

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**LAND APPEAL NO. 9 OF 2020**

*(Originating from decision No. 8/2019 of Kabuku ndani Ward Tribunal, Arising from  
Land Appeal No. 91/2019 of Korogwe District Land and Housing Tribunal)*

**SACRA ULOMI MNTENGA.....APPELLANT**

**-VERSUS-**

**IMRANI R. KIMARO.....RESPONDENT**

**J U D G M E N T**

*Date of last order: 08/02/2022*

*Date of judgment: 10/03/2022*

**AGATHO, J.:**

The Appellant being aggrieved by the decision of Korogwe District Land and Housing Tribunal at Korogwe delivered on 11/02/2020 appealed to this Court on the following grounds:

1. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering the Respondent (Imran R. Kimaro) did not present in person in the case against him, and that the procedure for representation was not followed by lower trial Ward Tribunal.

2. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering the one Juma Sadick Lema appeared as a witness and not as representative of the Respondent, and that the citation of this case does recognize the Respondent as Imran R. Kimaro and not Juma Sadick Lema [by Power of Attorney if any].
3. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering that the fact that the judgment of the lower trial Ward Tribunal was endorsed by the secretary [one Abraham Mtegwa] in his capacity as a secretary which is contrary to clear provision of the law.
4. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without the opinion of the two assessors namely, Mrs. Wasiwasi and Mr. Nampesya.
5. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering that on the material date of the judgment by the lower the lower Ward Tribunal [dated 1<sup>st</sup> August 2019] the Chairperson, one Hemed Baruth was not present in the decision, but he was counted in the coram as present.

6. That , the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering the lower Trial Ward Tribunal did seek opinions from one side of the Respondent's witness without seeking the same opinion from the Applicant, herein the Appellant.
7. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without that the lower Trial Ward Tribunal conducted farm measurements on Applicant's farm only, while the issue was the overlapping of farm boundaries by the Respondent.
8. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering that the lower Trial Ward Tribunal had illegally *suo sponte* to declare the 26 acres belong to the Respondent, of which was neither properly measured, nor declared by the Respondent.
9. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering that the lower Trial Ward Tribunal had admitted three Applicant's exhibits [Kielelezo No. 1, Kielelezo No. 2 and Kielelezo No. 3] which have carried weight to the fact of the case.

10. That, the 1<sup>st</sup> appellate Tribunal grossly erred in law and fact in giving its decision without considering that the land in dispute is unsurvey land and therefore there was a need for a reliable method to measure the same. Further that a mere rope without scales cannot give proper measurements.

The Appellant prays that the Court allow the appeal and quash the decision of the lower Trial Ward Tribunal and the 1<sup>st</sup> appellate District Land and Housing Tribunal with costs and declare the Appellant as a rightful owner of the suit land.

On the date fixed for hearing the Court ordered the appeal to be disposed by way of written submissions. It drew the schedule for filing parties' submissions and the parties complied with.

To determine the appeal, the Court raised several issues compatible with the grounds of appeal. Upon examining the issues raised the findings were drawn.

(1) Whether the absence of the Respondent at the Ward Tribunal it is fatal and led to miscarriage of justice. But before inquiring into this issue I asked myself whether that was raised in the District

Land and Housing Tribunal? Upon perusal of the Court record of proceedings it became apparent that the issue was indeed raised in the District Land and Housing Tribunal. However, it is not seen in the District Land and Housing Tribunal's judgment. Even if it was not raised at the District Land and Housing Tribunal, the issue of legal representation by a person having no power of attorney is a point of law. It thus entails illegality. It can be raised at any stage. The Ward Tribunal permitted Juma Sadick Lema to prosecute the case without having power of attorney from the Respondent. That is apparent on pages 6-7 of the typed Ward Tribunal Proceedings. The records show that the Respondent wrote a letter to the Ward Tribunal informing it that he will not be able to attend the tribunal on the date set instead he asked Juma Sadick Lema to appear before the tribunal on his behalf. I should state that the letter which the Respondent addressed to the Ward Tribunal is not power of attorney. The trial tribunal was wrong to allow Juma Sadick Lema to prosecute the case as the Respondent. He had neither power of attorney nor locus standi. He could have been called as a witness but not to step into the shoes of the

Respondent. That vitiated the trial Ward Tribunal's proceedings and the decision. **Mbarak and Another v Kahwili, Civil Appeal No. 154 of 2015/2016 CAT.** Therefore, the first and second grounds of appeal have merits.

