

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOB A DISTRICT REGISTRY
AT BUKOB A

LAND APPEAL NO. 14 OF 2022

(Arising from Land Appeal No. 45 of 2020 of Karagwe District Land and Housing Tribunal, originating from Land Case No. 01 of 2020 of Kimuli Ward Tribunal)

BALNABAS BAMPABULA.....APPELLANT

VERSUS

ENELCO AFRED.....RESPONDENT

JUDGMENT

29/08/2022 & 02/09/2022
E.L. NGIGWANA, J.

This is a second appeal. The matter traces its origin from the decision of Kamuli Ward Tribunal at Kyerwa District in Kagera Region in Land Case No. 01 of 2020 whereby the respondent hereinabove sued the appellant Balnabas Bampaula on allegation that the appellant had trespassed into his land situated at Rwanyango Village.

In his defence before the Ward Tribunal, the appellant asserted to have bought the disputed land from the herein above respondent. Upon trial, the Ward Tribunal decided the matter in favour of the appellant.

The respondent, being aggrieved by the decision of Kamuli Ward Tribunal, appealed before the District Land and Housing Tribunal for Karagwe at Karagwe in Land Appeal No. 45 of 2020.

After hearing the appeal, the proceedings and resultant judgment of the Ward Tribunal were nullified. The District Land and Housing Tribunal went a step ahead to determine the matter on merit the appellant, now

respondent was declared the lawful owner of the suit land. The Tribunal ended its judgment as follows; I quote;

"Hivyo ni hitimisho langu kuwa rufaa hii ina mashiko na hivyo inakubaliwa. Mwenendo na hukumu ya Baraza la Kata inawekwa pembeni na kutenguliwa/futwa. Mleta Rufaa ni mmiliki halali wa eneo la mgogoro na kwa kuwa anakiri kumuuzia mjibu rufaa hekari moja, basi atenge hekari moja kwenye eneo lake la hekari sita (6) na kumkabidhi mjibu rufaa mbele ya viongozi wa eneo husika kwa maandishi. Mleta Rufaa ana haki ya gharama ya Rufaa hii."

Aggrieved by the decision of the DLHT, the appellant knocked the doors of this court by way of appeal, clothed with five (5) grounds of appeal which I see no reason to reproduce them here, because before the commencement of the hearing, the appellant through his advocate Mr. Frank John dropped grounds No. 3, 4 and 5, and then prayed for leave of the court to have one additional ground, the prayer which was not objected by Mr. Victor Blasio, learned counsel for the respondent. The prayer was duly granted therefore, additional ground will be ground No. 3.

Therefore, the grounds of appeal in this matter are follows;

- 1. That, the Hon. Chairman of the appellate Tribunal grossly erred in law to nullify the proceedings of the Ward Tribunal which had no any single irregularity pointed out in the proceedings and judgment.*
- 2. That the Hon. Chairman of the Appellate Tribunal misdirected himself in law to give orders as substantive rights of the proceedings which had already nullified contrary to law.*

3. That, the proceedings and judgement of the District and Housing Tribunal are tainted with irregularities for want of Tribunal's Assessors opinion.

Arguing the 1st and 2nd grounds of appeal, Mr. Frank submitted, that the Hon. Chairman misdirected himself by nullifying the proceedings and judgment of the Ward Tribunal without indicating any irregularity committed by the Ward Tribunal. He added that, even if, it is assumed for the sake of argument that that there was a gross procedural irregularity, the proper remedy under the circumstances of this case was retrial.

He added that, the Hon. Chairman having nullified the proceedings and the judgment of the Trial Tribunal had no mandate to proceed determining the appeal on merit. According to Mr. Frank, what was done by the Hon. Chairman was nullity.

Arguing the 3rd ground of appeal Mr. Frank submitted that, it is a legal requirement that assessors' opinion must be reflected in the proceedings. He insisted that though the Hon. Chairman stated at page 10 of the typed proceedings in these words; "*Maoni ya wajumbe yamesomwa na wajumbe wenyewe mbele ya wadaawa wote wawili na hivyo sasa napanga tarehe ya hukumu*", that was not sufficient because the contents of what was read was not recorded by the Hon. Chairman. The learned counsel referred this court to the case of **Gervas Nyamulomba and Another versus David Balamba**, Land Case Appeal No. 32 of 2020, HC-Bukoba Registry (unreported) where it was held that;

"Failure to record the assessors' opinion in the proceedings is good as the case was heard without assessors."

On his side, submitting on 1st and 2nd grounds of appeal, Mr. Victor Blasio conceded that the Hon. Chairman erred in law when nullified the proceedings and judgment of the Ward Tribunal without indicating any procedural irregularity committed by the Ward Tribunal. He is also of the same view that, the Hon. having nullified the proceedings and the judgment had no legal power to determine the merit of the appeal. The learned counsel also conceded that there was improper involvement of assessors in the hearing of Appeal No. 45 of 2020 because the proceedings of the DLHT do not reflect the assessors' opinion.

