

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

MISC. LAND CASE APPEAL NO. 63 OF 2021

(Arising from Ijuganyondo Ward Tribunal Case No. 3 of 2019 and Bukoba District Land and Housing Tribunal Application No. 39 of 2019)

ELISA LWAKATARE.....APPELLANT

VERSUS

JOAS ZACHWA MUGANYIZI..... RESPONDENT

JUDGMENT

17th February & 25th February 2022

Kilekamajenga, J.

The instant appeal was preferred against the decision of the District Land and Housing Tribunal for Kagera at Bukoba. The appellant framed five grounds of appeal thus:

- 1. That the trial tribunal was not properly composed by the members whose genders were not disclosed and their coram per sitting was not recorded;*
- 2. That the opinion of assessors in the first appellate tribunal was not properly recorded in the although referred in the judgment;*
- 3. That the first appellate tribunal did not consider anything in respect of the grounds of appeal thereto as well as the written submission of the appellant during the composition of the judgment especially the requirement of the presence of the neighbour during the survey procedure of the land and purchase;*
- 4. That the trial tribunal's decision cannot be executed in law for want of specification of the Suitland by the respondent;*

5. That the challenge by the first appellate tribunal chairman that the appellant made general allegation in respect of land encroached upon without specification such as boundaries of the land, size, etc. was one sided as even the respondent is caught in the same boat.

When the appeal came for hearing, the appellant appeared in person and enjoyed the professional legal services of the learned advocate, Mr. Jovin Rutainurwa. On the other hand, the respondent was absent but represented by the learned advocate, Mr. Aaron Kabunga. When invited to defend the appeal, the counsel for the appellant argued that, the Ward Tribunal was not properly composed. Under **Section 11 of the Land Dispute Courts Act, Cap. 216 RE 2019**, the Ward Tribunal must be composed of at least four members and not more than eight members. In this case the names of the members do not appear on the pages of the proceedings of the Ward Tribunal. Therefore, it is not clear whether the members ever participated during the hearing of the case. This irregularity is fatal as stated in the case of **Mariam Madali v. Hadija kihemba, Misc. Land Case Appeal No. 16 of 2019**.

On the second ground, the counsel for the appeal argued that, the decision of the District Land and Housing Tribunal lacks opinions of assessors. Section 23 (2) of the Land Disputes Courts Act provides for the composition of the tribunal; it is therefore mandatory for assessors to give their opinions. Also Regulation 19 (2)

of the Land Disputes Court (the District Land and Housing Tribunal) Regulations, GN No. 174 of 2003 reinforces the above provision of the law. In the instant case, assessors did not give their opinions something which is contrary to the above cited provisions of the law. To cement the argument, the counsel referred the court to the case of **Rev. Peter Benjamin v. Tumaini Mtazamba @ Mwema, Land Appeal No. 69 of 2019**. He finally prayed to withdraw the third, fourth and fifth grounds of appeal and urged the court to allow the appeal with costs by quashing and setting aside the proceedings of the Ward Tribunal, District Land and Housing Tribunal and decisions thereof.

In response, the counsel for the respondent, Mr. Aaron Kabunga states that, if the names of members of the Ward Tribunal do not appear in the proceedings, we cannot say whether the tribunal was fully composed. The counsel further supported the argument that the law requires the District Land and Housing Tribunal to be composed of a chairman and two assessors who must also give their opinions before the tribunal pronounces the judgment. He further joined hands with the counsel for the appellant that, the District Land and Housing Tribunal did not record assessors' opinions something which vitiates the proceedings. Despite supporting the prayer to quash and set aside the proceedings and judgment of the appellate tribunal, he objected the order for costs because the error was occasioned by the tribunal and not by the parties.

