

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MOROGORO SUB REGISTRY)  
AT MOROGORO**

**LAND APPEAL NO. 12 OF 2021**

**SELINA KALOLI ..... APPELLANT**

**VERSUS**

**1. MFAUME ALLY**

**2. RAJABU ABDALLAH NAUKE } ..... RESPONDENTS**

**(Being appeal form the Judgment and Decree of the District  
Housing and Land Tribunal for Morogoro district at Morogoro)**

**(Hon. M. Khasim, CP.)**

**dated the 27<sup>th</sup> day of September, 2021**

**in**

**Land Application No. 51 of 2018**

**JUDGMENT OF THE COURT**

**Date of Last Order: 18/01/2022 &  
Date of Judgment: 28/01/2022**

**S.M. KALUNDE, J.:**

The appellant was the first respondent in Land Application No. 51 of 2018 ("the application") which was filed at District Housing and Land Tribunal for Morogoro district at Morogoro ("the trial tribunal"). The application terminated in favour of the 1<sup>st</sup> respondent herein and applicant in the application.

The application before the trial tribunal emanated from facts which are not complicated to tell. The facts can be narrated as



follows: the 1<sup>st</sup> and 2<sup>nd</sup> respondent both owned houses located within Morogoro Municipal. The 1<sup>st</sup> respondent owned a house registered as House No. 366/J/KH situated at Mazimbu whilst the 2<sup>nd</sup> respondent was registered as House No. 165/CH located in Chamwino, both are within Morogoro Municipal. The dual plus the appellant entered into an agreement with for the bartering of their respective houses in exchange of a discharge of a loan obligation owed by the 2<sup>nd</sup> respondent. Apparently, the 2<sup>nd</sup> respondent had taken out a loan with TPB Bank and was in default, his house was thus, due for auction. To rescue the situation, he approached the 1<sup>st</sup> respondent to pay the outstanding amount and a top up and as part of the transaction the two would exchange their houses. The agreement was that the appellant and the 2<sup>nd</sup> respondent handover the house on 11<sup>th</sup> January, 2018. Things did not go as planned. On the respective date the appellant and the 2<sup>nd</sup> respondent handover the house and hence the suit before the trial tribunal.

Upon hearing the parties, the tribunal was satisfied that the two sides had concluded a valid agreement that the 1<sup>st</sup> respondent was the lawful owner of House No. 366/J/KH situated at Mazimbu.



The appellant and the 2<sup>nd</sup> respondent were ordered to yield up vacant possession to the 1<sup>st</sup> respondent and an order restraining the appellant and the 2<sup>nd</sup> respondent from interfering with the 1<sup>st</sup> respondent's ownership of the house was issued. This is the finding which is the subject of complaint in the present appeal.

Upon completion of pleadings, I fixed a date for hearing. However, as I was going through the records, I noted some irregularities in the proceedings before the trial tribunal. Thus, when parties appeared before me, I invited them to address the Court on the appropriateness of the proceedings. In response, **Mr. Elipidi Tarimo** learned counsel for the respondent was quick to point out that he was not present before the trial tribunal. he recommended that the respondents inform the Court what transpired on the ground. His would be to address on the appropriateness of what transpired.

MFAUME ALLY, the 1<sup>st</sup> respondent, recalled that the trial before the trial tribunal was held with the aid of assessors. He recounted that he gave testimony in the presence of two assessors. However, he said at one point the tribunal proceeded with one assessor as the



other assessor had passed away. He recounted that, at a subsequent date they were informed that the remaining assessor had also passed away and the tribunal would proceed without any assessor. He never recalled having heard the remaining assessor deliver the opinion before his passing. RAJABU ABDALLAH NAUKE, the 2<sup>nd</sup> respondent, admitted that the trial at the tribunal proceeded with the aid of assessors and that at one point they were informed that the tribunal would proceed without assessors as they had all passed away. He also recalled never to hear them deliver their opinion before their demise.

On taking the floor, Mr. Tarimo pointed out that, in view of what is stated by the respondents, there were flaws in the proceedings before the tribunal. He argued that the trial tribunal had correctly proceeded with the trial under section 23(3) of **the Land Disputes Courts [Cap. 216, R.E. 2019]**. He also added that the records included an opinion of an assessor who had been reported to have died. In his view, the fact that the opinion of an assessor who had been reported dead found its way into the proceedings and was cited in the decision of the tribunal raised doubts on the legality of



the trial tribunal proceedings, the consequence of which was to vitiate the entire proceedings. He opined that the matter be remitted before the trial tribunal for a fresh retrial.

