

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO. 78 OF 2021

*(Arising from the decision of the District Land and Housing Tribunal of Tarime at Tarime
in Land Application No. 70 of 2019)*

BETWEEN

OYAKO OLUM ABOGE.....APPELLANT

VERSUS

JALANG'O OLUM AIRO.....ESPONDENT

JUDGEMENT

1st Nov & 20th December, 2022.

M. L. KOMBA, J.:

This appeal traces its origin from the decision of the District Land and Housing Tribunal of Tarime at Tarime (DLHT) in Land Application No. 70 of 2019 where appellant applied for declaration that he is the rightful owner of the disputed land located at Bukwe Village at Rorya. He claimed that respondent trespassed over the disputed land which is 3 acres. After heard both parties, DLHT decided that respondent was the rightful owner of the disputed land and dismissed application. Chairman was persuaded that respondent managed to prove his ownership from his grand farther then to his father who in 1986 gave the said land to the respondent. Chairman of DLHT declared the land belong to the respondent.

Dissatisfied by such decision, appellant file petition of appeal with six (6) grounds. However, for the reasons to be apparent soon, I shall reproduce second ground which reads;

'2. That the honorable chairman erred both in law and in fact by disregarding assessors' opinion without assigning reasons.'

When the appeal was called on for hearing on 01 November, 2022, the appellant was represented by Victor Joseph Mhana, an Advocate while the respondent did not enter appearance but he filled reply to petition.

Mr. Mhana argued by combining ground 1, 5 and 6 then ground 3 and ground 4 were argued together and last he submitted on non-considering opinion of assessors. On the second ground which was argued as the last ground he said he is aware that assessor's opinion did not bind the chairman but when departing from their opinion Chairman must give reasons. He further submitted that at page 5 of the judgement chairman indicate to differ with assessors whose opinions were on the side of the applicant and he conclude by dismissing the application without giving reasons. He prayed this court to nullify proceedings.

Respondent in his reply to the petition of appeal indicated this ground to be baseless on account that the chairman gave his reasons to differ with

assessors as the appellant did not state how he got the ownership of the disputed land.

That prompted me to raise a question whether the Chairman of the Tribunal, who sat with two assessors and complied with the mandatory requirement of sections 23 (1), (2), and 24 of the Land Disputes Court Act, Cap. 216 R.E. 2002 (the Act).

It is a mandatory legal requirement that in adjudicating land matters before the Tribunal, the Chairman sits with aid of assessors. The assessors sitting in are vested with mandate to participate by asking questions, giving opinion albeit in writing before the Chairman proceeds to compose a decision of the Tribunal. And all these must be reflected on record of proceedings. Besides, where the Chairman disagrees with the opinion of the assessors, he must record reasons. In the absence on record of the opinion of assessors, it is impossible to ascertain if they did give any opinion for consideration in composing the judgment of the Tribunal. **See: Emmanuel Christopher Lukumai vs. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013.

In my endeavor to find an answer to my query, guided with the above decision, I find it apt to start with what the law provides, and on that, I will start with sections 23(1) and (2) of the Act, dealing with the composition and role of assessors. The provision reads: -

` 23 - (1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment'

From the provision of section 23 (1) and (2), the composition of the Tribunal has been listed to be mandatorily, a chairman sitting with not less than two (2) assessors. On the other hand, under section 23 (2), which has to be read together with Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations GN No. 174 of 2003 (the Regulations), the requirement is that after taking part in the conduct of the matter, the assessors are required to give their opinions in writing and the same be read out to the parties before the Chairman pronounce a decision which has incorporated those opinions. **See: Edina Adam Kibona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported).

In the present appeal, there is no doubt that the Chairman sat with two (2) assessors from the commencement of the hearing. Record shows assessors were to give their opinion on 28/07/2021 and on the material date after column there was a narration that opinion was read. There is no written

opinion of assessors in record which the Chairman depart from while composing decision.

As narrated on foregoing paragraphs, opinion of assessors must be in writing and must be read out to parties and has to be incorporated in judgment as required sections 23 (2), 24 of the Act and Regulation 19 (2) of the Regulation; and if Chairman has any differing opinions to be reflected on the record. The provision of section 24 of the Act states:

*'24. 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.**' Emphasis Added]*

Canvassing through the Chairman's decision found on pages 4 and 5 of judgement, it is apparent apart from not being sought, there is no consideration of assessors' opinions, as nothing is reflected in the judgment.

The paragraph reads;

'...kutokana na hoja ya kwanza kujibiwa kinyume kuwa mjibu maombi hajavamia eneo lenye mgogoro na kwa kuzingatia Ushahidi uiliotolewa na mjibu maombi kuonesha jinsi gani amemiliki eneo lenye mgogoro baada ya kupewa eneo hilo na baba yake mwaka 1986 natofautiana na maoni ya wazee washauri wa Baraza yaliyokuwa upande wa mleta maombi. Huo ndio msimamo wangu nayafuta maombi haya....'

Just as rightly submitted by Mr. Mhana, in the present appeal there is no reason forwarded by the chairman for his departure. In the case of **The General Manager Kiwengwa Strand Hotel vs. Abdallah Said Musa**, Civil Appeal No. 13 of 2012 (unreported), the Court of Appeal stated as follows:

'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 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.'

Failing to consider the assessors' opinion in the Tribunal decision as it is in the instant case, regardless of whether the Chairman agreed or not with the said opinion, is a fatal omission that goes to the root of the matter, consequently vitiating the proceedings. Guided by the position in Court of Appeal decision in **Yakobo Magoiga Kichele vs. Penina Yusuph**, Civil Appeal No. 55 of 2017 (unreported), I wish to echo the stance that omission by the Chairman of the Tribunal cannot be salvaged under section 45 of the Land Disputes Courts Act prescribing and augmenting on substantive justice, as it occasioned injustice to the parties. See **Peter Makuri vs. Michael**


Magwega, Civil Appeal No. 107 Of 2019 Court of Appeal of Tanzania at Mwanza (unreported).

Accordingly, I invoke powers bestowed by this court under section 42 of the Act to nullify proceedings and quash judgement and orders made before the District Land and Housing Tribunal in Land Application No. 70 of 2019. Consequently, I direct Chairman to compose new judgement and state reasons to depart with opinion of assessors or otherwise within six months of this decision.

No order as to costs.


DATED at MUSOMA this 8th day of December, 2022.




M. L. Komba
Judge

8th December, 2022

Judgement delivered on 20th December, 2022 in chamber in the presence of **Finias Olum Oyako**, relative of Appellant and in the presence of respondent who appeared in person.


M. L. Komba
Judge

20 December, 2022