

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPEAL NO. 12 OF 2022

(C/F Babati District Land and Housing Tribunal, Appeal No. 33 of 2020 and Laghanga Ward Tribunal Application No. 5 of 2019)

GINYOKA GICHENOGA.....APPELLANT

VERSUS

SIDETA SHABAQUT.....RESPONDENT

JUDGMENT

27/09/2022 & 05/10/2022

BARTHY, J

The appellant Ginyoka Gichenoga dissatisfied with the decision of the District Land and Housing Tribunal of Babati at Manyara delivered on 19th of January, 2022 lodged this appeal based on the following grounds:

- 1. That, the District land and Housing Tribunal erred in law including Section 18 (2) of the Land Disputes Courts Act, No. 2 of 2002 Cap 216 R.E 2019 when allowed an appeal with costs without availing parties with an opportunity to address the Tribunal on a point of law raised by the Appellate Tribunal suo motto that one John Ginyoka who represented the Appellant herein and trial had no power of attorney to do so.*



2. *That, the appellate Tribunal abdicated its duties when ignored the strength of the 1st ground of appeal supra which touches the violation of fundamental right of being heard.*
3. *That, the Appellate Tribunal erred in law and fact when entertained the second ground of appeal allowing the appeal and set aside proceedings and decision of the ward Tribunal without considering Section 16 (2) (a) of the ward Tribunals Act, Act No. 2 of 2002 Cap 216 R.E 2019.*
4. *That, the Babati district Land and Housing Tribunal failed to differentiate the role of assessor in Primary Court versus role of members of Ward Tribunal as far as the ward Tribunal Act and Land Disputes Courts Act is concerned.*
5. *It was wrong for the District Land and Housing Tribunal to quash and set aside the proceedings of Ward Tribunal and directed the Appellant herein to sue to the Respondent herein who will remain on the suit land until otherwise decided while it was the Respondent herein who instituted the case at the Ward Tribunal.*
6. *That, Proceedings of District Land and Housing Tribunal are tainted with procedural irregularities in several aspects of law including absence of assessors' opinion to parties, change of chairperson (s) and contradiction on issuance of Judgement and Decree.*

The appellant therefore prayed his appeal be allowed by quashing the appellate decision of the tribunal with costs and restores the decision of the tribunal. In alternative to direct parties to be heard before another chairperson.

With respect to the appeal at hand, the brief background of the matter is crucial in order to appreciate this appeal. The records reveal that, the

respondent herein sued the applicant at Laghanga Ward Tribunal seeking to be declared the lawful owner of the piece of land measured one (1) acre claimed to have been invaded by the appellant. The ward tribunal having gone through the evidence tendered it held the disputed land to be the property of the appellant.

Aggrieved with the said decision, the respondent appealed to the District Land and Housing of Babati (DLHT) where the decision and proceedings of the Ward Tribunal were quashed and set aside and the respondent was declared the lawful owner of the disputed property.

Discontent with the said decision, the appellant preferred the present appeal armed with six grounds as shown above.

During the hearing of this appeal which proceeded orally, the appellant was represented by Mr. Lengai Nelson Merinyo, the learned counsel whilst the respondent was represented by Mr. Salehe Salehe, the learned counsel holding brief of Mr. Omary Giunda, the learned counsel with the instruction to proceed with the hearing.

Supporting the appeal, Mr Merinyo opted to start with the sixth ground of appeal which was an additional ground of appeal. Mr. Merinyo with respect to this ground he argued that, the proceedings of DLHT are tainted with procedural irregularities in several aspects including absence of assessors' opinion to parties, change of chairpersons and contradiction on issuance of judgment and decree.

Addressing the issue of assessors, he submitted that there was no opinion of assessors prior the judgment of DLHT; there was a change of different Chairman from Hon. Chairpersons; Mahelele, Mdachi and Mwihava in various dates without assigning reasons for the same.



He added that, at the end, the judgment of the DLHT was delivered by Chairperson Mwiwaha who did not issue orders to parties to file written submission. But, the person who signed the decree was not the one who delivered the judgment. There was no reason given as to the change of hands of the chairpersons.

Mr. Merinyo further pointed out that, the date of the judgment was different from the date it was delivered. Then, the judgment of Chairperson Mahelele who made orders for written submission to be filed by the parties, were later on vacated by the order of Chairperson Mdachi on the ground it did not include the opinion of assessors whose time had expired. In all those changes, no reason was ascribed to justify the same in accordance to the law.

On the respondent's side, Mr. Salehe the counsel for the respondent counter argued that the DLHT's proceedings and judgment were not tainted with irregularities as alleged by the counsel for the appellant.

With respect to the issue of assessors he stated they were covered with s. 3 of the Courts (Land Dispute Settlement) Act Cap 216, which empowers chairperson to proceed without assessors.

Addressing on other irregularities, it was his submission that, the appellant did not explain as to how he was prejudiced with the same. He therefore prayed to this court to invoke Section 3A and B of the Civil Procedure Code, Cap 33 R.E 2019 and Section 45 of the Courts (Land Dispute Settlement) Act to cure the raised irregularities under the principle of overriding objective.

Having heard the extensive submissions of both parties with respect to the appeal at hand, I find that from all grounds emanate from a single

issue. The court will therefore condense the grounds of appeal and determine, whether the proceedings and judgment of the trial tribunal are tainted with irregularities.

