

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND APPEAL CASE NO. 2 OF 2022

(Arising from Land Appeal No. 48 of 2021 District Land and Housing Tribunal of
Kigoma Before: M. Mwinnyi, Mwenyekiti)

YUSUPH SHABAN RUGANDA..... APPELLANT

VERSUS

MUSSA JUMA RUGANDA..... RESPONDENT

JUDGMENT

24/6/2022 & 28/7/2022

MANYANDA, J

The appellant, Yusuph Shaban Ruganda, is aggrieved by the judgment and decree of the District Land and Housing Tribunal for Kigoma, hereafter referred to as "the DLHT" in Land Application No. 48 of 2021 dated 3/1/2022.

The DLHT decided in favour of the Respondent, Mussa Juma Ruganda, who was the applicant before it.

Mussa Juma Ruganda had applied before the DLHT for orders that he be declared a lawful owner of a house (suit property) and Yusuph Shaban



Ruganda, the appellant herein, who was the respondent before it, evicted from the suit property.

Before the decision of the DLHT both parties lived in the same house (suit property). The parties also are related in that the appellant is a respondent's nephew.

While the respondent claimed the suit property to belong to him after inheriting it from his father, the appellant also claims interests in the suit property on behalf of his mother as lawful share of inheritance for his mother.

The appellant's mother and the respondent are siblings, been bloody brother and sister.

As explained above, the DLHT decided in favour of the respondent and ordered the appellant to vacate from the house (suit property). Hence the instant appeal.

The appellant was represented by Mr. Thomas Msasa, learned Advocate and Victoria Nyembea, learned Advocate and the respondent was represented by Mr. Michael Mwangati, learned Advocate.

The appellant raised a total of eight (8) grounds of appeal namely;-

1. *That the trial tribunal erred both in law and facts for hearing and determining the matter while it had no pecuniary jurisdiction according to law;*
2. *That the trial tribunal erred both in law and facts for admitting exhibits while it was not properly identified by PW1'*
3. *That the trial tribunal erred in law and facts by admitting exhibits tendered by PW1 while it was not cleared/read loudly before its admission;*
4. *That the trial tribunal decision is null an void for lack of opinion for the assessors in both the judgment and in the proceeds;*
5. *That the trial tribunal erred in law and facts for failure to evaluate the evidence on record and hence reached into wrong decision;*
6. *That the trial tribunal erred in law and facts for neglecting to take into consideration the evidence of DW2 when composing the judgment;*



7. That the trial tribunal erred in law and in facts for entering judgment in favour of the applicant while the case was not proved in the balance of probability; and

8. That the trial tribunal erred in law and facts for basing its decision that the right of basing its decision that the right of occupancy were not contested by the respondent while it was questioned on how it was obtained.

Mr. Msasa submitted on all the grounds by grouping them into four groups namely, as ground one, ground two and three, ground four, and ground five, six, seven and eight.

Arguing in support of ground one, Mr. Msasa submitted that the DLHT had no jurisdiction to determine the case before it because the value of the subject matter was more than Tshs 300,000,000/=. That this fact was not controverted in the Written State of Defence. On top of that a preliminary objection to this effect was raised but was not resolved by the DLHT.

In respect of ground two and three Mr. Msasa argued that Exhibit A1 was wrongly admitted in evidence because no basis was established by the tendering witness before, that, it was tendered by the witness, he did not



identify it before tendering. The counsel argued that the witness, PW1 did not describe, more the same exhibit was not read out in Court after admission. The Counsel was of the views that the exhibit is supposed to be expunged because the irregularities are incurable. He cited the case of **Samwel Kambanga Maulid vs UFK Northwest**, Land Appeal No. 21 of 2019 (2020 TZ HC 1056 of 18/5/2020) in which an exhibit was expunged from the record because it was not read after admission.

In ground four the complaint is about lack of assessors opinion which that the opinions not only are not reflected on record as been read out but also not incorporated in the judgment and the proceedings. There is no endorsement by the trial tribunal inviting the assessors to give their opinion. In the judgment there are no reasons for the chairman to concur with the assessors. The Counsel opined that absence of assessors involvement in the trial of the case is a fatal irregularity leading to nullity in both judgement and proceedings; per section 24 of the Land Dispute Courts Act, [Cap.216 R.E. 2019] (LDCA). He cited the case of **Ameir Mbalaki and Another vs Edga Kihwili**, Civil Case No: 154 of 2015 (216 TZS CA 154 of 27/7/2016).

In respect of grounds five, six, seven and eight Mr. Msasa submitted that the case was not proved to the balance of probabilities because the whole



evidence did not show how the suit property was given to the respondent by the demised father. He did not produce any document to prove that the suit property was given to him by his parent (father).

That while there is undisputed evidence that the suit property was under ownership of the respondent's father the late Juma Ruganda, there is no single evidence to support him that the suit property was given to him by the said late Juma Ruganda. That the evidence led by the appellant is that he lived with his mother in the same house all the time, but the respondent chose to expel him from the house after his mother's death. Further, the counsel submitted that there is no reason why the respondent didn't raise the issue of being given the suit property during the livelihood of his mother and the said Juma Ruganda. The Counsel prayed the appeal to be allowed.

