

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

LAND APPEAL NO. 32 OF 2021

(Originating from the Decision of the District Land and Housing Tribunal for Mbeya
District at Mbeya Application No. 265 of 2020)

GOD s/o MLIGO APPELLANT

VERSUS

JAPHET WILLIAM @ MWAUNGA 1ST RESPONDENT

MARIO TATIZO @ MHIJI 2ND RESPONDENT

JUDGMENT

Date of last order: 03/02/2021

Date of judgment: 30/03/2022

NGUNYALE, J.

The first respondent preferred Application No. 265 of 2020 before the District Land and Housing Tribunal for Mbeya at Mbeya against the appellant seeking to be declared a lawful owner of the disputed land measured 10 acres herein after to be referred to as the suit land. In his application he alleged that the appellant has invaded his farm without any colour of right. The Tribunal held a full trial which was concluded on 23rd

day of March 2021 in favour of the first respondent who was declared a lawful owner of the suit land. The appellant was strongly aggrieved, he preferred this appeal by filing eight grounds of appeal per petition of appeal dated 4th May 2021. For reasons which will be apparent, the Court will confined itself to answer the seventh ground of appeal which reads:

That, the trial tribunal erred both in law and fact for failure to make record and consider the opinions of the Tribunal assessors in the proceedings and in its judgment without sufficient reasons.

Earlier, the parties filed their respective submission according to the Court schedule but upon perusal of the same neither of the parties argued the above ground of appeal. Of concern, the Court called upon the parties to address the issue about the role of the wise assessors before the trial Tribunal.

Mr. Gerald Msegeya learned Counsel for the appellant submitted that the law about wise assessors has been set out in section 23 (2) of the Land Disputes Act R. E 2019 read together with Regulation 19 (2) of the Land Disputes (The District Land and Housing Tribunal) Regulation G. N 174 of 2003. The role of the wise assessor is to give their opinion after the closure of hearing of the case and the chairperson is supposed to consider their opinion before composing judgment. In the present case on 4th day of March 2021 the Chairperson ordered the wise assessors to prepare

their opinion and the same were to be read to the parties on 9th March 2021. Unfortunately, on 9th March 2021 the opinion were not read out and on 23rd March 2021 judgment was pronounced. Mr. Msegeya submitted further that there is no evidence throughout the proceedings that the opinions were read out to the parties as require by the law. Omission of this procedure according to the leaned Counsel occasioned injustice to the parties.

The learned Counsel submitted further that the omission not to give their opinion vitiated the whole proceedings and judgment of the Tribunal. Everything done and ruled upon by the Tribunal was a nullity. He referred the Court to the case of **DR. Clement Karugendo vs. Peter Andrew Athuman**, Civil Appeal No. 92 of 2018 where the Court of Appeal nullified all proceedings on the same mistake. He prayed the Court to nullify judgment and proceedings and order trial *denovo* before another Chairman and set of assessors.

Ms. Jenifa Silomba learned advocate for the respondent strongly objected the position submitted by the appellants. She submitted that on the proceedings of the trial Tribunal dated 9th March 2021 the opinion of the wise assessors were read to the parties as indicated on page 23 of the proceedings of the Tribunal. The Tribunal said *maoni ya wazee wa baraza*

yatasomwa tarehe 09/03/2021. Ms Silombwa was of the view that there was full participation of the assessors under the law. She referred to the case of **Dr Clemence Kalugendo supra** page 7 where the Court of Appeal quoted the case of **Edim Adam Kibona vs. Absolom Swebe** Civil Appeal No. 286 of 2017; -

"... as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of regulation 19 (2) of the Regulation, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili: that opinion must be in the record and must be read to the parties before the judgment is composed"

On her further submission she submitted that the trial Tribunal complied to the law because on 9th March 2021 the same were read to the parties. At page 23 of the proceedings, it is evident that there was two assessors Musa and Vivian. She said that she represented the respondent before the trial Tribunal and it was her humble stance that the Tribunal complied to the law. She referred the Court to the case of **Abtony Nyansio Mwanisenga vs. Kalolo Jakobo Msawila**, Land Appeal No. 63 of 2020 High Court of Tanzania at Mbeya in which the opinion of the assessors formed the records of the Tribunal hence the Court held that situation amounts to full participation of the assessors.

Mr. Msegeya had an opportunity to rejoin. He submitted that the opinions of the wise assessors were not read to the parties. The proceedings before

the trial Tribunal nowhere shows that the opinion was read to the parties. The argument that they were read was to be reflected in the proceedings. He prayed the Court to nullify proceedings and order retrial.