I had raised the issue suo motu in terms of section of the provisions of section 23 of **the Land Disputes Courts Act [Cap. 216, R.E. 2019]** ("the Act") read together with regulation 19 of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003** ("the Regulations"). For ease of reference, section 23 is reproduced hereunder:

*"23-(1) **The District Land and Housing Tribunal established under section 22 shall be composed of at least a 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.**"*

*(3) (3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, **either or both members of the Tribunal** who were present at the commencement of proceedings is or **are absent, the Chairman and the remaining member,***





*if any, may continue and conclude the proceedings notwithstanding such absence.*

[Emphasis is mine]

My understanding of the above section is that a properly constituted tribunal in terms of the Act is composed of the Chairperson and two assessors. Another important takeaway is that the two assessors must, at all times, be present throughout trial, and they must be actively and effectively involved so that they can have a meaningful contribution in advising the Court. However, the section provides a flexibility where, for any reasons, one or all the assessor misses a hearing session, the tribunal may proceed with the remaining assessor or without any assessor, as the case may be. (See **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015, Court of Appeal at Iringa (unreported)). The important caution is that an assessor who had missed a hearing session of the tribunal should not be allowed to rejoin the case in the next hearing. See **Enosi v Republic** (Criminal Appeal No. 135 of 2015) [2016] TZCA 135; (21 October 2015 TANZLII). Suffice to note that the substance of section 23 above has been replicated under regulation 19 of the Regulations.

In the present case the records show that trial commenced on 18<sup>th</sup> February, 2019 where the tribunal framed issues and the testimony of AW1 was partly received and the matter was adjourned. The wise assessors present at the commencement of the trial were **Mr. Mkama** and **Mrs. Lenah Nsana**. Further hearing of the testimony of AW1 proceeded on 2<sup>nd</sup> September, 2019 in the presence of the above mentioned assessors. On the day the tribunal concluded the testimony of AW1 and AW2 and the applicant's case was marked as closed.

It would appear the matter was not heard for the remainder of 2019 and the entire 2020. Hearing resumed on 28<sup>th</sup> January, 2021. According to the Coram for the date read as follows:

**"28/1/2021**

**CORAM. M. KHASIM CHAIRMAN**

**MEMBERS: (1) MKAMA  
(2) NSANA**

**APPLICANT: Present**

**RESPONDENTS: Ms. Kay Zumo Adv  
for the 1<sup>st</sup> respondent  
who is present, 2<sup>nd</sup> is  
also present.**

**R/A: CHAMAI"**



On the day, the counsel for the 1<sup>st</sup> respondent and appellant here intimated that they had three witnesses to commence the defense case. The respondents nodded that they were ready for trial. The tribunal made the following order:

"Tribunal: -

*This case will proceed with only one assessor since the second one is sick. This is allowed by section 23(3) of Land Disputes Courts Act No. 2/2002.*

**Sgnd.**

**28/01/2021"**

The above records show that the trial tribunal had properly proceeded with one assessor under the dictates of section 23 (3) of the Act. However, there was a problem with the coram. Apparently, the members available were two, that is **Mr. Mkama** and **Mrs. Nsana**. On the day, defence case opened and the court heard the testimony of **DW1**, **DW2** and **DW4**. The case was adjourned.

Further hearing of defence case resumed on 30<sup>th</sup> June, 2021.

The coram for the day was as follows:

**"28/1/2021**

**AKIDI MWENYEKITI M. KHASIM**





**WAJUMBE: (1) MPITE  
(2) MGAZIJA**

**MUOMBAJI: Yupo**

**WA/MAOMBI: (1)Wakili Kay Zumo  
kwa ajili ya mdaiwa  
wa 1- Yupo**

**(2) - Yupo**

**KARANI: CHAMAI"**

On the day, both parties intimated their willingness and readiness to proceed with the hearing of the defense case. In that respect, the tribunal made the following order.

**"Baraza: -**

*Shauri hili litaendelea kusikilizwa bila wajumbe kwa sababu mjumbe aliyekuwa amebakia kusikiliza shauri hili amefariki dunia, baraza litaendelea bila wajumbe.*

**Sgnd.**

**28/01/2021"**

Literally translated, the above order issued by the tribunal meant the following:

**"Tribunal: -**

*Hearing of the application will proceed without the wise assessors as the remaining assessor has passed away, the tribunal will proceed without assessors."*

In view of the above order, the tribunal proceeded with the matter without the assistance of any assessor. At this juncture, I agree with Mr. Tarimo that the trial tribunal was right to proceed without an assessor as that was allowable under section 23 (3) of the Act. Upon making such order the tribunal heard the testimony of **DW4.**

Despite having proceeded without an assessor, the tribunal purported to include the opinion of an assessor in its judgment. Part of the judgment of the handwritten judgment and typed judgment at page 10 through to 11 read:

*"Baraza liliketi na wajumbe wawili wakati wa kuanza kusikiliza shauri hili wajumbe hao ndio walitakiwa kutoa maoni yao. Lakini kwa bahati mbaya mjumbe mmoja alifariki kabla ya shauri kuisha. Kama kifungu cha 23 (3) cha Land Disputes Courts Act No. 2/2002 kinavyoruhusu, baraza liliendelea na mjumbe mmoja ambaye alitoa maoni yake kama ifuatavyo: - "*

