

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOPA DISTRICT REGISTRY
AT BUKOPA**

LAND CASE APPEAL NO. 26 OF 2022

*(Arising from Land Case Appeal No. 59 of 2021 of the High Court of Tanzania at Bukoba.
Originating from Application No. 34/2017 of the District Land and Housing Tribunal for
Kagera at Bukoba)*

FROLENTINA PHILBERT-----APPELLANT

VERSUS

ERICK KABENDERA-----RESPONDENT

(Administrator of the late Verdiana Protace Mujwahuzi)

JUDGMENT

28/09/2022 & 03/10/2022.

Isaya, J.

Dissatisfied with the decision of the District Land and Housing Tribunal for Kagera at Bukoba handed down on 21.09.2017 vide Application No. 34/2017, the appellant, Froleentina Philbert has appealed to this court challenging the said decision which was decided in favour of the respondent. For easy understanding, a brief of material facts to the dispute can be discerned from the available record.

In 2017, Verdiana Protace Mjwahuzi who is now the deceased, sued the appellant herein together with another person one Juliana Protace who is not a party to this appeal, claiming for the suit land which was left by the late Rev.Fr. Robert Rweyemamu, a Roman Catholic priest. That, when the said priest bought the suit land in 1987, gave it to Gaudencia Mukagorora, the mother of the appellant to care of it. That the said priest before his



demise, had ordered that after the death of Gaudencia, her children and grandchildren would vacate the said suit land therefore, the same be remitted to the clan for distribution to the lawful heirs. However, the appellant refused to vacate the premise claiming to have occupied the same land which was given to them by the priest and after the death of her mother, she continued living in that suit land until when the dispute arose.

The DLHT in its final analysis, ruled in favour of Verdiana Protace Mjwahuzi reasoning that the appellant and her mother were mere invitees. However, on 31/12/2019 before filing this appeal, Verdiana Protace Mjwahuzi died, hence, the respondent Erick Kabendera, being the administrator of estate, stepped into the case.

The memorandum of appeal filed in this court to challenge the DLHT decision by the appellant hinges on five grounds of appeal which can be paraphrased that; **One**, the decision was reached without taking into account and recording the opinions of assessors. **Two**, the ruling delivered was reached without giving the appellant a right to be heard. **Three**, the hearing proceeded without framing issues. **Four**, the tribunals proceeded with the hearing without determining the preliminary objection raised in the WSD. **Five**, the matter was time barred for elapse of 27 years.

When this appeal was called on for hearing, the appellant enjoyed the legal services of Mr. Ibrahim Mswadick whereas Mr. Zedy Ally appeared for the respondent. On his party, Mr. Mswadick opted to argue only the first ground and dropped the rest on the view that the first ground is capable of disposing of the entire appeal. He submitted that the tribunal

did not record the assessors' opinions contrary to section 23 of the Land Disputes Court Act, Cap 216 R.E 2019 as amended by written Law (Miscellaneous Amendment) Act No.3 2021. That section 23(1) of the Act requires the composition of the Tribunal to be one Chairman and not less than two assessors. He added that under section 24 of Cap, 216, in reaching the decision, the chairman is required to take into account the opinion of assessors though is not bound by them.

He substantiated that the decision of the tribunal which was delivered on 21/09/2017, there is no assessors' opinion which is contrary to the law. To back up his position he referred me to the decision of this court of **Eusther Eustace vs Lestituta Bashasha**, Land Case Appeal No.54 of 2021 which cited the court of appeal case of **Edina Adam Kibona v Absalom Swebe(SHELI)** Civil Appeal No.286/2017, CAT while making reference to the case of **Amir Mbaraka and Azania Bank Corporation Ltd vs Edgar Kahwili**, Civil Appeal No. 154 of 2015.

Mr. Mswadiku prayed this court to allow the appeal with costs by nullifying the proceedings of the tribunal and set aside the decision thereof.

Replying, Advocate Zeddy Ally, outrightly, conceded to the submission of the appellant's counsel. He elaborated that it is true under section 24, the chairman is required to sit with not less than two assessors and their opinions must be reflected in the proceedings. According to Mr. Zeddy, the judgment and proceedings are tainted with incurable irregularities. He prayed the proceedings to be quashed and judgment be set aside and also prayed the case to be tried *de novo* before the different chairman with a new set of assessors. In terms of costs, he was of the different



view that since the anomaly was not contributed by parties each party should bear its own costs.

I have considered the appellant's submission of both counsel concerning the first ground. Again, I visited the records from the trial tribunal to confirm what was submitted by parties to this appeal. Parties are at one that neither the proceedings nor the judgment of the tribunal reflect the assessor's opinion.

The law on section 23 (1) of Land Disputes Court Act, Cap 216(Supra) provides as quoted:

"The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors"

Section 24 of the same Act provides:

"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion. "

Reading between lines, it is not difficult to comprehend the clarity of the provisions that the Chairman is not only required to sit with two assessors but also to get their opinion as well before composing the judgment. Though the Chairman is not bound by the assessors' opinion, he will be required to give reasons for differing with such opinions. However, in the instant case, the assessors' opinions are not reflected in the proceedings nor even being considered in a judgment. The scrutiny on the trial proceedings reveals that even assessors were neither recorded in a tribunal's coram to prove their presence. The reasons of not involving the assessors were not stated. With this flaw, the tribunal was not constituted.



Lack of compliance to this mandatory requirement as learned counsel submitted, renders the proceedings and judgment thereof a nullity.

There a plethora of authorities where this court and the Court of Appeal have now and then over emphasized that assessors are not there as mere decorations, but they are part and parcel of the proceedings and their role should not be undermined. It suffices to refer few; **Andrew Kazinduki vs Josephat Mbagwa (Administrator of the estate of late Ernest Kaserwa)**

vs Land Appeal no. 62 of 2019 HC at Bukoba (Unreported), **Eusther Eustace vs Lestituta Bashasha**, Land Case Appeal No.54 of 2021, HCT at Bukoba which cited the court of appeal case of **Edina Adam Kibona v Absalom Swebe(SHELI)** Civil Appeal No.286/2017, CAT as rightly relied by the appellant's counsel.

What is gleaned from the that there is no way we can conclude that the chairman was aided by assessors in the trial as the proceedings and judgment is the result of one man show to wit the chairman.

I agree with Mr. Zeddy that since the anomaly was caused by the tribunal and not parties, Costs cannot be shouldered to the respondent as the appellant's counsel had prayed.

In the event I nullify the whole proceedings, quash and set aside the judgment and decree of the DLHT. I direct that application No.34/2017 should be heard *de novo* before another Chairman/Chairperson and a new set of assessors. Since the irregularity was not caused by the parties, I make no order as to costs. Appeal allowed to the extent afore explained.

It is so ordered.





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G. N. Isaya

JUDGE

03/10/2022

Court

Judgment delivered in chamber court this 03rd day of October, 2022 in the presence of Frank John, Advocate for Respondent, also holding brief for Victor Blasio, Advocate for the Appellant, Audax Vedasto (Judge's Law Assistant) and Ms. Grace Mutoka (B/C).



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G. N. Isaya

JUDGE

03/10/2022

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