- (2) The third ground of appeal was dropped by the Appellant. I will thus proceed to examine the fourth ground of appeal in which the issue raised is whether the District Land and Housing Tribunal rendered a decision without considering the opinion of assessors (Mrs. Wasiwasi and Mr. Nampesya). Looking at the District Land and Housing Tribunal proceedings I found the written opinions of assessors. However, what is bewildering is a conspicuous lack of opinions of the assessors in the District Land and Housing Tribunal's judgment. It means the District Land and Housing Tribunal Chairperson did not consider the opinion of assessors in reaching his decision. Although the assessors were unanimous in their opinions (date 14<sup>th</sup> January 2020) that the decision of Ward Tribunal was correct, these opinions are nowhere to be found in the District Land and Housing Tribunal's judgment.

- (3) As for the fifth ground of appeal, we ask, Does the absence of the Chairperson of Ward Tribunal, one Hemed Baruth render the decision of the tribunal illegal? In order to answer that question we look at the Section 16 of Ward Tribunal Act. It provides that the tribunal can regulate its own procedures. However, the composition of the tribunal is crucial without him there is coram. In the trial Ward tribunal the date when decision was delivered the chairperson was absent. However, one of the member (Tumaini J. Mkilindi) signed the judgment on behalf of the Chairperson. I am of the view that such anomaly did not lead to miscarriage of justice. I thus reject the fifth ground of appeal.
- (4) Regarding the sixth ground of appeal, and going through pages 4-6 of the Ward Tribunal proceedings they contain evidence of the Appellant's witnesses. The allegation that the Ward Tribunal did not consider the opinion of the Appellant's witnesses is false. For clarity, I would like to state that the evidence given by the witnesses is not opinions except for expert evidence which sometimes is referred ad expert opinion. The testimony has to be on facts that the witnesses saw, heard or felt. The Ward Tribunal's

handwritten judgment pages 1-6 contain evidence given by the witnesses of the Appellant. Also pages 11-13 of that judgment contain evaluation of the evidence and page 14-15 of the same contain decision and reasons thereof. Therefore, the sixth ground of appeal is dismissed for lacking merits.

- (5) In the seventh ground of appeal the Appellant claims that the Ward Tribunal conducted farm measurements on Appellant's farm only while the issue was the overlapping of farm boundaries by the Respondent. This ground of appeal is unfounded because the dispute was not boundary dispute. It was rather the invasion into the suit land measures 36 acres. The Ward Tribunal did visit the locus in quo, heard the parties, their witnesses and saw their exhibits. The Ward Tribunal measured the suit land so as to ascertain who is the rightful owner following the allegation that the Respondent trespassed into the Appellant's land. The Ward Tribunal found out that the 36 acres belonged to the Appellant and 50 acres belonged to the Respondent. That is clear on pages 2-4 of the District Land and Housing Tribunal's judgment. Therefore, the seventh ground is dismissed.



- (6) The eighth ground of appeal that the Ward Tribunal erred in the size of the disputed piece of land because the method or tool used to measure size of land was a rope that does not have scales. This ground of appeal is baseless. What matters is to get the right size of the piece of land in dispute.
- (7) The ninth ground of appeal also lacks merit because the District Land and Housing Tribunal was right as it decided in favour of the Respondent basing on the evidence. It is not true that it did not consider the Appellant's evidence. Rather, the decision was in favour of the Respondent because the tribunal found that his evidence has more weight than that of the Appellant.
- (8) The tenth ground of appeal repeat the seventh and eighth grounds of appeal. I find it to be lacking substance because in the circumstances of this case, the Ward Tribunal using the rope to measure the size of the piece of land in dispute is proper. There was no surveyor. Moreover, and as the Appellant stated it is unsurveyed land thus GPS, and coordinates could not be used as instruments for measuring the size of the land in dispute.

