

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI**

LAND CASE APPEAL NO. 40 OF 2022

(Arising from Application No. 105 of 2015 before the Land and Housing Tribunal for Moshi)

ANNALYDIA GOSBERT RUTUNDA

(As legal administratrix of estate of the

late Gosbert Rutunda)**APPELLANT**

VERSUS

HAROLD ELIUD MTUNGA.....1ST RESPONDENT

JACKSON ELIUD MTUNGA

(As administrator of estate of the

late Sevestine Eliud Mtunga)**2ND RESPONDENT**

JUDGMENT

Last Order: 15th March, 2023

Judgment: 28th April, 2023

MASABO, J.: -

In this appeal, the appellant is challenging the judgment and decree of the District Land and Housing Tribunal (DLHT) of Moshi at Moshi in Application No. 105 of 2015. The brief facts of the application as discerned from the DLHT's record is that, the 1st respondent herein filed Application No. 105 of 2015 against the late Gosbert Rutunda (now, legally represented by his administratrix, the appellant herein) and the late Sevestine Eliud Mtunga (now legally represented by his administrator, the 2nd respondent herein) over a 50.606 x 82.727 meters parcel of land located at Yamu Makaa Village within Moshi District. His prayers before the DLHT were for a declaratory order that suit land belonged to the late Eliudi Mtunga, eviction of the respondents and/or their agents and a permanently restraint to the respondents, their family members and any other person from trespassing the suit land. The trail ended in the 1st

respondent's favour after the DLHT declared the suit land to be part of the of the estate of the late Eliud Mtunga.

Aggrieved, the appellant has filed this appeal on 9 grounds in which she averred that, the trial tribunal erred in law and fact by: **one**, determining the matter on merit without disposing the preliminary objection raised by respondents; **two**, proceeding to entertain the matter and entering judgment despite change of assessors; **three**, determining the matter in the absence of assessors that were present at the commencement of suit; **four**, allowing the 2nd respondent to file his written statement of defence after closure of the applicant's case; **five**, failing to declare the 1st respondent a *bonafide* purchaser; **six**, failing to properly evaluate the evidence on record; **seven**, determining the matter without considering that it was assigned to another chairman; **eight**, relying on evidence of 2nd respondent's written statement of defence which was not adduced on oath and; **nine**, failing to order amendment of pleadings when the appellant appeared as administratrix of estate of the 1st respondent. Based on this ground, she has prayed that her appeal be allowed with costs, the judgement and decree of the DLHT be set aside and for a declaratory order that the suit land belonged to the late Gosbert Rutunda. Hearing of the appeal proceeded *viva voce*. The appellant was represented by Regina Mwanri, Advocate; the 1st respondent by Chiduo Zayumba, Advocate. The 2nd respondent declined service and did not enter appearance hence an *ex parte* hearing against him.

At the commencement of the hearing, Mr. Zayumba conceded to the 2nd and 3rd grounds of appeal and submitted that, he is convinced that they are fit to dispose of this appeal.

Addressing the court, Ms. Mwanri did not contest. She prayed and obtained leave to submit exclusively on these two grounds which she consolidated and argued that, the assessors who were present during commencement of the trial were not the ones that gave their final opinion at the closure of the trial. She referred to page 7 of the DLHT proceedings and argued that the record demonstrates that at the commencement of hearing on 25/2/2016, there were two assessors; Juma Mushi and Julia Mmasy. Surprisingly, it shows that on the same day, two other assessors; Sarah Mchau and Elder Mushi were questioning PW1, Emmanuel Msigwa and PW2, Izakana Mtunga. Further, on 2/10/2018 (at page 26) the coram shows J. Mmasi and T. Temu as assessors. These two heard PW3's testimony. On 14/11/2018, the assessors were J. Mmasi and T. Temu who heard the evidence of PW4. Ms. Mwanri proceeded that, the records further show that, during the defence case, the assessors changed completely where by on 08/12/2021 (page 45 of the proceedings) the assessors were Mchau and Lukindo who heard the testimony of all the respondents and their witnesses as evident in page 51 and 53 of the proceedings.