In his reply to the ground of appeal Mr. Mwangati opposed the appeal, he submitted in the same sequence Mr. Msasa had adopted.


In respect of grounds five, six, seven and eight, Mr. Mwangati argued that the case was proved to the required standard in Civil cases that is the balance of probabilities. The evidence of the Respondent is that the suit property was given to him by his father while he was still alive in 1972.

The respondent was corroborated by the testimony of PW2 who handed the suit property to him by then the appellant was not born.

That the respondent was supported by the administrator of the estate of the respondent's father Late Juma Ruganda, he is Maneno Juma Ruganda who is also the appellant's brother. This witness tendered a letter of administration as Exhibit A2 and testified that the suit property is not among the estates of late Juma Ruganda.

As regard to the preliminary objection which comprise of ground one, Mr. Mwangati submitted that the same was resolved by the DLHT that it would be determined in the judgment after hearing the whole evidence because it was more evidential than point of law. Hence it was among the framed issues.

As regard to the complaint on admission of Exhibit A1 which comprises of the complaint in grounds two and three the Counsel submitted that Exhibit A1 was properly admitted in law for two reasons. Firstly, the tendering witness laid a foundation for his competence to tender the same in evidence by stating that he is the owner of the suit property and was issued with the title deed. He was therefore, the custodian of the Title Deed "Exhibit A1".



Secondly, the exhibit was admitted in evidence without objection. The act by the appellant to question its admissibility at this stage is an afterthought.

As regard to the complaint in ground four about absence of assessors' opinion, Mr. Mwangati submitted that the assessors were fully involved both in the hearing of the case and at the stage of giving their opinion whereas they dully filled their written opinion and the trial chairperson considered them in the judgment.

As regard to costs, Mr. Mwangati prayed waiver of costs because if the irregularities are accepted, then the same were not contributed by the respondent, and remedy is for trial denovo. He cited the case of **Tubona Mwambeta vs Mbeya City Council**, Civil Appeal No. 287 of 2017 (TZ HC 35 of 2022) and **Ruth Lugomole vs Kitarnka Preservation and Conservation Association (KPCA)**, Misc. Land Appeal No. 3 of 2021 (TZ HC 930 OF 2022).

He prayed the appeal to be dismissed and proceedings and judgment are if nullified, then a retrial be ordered.

In rejoinder Mr. Msasa reiterated his arguments in his submission in chief. In addition, he prayed the appeal to be allowed with costs. That retrial will not suit for it will allow the respondent to fill up gaps in their case.

Those were the submissions by the Counsel for both parties. I thank them for with the usual zeal and eloquence, have well discharged their duties to the assistance of this Court in determining this matter.

Let me start with ground number four of appeal because it has the effect of disposing of the apple, if accepted.

In respect of ground four, Mr. Msasa, the Counsel for the Appellant, has argued that it was an incurable error for the DLHT to determine the case before it without dully involving the assessors as per mandatory requirement of the law. On the other hand Mr. Mwangati, Counsel for the respondent, has insisted that the assessors were dully involved.

To determine this controversy I will have to visit the proceedings and the judgment of the DLHT.

It is on record in the proceedings that hearing of the Land Application No. 48 of 2021 started in the DLHT on 1/7/2022 the coram on that day shows that there was a chairperson namely Hon. Chinuku, because it was the first appearance both parties as well as assessors were absent. All had no notice, hence it was ordered the matter to be heard on 2/8/2021 and parties together with the assessors to be summoned.



On 2/8/2021 the parties appeared, however because there were some preliminary issues including preliminary objections, the assessors were summoned for the first time on 20/10/2021 after ironing out the said preliminary issues. The said assessors are namely Francisca Luvakubusa and Richard Mahwata.

Hearing of the case before the DLHT took place between 10/10/2021 until on 24/11/2021 where it was recorded as follows.

"RXD

Sina nyongeza

Kiviyiro – nimefunga Ushahidi

Amri – Maoni ya wajumbe 2/12/2021"

Literally means in re-examination in Chief the witness had nothing to say and Mr. Kiviyiro, the appellant's Counsel, who was also the respondent's Counsel before the DLHT, closed the defence case. Then the DLHT ordered 2/12/2021 to be a date from receiving assessors opinion.

However, on 2/12/2021 there a coram which indicate the presiding officer was M. Mwinyi and tribunal clerk one Erica. Nothing else is indicate. This is per the handwritten proceeding because the typed proceedings don't even contain the coram at all.

This means, the proceeding is not indicative as to who were the parties and whether they did attend or not. It is also not indicative of assessors either. Since that is the end of the proceedings, there followed a judgment which was delivered on 3/1/2022.

