

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 83 OF 2021

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 129 of 2015, the Judgment Dated at 16th April 2020 (Hon. Munzerere, Chairman))

EDITH APOLO BAILEMBA (as Administratrix
of the Estates of the late Andreas Kibamtula).....**APPELLANT**

VERSUS

ANDREAS KOMSIMBILI.....**RESPONDENT**

JUDGEMENT

Date of Last Order: 30.06.2022

Date of Judgment: 15.07.2022

Ebrahim, J.

This appeal has been instituted by **EDITH APOLO BAILEMBA** as an administratrix of the estates of the late Andreas Kibamtula who passed away on 24/08/2021. The deceased died while he has already applied for extension of time in this Court to file the appeal out of time and the same was granted.

The appellant is challenging the judgment dated at 16th April 2020 of the District Land and Housing Tribunal for Mbeya in Land Application No. 129 of 2015.

This matter traces its history way back in 2015 when the herein Respondent Andreas Komsimbili instituted Land Application before the trial Tribunal against Andreas Kibamtula (the deceased) claiming that the deceased invaded his land measuring about 18 acres located at Ubaruku Village in Mbarali District. Having heard the matter on merits, the trial Tribunal in its judgment dated 18th April 2017 struck out the Application on the reason that there was non-joinder of necessary parties.

Aggrieved by the decision the appellant filed before this court Land Appeal No. 24 of 2017. In considering the fact that the trial Tribunal erred when it struck out the matter, this Court, Hon. Ngwala, Judge (as she then was) quashed and set aside the decision. This court also ordered the trial Tribunal Chairman with assessors who heard the matter to re-compose the judgment by considering evidence adduced by the parties and accord them rights according to the evaluation of evidence. The Chairman composed a judgment and declared the Respondent the rightful owner of the suit land. The Appellant was aggrieved hence the present appeal.

The appellant has advanced two grounds of appeal as follows:

1. That the trial Tribunal erred in law and fact for failure to observe the order of this court that he should compose judgment and consider opinion of assessors.
2. That the appellant was denied his right to be heard when the Tribunal visited locus in quo.

The appeal was heard by way of written submissions. The Appellant was represented by advocate Akiza Rugemarila whereas the respondent was advocated for by advocate Philip Mwakilima.

Supporting the appeal, advocate Rugemarila submitted regarding the 1st ground of appeal that the trial Tribunal did not adhere to this Court's order given in Land Appeal No. 24 of 2017 which directed it to read the opinion of assessors to the parties. According to him, the law requires the Chairman to take into account the opinion of assessors and read it to the parties before composing judgment. On that account he relied on **sections 23 (1), (2) and 24 of the Land Disputes Courts Act, Cap. 216 R.E 2019** and **Regulation 19(2) of the Land Disputes Courts (the District Land and Housing tribunal) Regulations, 2003 G.N. No. 174 of 2003.** Advocate Rugemarila also cited the case of **Edina Adam Kibona**

vs Absolom Swebe (SHELI), Civil Appeal No. 286 of 2017 CAT at Mbeya (unreported). He thus prayed for this Court to nullify the judgment and proceedings and order the matter be re-heard by another chairman and assessors.

As to the 2nd ground of appeal, advocate Rugemarila submitted that the trial Tribunal erred by failure to accord the parties right to be heard. He argued that since the Respondent in his evidence claimed to have acquired the disputed land by allocation from the Village Council and as much as the Tribunal visited the *locus in quo*; it (the Tribunal) was supposed to call a member of the Village Council to testify.

Further, advocate Rugemarila contended that the respondent did not prove his case to the required standard since the witnesses he called did not come from the Village Council where he claimed to have acquired the disputed land. He thus implored this court to declare the appellant as the lawful owner.

In reply, on the 1st ground of appeal Advocate Mwakilima submitted that in its order in Land Appeal No. 24 of 2017, this Court did not direct the Trial Tribunal to retry the matter but to consider the already recorded evidence. Though Mr. Mwakilima admitted

to be aware of the requirement of the law in recording the opinion of assessors, he was of the view that in this case the Tribunal included the opinion of assessors as reflected at page 8 of the typed judgment. To him, that ground of appeal lacks merit.

With regard to the 2nd ground of appeal advocate Mwakilima forcefully opposed it on the reason that the proceedings at the locus in quo are clear. That the issue of non-calling a member of the Village Council was neither raised in the trial Tribunal nor did the Appellant cross-examine the respondent. Advocate Mwakilima added that it is not a duty of the Court/Tribunal to collect evidence from the uncalled witness. That it was upon the appellant to call any member of the Village Council whom he thought was useful to adduce evidence in his side. He thus prayed for the dismissal of the appeal with costs.

In his rejoinder submissions, advocate Rugemarila made a replica of his submission in chief and reiterated his previous prayers.

I have considered the rival submissions by counsels for the parties. Starting with the first ground of appeal, the issue to be determined by this court is whether the trial Tribunal offended the law regarding the opinion of assessors.