Ms. Mwanri argued that, the involvement of assessors is legal issue regulated by section 23(1), (2) and (3) of the Land Dispute Courts Act [Cap 216 RE 2019] and Regulation 19 (2) of the Land Dispute Courts (District Land and Housing Tribunal) Regulations which gives no room for

unregulated change of assessors. Thus, the interchanging of assessors in the present case was offensive of the law. She argued further that, the last two assessors, Lukindo and Mchao did not hear the testimony of PW1, PW2, PW3 and PW4. All they heard was the defence case. Hence, they ought not to have given their opinion in respect of the case. The anomaly, she argued, was a fatal one and has rendered the proceedings, judgment and decree null and void. In fortification, she cited the case of **Kimasio Rural Co-operative Society Limited and Another vs The Registered Trustees of Catholic Diocese of Moshi (t/a Sangiti Secondary School)** Land Appeal No. 41 of 2021 in which the court cited the case of **Joseph Kabul vs Reginam** [1954-55] EACA Vol. xx1-2. Where it was held that where the assessor who has not heard all the evidence is allowed to give an opinion of the case, the trial is a nullity.

She also cited the case of **Edna Adam Kabona vs Absolom Swebe** Civil Appeal No. 286 of 2017 CAT at Mbeya at page 5 where it was stated that assessors must engage and participate in the proceedings so that they can give their opinion. In the foregoing, she concluded that since Lukindo and Mchau were absent during the applicant's case, the DHLT committed a fatal irregularity by allowing them to give their opinion. Hence, she prayed that the court allow the appeal, quash and set aside the decision and order of the DLHT and declare that the suit land belongs to the appellant and the costs be borne by the respondent.

On his party, Mr. Zayumba briefly submitted that indeed, the proceedings exhibits the anomaly pointed out by Ms. Mwanri. Three sets of assessors participated in the hearing and those that gave their opinion were not the

ones who heard the plaintiff's case. Thus, there is a justification for nullification of the proceedings as held in **Kimasio Rural Co-operative Society Limited and Another vs The Registered Trustees of Catholic Diocese of Moshi** (supra). As regards the prayer for costs, he ardently opposed and argued that, as the anomaly was wholly occasioned by the DLHT, none of the parties should be condemned to bear the costs occasioned by such anomaly. Besides, he argued, the appellant has conceded to the appeal. Thus, it will be in the interest of justice for each of the parties to bear its costs. He similarly opposed the prayer that upon the nullification of the DLHT's proceedings, the appellant be declared the owner of the suit land. The available remedy, he argued, is to have the matter remitted back to the DLHT for a fresh trial to be conducted under newly appointed assessors.

Rejoining on the prayer for costs, Ms. Mwanri submitted that the appellant deserves compensation as she has engaged an advocate to represent her and in doing so, she has already incurred costs.

From the submissions above, and upon the respondent's counsel conceding to the two grounds of appeal which challenge the competence of the assessors, the sole question for determination by this court is whether, there was any anomaly in the participation of assessors and if so, whether it is fatal and vitiates the proceedings of the DLHT, questions to which the parties have jointly appended an affirmative answer.

Verifying what has been submitted by the parties, I have thoroughly read the DLHT to ascertain the anomaly and its gravity. In that adventure, I

have observed as correctly submitted by Ms. Mwanri and supported by Mr. Zayumba that, the proceedings exhibit an anomaly in the participation of assessors. It is apparent on the coram of the DHLT as appearing on page 7 of the typed proceedings that when the applicant's case was opened on 25/02/2016, the assessors that sat were Juma Mushi and Julia Mmasy. This coram is, however, at variance with the one on the hand written proceedings which shows that the coram had Juma Mushi and Sarah Mchau as assessors. The two assessors were present during the testimony of PW1, PW2 which entails that, they rightfully questioning these two witnesses. The variance between these two records suggests that, there was a clerical error in the typed proceedings as it ought to reflect the hand written proceedings.

