

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

LAND CASE APPEAL NO. 02 OF 2021

(Originating from Application No. 106 of 2018 in the District Land and Housing Tribunal for Kagera at Bukoba)

BERNADETA BURCHARD----- APPELLANT

VERSUS

BURCHARD KALOLI-----1ST RESPONDENT

SAID SULEIMAN-----2ND RESPONDENT

JUDGMENT

Date of Last Order: 21/03/2022

Date of Ruling: 01/04/2022

A. E. Mwipopo, J.

The appellant herein namely Bernadeta Burchard filed Application No. 106 of 2018 in the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 18 of 2021 against the respondents herein namely Burchard Kaloli and Said Suleiman for the ownership suit premises located at Kakindo Village within Kasambya Ward and Misenyi District. The said application was dismissed by the District Land and Housing Tribunal for want of merits and the 2nd respondent

was declared the rightful owner of the suit land. The Appellant was aggrieved by the decision of the trial Tribunal and filed a Memorandum of Appeal in this Court contains five grounds of appeal as provided hereunder:-

- 1. That, the trial Chairman purposely erred in law and fact to order that the applicant was aware of the sale transaction of the suit land and issued her consent.*
- 2. That, the trial Tribunal erred in law and fact to determine the case based on prior case between the respondents which had different cause of action or issues to be determined.*
- 3. That, the trial Chairman was wrong to order that since the appellant appeared in Court on behalf of the 1st respondent that pre supposes that she did not dispute the sale of the suit land.*
- 4. That, the trial Chairman erred in law to ignore the role of the Tribunal assessors.*
- 5. That, the trial Chairperson purposely erred in law and fact to declare the 2nd respondent as the lawful owner of the suit land without satisfactory and reliable evidence to prove how he acquired the same against the weight of evidence from the 1st respondent.*

On the hearing date both parties were represented by advocates. Mr. Lameck Erasto, Advocate, appeared for the appellant, whereas, Mr. Ibrahim Mswadick, Advocate, appeared for the 2nd respondent.

The court asked parties who are present in Court to address the Court on the fourth ground of appeal in the memorandum of appeal about the composition of the trial District Land and Housing Tribunal since the record of the trial Tribunal

is silent on the involvement of the assessors and if they provided their opinion as required by the law.

The counsel for the appellant submitted on the said fourth ground of the appeal that page 77 of the typed proceedings of the trial Tribunal shows that the 1st respondent was closing his defence case on 22nd July, 2020 and the counsel for the 2nd respondent prayed for the Tribunal to fix a date for assessors opinion and the Chairman of the Tribunal fixed the date of assessors opinion. However, the record does not show if the assessors provided their opinion until the judgment was delivered on 24th November, 2020. G.N. No. 174 of 2003 provides in regulation 19 (2) for the requirement of the assessors to provide their opinion. He said that the omission is fatal and vitiates the proceedings and the judgment of the trial Tribunal. The counsel also said that Ms. Jenester Lugakingira who is one of the assessor was not involved to ask question to DW4 as the record is silent if he was afforded opportunity to ask question to the witness. This is seen in page 66 of the typed proceedings.

The counsel for the 2nd respondent agreed that the record is silent if the assessor provided their opinion. He prayed for the court to quash the entire proceedings and judgment of the trial Tribunal and to order retrial before another Chairman and new set of the assessors.

As I stated earlier herein, I observed in the trial Tribunal proceedings that assessors' opinion was not recorded in the proceedings of the Tribunal. This is the fourth ground of the appeal as raised by the appellant in her memorandum of appeal. The Tribunal's typed proceedings reveals in page 77 that the case was coming before Tribunal for assessors' opinion on 14th August, 2020. But, the case came before the Tribunal on 1st August, 2020, and on 21st August, 2020 and the assessors did not provided their opinion. The Tribunal proceeded to deliver its judgment on 24th November, 2020. Even the judgment of the Tribunal say nothing about the assessors' opinion.

The Land Disputes Courts Act, Cap. 216, R.E. 2019 provides under section 23(2) that the District Land and Housing Tribunal is duly constituted when held by a chairman sitting with two assessors who shall be required to give out their opinion before the Chairman reaches the judgment. The chairperson has duty to require every assessor present at the conclusion of the trial of the suit to give his or her opinion in writing and read it to the parties before drafting the final judgment. This is provided under Regulation 19 (1) and (2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003. The said Regulations provides that, I quote:-

"19 (1) The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;

(2) Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.”

