

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISC. LAND APPEAL NO. 29 OF 2021

(From the District Land and Housing Tribunal for Rungwe at Tukuyu in Land Appeal No. 40 of 2018. Originating from Kyimo Ward Tribunal in Land Case No. 51 of 2018)

DAIMON ADAM.....APPELLANT

VERSUS

MAGRETH MWAIKA.....RESPONDENT

JUDGEMENT

Date of Last Order : 21/04/2022

Date of Judgement: 26/05/2022

MONGELLA, J.

The appellant filed this appeal challenging the decision of the District Land and Housing Tribunal for Rungwe at Tukuyu (the Tribunal) rendered in Land Appeal No. 40 of 2018. The matter emanated from Kyimo Ward Tribunal (WT), which ruled in his favour. The respondent appealed against that decision in the Tribunal whereby the WT decision was reversed. The Tribunal considered one major ground being that the matter was *res judicata*. This was in consideration of the fact that the appellant in 2008 filed a case in the WT against the respondent's husband, one Ernest Mwisaka, regarding the same disputed land.



The matter went for appeal in the Tribunal which declared Ernest Mwaisaka the rightful owner. When Ernest Mwaisaka died, the appellant filed a fresh case over the same disputed land against the respondent who continued to use the land surviving her husband. Like I said the WT ruled in his favour causing the respondent to appeal to the Tribunal, which reversed the WT decision. Aggrieved by the decision, he preferred the appeal at hand on one ground being: "**that the Chairman erred in law and fact in its judgment by not indicating the opinion of Tribunal assessors.**" The appeal was argued by written submissions.

In this appeal, he was represented by Mr. Gerald Msegeya, learned advocate. Mr. Msegeya, while referring to **section 23 (1) and (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019 and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003**, argued that the Tribunal is properly constituted when it sits with two assessors. He contended that being a creature of the law, the presence of assessors becomes valuable if they are actively, effectively and fully involved in the whole of the proceedings and give their opinion after the conclusion of the hearing. That the opinion they give ought to be reflected in the judgment of the Tribunal with the Chairman's comments as to whether he concurs or differs with the said opinion. Where he differs he is obliged to give reasons.

In consideration of the legal position he faulted the Tribunal judgment for not showing that the Tribunal assessors sat with the Chairman and it contains no discussion of the opinion of the assessors as required under **section 24 of the Land Disputes Courts Act**. In addition he referred the



case of **Edina Adam Kibona vs. Absalom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (CAT at Mbeya, unreported) in which while quoting its previous decision in the case of **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017 the Court of Appeal ruled that assessors must actively and effectively participate in the proceedings and give their opinion in the presence of the parties to enable the parties know the nature of their opinion and whether such opinion has been considered by the Chairman in his decision.

Mr. Msegeya was of the opinion that the Tribunal committed a serious irregularity for not considering the opinion of assessors in its judgment which also occasioned injustice to the parties. In the premises, he prayed for the Court to nullify the whole Tribunal proceedings, judgment and decree and order the matter to be tried *de novo* before another chairman and set of assessors.

The respondent was represented by Mr. Amani Simon Mwakolo, learned advocate who supported the appeal. He submitted that after perusing the Tribunal record he realised that the assessors delivered their opinion on 04th June 2021 and their written opinions are in the Tribunal record. He was of the view that the Hon. Chairman complied with the law by giving the assessors opportunity to air their opinion.

However, he said, the Hon. Chairman failed to record the opinion of assessors in the judgement, or to acknowledge their presence, or to give reasons if he departed with their opinion. He referred the Court to the



case of **Emmanuel Christopher Lukumai vs. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013 (CAT at DSM, unreported) which held that

“Since the law required the assessors to give their opinion, in our view, it must be on record in order to ascertain if the Chairman in preparing the tribunal's judgment did consider the opinion of the assessors. Besides where the Chairman disagree with the opinion of the assessors he must record the reasons.”

Considering the position of the law he concluded that the failure by the Hon. Chairman to record the opinion of the assessors in his judgement or the reasons for departure is a fatal irregularity. Just like Mr. Msegeya, he prayed for the Tribunal judgment to be nullified and for the matter to be heard *de novo*. He further prayed for the appeal to be allowed without costs on the reason that the defect has been caused by the Tribunal.

After considering the learned counsels' submissions, I find that both of them are in consensus that the irregularity is on the Tribunal judgment and not proceedings. Both counsels have clearly submitted that the assessors were given the opportunity to air their opinion and they in fact aired their opinion on 04th June 2021. Mr. Mwakolo specifically added that the written opinion by the assessors was also filed in the Tribunal as it is in the record of the Tribunal.

I have gone through the Tribunal record and I agree with the learned counsels that the proceedings portray active participation of the assessors



during hearing of the case. The flaw lies with consideration of their opinion in the Tribunal judgement by the Hon. Chairman.

Going through the judgement as well, I concur with the learned counsels that the opinion of assessors was not at all considered. There is no any mention of their participation in the matter. It is not stated anywhere if the Hon. Chairman agreed or departed with the assessors' opinion. This is indeed a serious irregularity in the judgment as it contravenes the mandatory provisions of **section 24 of the Land Disputes Courts Act, Cap 216 R.E. 2019**, which states:

*"In reaching decisions, **the Chairman shall take into account the opinion of the assessors** but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."* [Emphasis added]

See also: **Emmanuel Christopher Lukumai vs. Juma Omari Mrisho** (supra). On the other hand however, I do not subscribe to the learned counsels' submissions that the whole Tribunal proceedings should be nullified and the matter be heard *de novo*. Since the irregularity lies with the judgement and not the proceedings, I find that it is the judgment that is to be rectified and not the proceeding in the interest of justice.

Having observed as above, I only nullify the Tribunal judgment and order for the case file to be remitted back to the Tribunal for a proper judgment to be composed and pronounced by the same Chairman by reflecting the opinion of assessors. If the presiding Chairman shall not be available, the judgment shall be composed and pronounced by another Chairman.

The judgment should be composed within ninety (90) days from the date of this judgment and thereafter an aggrieved party may wish to take necessary steps to challenge the decision. Each party shall bear his/her own costs of the case.

Dated at Mbeya on this 26th day of May 2022.


L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 26th day of May 2022 in the presence of the appellant and Mr. Amani Simon Mwakolo, learned counsel for the respondent.


L. M. MONGELLA

JUDGE