Having considered the oral submissions advanced by the learned advocates and upon going through the proceedings of both the trial tribunal and the DLHT, I see prudence to start addressing the 3rd ground of appeal.

Section 34 (1) of the Land Disputes Courts, [Act Cap. 216 R.E 2019] provides that;

"The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors, and shall:-

- (a) Consider the records relevant to the decision;*
- (b) Receive such additional evidence; and*
- (c) make such inquiries, as it may deem necessary."*

It is therefore apparent that, according to section 23 (1) and (2) and section 34 (1) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], the DLHT when exercising its Original Jurisdiction or appellate jurisdiction, is properly constituted when it consist of one Chairman and not less than two assessors. Unless properly constituted, the DLHT has no Jurisdiction to determine the matter before it.

In the matter at hand, the record shows that Appeal No. 45 of 2020 was heard 7/09/2021. Before the commencement of the hearing the Hon. Chairman indicated that he would sit with two assessors. Page 6 of the typed proceedings read as follows;

"Katika Kusikiliza Mgogoro huu, nitasaidiwa na wajumbe wawil wa Baraza watakaotoa maoni yao kabla ya hukumu na maoni hayo yatazingatiwa kwenye hukumu."

Therefore, tribunal was properly constituted because the Chairman sat with two assessors namely; **Longino Sylvester and Lukuletia Saulo**. Section 23 (2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], provides that;

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

Regulation 19 (2) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations, 2003 also imposes a duty upon the Chairman to require every assessor present at the conclusion of the hearing, to give his or her opinion in writing. The same provides;

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

In this matter, the record of the DLHT reveals that, at the conclusion of the hearing of the appeal, the assessors were invited by the Hon. Chairman to

give their opinion. Let page nine (9) of the typed proceedings speak for itself;

Baraza:

"Tumewasikiliza pande zote mbili pia sasa nawaalika wajumbe kuandaa maoni yao yatakayosomwa tarehe 14/09/2021."

The record also revealed that, on 14/09/2021, the parties entered appearance and each assessor read his opinion in the presence of the parties. Let the record speak for itself;

"Tarehe: 14/09/2021

Masao E: Mwenyekiti

Amina: Katibu

Mleta Rufaa: Yupo

Mjibu Rufaa: Yupo.

Baraza:

Maoni ya wajumbe yamesomwa na wajumbe wenyewe mbele ya wadaawa wote wawili na hivyo sasa napanga tarehe ya hukumu.

Saini: Masao E.

Mwenyekiti

14/09/2021"

The Hon. Chairman considered the opinion of assessors and indicated in page 11 of the typed judgment. The hand-written opinion of each assessor dated 14/09/2021 are available in the record of the DLHT. In the

case of **Edina Adam Kibona versus Absalom Swebe**, Civil Appeal No. 286 of 2017 the Court of Appeal held that;

"Therefore, in our considered view, it is unsafe to assume the opinion of assessor which is not on record by merely reading the acknowledgment of the chairman in the judgment in the circumstances, we are of a considered view that, assessor did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity. In view of the settled position of the law, where the trial has to be conducted with the aid of assessors --- they must actively and effectively participate in the proceedings so as to make meaningful their role of giving opinion before the judgment is composed---. Since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give 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."

I am alive of the decision in the case **Hosea Andrea Mushongi (Administrator of estate of the late Hosea Mushongi) versus Charles Gabagambi**, Land Case Appeal No. 66 of 2021- HC – Bukoba Registry in which the procedure of recording assessors' opinion was addressed. The court held among other things that;

"The procedure is, when an assessor is reading his/her opinion in the presence of the parties, the chairman should record such opinion. Therefore, it is not sufficient for the chairman to simply state that, the opinion of assessors recorded without writing them down in the proceedings," and the decision of the case of the case of **Gervas**

Nyamulomba and Another versus Jonathan (supra) HC-Bukoba Registry where it was held that;

"Failure to record the assessors in the proceedings is as good as the case was heard without assessors."

I am also alive of the Court of Appeal current decision dated 05/05/2022 in **Elilumba Elizel versus John Jaja**, Civil Appeal No. 30 of 2020 CAT (Unreported) where at page 11, the Court held among other things that:

Consideration of assessor's opinion in the judgment go hand in hand with recording their opinion during proceedings."