The involvement of assessors is crucial and their opinion must be availed in the presence of parties so as to enable them to know the nature of the opinion and whether the same has been considered in the judgment. It is settled law that 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 meaningful their role of giving their opinion before the judgment is composed. (See. **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017, Court of Appeal of Tanzania, at Mbeya; and **Sikuzani Said Magambo and Another v. Mohamed Roble**, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania, at Dodoma).

From this settled position of the law, the District Land and Housing Tribunal was supposed to involve the assessors actively in the determination of the case. In this case the trial Chairman of the Tribunal failed to afford opportunity for assessors to provide their opinion in the presence of the parties. The typed record of proceedings is silent if the assessors were afforded opportunity to provide their opinion even after the trial Chairman fixed twice the date for assessors' opinion. It is not safe to assume that the assessors provided their opinion without the said

opinion to appears in the record. The Court of Appeal met as similar situation in the case of **Ameir Mbarak and Another V. Edgar Kahwili**, Civil Appeal No. 154 of 2015, (Unreported), where it held that, I quote:-

"Therefore, in our considered view, it is unsafe to assume the opinion of the Assessor which is not on the record by merely reading the acknowledgment of the Chairman in the judgment. In circumstances, we are of considerable view that, assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was serious irregularity."

The Court is satisfied that the omission is fundamental procedural irregularity that have occasioned a miscarriage of justice to the parties.

Further, as it was stated by the counsel for the appellant that Ms. Jenester Lugakingira who is one of the assessor was not afforded opportunity to ask question to DW4 as the record is silent. This is seen in page 66 of the typed proceedings. The settled position is that the record of proceedings has to show specifically as to how each among the assessor participated in asking questions.

The Court of Appeal was of similar position when discussing the role of assessors in the District Land and Housing Tribunal in the case of **Awiniel Mtui and 3 Others v. Stanley Ephata Kimambo**, Civil Appeal No. 97 of 2015, Court of Appeal of Tanzania at Arusha, (Unreported), where it held that:-

"As in the instate case the record just generalized that it was a Tribunal which asked questions, we are of the view that it was wrong, as the record should have shown specifically as to how each among members participated in asking questions."

From above cited case, it is mandatory for the Chairman of the Tribunal to record specifically each among the assessors participated in asking questions, and if a Chairman or any member among the assessors do not have question to ask the witness the record shall show NIL after recording the name of assessor. This was not done by the trial Chairman in the present case. The typed proceedings of the trial Tribunal shows at page 66 paragraph with the heading question from assessors after DW4 finished his testimony. Unfortunately, in the said paragraph the name of one assessor namely Anamery Mutejwa shows that she was the only one among the assessors who asked questions to the witness. The typed record shows at page 30 that on 05th May, 2020 assessors namely Anamery Mitajwe and Jenester Lugakingira were present when all defence witnesses testified including DW4. At page 50 of the typed proceedings the record shows that Jenester Lugakingira was afforded opportunity to ask DW1 question but she has no question. This is how the proceedings of the trial Tribunal was supposed to be recorded. The silence on typed proceedings to shows that the assessor namely Jenester Lugakingira was afforded opportunity to as DW4 question is fatal. Thus, I

find that the District Land and Housing Tribunal failed to involve the assessors actively in the determination of the case.

For that reason the proceedings and entire trial before the Tribunal are vitiated. The Consequences of this serious irregularities is to render such trial a nullity as it was held in **Samson Njarai and Another V. Jacob Mesoviro**, Civil Appeal No. 98 of 2015, Court of Appeal of Tanzania, (Unreported) and in **Awiniel Mtui and 3 Others V. Stanley Ephata Kimambo and Another**, Civil Appeal No. 97 of 2015, Court of Appeal of Tanzania, (Unreported).

Therefore, I proceed to quash the proceedings and the judgment of the trial Tribunal. The matter is remitted back to the District Land and Housing Tribunal for Kagera at Bukoba and I order for the trial to start afresh before another chairman and a new set of assessors. As this issue which is appellant's fourth ground of appeal has disposed of the matter, the remaining grounds will not be determined. In the circumstances of this case, each party has to take care of his own cost. It is so ordered accordingly.



A.E. Mwipopo

Judge

01.04.2022