Further to this, the record demonstrates that, on 10/10/2018, the hearing of the applicant's case proceeded whereas the assessors were J. Mmasy and T. Temu. Unlike in the previous record, this coram is the same in both, the typed and handwritten proceedings. These two assessors were also present during the hearing of PW3 and PW4 evidence on 14/11/2018 on which date, the applicant's case was closed. The defence case opened on 08/12/2021 and assessors on that day were Mchau and Lukindo. The same is reflected in page 45 of typed proceedings as well as in the hand written proceedings. These two, were present throughout the defence case. The opinions of assessors were also delivered by the two. It is therefore true that, there were 3 sets of assessors the first one constituted by Sarah Mchau and Juma Mushi; the second by J. Mmasy and T. Temu and the last by Mchau (probably Sarah Mchau) and one Ms. Lukindo (whose full name was never disclosed).

As correctly submitted concede with Ms. Mwanri, the presence of assessors in the DLHT is a legal issue regulated by section 23(1), (2) and (3) of the Land Dispute Courts Act and Regulation 19(2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations which read;

23. (1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.

(2) 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.

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.

Regulation 19 (2);

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

From the foregoing, it is now settled that, for the assessors to give opinion at the conclusion of the trial before the DLHT at least one of them must be in attendance throughout the trial. Underlining this position, the Court of Appeal in **Amri Shabani Gunda vs Salum Mohamed Mashauri** (Civil Appeal No. 84 of 2021) [2022] TZCA 233 (Tanzlii) held thus;

“The cited provision clearly indicates that, at least one of the assessors must be among the assessors in attendance throughout the trial so as to enable them to make an informed and rational opinion.”

Therefore, as correctly submitted by both counsels, the DHLT lucily erred in permitting the assessors in the last set to give opinion on the case while they all partially participated in the trial as they were not present during the applicant’s case. As for the consequence of such an error, the law is settled that such an anomaly is fatal to the trial as it renders it a nullity. (See **Joseph Kabul vs Reginam (supra)**; **Y.S. Chawalla & Co. Ltd. Vs Dr. Abbas Teherali** (Land Appeal No. 15 of 2013) [2019] TZCA 23 (Tanzlii); **Paul Mushi (as Attorney of Salim Ally) vs Zahra Nuru** (civil Appeal No. 221 of 2019) [2022] TZCA 502 (Tanzlii) and **Amri Shabani Gunda vs Salum Mohamed Mashauri** (Supra)). In **Y.S. Chawalla & Co. Ltd. Vs Dr. Abbas Teherali** (supra), the Court of Appeal held that;

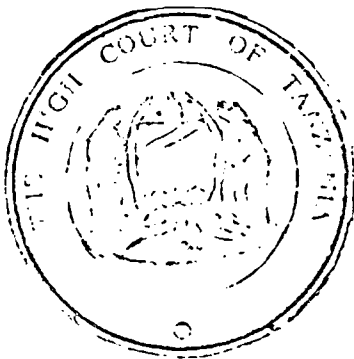
“Having heard the parties, we confirmed our concern that, in the course of trial, the Tribunal Chairperson was irregularly aided by different sets of assessors. The irregular procedure did not augur with the provisions of section 23(3) of the Land Disputes Courts Act, Chapter 216 of the Revised Edition of 2002(the Act) ... As we have vividly demonstrated, in the proceedings under our consideration, there was an unwarranted replacement of assessors on several occasions. The replacement offended the clear provision of the law which we have extracted and will alone, suffice to vitiate the trial proceedings of the Tribunal.”

Correspondingly, in the present case, the irregularity has rendered the trial a nullity. The 2nd and 3rd grounds of appeal are thus, with merit and, on the basis of which, I allow the appeal. Further, invoking the revisional

jurisdiction vested in this court by section 43 of the Land Dispute Courts Act, I nullify the proceedings, quash and set aside the judgment and decree of the trial DLHT. I subsequently order that the case file be remitted back to the DLHT to be retried before a duly constituted tribunal under a different Chairman and assessors.

As to costs, considering that none of the parties is to blame for the anomaly upon which this appeal has succeeded and considering also the respondent has conceded to the appeal, I have found it to be in the interest of justice that the costs be shared by each of the parties shouldering its respective costs.

DATED and DELIVERED at Moshi this 28th day of April 2023.



X

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

J.L. MASABO

JUDGE

28th April 2023