In determining the merits or otherwise of the instant appeal, there are two legal grounds that worthy determination. On the first ground of appeal, the counsel for the appellant argued that, the proceedings of the Ward Tribunal do not show the Coram. On this point, I perused the records of the Ward Tribunal and found out that the whole proceedings of the Ward Tribunal do not show the names of members of the Ward Tribunal. The names of members only feature in the judgment something which casts doubt on whether the Ward Tribunal was composed with the required members when hearing the case. This is not only a fatal irregularity, but also vitiates the proceedings and decision thereof. On this point of law, I am persuaded by the principle stated in the case of **Venance Tengeneza v. Kawawa Mwapili, Misc. Land Appeal No. 13 of 2008** which was quoted with approval in the case of **Kassimu Ngoroka v. Bernard Masembula, Misc. Land Appeal No. 3 of 2016** where my learned brother Ngwembe J. stressed that:

'The law requires, proper composition of the Ward Tribunal, must indicate names, gender and signature of each members; among members three must be women. Secretary to the tribunal is not among members of the Ward Tribunal.'

In the case at hand, the composition of the Ward Tribunal violated the above principle of the law by not indicating the names of members in the proceedings.

The irregularity was fatal to the proceedings and decision thereof a nullity. I find merit in the first ground of appeal.

On the second ground of appeal, the counsel for the appellant argued that the chairman of the tribunal did not solicit assessors' opinion before composing the judgment. This ground prompted my visit to the proceedings of the District Land and Housing Tribunal which shows that, on 21st October 2019, the District Land and Housing Tribunal ordered assessors to record opinion on 14th November 2019. When the case came for mention on that date, the case was re-scheduled for assessors' opinion on 23rd January 2020. When that date came, the case was scheduled for judgment and no assessors' opinions were ever recorded.

It is very unfortunate that this blatant error is becoming common in the records of the District Land and Housing Tribunal. It is even worse because the irregularity vitiates the proceedings and cannot be cured by the overriding principle. My duty is to raise an alarm for all the tribunal chairmen to hear this most repeated default. **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019** provides for the composition of the District Land and Housing Tribunal. For academic purposes, I reproduce the section thus:

"23 (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors; and

(2) The District Land and Housing Tribunal shall be dully 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 amplification of the above law was done by **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** thus:

"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 the hearing to give his opinion in writing and the assessor may give opinion in Kiswahili”.

The principle garnered from the above provisions of the law is that, the chairman does not sit with assessors as luxury; they must participate and finally record opinions before the chairman composes the judgment. The opinion must be read in the presence of the parties and be recorded in the proceedings. Also, the chairman must consider the assessors’ opinions and must give reasons in case he/she decides to depart from their opinions. **Section 24 of the Land Disputes Courts** clearly clarifies this point of law thus:

'24. In reaching decisions, the chairman shall take into account the opinion of assessors but shall not to be bound by it, except that the chairman shall in the judgment give reasons for differing with such opinion.'

The Court of Appeal of Tanzania has, on several occasions, insisted of the compliance with the above principle of the law. For instance in the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported)**, the Court of Appeal observed that:

"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed".

Also, in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** the Court of Appeal of Tanzania remarked that:

"Therefore, in our own considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the

acknowledgement of the chairman in the judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."

In the instant case, as earlier stated, the chairman of the District Land and Housing Tribunal did not solicit opinions from assessors something which vitiated the proceedings and the decision thereof. Based on the above analysis, I hereby allow the appeal. I hereby quash and set aside the proceedings of the Ward Tribunal and that of the District Land and Housing Tribunal and the decision thereof. I leave the matter for any interested party to file a fresh case. No order as to costs because the error was committed by the tribunals and not by the parties. It is so ordered

Order




Ntemi N. Kilekamajenga
JUDGE
25/02/2022

Judgment delivered today on 25th February 2022 in the presence of the appellant and Ms. Theresia Bujiku (Adv) also holding brief for advocate Jovin Rutainurwa. Right of the appeal explained.




Ntemi N. Kilekamajenga
JUDGE
25/02/2022