To my understanding, the Land Disputes Courts Act, [Cap 216 R.E 2019] and its regulations to wit; Land Disputes Courts (The District land and Housing Tribunal) Regulations, 2003 do not state that the filed opinion by assessor should be recorded down by the Chairman or reproduced in the proceedings. In my interpretation, the law requires that;

- (a) *The Hon. Chairman/Chairperson must sit with not less than two assessors;*
- (b) *The Hon. Chairman must require every assessor present at the conclusion of the hearing to give his opinion.*
- (c) *The assessors' opinion must be writing;*
- (d) *The assessors' opinion must form part of the court record;*
- (e) *Assessors' opinions must be read to the parties 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.*
- (f) *The proceedings must reflect that (a), (b), (c), (d) and (e) above have been duly complied with.*

(g) *The Hon. Chairman must consider the opinion of assessors in the judgment, but shall not be bound by it, but where the Chairman disagrees with the opinion of assessors, he must assign reasons.*

It was held in the case **Peter Makuri versus Michael Mgwega**, Civil Appeal 107 of 2019 CAT (Unreported) that;

"Failure to request, receive, read out to parties , and consider the assessors' opinion in the Tribunal's decision as the case in the instant case, regardless of whether the Chairman agreed or not with the opinion, is a fatal omission that goes to the root of the matter, consequently, vitiating the proceedings."

Indeed, I cherish the best procedure developed through case law as cited herein above that the opinion has to be recorded in the proceedings. However, the principle that each case has to be looked at its own circumstances should not be left behind. In the matter at hand, I do agree with both learned advocates that the contents of the opinion were not recorded in the proceedings and the proceedings do not reflect how they opined, that is to say; whether they have opined in favour of the appellant or respondent. The Chairman just indicated that assessors read their opinion before the parties to the case.

This court before my sister, Kairo, J, (as she then was) when confronted with similar situation of assessors' opinions being filed in court but being not reproduced in court proceedings, through the case of **Justus P. Mutakyawa versus Bernadetha Kanyankole**, Land Case Appeal No. 54 of 2019 When interpreting section 19 (2) of the regulation had this to say; *"therefore Regulation 19 (2) requires the opinion by assessors to be presented to the chairman in writing and Kiswahili as was done in this*

case. With due respect to Advocate Kabunga, the law does not impose mandatory requirement for assessors' opinion to be reproduced in the proceedings. The intention was to ensure that the assessors submit their opinions to the chairman before he writes a judgment which in this case, the purpose was fulfilled. I thus join hand with Mr. Mutatina that since they were recorded/written and read before the tribunal and annexed in the case file, it suffices to fulfil the purpose of law and the same form part of the tribunal's record like any document in the case file."

Now, the question is whether the said omission is a fatal omission that goes to the root of the matter, and consequently, vitiating the proceedings and the resultant judgment?.

The fatality of any irregularity depends upon whether or not it occasioned a miscarriage of justice. If it has occasioned a miscarriage of justice, is incurable. As far as land matters like the present one are concerned, section 45 of the Land Disputes Courts Act Cap 216 R.E 2019 provides that;

*"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 hearing 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 a failure of justice.**"*

Being guided by the herein above principle, the answer to the herein above question is in the negative. I am saying so because in the instant matter, the Hon. Chairman sat with two assessors as required by the law, at the

conclusion of the hearing, he invited them to give their opinion in writing and the assessors did so. Then, each assessor read its opinion in the presence of the parties on 14/09/2021, and from there, the judgment was composed. The handwritten opinion of each assessor read over to the parties formed part of the record of the DLHT. Furthermore, there is no complaint raised by the appellant or respondent that what was considered by the Hon. Chairperson in the judgment is different from the opinion read to them on 14/09/2021. The procedural irregularity existed in this case is curable since it has occasioned no failure of justice.

In that premise, the 3rd ground of appeal is hereby dismissed for want of merit. If the herein above discussed omission was the only irregularity in the case at hand, the proceedings and the resultant judgment of the DLHT would have remained safe.

I now turn to the 1st and 2nd grounds of appeal. There is no doubt that the proceedings and the resultant judgment of the Ward Tribunal were nullified by the DLHT and worse enough, no reasons assigned for such decision.

Upon perusal of the record of DLHT, I discovered that there was no ground of appeal raised by the appellant now respondent attacking the competence of proceedings of the Trial Tribunal. The nullification by the Hon. Chairman meant that the proceedings and decision of the Ward Tribunal had no legal force any more. In other words, they were declared invalid/void. It is as if, they have never existed.

Since the proceedings were nullified, the Hon. Chairman had no base upon which to stand and proceed to determine the Appeal No. 45 of 2020 on merit. In the premise, I find the 1st and 2nd grounds of appeal meritorious. Again, I found not safe to remit the file to the Hon. Chairman for him to

compose a judgment afresh. For the interest of justice, I am constrained to invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Courts Act Cap. 216 R:E 2019 to nullify the proceedings of the DLHT, quash and set aside the judgment and orders thereto.

For avoidance of doubt, the Trial Tribunal proceedings and decision thereto are still intact. The Petition of Appeal and reply to petition in respect of Appeal No. 45 of 2020 also remain intact. The case file is remitted to DLHT to be heard denovo before another Chairman and a new set of assessors. Given to the fact that the anomaly was caused by the Tribunal, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 2nd day September, 2022.



E. L. NGIGWANA

JUDGE

02/09/2022

Judgment delivered this 2nd day of September, 2022 in the presence of both parties in person, Hon. E.M. Kamaleki, Judges Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

02/09/2022