Admittedly, the parties have discharged their duty of assisting the Court, subsequently, the Court will confine itself to answer a single issue as **to whether the wise assessors actively and properly played their role according to law**. Mr. Msegeya earlier declared his stance that the assessors could not complete their role because the opinion were not read to the parties the anomaly which is fatal. He was of the view that the best option is for the appellate Court to order retrial. He cemented that it is not reflected in the proceedings that the opinions of the assessors were read before the parties. The position of the appellant was strongly contested by the respondent. Ms. Silomba submitted that the date set for the opinion to be read they were read and both wise assessors were present.

Having heard the rival argument of the parties, I wish to move to the Court file to see the records before the tribunal. I think the following proceedings will speak louder: -

Amri: - ushahidi umefungwa na pande zote mbili.

- *Wazee wa baraza waandae maoni na kuyaleta kabla ya tarehe 9/03/2021.*

- *Maoni ya wazee wa baraza yatasomwa tarehe 09/03/2021.*

Imesainiwa

T. Munzerere

Mwenyekit

04/03/2021

09/03/2021

Akidi: T. Munzerere -Mwenyekit

Washauri 1. Vivian 2. Vivian

KB: Zamda

Mdai: hayupo

Mdaiwa: Wapo

Amri: - Hukumu tarehe 17/03/2021

Wahusika wafike.

Imesainiwa

T. Munzerere

Mwenyekit

09/03/2021

Amri: Hukumu tarehe 23/03/2021

Imesainiwa

T. Munzerere

Mwenyekiti

17/03/2021

23/03/2021

Akidi: T. Munzerere – Mwenyekit

Mdai: yupo

Mdaiwa: yupo

Amri: Hukumu imesomwa mbele ya wahusika.

Imesainiwa
T. Munzerere
Mwenyekiti
17/03/2021

The proceedings above are evident that the assessors were ordered to prepare their respective opinion but there is no evidence as to whether the opinion of the wise assessors were read to the parties. Before I rule on the same, it is necessary to look to the law and court practice. Section 23 (2) of the Land Disputes Courts Act Cap 216 R. E 2019 is the relevant law about role of assessor, it provides:

"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"

The above provision is read together with Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003 provides that:

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

Having in mind the two provisions, certainly, the trial Tribunal on 4th day of March 2021 ordered the wise assessors to prepare their respective opinion. The said opinion were expected to be read before the parties on

9th March 2021. The proceedings as quoted above are silent as to whether the said opinions were read or not. Ms. Silomba was of the view that the said opinions were read and she was present representing the respondent before the trial Tribunal. I will not buy the words of the counsel that he was present before the Tribunal when the opinions were read because Courts records must speak by themselves without being supplemented.

Currently, I am aware now of the position of the law as settled by section 23 (2) of the LandCourts Disputes Act Cap 216 R. E 2019 and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations that the Tribunal must sit with two assessor who shall prepare their opinion before pronouncement of judgment. The proceedings are silent as to whether the said opinion were read or not, in order to appreciate the necessity of reading the said opinion before the parties it is important to consider Court practice. Court practice through case law will tell us the essence of reading the opinions before the parties. I find no reason to go far looking for case law, I will look at the case which gives the view submitted by the appellant.

In the case of **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported), in underscoring the need to require

every assessor to give his opinion and their opinion be on record, the Court of Appeal observed:

"In view of the settled position of the law, where the trial has to be 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. .. , 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."
[Emphasis supplied].

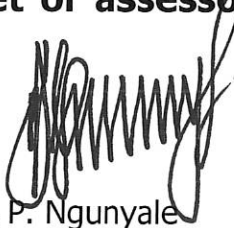
Since the proceedings do not give proof that the opinion were read before the parties this was a fatal mistake. The above decision of the Court of appeal insists that the opinion of the assessors must be read before the parties. Therefore, the proceedings and judgement before the trial Tribunal were not proper for lack of opinion of the assessors laid down before the parties before judgment. I hold that what transpired was a fatal irregularity which calls the Court to nullify all the proceedings and judgment of the trial Tribunal as I hereby do.

The proceedings and judgment have been nullified, what is a proper remedy to the parties? I wish to refer the decision of **Fatehali Manji V.R**, [1966] EA 343, cited by the case of **Kanguza s/o Mchemba v. R** Criminal Appeal NO. 157B OF 2013. The Court of Appeal of East Africa

restated the principles upon which court should order retrial. The court observed that:

"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the Page 7 of 9 prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and. should not be ordered where it is likely to cause an injustice to any party..."

In the present case the original trial was illegal because the wise assessor could not properly and actively pray their role. Guided by the above decision, proceedings and judgment are hereby nullified and orders set aside. **I order retrial with immediate effect to be presided by another chairman with a set of assessors.** appeal allowed to the extend explained.



D. P. Ngunyale

Judge

30/03/2022

Judgement delivered in presence of the parties in person.


D. P. Ngunyale

Judge

30/03/2019