

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

MISC. LAND APPEAL NO. 58 OF 2021

*(Arising from the decision of the District and Land housing Tribunal in Mwanza in Application no
82 of 2012]*

SYLVESTER MUSWAGA.....1ST APPELLANT
ALPHONCE MUSSA.....2ND APPELLANT
VERSUS
MAXIMILIAN KADASO.....RESPONDENT

JUDGMENT

Date of Last order 26/9/2022
Date of Judgment 03/10/2022

MASSAM, J.

The appellants lodged this appeal challenging the decision of The District and Housing Tribunal for Mwanza in Mwanza in Application No. 82 of 2012 which was decided in the favor of the respondent, briefly, it goes that the respondent at the trial tribunal applied to the respondents Yakobo Mayolwa and 7 others prayed for the following reliefs,

- (1) A declaration that the applicant is the lawful owner of the
disputed land

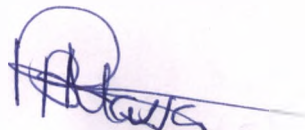


- (2) An eviction order be issued against all the respondents.
- (3) A permanent injunction restraining the respondent's servants or agents from interfering with the disputed land.
- (4) Payment of tshs 80,000,000 as general damages.
- (5) costs of the case.
- (6) Any order which tribunal may be deem to grant just.

At the end of the trial, the trial tribunal ordered that the applicant is the legal owner of the disputed land and the respondents are trespassers so they were ordered to vacate from the disputed land and they are restrained from interfering with the peaceful enjoyment of the land by the applicant, payment of tshs 80,000,000 as general damage to pay costs of the case.

Aggrieved by the decision, appealed before this court and give three grounds of appeal as follows:

1. That the trial court erred in law and in fact by pronouncing the judgment in favor of the Respondent in absence of sufficient evidence to prove his case.
2. That the trial court erred in law and in facts by declaring the respondent as the lawful owner of the disputed land.

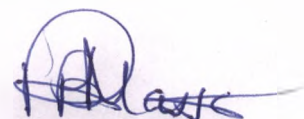


3. That the trial tribunal gross erred in law and in facts for relying and proceeding which had been tainted with confusion and illegality.

When the matter was called for hearing the appellant had the service of Mr. Julius Mushobozi advocate, while the respondent represented himself

Submitting to his appeal Mr. Mushobozi advocate informed this court that he filed three grounds of appeal, he chooses to argue ground number one and two jointly and the third ground separately. He said that he will start with the third ground of appeal which deals with court proceedings he stated by saying that the appeal originated from the decision of the District and Land Housing Tribunal of Mwanza the said judgment delivered on 15/1/2021 which declared the respondent to be the owner of the disputed land.

In his side, he is objecting to all proceedings in that case because it has illegality and a lot of contradictions. The trial chairman failed to control the proceedings of her case as she allows court assessors to cross-examine witnesses which is against the law. He supported his argument with section 142 and 146 of the Tanzania Evidence Act, also with the case of **Baraka Jail Mwandembo vs. Republic**, Criminal Appeal No. 102 of 2014 in page 5 it held that assessors are not authorized to cross examine the witness under section 142 and 146 [2]of TEA or section 265 of the criminal



procedure act as they cannot serve as adverse party, the intense of assessors to cross examine vitiates proceedings, in the present proceedings in page 69 of the typed proceedings assessor Mr. Dotto did cross examine PW1 also in pages 71 and 72, 76, 96 and 98 of typed proceedings that vitiates proceedings.

He went on that, another thing which chairman failed to control her proceedings is to fail to record the assessors opinion, which is reflected to the judgment in pages 8-10 that opinion did not seen in the proceeding that is against the procedure as everything happening to court must be reflected in the court proceeding as elaborated in the case of **Hosea Andrea Mushongi vrs Charles Gabagambi** land appeal No. 66 of 2021 H.C Bukoba. In this case, the court insisted that the assessor's opinion must be recorded and read over to the parties, in the present case the chairman was just stating the opinion of the assessors but he did not put down to the proceedings, so acknowledgment in judgment does not acceptable.