In addressing the issue at hand, I will start with the change of hands of presiding chairman from the time the matter was instituted before DLHT to the stage of delivering the judgment. As stated by Mr. Merinyo that the records of the tribunal show the chairpersons changed during the trial without assigning any reason.

In our present application the record of the tribunal shows that on 30/06/2020 before Hon Mahelele, Chairman he ordered the assessors to file their opinion on 08/07/2020. However, on 19/05/2021 another Chairman took over the matter and gave the following orders;

"1. Kwa kuwa Shauri hili liliposikilizwa kwa maandishi ilikuwa kwa amri iliyotolewa na washauri wa baraza walikuwa tofauti na hawa wa sasa na washauri hao muda wao wa uteuzi ulishaisha inaamriwa kuwa mawasilisho yote yaliyohusisha iletwe kwa amri ya tarehe 26/05/2021 yameondolewa kwenye kumbukumbu ya shauri na usikilizaji kwa maandishi uanze upya.

2. mawasilisho ya Mrufani yaletwe 26/05/2021.

3. Mawasilisho ya Mrufaniwa yaletwe tarehe 02/06/2021.

4. Majumuisho tarehe 09/06/2021

5. Shauri litajwe tarehe 29/06/2021 saa nne asubuhi."

Thereafter on 10/01/2022 Hon. Mwiwaha chaired the session without assessors and without assigning any reasons for taking over and in the absence of the assessors. On 10/01/2022 Hon. Chairman Mwiwaha

delivered a judgment which was prepared by Hon. M.S Mahelele dated 15/09/2020 whose submission orders were vacated by Chairman Mdachi and the decree dated 19/01/2022 was prepared by chairman Hon. M.S Mahelele. Also, the opinion of assessors was not recorded in the proceedings of the DLHT.

When it comes to the change of hands of the adjudicators, the law is very clear. Under Order XVII, Rule 10(1) of **the Civil Procedure Code**, Cap. 33 R.E. 2019 which also bind the District Land and Housing Tribunal provides that:

" Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."

The said provision was emphasized in various cases including the case of **Kinondoni Municipal Council v. Q Consult Limited**, Civil Appeal No. 70 of 2016 quoting with approval the case of **M/S Georges Centre Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported), where the Court of Appeal of Tanzania held that:

" The general premise that can be gathered from the above provision is that, once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that. The provision cited above

imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is party heard by another."

It goes without saying that, the records speak for itself that no reasons were offered for the change of hands of the presiding chairmen before the tribunals. The irregularity is fatal and contravene with the requirement of the law.

Also, Mr. Merinyo has faulted the proceeding and judgment of the tribunal to have been going on without the presence of the assessors and there was no record of their opinion.

Mr. Salehe the counsel for the respondent had stated in his submission that s. 3 of the Courts (Land Dispute Settlement) Act Cap 216, empowers chairperson to proceed without assessors. This position is misleading and lacks authenticity.

It has been decided in numerous cases including the case of the **Ameir Mbarak and Azania Bank Corp Ltd. v. Edgar Kahwili**, Civil Appeal No. 154 of 2015, Court of Appeal at Iringa the court held that:

"Therefore, in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment 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 was a serious irregularity."

Also, in the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 the CAT held:



"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors,...they must actively and effectively participate in the proceedings so as to make meaningfully their role of giving their 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 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."

Failure to record and read out assessors' opinion to the parties was stated in the case of **Peter Makuri v. Michael Magwega**, Civil Appeal No. 107 of 2019, CAT (unreported) in the following terms;

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

Mr. Salehe was also of the view that, the alleged anomalies were not proved to have occasioned any miscarriage of justice from the appellant's account. Therefore, the mischief can be cured with S. 3A and B of the Civil Procedure Code Cap 33 R.E. 2019 and S. 45 of the Courts (Land Disputes Settlement) Act Cap. 216.

It is true that the introduction of S. 3A and B of the Civil Procedure Code Cap 33 R.E. 2019 had intended court to do away with technicalities but not do away with mandatory requirements of the law. It was so stated in

the case of **Juma Busiya v. Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No. 273 of 2020, Court of Appeal of Tanzania at Mbeya held that;

"The principle of overriding objective cannot be applied blindly to cure every failure to comply with the mandatory provision of the law."

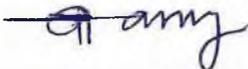
These irregularities go to the root of the matter, and renders the judgments and proceedings of tribunal nullity on account of the non-participation of assessors and change of chairmen during the proceeding without ascribing reasons for the same. This ground alone is capable of disposing of the appeal and I do not see the need to determine other grounds raised by the appellant.

Consequently, I allow the appeal, quash the judgments and proceedings the Tribunal. In lieu thereof, I order a retrial before another chairman and a different set of assessors. Since the error emanated from the tribunal itself, I make no order as to costs.

Ordered accordingly.

DATED at ARUSHA this 05th day of October 2022.




G.N. BARTHY
JUDGE
05/10/2022

Delivered in the presence of Mr. Leselia Nelson holding brief of Mr. Lengai Merinyo the counsel for the appellant and Mr. Salehe Salehe holding brief of Mr. Omary Gyunda the counsel for the respondent.