tribunal judgment is a result of irregularity of the proceedings.

Mr. Ngafumika submitted that on 27<sup>th</sup> June 2018 when the case was scheduled for the defence one assessor Mr. Mwapinga was recorded to be on safari, but despite the fact that he was absent still he participated in giving opinion.

Regulation 19(2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations provides that:-

*"Notwithstanding subsection (1) the chairman shall, before making his*

*judgment, require every assessor present at the conclusion of the hearing to give opinion in writing and the assessor may give his opinion in Kiswahili"*

Again in the case of **EDINA ADAM KIBONA V ABSOLOM SWEBE (SHELI)** (supra) Mwambegele JA among other things while citing the case of **Tubone Mwambeta v Mbeya City Council** Civil Appeal No. 287 of 2017 (Unreported) emphasized at page 4 and 5 that:

*"In the view of the settled position of the law where the trial has be 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 since Regulation 19(2) of the Regulations require every assessor present at the trial at the conclusion of the hearing to give his opinion in writing". (Emphasis supplied).*

In our instant appeal as it was rightly submitted by Mr. Ngafumika and I agree with him that, the assessor one Mr. Mwapinga as he was on safari when the case scheduled for defence, was not supposed to give



opinion as he did not fully participate in the hearing of the case. He did not hear the respondent's defence now appellant. His opinion was based only on the evidence of the applicant. Mr. Good Mgimba learned advocate has argued that the counsel for the applicant did not cite the provision that has been violated thus what he submitted are mere words which are not backed by law. The learned advocate for the respondent also relied on the overriding objective as provided for under section 45 of the Land Disputes Court's Act (the Act) that no decision of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of error, omission or irregularities in the proceedings before or at the hearing unless such error, omission or irregularities has occasioned a failure of justice. He also relied on regulation 19(2) of GN No. 174 of 2003, requiring assessors who were at the conclusion of the hearing to give opinion. I think Mr. Mgimba is not more right in his argument. It is on record and not in dispute that Mwapinga absented himself on 27/6/2018 when the case was scheduled for defence, which means he did not hear that part of evidence in that case. He could not be permitted again to join the hearing in terms of section 23 (3) of the Act. As there are procedural laws above mentioned with a mandatory requirement, the principle of overriding objective cannot be applied as it was held in the case of ***Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others***, Civil Appeal No. 66 of 2017, CAT (unreported), where the Court held that:-

*"Overriding objective principle cannot be applied blindly against mandatory provision of procedural law".*

Thus, the act of Mwapinga assessor of giving opinion while he did not fully participate in the hearing vitiates the whole proceedings. The argument that counsel for the applicant did not cite any violated provision is baseless as that is a point of law which this court blind fold its eyes as it goes to the jurisdiction of the Tribunal. Thus, this complaint in my opinion has merit.

With regard to the second irregularity the complaint here is that, all evidence was reordered by one Chairman, and judgment composed by another chairperson. To him the one before whom evidence is given is at a better position to know the demeanor of a witness, to that he cited the case of ***Kajoka Masanga versus The Attorney General and Another*** (supra).

In the case of ***Diamond Motors Limited versus K-Group (T) Limited***, Civil Appeal No.50 of 2019 CAT at DSM (unreported) at page 15-16 it was held that:-

"As regards to the first ground of appeal, we find it appropriate to reproduce Order XVIII Rule (10) of the CPC which provides that:-

*Where a judge or Magistrate is prevented by death, transfer or other cause from conducting the trial of a suit, his successor may deal with any evidence or memorandum taken down or made by him under the forgoing rules as if such evidence or memorandum has taken down or made by him or under his direction under the said rules and may proceed with the suit from stage at which his predecessor left”.*

Also at page 18 the Court of Appeal went on holding that, we are aware of the recent decision of this court ***in Mariam Samburo (Legal Representative of the late Ramadhani Abas) versus Masoud Mohamed Joshi and Two Others***, Civil Appeal No.109 of 2016 (unreported), in which the Court insisted that recording of reasons for taking over the trial of a suit by a judge is a mandatory requirement, as it promotes accountability on the part of successor Judge. The court went on to state that overriding objective principle is not applicable against the mandatory provisions of the procedural law which goes to the very foundation of the case. The Court held that;

*"In the appeal at hand, we find and hold that, the take over of the partly heard case by the successor judges mentioned*

*above was highly irregular as there were no reasons for the succession advanced on record of appeal. We think that in the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure by the successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity”.*

In the instant case records reveals as follows:-

19/02/2020

Quoram: G. Fabian, Chairperson

Ass (i) Mrs. M. Mtwewe

(ii) Mr. K. Ngwinamila

Applicant: Present

Respondent: Absent

RMA: Asha

**Tribunal:** The matter is for hearing at the defence side, but the presiding chairman who started to hear this case has transferred to other duty station, I will proceed with this matter.

**Applicant:** It is true but the respondent is not here”.

Having gone the tribunal records in my opinion the complained of irregularity lack merit because the chairperson who took over the matter assigned reason for him taking over the matter, although the Appellant was absent on that date. The reason given is that the presiding chairman was transferred to another working station. However the appellant was aware of that hearing date as Mr. Mussa Mhagama learned advocate appeared holding brief for Mr. Frank Ngafumika advocate for the respondent the last date the case was scheduled for ruling, but he absented himself without assigning good reason for his absence. He kept on absenting himself until when judgment was delivered in his absence. It trite that parties should make follow up to their cases. While I agree with Mr. Ngafumika that the judicial officer who heard the evidence of witnesses is at a better position to decide the case than the one who did not hear the witnesses and assess their demeanor. However the predecessor Chairman in this case was prevented from proceeding with the case following his transfer to another duty station.

As regard to third complaint on irregularity that set of new assessors was involved in hearing the case, it is on record that on 19/2/2020 one Mrs M. Mtweve and Mr. K. Ng'winamila were recorded as assessors, however

g did not proceed. It is not explained in the Tribunal why the two were called as assessors. But as it was by Mr. Mgimba as they did not participate in hearing the presence could not vitiate proceedings. I therefore is base.

ing satisfied that there is irregularity in the proceedings relating participation of Mwapinga to give opinion while self in between as I have demonstrated above, this to dispose of the appeal and I have no reason to remaining grounds of appeal as will serve nothing. The red vitiates the proceedings, and render the same a proceedings and the judgment thereof are quashed. It is at the matter be retried before the District Land and out before a different chairperson and a new set of


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**INGA** this 24<sup>th</sup> day May, 2022.

  
**F.N. MATOGOLO**

**JUDGE.**

**24/05/2022**


Date: 24/05/2022  
Coram: Hon. F. N. Matogolo – Judge  
L/A: B. Mwenda  
Appellant: Absent  
For the Appellant: Absent  
Respondent:   
For the Respondent: Absent  
C/C: Grace

**Mr. Edrick Mwinuka – Advocate:**

My Lord I am holding brief for Mr. Good Mgimba advocate for the respondent. The parties are not present. The matter is coming for judgment I am ready to receive.

**COURT:**

Judgment delivered.

  
**F. N. MATOGOLO**  
**JUDGE**  
**24/05/2022**