Another illegality which occurred in the court proceedings is the issue of visiting locus in quo, the procedure wants when the court went to visit locus in quo to record all matters that happen in that visit and reassemble it and read over to the court to all parties, that can help to put things clearly.



In case there is something left to be added, see the case of **Prof T.L Maliyamkono vrs Wilhelm Sirivester Erio** civil appeal No. 93 of 2021 in pages 11,12,13. In page 12 the court said that however where it necessary to conduct such visit the court must attend with parties and advocates if any and such witnesses who may have to testify in particular matter notes should be taken during the visit and all those attendances should resemble in court and the notes be read over to the parties to ensure its correctness. In this case, the court said that the said omission by the trial court caused injustice and thus vitiated the proceedings. He said that in this present case the tribunal visited locus in quo on 11/8/2020 in page 177 the court recorded that it was for visit locus in quo in the presence of parties and she put the order that the opinion of assessors will be taken on 25 /11/2020. The said order talk nothing about the compliance of the directives of the case of **Prof T. L. Maliyamkono** (Supra), In the present case, justice was not done as the chairman did not give parties the right of the notes to be read out after came from visit of locus in quo, so all omissions mentioned above show that the chairman failed to control her proceedings.

In submitting ground number 1 and 2 which is he pray to consolidate it he submitted that the said grounds deals with the evidence and the tribunal



was not keen enough as it fails to know that the respondent did not manage to prove his case, the case was filed on 2012 and the respondent said that the first land dispute started on 1997 so it was 15 years since the first dispute raised to the year when the matter was filed in court, so this matter is time barred. Also, the respondent did not show openly the boundary of his land in order to prove the trespass, also exhibit P1 did not show the size of the disputed land, again he said that the evidence testified was weak but chairman did not show why she did not believe the evidence of appellant despite the weak evidence testified by respondent, he support his argument with the case of **Lutter Symphorian Nelson verse Attorney General and another** 2000 TLR 419 CAT which held that the trial judge failed to give reasons for disbelieving witness was improper and unjustifiable, so he pray this court to nullify the tribunal decision and to enter judgment on the appellant in alternative to quash all proceedings and order retrial before another chairman.

Responding to the submission from the advocate of the appellant respondent submitted that he is the owner of that plot and he has all exhibits which he tendered to the tribunal in application No. 82/2012, the first exhibit which he tendered was the sale agreement which witnessed by village



chairman and '*wazee wa nzenzo*' another exhibit was the decision from Buhongwa ward decision dated on 8/7/2003 that decision came after the evidence of wananzengo of Mwasongwe and Bulale and all prove that he is the legal owner, in the case No. 42/2005 at Mwanza District Land Housing Tribunal he won the case and declared to be the legal owner and the land officers of Misungwi and Nyamagana was called to identify his plot belonged to which District and they approved by saying that Nyashishi river was a boundary between Misungwi and Nyamagana.

Again, the respondent said that when the court visited the land in dispute appellant refused to appear. Lastly, he submitted that he prays this court to order that he is a legal owner and be hand over the land to own it and to be given the costs of the case.

In his rejoinder, the advocate for the appellant Mr. Julius Mushobozi submitted that the decision of the Buhongwa ward Tribunal was admitted as exhibit P3 by PW3 [Robert Mbaso Katuma from page No. 94-98 [typed proceeding] PW3 was ward chairman in page. 96 in 3rd line he said that the matter before them was not ownership but boundary issue, so he prays to be considered in his submission.



I have dully considered the record of the lower tribunals and exhibits, as well as the grounds of appeal and the submissions for and against the appeal. The pertinent issue for determination is **whether the decision of the appellate tribunal was justified.**

According to the record, the counsel for appellant Julius Mushobozi raise the issue of illegality of the court proceeding that the tribunal allowed the assessors to cross-examine the witness which is against the law. In sections 142 and 146 of the Tanzania Evidence Act Cap. 6 Re: 2019, and the cited case of **Baraka Jail Mwandembo vs. Republic**, Criminal Appeal No. 102 of 2014 which held that assessors are not allowed to cross-examine.