Before concluding, I wish to emphasize that while many grounds of appeal examined hereinabove lacked merits, there are few grounds of appeal that have merits. These are first, second and fourth grounds of appeal. I am saying so because these grounds are anchored on the point of law and failure to observe the same is fatal. The first and second grounds of Appeal touch upon the issue of locus standi and power of attorney. I have held that Juma Sadick Lema did not have power of attorney and hence lacked locus standi to prosecute the case on behalf of the Respondent. Therefore, the Ward Tribunal was wrong to allow him to prosecute the case. That is a fatal irregularity.

Regarding the fourth ground of Appeal, I asked myself, whether the assessors' written opinions were considered in the judgment of the District Land and Housing Tribunal. Going through the District Land and Housing Tribunal judgment, the opinions are missing.

And as obiter dicta, one may ask were the opinions of assessors read over to the parties before the judgment was composed? It is not clear if the District Land and Housing Tribunal Chairperson did not course the opinions of the assessors to be read over to the parties before composing the judgment. The record of District Land and Housing Tribunal proceedings

show that the assessors wrote their opinions. The assessor: Mary Wasiwasi Mhina, and Martin A. Nampesya, their opinions are dated 14/01/2020.

From above, it follows that the provisions of Regulation 19(2) of Land Disputes Court/the District Land and Housing Tribunal Regulation of 2003 was party complied in that the assessors wrote their opinions. However, the proceedings of the District Land and Housing Tribunal are silent as to whether the assessors' opinion were read over to the parties before judgment was delivered.

The problem here is that nowhere in the proceedings of the District Land and Housing Tribunal did the chairperson cause the written opinions of the assessors to be read over to the parties. It means the parties were denied the right to know the opinions of the assessors. This is a fatal irregularity as it was stated in **Edina Adam Kibona v Absolom Swebe (Sheli) Civil Appeal No. 286 of 2017, CAT at Mbeya**. In this case the CAT held at page 6 that:

*"In trials before the DLHT assessors must fully participate and at the conclusion of evidence, in terms of Regulation*

*19(2) of the Regulations, the Chairman of DLHT must require everyone of them to give his opinion in writing. That opinion must be in the record and must be read to the parties before judgment is composed."*

More serious, the entire judgment of the District Land and Housing Tribunal did not contain any of the assessors' opinions. I am dismayed with the District Land and Housing Tribunal's judgment as it does not show whether the District Land and Housing Tribunal Chairperson did consider the opinions of assessors. Nowhere in that judgment the assessors' opinions are mentioned. While the original record of proceedings of the District Land and Housing Tribunal contains written opinions of assessors, the Chairperson of the District Land and Housing Tribunal did not refer to them in his judgment.


Although the issue of failure to read over opinion of assessors to the parties before composing judgment of District Land and Housing Tribunal as per Regulation 19(2) of Regulations of 2003 was not raised by the parties, it is a point of law and failure to observe it implies a fatal irregularity. The record of proceedings of District Land and Housing

Tribunal does not show whether the assessors read over their opinions in the presence of the parties before the judgment was composed.

In the end I find the first, second and fourth grounds of appeal to have merit. And basing on those grounds I allow the appeal. The proceedings and judgment of Korogwe District Land and Housing Tribunal, and that of Kabuku Ward Tribunal are nullified. I order commencement of an expedited fresh hearing of the land case at Kabuku Ward Tribunal before another Chairperson and a new set of members. I make no order for costs.

**DATED at TANGA** this 10<sup>th</sup> Day of March 2022.



  
**U. J. AGATHO**  
**JUDGE**  
**10/03/2022**

**Date: 08/03/2022**

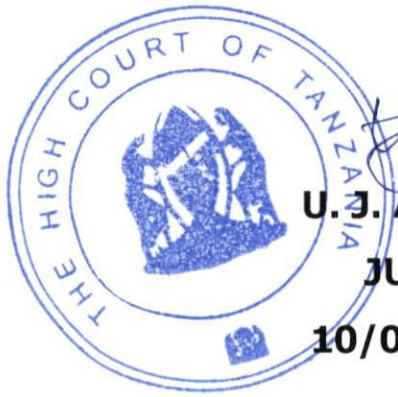
Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

**Court:** Judgment delivered on this 10<sup>th</sup> day of March, 2022 in absence of the parties.



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**U. J. AGATHO**  
**JUDGE**

**10/03/2022**

**Court:** Right of Appeal is available as per the law.



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**U. J. AGATHO**  
**JUDGE**

**10/03/2022**