

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

LAND APPEAL NO. 22 OF 2021

*(Originating from Maswa District Land and Housing Tribunal in land Appl. 47 of
2018)*

BUBI MULULO AND 2 OTHERS.....APPELLANTS

VERSUS

SHIMBA JIKONOKA.....RESPONDENT

JUDGMENT

08 March, 2022.

A. MATUMA, J.

The Appellants stood sued by the Respondent in the District Land and Housing Tribunal for Maswa vide Land Application No. 47 of 2018 for ownership of land.

After the full trial, the Hon. Chairman of the trial tribunal adjudged for the Respondent herein declaring him the lawful owner of the suit land at Lagangabilili village within Itilima District in Simiyu Region.

The Appellants became aggrieved hence this appeal on several grounds but for the purposes of determination of this appeal, I find that the following complaints gathered from the grounds of appeal suffices to dispose of, the appeal. I therefore required the parties to address me on those complaints namely;

- i. Change of assessor in the course of hearing the suit.*

ii. Improper closure of one of the appellants' case by the trial tribunal.

At the hearing of this appeal, the Appellants were not present but were dully represented by Mr. Daud Masunga learned advocate. The respondent was present in person unrepresented.

Submitting on the herein above complaints, the learned advocate for the appellants submitted that, the involvement of assessors in the trial of this case at the trial tribunal, violated the mandatory requirements of section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E 2019 as there were change of assessors at different stages of the proceedings. He pointed out in the proceedings the names of the assessors who changed at different stages and the date thereof. The learned advocate stressed that such changes without any reasons was fatal rendering the proceedings and judgment thereof a nullity. He cited the case of **Ameir Mbaraka and Another versus Edger Kahwili, Civil appeal no. 154 of 2015** to that effect.

About the closure of one of the Appellants' case, who is the 1st Appellant herein, the learned advocate submitted that it was wrong for the trial tribunal to close the appellant's case in his absence as it was known that the Appellant's advocate was attending the High Court session and therefore could not attend the trial and call witness for the 1st Appellant.

Having been probed by the court on the propriety of the manner in which documentary exhibits were dealt with, the learned advocate submitted that they were being admitted without any ruling even when

they were objected and they were not read to the parties after its admission in evidence.

On his party the respondent a layman could not have much assist on the grounds herein which are legally based. Here only highlighted the court on the reason of the change of assessors that one of them died in the course of trial.

Without wasting time, I find the first complaint with merit. This is due to the fact that, in the course of hearing the suit, the trial chairman started with two lay assessors namely, Ramadhani Chambulilo and Zuhura Mageuza. These two assessors as rightly pointed out by Mr. Masunga learned advocate, heard the evidence of PW1 Shimba Jikonoka now the respondent. But when PW2 and PW3 Shiwa Sinza and Ngemelo Masaka gave their evidence, Ramadhani Chambulilo was absent for undisclosed reason but one Ester Kulwa is indicated to have sat as the tribunal assessor along with Zuhura Mageuza.

The two also heard defence witnesses namely, Teli Kilugala (DW1), Nandi Charles (DW2), Shaha Choza and Pupu Ng'wandu. Then Ester Kulwa went missing until on 19/10/2020 when the honourable chairman under section 23(3) of Cap. 216 ordered the proceedings to continue with one assessor Zuhura Mageuza. With the aid of that single assessor, the evidence of Pagi Magese was given. Thereafter the case for the defence was closed.

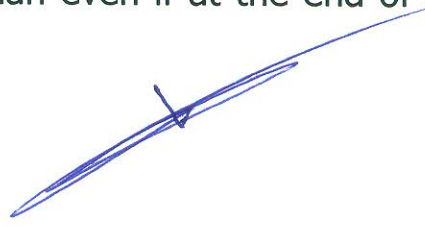
It is on record at page 55 of the proceedings that, both assessors opined including Ester Kulwa who did not sit in the proceedings throughout. The records reads;

"The matter is coming for reading assessors opinion. The same have been read whereby Mama Zuhura Mageuza opined that the 2nd and 3^d respondents are lawful owners of the same while Ester Kulwa opined that the Applicant has not proved his case".