Also, he raises another crucial point concerning the involvement of assessors to the trial was not proper as their opinion was never recorded nor availed in the record so he prays the court to nullify the proceedings and order the re-trial. Again, the appellant's counsel informed this court of another irregularity when the trial tribunal visited the land in dispute the chairman did not take note of what transpired and resemble in court and read over that notes to the parties in order for the parties to have a chance to add any opinion if any for what transpired in the said visit. He cement his argument with the case of **Prof T.L Maliyamkono vs. Wilhelm Sirivesta**



Erio Civil Appeal No. 93 of 2021 in pgs. 11,12,13, in this case, the court held that however where it is necessary to conduct that visit the court must attend with parties and advocates if any and such witnesses who may have to testify to the particular matter further notes should be taken and reassemble in court and read over to the parties to ensure its correctness. In reply to the argument of the appellant's counsel the respondent replied only one issue concerning the issue of the visit to the land dispute that the respondent was called to visit but refused to attend but the two issues reply nothing.

I have dully considered the submission from appellant counsel for the parties on the involvement of the assessors at the trial, in the present case the trial was conducted by the aid of assessors but nowhere in the record show that the chairman record the opinion of the assessors. So, according to the absence of assessors opinion in the record the said omission is fatal. This was insisted in the case **Hamisi S. Mohsin and 2 Others vs. Tangira Contractors**, Civil Appeal No. 51 of 2013 [unreported], in this case, the opinion of assessors was missing in the record the same as in this appeal at hand. Considering the effect of the omission the court observed that, since the law requires assessors to give an opinion, such opinion must be in record in order to ascertain if truly, the chairman in preparing the judgement did



consider the opinion of assessors. In the absence of records of the opinion of assessors, it is impossible to vouch if they gave any opinion for consideration in composing the judgment on the tribunal. Since the opinion is missing this is a fatal omission which occasioned a failure of justice and there was no fair trial. This requirement was also insisted in the case of **Hosea Andrea Mushongi** (supra) cited by the appellant counsel which insisted that, the opinion of assessors must be recorded.

Also, another issue this court can consider is the procedure when the court visited the land in dispute. The appellant counsel in his submission raise the issue that the procedure required was not followed as directed in the case of **Prof. T. L. Maliyamkono**[supra]in this case the court said that visit locus in quo is not mandatory and it is done only in exceptional circumstances however when it is necessary to conduct that visit the court must attend with parties and their advocates if any and such witness who may have to testify in that particular matter, further notes should be taken during the visit and then all those attendances should re assemble in court and the notes be read out to the parties to ensure its correctness, see the cases of **Avit Thaddeus Masawe v Isidory Assenga** Civil Appeal No. 6 Of



2017, and Sikudhani Sadi Magambo and another Mohamed Roble

Civil Appeal No. 197 of 2018

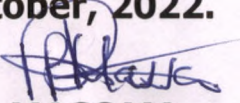
In this case at hand, it is clear that Tribunal did not adhere to the procedure laid down in the above cases as the absence of it, this court cannot be in a position to know what transpired in that visit, so the said omission occasioned the injustice and thus vitiates its decision.

On the basis of my findings on two mentioned issues raised in the ground No 3. I am in the settled view that the same suffices to dispose of this appeal, so no need to consider the issue of whether or not assessors cross-examine the witnesses or not, also to consider other grounds of appeal. As a result, I hereby allow the appeal with costs and nullify the proceedings, quash the judgment and set aside orders arising thereof. I order a retrial before another chairman with competent jurisdiction.

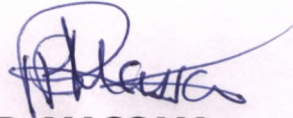
It is so ordered.

DATED at MWANZA this 3rd October, 2022.




R.B. MASSAM
JUDGE
03/10/2022

Court: Ruling delivered on 03rd October, 2022 in the presence of Mr. Julius Mushoboz advocate for the Appellant and in the presence of the respondent in person.



R.B. MASSAM
JUDGE
03/10/2022