The above passage meant:

*"At the commencement of the trial the tribunal sat with the aid of two assessors who would have provided their opinion. Unfortunately, one of the assessors passed away before*



*conclusion of the case. As allowed by section 23 (3) of the Land Disputes Courts Act No. 2/2002, the tribunal proceeded with one assessor who provided her opinion as follows:*

*- "*

The learned Chairman went on to reproduce a portion of an opinion allegedly opined by **Mrs. Lenah Nsana**. For obvious reasons I will not reproduce the substance of the opinion.

It was the above observation of the tribunal that triggered my mind. **Firstly**, the record is clear that on 28<sup>th</sup> January, 2021 the tribunal had proceeded with one assessor after one assessor fell sick. It is also on record that on 30<sup>th</sup> June, 2021 the tribunal proceeded without assessors as the remaining assessor had passed away. Strangely, the opinion of an assessor who had reportedly died made it to the judgment of the tribunal. **Secondly**, even assuming that, which it is not, the opinion was actually prepared by the said assessor. The record is silent whether the said opinion was availed in the presence of the parties as has been held in several decisions including the case of **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal No.197 of 2018) [2019] TZCA 322; (01 October 2019 TANZLII) and **Dora Twisa Mwakikosa vs**



**Anamary Twisa Mwakikosa** (Civil Appeal No.129 of 2019) [2020]

TZCA 1874; (25 November 2020 TANZLII).

**Thirdly**, I have also noted that, besides not being availed in the presence of parties, the opinion of one **Mrs. Lenah Nsana** which made it into the records, was not signed nor dated. As such its authenticity is questionable yet is made it into the judgment. If indeed the said **Mrs. Lenah Nsana** had prepared the opinion, she could have signed it and appended the respective date. But that is not what the records communicate to this Court. Be it as it may, how the opinion made it into the records let alone making it into the judgment of the tribunal leaves a lot to be desired.

In the end I am of a settled view that once the tribunal had proceeded without any assessor it was inappropriate for the tribunal to consider the opinion of an assessor who was not present to the conclusion of the trial, on account of being dead, and more so given that her opinion had not been delivered in the presence of the parties. This raises a question whether the parties received a fair trial in accordance with the law.

On the strength of the cited provisions and previous decisions cited above, I am satisfied that the pointed omissions and irregularities amounted to fundamental procedural errors that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal. In my considered view, these above suffices to dispose of the matter and I find it to be an academic exercise to dwell on discussing the remaining grounds of appeal.

Nonetheless, before I pen off, I feel beholden to say something about what happened in the proceedings dated **28<sup>th</sup> January, 2021** and the **30<sup>th</sup> June, 2021**. The record show that on the former date the two assessors who had commenced hearing were all present. However, it is on record that the tribunal made orders that it was proceeding with one assessor because the other was sick. One wonders why the records would show the two assessors present, yet the tribunal would make orders to proceed with one assessor. Similarly, on the later date, the records show that the tribunal had proceeded without an assessor. Again, the records had a different set of assessors, that is **Mpite** and **Mngazija**. The two had never





attended any previous hearing. I hasten to say that, on both occasions, had the trial Chairman took trouble to confirm the coram for the day this troubling trepidation might not have happened.

At this juncture I wish to state that the coram of the Court or tribunal is a very important component of the decision making of any body. Its significance need not be overemphasized. For that matter I call upon all judicial officers or individuals presiding over dispute settlement or proceedings, of whichever nature, to exercise due care and diligence against a growing and long "cherished tendency" where court clerks, now renamed record management assistant, prepare the coram without necessarily understanding and considering the circumstances on a given day and sometimes in clear opposition to the orders of the tribunal, as was the case in the instant case. It should be noted that, while the mistake might seem to emanate from the court or tribunal, and not necessarily affecting the proceedings, in some situations the consequences might be damning for the parties. I will stop here for today in the hope that the memo is dispatched.



All said and done, I invoke the revisional power conferred on this Court under section 43 of Cap. 216 to quash the entire proceedings and set aside the judgment and decree of the DLHT in Land Application No. 51 of 2018. In the result, I remit the case file to the tribunal for rehearing of the application before another Chairman sitting with a new set of assessors. Given the age of the appeal and in the interest of justice, I order the application be disposed in no more than six (6) months.

Having raised the matter *suo motu* and this being the fault of the tribunal, I make no order as to costs.

**It is so ordered.**

**DATED at MOROGORO this 28<sup>th</sup> day of JANUARY, 2022.**



A handwritten signature in blue ink, belonging to S.M. Kalunde, is positioned above the printed name.

**S.M. KALUNDE**

**JUDGE**