

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOKA DISTRICT REGISTRY**

**AT BUKOKA**

**LAND APPEAL NO. 87 OF 2021**

*(Originating from Application No. 18 of 2021 at the District Land and Housing Tribunal for Kagera at Bukoba)*

**BELENEGO BONIPHACE----- APPELLANT**

**VERSUS**

**WINIFRIDA MUKONO-----RESPONDENT**

**RULING**

**Date of Last Order: 14/03/2022**

**Date of Ruling: 25/03/2022**

**A. E. Mwipopo, J.**

Belenego Boniphace, the appellant herein, filed the present appeal against the decision of the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 18 of 2021. The respondent namely Winifrida Mukono successfully sued the appellant for trespassing in the District Land and Housing Tribunal. The trial Tribunal declared the respondent to be the lawful owner of the land in dispute and ordered the appellant to vacate from the said suit land.

The Appellant was aggrieved by the decision of the trial Tribunal and filed Memorandum of Appeal in this Court contains three grounds of appeal as provided hereunder:-

- 1. That, the Hon. Chairman of the District Land and Housing Tribunal erred in both law and facts by deciding the case against the weight of evidence as the appellant tendered the sale agreement – Annexure D1 which is a sale agreement to prove how he acquired the land in dispute while the respondent had no any documentary evidence to wit, deed of gift to prove how she acquired the suit land from her husband who also had a good title as there was no evidence to prove how the husband of the respondent acquired the same.*
- 2. That, the Hon. Chairman of the District Land and Housing Tribunal erred in both law and facts by disregarding the sale agreement tendered as Exhibit D1 by appellant and relied on incorrect measurement while the same was appearing in another sale agreement and the dispute between parties was not on the boundary but the suit land.*
- 3. That, the Hon. Chairman of the District Land and Housing Tribunal erred in both law and facts by ignoring that the seller of the suit land to the appellant was not Alfonsi Arisen but his sister without taking into the account the facts that the seller by that time was residing in Dar Es Salaam.*

On the hearing date both parties were present. The appellant appeared in person and the respondent who was present in Court had a service of Mr. Ally Chamani, Advocate.

The court observed that there were some irregularities in the trial Tribunal proceedings regarding involvement of assessors during hearing. The record of the trial Tribunal shows that assessors did not provide their opinion before the trial Tribunal delivered its judgment. For that reason, the Court requested both parties to address the court on the illegality.

The appellant being a lay person said while addressing the Court that the tribunal erred to provide its decision without assessors' opinion which caused injustice to him. He prayed for court to set aside the judgment of the tribunal.

Counsel for respondent addressed the Court by saying that page 37 of the proceedings where the record of the proceedings does not show at all if the assessors provided their opinion. This means that the assessors were not involved in the decision. The remedy where assessors were not involved to provide their opinion is to quash the proceedings from 01.09.2021 and its judgment and return the file back to tribunal so that assessors have to provide their opinion. This was done by the Court of Appeal in **Godfrey Nzowa v. Selemani Kova and Another**, Civil Appeal No. 183 of 2019, Court of Appeal of Tanzania at Arusha, (unreported), at page 20 of the judgment where the court did set aside proceedings up to the time before the error was made which was failed to join the necessary party.

The counsel alleged that this will not prejudice the parties and will save the time for not starting the trial afresh. In case the assessors' time has expired and the trial Chairman is not available, the Chairperson who will take over has to provide for the reason for taking over. This way interest of justice will be served to both parties. The counsel also prayed for the court not to order for the cost.

As stated earlier herein, I observed in the trial tribunal proceedings that assessors' opinion was not recorded in the proceedings of the Tribunal. The Tribunal's typed proceedings reveals in page 37 that on 03<sup>rd</sup> September, 2021 the case was coming for assessors' opinion but there is no opinion from any of the assessor which was recorded. The trial Tribunal delivered its judgment on 3<sup>rd</sup> September, 2021. Even the judgment of the Tribunal says nothing about the assessors' opinion.

Under section 23(2) of the Land Disputes Courts Act, 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 before making his final judgment on the matter. 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 enable them to know the nature of the opinion and whether the same has been considered in the judgment. (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). 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.

From this settled position of the law, I find that the District Land and Housing Tribunal failed to involve the assessors actively in the determination of the case. In this case the trial Chairman of the Tribunal failed afford opportunity for assessors to provide their opinion in the presence of the parties. It is not safe to assume that the Assessors provided their opinion from acknowledgement found in

the judgment. 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), 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.

The counsel for the respondent said that the remedy where assessors were not involved to provide their opinion is to quash the proceedings from where the assessors were supposed to provide their opinion and its judgment. The file has to be returned back to the trial Tribunal so that assessors could provide their opinion. The counsel relied in the case of **Godfrey Nzowa v. Selemani Kova and Another**, (Supra). I have read the cited judgment of the Court of Appeal and I found that the circumstances in the cited case and the present case are different. In the cited case the issue discussed before the Court of Appeal was non-joinder of necessary the party. The Court of Appeal in the cited case ordered the record be remitted back to the trial Court for retrial after the necessary parties have been in the suit.

As the counsel for the appellant hinted there is possibility of chairman and the assessors' time to expire as their tenure is for specific time. The failure of the trial chairman to involve actively the assessors who were present during trial is the reason for vitiating the trial. Allowing successor chairman to take over the case after record the reason for taking over in case the predecessor Chairman is not available without having solution for involvement of the assessor means that the purpose of the law to involve the assessors in determining the land matters in the District Land and Housing Tribunal will be defeated. Thus, I do not agree with proposition by the counsel for the appellant to quash proceedings of the trial Court before judgment and to afford assessors opportunity to give their opinion.

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).

Since the Tribunal was not properly composed contrary to section 23 (3) of the Land Disputes Courts Act, Cap. 216, R.E. 2019, I find that the whole proceedings of the trial Tribunal was a nullity.





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. In the circumstances of this case, each party has to take care of his own cost. It is so ordered accordingly.



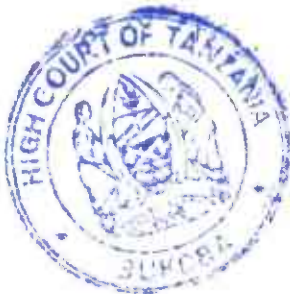
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A.E. Mwipopo

**Judge**

25/03/2022

The Ruling was delivered today, this 25.03.2022 in chamber under the seal of this court in the presence of the Appellant and the Respondent.



A handwritten signature in blue ink, appearing to be "A.E. Mwipopo", written over a horizontal line.

A. E. Mwipopo

**Judge**

25/03/2022