

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBIA DISTRICT REGISTRY

AT BUKOBIA

LAND APPEAL NO. 99 OF 2021

*(Originating from Application No. 41 of 2019 of the District Land and Housing
Tribunal for Kagera at Bukoba)*

DEUSDEDITH KATABARO----- APPELLANT

VERSUS

JONATH MASHULANO-----RESPONDENT

JUDGMENT

Date of Last Order: 26/07/2022

Date of Ruling: 26/07/2022

A. E. Mwipopo, J.

The appellant namely Deusdedith Katabaro sued the respondent namely Jonath Mashulano at Bukoba District Land and Housing Tribunal in Application No. 41 of 2019 for trespassing in the suit land located at Omushasha, Byogo within Nyarugongo Village, Ishozi Ward and Missenyi District. After hearing evidence from both parties, the trial Tribunal dismissed the application for want of merits and proceeded to declare the respondent the rightful owner of the suit land. The appellant was not satisfied and filled the present application after he was granted leave to appeal out of time against the decision of the trial District Land and

Housing Tribunal. The appellant filed in this Court petition of Appeal containing 8 grounds of appeal as follows hereunder:-

- 1. That, the trial Tribunal's proceedings stand a nullity for failure to record the assessors' opinion, thus, the tribunal was not properly composed in law to determine the suit.*
- 2. That, one of the Tribunal's assessors by name of H. Muyaga did not fully participate in trial of the matter despite of writing his opinion and no reason was given for the omission.*
- 3. That, the successor Chairman of the trial Tribunal erred in law and facts for failure to adduce reason(s) for taking over the matter from predecessor Chairman.*
- 4. That, the trial Tribunal erred in law and facts for stating that the appellant failed to prove how he was allocated the suit land by the Village Council while in fact he tendered a letter (Exhibit P2) from Village Council allocating him the same in 2003 and the respondent did not object that allocation.*
- 5. That, the trial Tribunal erred in law and facts to decide in favour of the respondent who failed to tender any document for his allocation of the suit land by the Village Council and so failed to know that oral account from respondent could not override the documentary evidence from the appellant.*
- 6. That, the trial Tribunal erred in law and facts for failure to recognize that the appellant has been in occupation of the suit land for more than 12 years undisturbed and within that time the respondent was supposed to bring an action before proper legal forum instead of looking for political solutions which has never been justification in computation of time.*

- 7. That, the trial Tribunal erred in law and facts to order the appellant to harvest his trees in the suit land without specifying the time period of so doing.*
- 8. That, the trial Tribunal erred in law and facts for deciding the suit against the weight of evidence.*

On the hearing date, the appellant who was present had the service of Mr. Gildon Mambo, Advocate, whereas, the respondent appeared in person unrepresented.

Before hearing commenced the court observed that there were some irregularities in the trial Tribunal proceedings regarding involvement of assessors during hearing. The record of the trial Tribunal shows that the trial commenced in the presence of two assessors, but during trial one assessor was absent and trial continued with one assessor and the opinion of assessors was not recorded in the proceedings. Also, the judgment of the trial Tribunal considered opinion of both assessors while the record does show that only one assessor was present on the date of receiving assessors' opinions. The Court asked both parties to address the Court on the said fatal irregularities which fall under grounds No. 1 and 2 in the appellant's petition of Appeal.

The counsel for the appellant addressed the Court where he stated that as it was observed by this court, there was poor involvement of assessors during trial. The hearing of the case commenced on 16/09/2019 in the presence of two

assessors namely H. Muyaga and F. Rutabanzibwa. On that day, the appellant and his witnesses testified on oath. The same assessors were present when DW1 testified on 04/11/2019. On 18/12/2019 hearing proceeded where DW2, DW3 and DW4 testified in the presence of one assessor namely F. Rutabanzibwa. There is no reason provided by the trial Tribunal for the hearing to proceed with one assessor only. After the close of defense case, the tribunal fixed date for hearing of assessors' opinion on 27/02/2020. On the said date, only one assessor was present namely F. Rutabanzibwa and it is not known if H. Muyaga gave his opinion. This is contrary to section 23 (2) of Land Disputes Courts Act, Cap. 216, R.E 2019. The District Land and Housing Tribunal is properly composed when constituted by a Chairman and two assessors. The assessors in this case was not properly involved as there is no reason for deciding to proceed with hearing with one assessor only and the record is silent if assessors provided their opinion. After parties informed the court that they are ready to receive assessors' opinion, the record is silent if the said opinion was read over to the Tribunal. The tribunal proceeded to fix the date of judgment.

In the judgment, the trial Chairman said in page 5 that he considered opinion provided by both assessors. It is clear that the Judgment and proceeding are contradicting each other. In the case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, CAT at Mbeya, (unreported), it was

held in page 6 that in view of the fact that the record does not show that the assessors were required to give the opinion of assessors, it is not understood how and at what stage the opinion found its way in the Judgment. The counsel said that the defects vitiates the proceedings. As result, the whole proceedings and decision of the Tribunal is nullity.

