

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND APPEAL NO. 54 OF 2022

(Arising from District Land and Housing Tribunal for Bukoba Application No. 95 of 2019)

LAUREAN TIBASANA..... APPELLANT

VERSUS

AUDAX P. KAMALA..... RESPONDENT

JUDGMENT

3rd and 5th April, 2023

BANZI, J.:

Before the District land and Housing Tribunal for Bukoba ("the DLHT") the Appellant instituted a land application against the Respondent and Deusdedith Mutakyawa who is not a party to this appeal accusing them to trespass into his land located at Lwomunda hamlet, Nyanga street, within Bukoba Municipality. After receiving the evidence of both parties, the DLHT dismissed the application with costs for want of merit and declared the Appellant as the trespasser to the suit land. Aggrieved with that decision, the Appellant lodged the appeal before this Court.

At the hearing, the Appellant was represented by Mr. Alli Chamani, learned counsel while, the Respondent had the services of Mr. Victor Blasio, learned counsel. Although the memorandum of appeal had three grounds,

but learned counsel for the Appellant abandoned two grounds and remained with one ground thus:

- 1. That, the trial tribunal erred in law for not involving the assessors in determination of the suit for want of recording their opinion in the court proceedings apart from making their reference in the judgment.*

Arguing in support of this ground, Mr. Chamani submitted that, the assessors were not involved in the sense that, their opinion was not recorded in the proceedings as required by law. He cited the case of **Sikuzani Saidi Magambo and Another v. Mohamed Roble**, Civil Appeal No. 197 of 2018 CAT at Dodoma (unreported) which underscored on the need for every assessor to give his opinion in the presence of parties. Since the procedure was flawed, he prayed for this court to quash the proceedings and judgment for being nullity. He also prayed for each party to bear its own costs because the irregularity was caused by the tribunal.

Mr. Blasio quickly conceded on the irregularity and submitted that, it is the position of the law that, failure to record the opinion of assessors in the proceedings renders the proceedings and judgment a nullity. He therefore prayed for proceedings to be nullified and judgment to be quashed.

Having considered the arguments of both sides as well as the record of the DLHT, the main issue for determination is *whether the proceedings before the DLHT were tainted with irregularities.*

It is prudent to note that, for the District Land and Housing Tribunal to be properly constituted in terms of section 23 (1) (2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019], the Chairman must sit with at least two assessors who are mandatorily required to give out their opinions before the chairman composes the decision of the tribunal. Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 governs the manner upon which the assessors are required to give their opinion. The same provides as hereunder:

"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 his opinion in Kiswahili."

Notably, it is clear from the provision of the law that, before the chairman makes his judgment, every assessor present at the conclusion of the trial is required to give his opinion in writing. Such opinion must be given in the presence of the parties and such opinion must be recorded in the

proceeding. This was stated in the case of **Edina Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 CAT at Mbeya (unreported).

In the matter at hand, the record shows that, after conclusion of hearing on 6th June, 2022, the chairman set the date for recording of opinion of assessors. On 10th June, 2022, the record reveals as follows:

"Tarehe: 10/06/2022

Akidi: R. Mtei - Mwenyekiti

Mwombaji: Hayupo

Wajibu Maombi: Hawapo

K/B/: Felister

Wajumbe: Annamery; Jenister

Wakili Victor Blasio – *Ninamwakilisha Mjibu Maombi wa*

1. Shauri linakuja kwa ajili ya maoni ya Wajumbe wa Baraza hili. Tupo tayari kupokea.

Baraza: *Maoni yamesomwa kwa Wakili wa Mjibu Maombi wa 1 na bila wadaawa kuwepo.*

Sgd. R. Mtei

Mwenyekiti

06(sic)/06/2022"

It is obvious from the extract above that, although the record reveals that the opinion of assessors was read over but such opinion was not recorded in the proceedings as required by law. Worse enough, both parties were not present when the said opinion was read over which is against the

law too. Under the prevailing circumstances, it cannot be said that, the trial was conducted with the aid of assessors as required by law. In the case of **Tubone Mwambeta v.Mbeya City Council**, Civil Appeal No. 287 of 2017 CAT at Mbeya (unreported) it was held that:

*"...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 added).

In another case of **Ameir Mbarak and Another v. Edgar Kahwili** Civil Appeal No. 154 of 2015 CAT (unreported), the Court of Appeal was faced with alike situation and held as follows:

"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 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."

Also, in another case of **Sebastian Kudike v. Mamlaka ya Maji Safi na Maji Taka**, Civil Appeal No. 274 of 2018 CAT at Arusha (unreported) it was stated that:

"...it is highly unsafe to assume the opinions of the assessors which is not on the record regardless of the chairman's acknowledgement in the Judgment. Thus, it is our considered view that, in the event the assessors did not give opinions for consideration in composing the judgment of the DLHT, this is a fatal irregularity. In the circumstances, as correctly submitted by Mr. Mbura, the judgments of the two courts below are a nullity and cannot be spared. We are fortified in that account because the proceedings before the High Court and the resulting impugned judgment both stem on null proceedings and judgment of the DLHT."

On the basis of the position of the law as cited above, it is undoubted that what transpired at the DLHT where the assessors gave their opinion in the absence of parties and such opinion was not recorded in the proceedings is a fatal irregularity which vitiates the entire proceedings before the DLHT. In that regard, the judgment of the DLHT cannot be spared for being a product of nullity.

Thus, I find the appeal with merit and I allow it. Consequently, I hereby invoke revisional jurisdiction under section 43 (1) (b) of the Land Disputes

Courts Act [Cap. 216 R.E. 2019] and nullify the entire proceedings of the DLHT, quash the judgment and set aside the decree dated 17th June, 2022. Any party who is still interested may file the fresh suit subject to the requirements of section 13 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] as amended by section 45 of the Written Laws (Miscellaneous Amendments) (No. 3) Act 2021. Since the irregularity was caused by the DLHT, each party shall bear its own costs.



I. K. BANZI
JUDGE
05/04/2023

Delivered this 5th day of April, 2023 in the presence of Mr. Alli Chamani, learned counsel for the Appellant who is also holding brief of Mr. Victor Blasio, learned counsel for the Respondent.



I. K. BANZI
JUDGE
05/04/2023