In the circumstances, that Ester Kulwa did not sit with the chairman throughout the proceedings as herein above reflected and in the circumstances that the Hon. Chairman had already ruled to proceed with one assessor Zuhura Mageuza, it was wrong for her to give her opinion. This was held in various case including that of **Ameir Mbaraka supra**. In such case the court of appeal held that," it is wrong to make change of assessors in the course of trial, it is wrong to allow the assessors who did not hear the suit through out to opine and it is wrong for not putting the assessors opinion on record so as to ascertain if the chairman did consider such opinion in preparing the judgment.

In the instant case, the lay assessor Ramadhani Chambulilo was replaced by Ester Kulwa without any apparent reason. And even if there would have been any apparent reason, the law did not allow replacement of assessors but to proceed with the remaining assessor or none if all assessors would have been unable to complete the trial.

Also Ester Kulwa wrongly opined in the case as she did not hear all the witnesses for both parties. Her opinion cannot be said to have not prejudiced the trial chairman even if at the end of the day he departed from such opinion.



In the light of the decision in Ameir Mbaraka's case supra, the proceedings thereof are a nullity. That alone suffices to dispose of this appeal.

I however find it better to consider also the second complaint herein. The 1st Respondent did not get opportunity to enter his defence as he is recorded to have defaulted appearance when the case come for hearing his defence. It is on record that, on such defence hearing date of the 1st Respondent's case he was absent. His advocate was as well absent. The respondent herein prayed for closure of the 1st Respondent's case and the Hon. Chairman agreed with him;

*"It is true the Respondent's counsel has not been given any excuse to the tribunal in respect to the case, the 1st respondent is absent too. In that regard **I have closed the defence case on the side of the 1st respondent**"*

After such order, it is when the opinion of assessors were taken and subsequently a judgement thereof which is subject to this appeal. I agree with the appellants' advocate that, it was wrong for the trial tribunal to close the 1st Respondent's case. In any manner if the 1st respondent was unable to prosecute his case by reason of absence without notice, the available course was to enter an exparte judgment against him as he was the respondent. I therefore allow this ground as well.

I however point out that, there are also a lot of procedural irregularities on record as rightly submitted by the Appellants' advocate having been probed by the court. Some of such problems are as follows. When PW1 Shimba Jikonoka was about to tender his documentary exhibit at page 18 of the proceedings, the learned advocated for the Appellant

objected the same being secondary evidence. PW1 was not accorded opportunity to respond to the objection instead the trial chairman ordered'

"Ruling on this will be delivered on the later date which I will fix at the end of hearing PW1."

Immediate after such order, PW1 was cross examined to the end. In the circumstances, his other evidence which he intended to put in evidence was not adjudged whether admissible or not nor the ruling thereof was delivered even on the later date as purported.

At page 35 of the proceedings when Nandi Charles prayed to tender his documentary exhibit, the respondent herein objected. Without hearing the objection and a reply thereof, the honorable chairman arbitrarily admitted such exhibit without even any reasoning for admission of the document which has been objected to;

"The said document dated on 30.9.2016 are hereby admitted as exhibit D1."

Also, Exhibit D1 along with other documentary exhibits such as exhibit D3 were not read to the parties. In the case of ***Samwel Kabonge Maulid versus UFK North West, land Appeal No. 21 of 2019***, High court at Kigoma it was held,

"It has been clearly settled that whenever a documentary exhibits is tendered in evidence, the same must be read loud in the presence of the parties to accord them opportunity to hear its contents for their guard in defence against the document."

In this case, documentary exhibits were blindly received and the opponent parties thereof did not know its contents and therefore a denial to fair trial as one cannot make thorough cross examination on the document he has not heard its contents.

I therefore find that this is not a fit case to determine the merits or otherwise of the evidence on record as there was a serious breach of procedural law.

I therefore allow the appeal on procedural grounds and thus nullify the entire proceedings and Judgment thereof. The Decree of the trial tribunal is as well set aside. In the circumstances, I order a retrial of this case before another chairman with a new set of assessors. This being an old case, I direct that the same be heard as soon as possible and be concluded without any undue delay.

There is no orders for costs to either party as the breaches were made by the tribunal itself.

It is so ordered.



**A. MATUMA
JUDGE
08/3/2022**

COURT; Judgment delivered this 8th day of March, 2022 in the presence of Mr. Daud Masunga learned advocate for the Appellants and in the presence of the Respondent in person. Right of Appeal explained.



**A. MATUMA
JUDGE
08/3/2022**