In the judgement, the chairperson one, Mbarouk Waziri Mwinyi, made reference to opinion of assessors. It was stated at the last page of the judgment as follows;

"Hadi kufika hapa naungana na maoni ya wajumbe Francisca Luvakubusa na Mahwata Richard, kwamba Mleta Maombi ndio mmiliki halali wa eneo la mgogoro".

Literally means, up to that stage the chairman concurred with the opinion of the assessors namely, Francisca Luvakubusa and Mahwata Richard, that the applicant is a lawful owner of the suit land.

As it can be seen, neither in the proceedings nor the judgment is indicative that there were recorded opinion of assessors let alone lack of endorsement for the same to have been read out aloud in the tribunal.

My perusal of the record in this file I found two handwritten documents which purport to be opinion of assessors. One is written and signed by



Francisca Luvakubusa and another by Mahwata Richard. However, the record is silent on how and when they found their way in the file.

In my views, it is imperative for the trial tribunal to endorse on the proceedings when receives the written opinion of assessors on the date the same are submitted. This is because such opinion are not filed in the registry but presented before the tribunal. The chairman has to endorse acknowledgment of receipt of the same in the proceedings. Then the same should be read out loudly and an endorsement to that they have been so read made in the proceedings. After doing that, then the opinion will be safely referred to in the judgment, considered and deliberated by the chairman in composing the judgment.

It is only by do so that a tribunal can be said to have fully involved the assessors, therefore, dully constituted under section 23 of the Land Disputes Courts Act (supra).

The composition of the DLHT and the role of those who constitute it is a creature of section 23 of the LDCA which reads as follows;

"23(1) The District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches judgment”.

The duty of the chairman to receive opinion of the assessors is imposed under Regulation 19(2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations, 2003, GN No. 173 of 2003 which reads as follows;

"19(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”.

As it can be seen, the provisions of the laws cited above are couched in mandatory terms using the word “shall” which connotes the function must be performed. It follows therefore that it was mandatory for the chairman in the matter before the DLHT to adhere to the requirement of these mandatory provisions of the law.

Courts have in cases without number, insisted that DLHT must be conducted in compliance with the provisions of section 23 of the Land Disputes Courts Act (supra) and GN. No. 173 of 2003.



In the case of the **General Manager Kiwengwa Strand Hotel vs Abdallah Said Mussa**, Civil Appeal No. 13 of 2013 unreported) which referred the case of **Abdallh Baramiye and Others vs Republic** [1990] TLR 42 the Court of Appeal stated inter alia that;-

"Denying the assessors of their statutory right as provided under the Act rendered their participation ineffective and lead to a mistrial and consequential miscarriage of justice".

As regard to the act of the chairman in this appeal of referring to opinion which are not in record, the Court of Appeal in the case of **Ameir Mbarak and Azania Bank Cooperation Ltd vs Edgar Kihwili**, Civil Appeal No. 154 of 2015 (unreported) stated 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 is serious irregularity".*

Equally in the case of **Tubone Mwambeta vs Mbeya City Council** (supra) cited to this Court, the Court of Appeal stated at page 11 that;

*"We are increasingly of the considered view that since Regulation 19(2) of the Regulations requires every assessor present at the trial at the conclusion of 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**". (emphasis added)*

The Court of Appeal in **Tubone Mwambeta's case (supra)** went on stating further that

"Surprisingly, the opinion of the assessors were slotted in the original Court file. We do not know as to when and how the same became part of the record. Besides parties were not aware of the existence of such written opinion". (emphasis added)

In this case as explained above, the record is silent on inception of the opinion of assessors instead, it is the chairman who purportedly made reference to that he called "opinion of assessors". The same opinion are not recorded in the record to have been received and read out aloud to parties in order to enable them know whether what the chairman concurred with is the same as what the assessors said.

This irregularity is a serious one.

As to the effect, I think I am bound to follow what the Court of Appeal did in the **Tubone Mwambeta's case (supra)** where it stated as follows;

"Three, the omission to comply with the mandatory dictates of law cannot be glossed over as mere technicalities as suggested by Mr. Mushokorwa. We say so because the law was contravened as neither were the assessors actively involved in the trial nor were they called upon to give their opinion before the chairman composed judgment. This cannot be validated by assuming what is contained in the judgment authored by the chairman as he alone does not constitute a Tribunal.

*Besides, **the lack of the opinion of the assessors rendered the decision a nullity we further order an expedient retrial** before the tribunal presided over by another chairman and a new set of assessors".* (emphasis added)

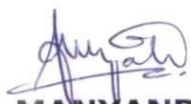
In this matter it is my strong conviction that the trial was vitiated, hence the judgment and the decree are a nullity too, I do hereby quash the proceedings, judgment and set aside the decree deliberating the rest of the grounds of appeal.

As to the way forward, I order that this matter be retried before a new chairman or chairperson and pair of assessors.

I decline to grant costs because the irregularities were occasioned on non-blame of the respondent. It is so ordered

Dated at Kigoma this 28th day of July, 2022




MANYANDA
JUDGE