The respondent also addressed the Court on the issue of involvement of assessors during trial. He said that both assessors were present throughout during trial at District Land and Housing Tribunal. What he was not sure is if the assessors were presence when their opinion was read over to the Tribunal. He was of the view that there is no need to quash the proceedings and return the file to the trial Tribunal to start afresh. He prayed for hearing of the appeal to proceed.

After hearing both parties addressing the Court, the issue for determination is whether or not assessors were properly involved in the trial before the Bukoba District Land and Housing Tribunal.

As it was stated earlier herein, I observed in the trial Tribunal proceedings the irregularities in assessors' involvement during trial. The proceedings of the trial Tribunal shows in page 5 that the trial commenced on 16.09.2019 in the presence of two assessors namely H. Muyaga and F. Rutanzibwa. Both assessors were present when issues were framed and during the testimony of the appellant - PW1, who was the sole witness for the case of the appellant, and during the testimony

of the respondent - DW1. When DW2, DW3 and DW4 were testifying on 18.12.2019 only one assessor namely F. Rutanzibwa was present. The trial Chairman proceeded with the hearing in absence of one assessor namely H. Muyaga. After the close of defence case, the matter was fixed for assessors' opinion on 14.01.2020 and 27.02.2020 where only one assessor namely F. Rutanzibwa was present. The record is silent if the said assessor provided his opinion, but, the trial Chairman proceeded to fix the matter for judgment. In the judgment of the trial Tribunal, the trial Chairman considered the opinion of both assessors in page 5 of the judgment without stating how the same has find its way in the judgment.

As it was rightly addressed by the counsel for the appellant, fully involvement of the assessors is crucial for any trial with assessors. Section 23 (2) of the Land Disputes Courts Act, Cap. 216, R.E. 2019, provides that Tribunal is duly constituted when held by a chairman and two assessors. Where one of the assessor is not available, the trial Chairman may conclude the trial with the remaining assessor, if any according to section 23(3) of Cap. 216, R.E. 2019. The section provides that in the course of any proceedings before the Tribunal where either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence. This

means that after the trial Chairman has made an order for hearing to proceed with one assessor, the Tribunal was supposed to continue and conclude the proceedings with the said remaining assessor only. In this case there was no order of the trial Tribunal for the hearing to proceed with one assessor only.

Moreover, the typed proceedings is silent if assessors provided their opinion and there is no opinion of any of the assessor which was recorded in the proceedings. This is contrary to regulation 19 (2) of the Land Disputes Courts (District Land and Housing Tribunals) Regulations, 2003, which requires the assessors to read their opinion in Court and the said opinion has to be recorded in the proceedings. In **Sikuzani Saidi Mgambo 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."

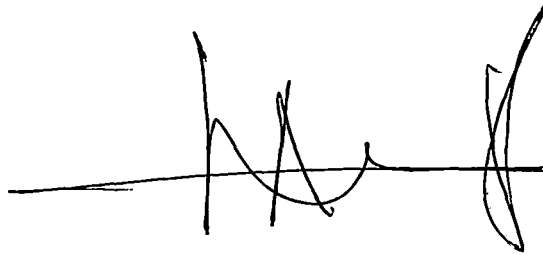
Similar position was stated in the cited case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)**, (supra).


In this case at hand, there is nothing to show that assessors' provided their opinion. However, the opinion of assessors' is found in the judgment of the trial Tribunal without knowing how and at what stage the said opinions found its way in the judgment. These omissions/ irregularities have prejudiced the parties since involvement of the assessors during trial before District Land and Housing Tribunal is essential and it goes to the jurisdiction of the trial Tribunal to determine the matter.

The respondent said when addressing the Court that assessors were present throughout the trial, though, they were not present when their opinion was read over to the trial Tribunal. However, the proceedings of the trial Tribunal does not demonstrate the same. The record clearly show that only one assessor namely F. Rutanzibwa was present when DW2, DW3 and DW4 were testifying. Also, the record does not show if any of the assessors provided opinion. For that reason, I find that assessors were not properly involved during trial and as result the proceedings and the entire trial before the Tribunal are vitiated. The Consequences of this serious irregularities is to render such trial a nullity. See. **Samson Njarai and Another vs. Jacob Mesoviro**, Civil Appeal No. 98 of 2015, Court of Appeal of Tanzania, (Unreported); and **Awiniel Mtui and 3 Others vs. Stanley**

Ephata Kimambo and Another, Civil Appeal No. 97 of 2015, Court of Appeal of Tanzania, (Unreported).

Therefore, I proceed to quash the proceedings and the judgment of the trial Tribunal. The matter is remitted back to the District Land and Housing Tribunal for Kagera at Bukoba and I order for the trial 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
26/07/2022



Court: Judgment was delivered in the presence of the appellant, counsel for the appellant and the respondent.


A.E. Mwipopo
Judge
26/07/2022