Before venturing into substance of the issue raised above, I wish to make one point clear. In his submission, counsel for the appellant contended that the trial Tribunal did not adhere to this Court's order given in Land Appeal No. 24 of 2017 which directed it to read the opinion of assessors to the parties. The contention was forcefully contested by the respondent's counsel. I find it prudent to quote the respective order for quick reference:

*"It is for this reason that, I see merit in this Appeal. The Order to struck out the suit is quashed and set aside. **The file be remitted back to the trial tribunal for the trial Chairman and assessors to compose a judgment and make a sound decision that is based on merits on the available evidence recorded.** Should it happen that the learned Chairman and the wise assessors who heard the Application are no longer at the tribunal, then another Chairman should compose a proper judgment. Appeal allowed with costs."* (Bold emphasis is mine)

Owing to that order, it is clear as argued by the respondent's counsel that the trial Tribunal was exclusively required to compose judgment on merits of the suit and no more. The averment by the appellant's counsel that the Tribunal was ordered to read the opinion of assessors to the parties is not supported by the record.

The Tribunal cannot thus, in that respect be faulted for non-recording or reading the opinion of assessors at the time of adhering to the order of this Court. Had it gone to record the same it would have amounted to opening the proceedings which could have been contrary to the order.

Now, turning to the issue posed above, out-rightly, it is mandatory requirement of **section 23 (2) of Cap. 216** and **Rule 19(2) of GN. No. 174 of 2003** that the District Land and Housing Tribunal be composed of a chairman and not less than two assessors. The assessors shall be required to give out their opinion before the chairman reaches the judgement. **Regulation 19 (2) of the GN** also underlines the need for the chairman to require every assessor present at the conclusion of the hearing to give his opinion in writing, which said opinion may be in *Kiswahili*. **Sections 23 (2)** provide that:

"23(2) -The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment."

Additionally, it has been said now and then by this Court and the highest Court of this land (the Court of Appeal of Tanzania) that the Chairman alone had no jurisdiction to adjudicate and determine the matter before him as he alone does not constitute a Tribunal. See **Emmanuel Christopher Lukumai vs Juma Omari Mrisho**, Civil Appeal No. 21 of 2013 CAT (unreported), **Ameir Mbarak and another vs DGAR Kahwili**, Civil Appeal No. 154 of 2015 CAT at Iringa (unreported), **Elilumba Elezel vs John Jaja** Civil Appeal No. 30 of 2020 [2022] TZCA 232 (TanzLii), **Martha A. Mwakinyali and Another vs Hamis Mitogwa** Misc. Land Appeal No. 13 of 2013 [2020] TZHC (TanzLii) to cite but a few.

In the instant case, counsel for the respondent contended that the trial Tribunal included the opinion of assessor in its judgment. The counsel went further quoting the pertinent part of the judgment and posed a question as whether the quotation did not amount to opinion of assessors.

Indeed, I have read the judgment. The trial Tribunal made such quotation. I have also perused the record and found a hand written opinion of one assessor by the name of B.B. KALONGOLE dated at 19/03/2017.

Besides, in my further perusal of the proceedings I observed that the last hearing date was on 01/02/2017 when the Tribunal visited the *locus in quo*. On that same date it set the date for judgment. The record however, does not show if the assessors were required to give their opinion in the presence of the parties. The similar situations occurred in the cases of **Ameir Mbarak and another vs DGAR Kahwili**, (*supra*), **Edina Adam Kibona vs Absolom Swebe (SHELI)** (*supra*) and **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 (unreported). In resolving the situation, the Court of Appeal observed as follows:

"Therefore, in our 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".

Furthermore, in the **Tubone Mwambeta** and **Edina Kibona's** case (*supra*) the court observed that:

*"..... since Regulation 19 (2) of the Regulations requires every assessor present at the conclusion of the hearing to give his opinion in writing, **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"*

All said with regard to the matter at hand, it is my considered view that the trial Chairman omission was a serious irregularity of which its effect need not be recapitulated. It is the law that failure by the Tribunal to include the opinion of assessors in the proceedings goes to the root of the case and renders the judgment and whole proceedings a nullity.

In the upshot, the judgment of the trial Tribunal dated at 16/04/2020 was a nullity. The remedy of which is ordering the retrial of the matter. See **Ameir Mbarak and another vs DGAR Kahwili**, (supra), **Edina Adam Kibona vs Absolom Swebe (SHELI)** (supra) to cite a few.

As above said, I need not belabour to consider the remaining grounds of appeal. Thus, the appeal is allowed. The proceedings and the judgment dated 16/04/2020 are hereby nullified and set

aside. Consequently, I direct the suit to be heard *denovo* expeditiously by another Chairman with a new set of assessors. Considering the circumstances which led to this appeal, I make no order as to costs.

Ordered accordingly.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", is written over the seal and extends to the right.

R.A. Ebrahim
JUDGE

Mbeya
14.07.2022

Date: 15.07.2022.

Coram: Hon. A.P. Scout, Ag-DR.

Appellant:

Respondent:

For the Respondent:

B/C: Patrick Nundwe.

Mr. Akiza Advocate for the appellant who is not present as well as the respondent is not present.

The matter is coming on for judgement we are ready to proceed.

Court: Judgement is delivered in the presence of Mr. Akiza Advocate for the appellant with the absent of Respondent; Court Clerk in Chamber Court on 15/07/2022.



A.P. Scout

Ag-Deputy Registrar

15.07.2022

**DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEVA**