

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO. 109 OF 2022

(Arising from Land Application No. 246 of 2018 in the District Land and Housing

Tribunal for Mara at Musoma)

BETWEEN

ESTER MACHUMU..... APPELLANT

VERSUS

HAMIS NYAMSENDA..... 1ST RESPONDENT

LUFUNJO MAINGU.....2ND RESPONDENT

JUDGMENT

02nd & 05th May, 2023.

M. L. KOMBA, J.:

Appellant and 2nd respondent are husband and wife. Appellant (wife) decided to sue her husband in the District Land and Housing Tribunal of Mara at Musoma (the trial Tribunal) over Land Application No. 246 of 2018, claiming that second respondent has sold the farm measured 10.5 acres which appellant claimed to be her property and was used for cultivation and residential. After the alleged sale, the 1st respondent demolished the appellant house and cause her loss to the tune of one million and five

hundred thousand Tanzania shillings and praying for declaration as the lawful owner of the disputed land where she lost the case.

Dissatisfied on decision and reasons to the said decision appellant lodged this appeal with 3 grounds which I don't find reason to reproduce them for reason which I will explain shortly.

At the hearing of this appeal, Appellant was represented by the Mr. Daudi Mahemba while the respondent hired the legal service of Mr. Godfrey Mroba both learned advocates. When allowed to address the court counsel for both parties submitted that they were not served with proceedings and the nature of the grounds of appeal compel them to read proceedings and apply for court file perusal. To fast track the hearing I consented to the prayer and allowed them to make court perusal for 30 minutes and we proceed with the hearing. After court file perusal counsel for parties had the following to say;

Starting with the counsel for appellant he informed the court that **they peruse file jointly** and discovered procedural irregularities regarding Land Application No. 246 of 2018. To mention some which discovered he

submitted that **first** the claim form filed to the trial tribunal did not indicate size, demarcation and description of the disputed land contrary to the law and that it will make difficulties in implementation of the decree.

Second, when the matter was heard for the first time Hon. Chairman sit without assessors contrary to section 23(1) and (2) of the Land Disputes Courts Act, CAP 216 (the Act) read together with regulation 19 (1) of GN 174 of 2003.

Third, the matter was heard by the chairman called Kitungulu. But on 20/09/2021 when the matter was at defence side, it was heard by honorable Makombe as a chairman and there is no reason for re assignment.

Fourth, the court record show that assessors' opinion were read in court on 28/09/2021 but it is in the same file the record shows one assessors with a name Swagarya wrote his opinion on 29/09/2021 this is impossible that opinion were read before its composition.

Fifth, on the date which opinion were read in court, it was not recorded whether assessors were in the tribunal or not and the coram is silent. That means they were absent when their opinion were read.

From these irregularities, it was his submission that from these irregularities the whole proceedings and orders are not proper and he prayed this court to invoke its powers under section 43 (1) and (2) of Cap 216 to nullify proceedings and orders emanated from the wrong proceedings.

Mr. Mroba subscribed to the appellant counsel on all issues raised and he summarized that the disputed land has no demarcation neither boundaries, assessors were not involved in certain stage of the hearing of the case at the trial tribunal and refer this court to the case of **Edina Adam Kabona vs. Absolom Sweve**, civil Appeal no. 286 of 2017 CAT at Mbeya (unreported) he submitted that Court of Appeal emphasized that assessors must be engaged and participate into proceedings so that they can give their opinion. He said absence of assessors during prosecution case make them unaware on what transpired and said this is fatal.

On the issue of change of presiding chairman, he conceded that they did not find reason why the file was assigned to another Chairman and the issue of assessors and their opinion, he submitted that facts are just as presented by

the counsel for the appellant that the date of writing opinion and date of reading opinion are contradicting and whether they were in the tribunal when their opinion was read. It was his submission that only remedy is to remit the file back to the trial tribunal for it to entertain the case on merit. It his prayer that if it pleases the court each party should bear its own costs.

Having heard submissions from each side, it my duty to determine whether there are procedural irregularity warranting interference by this court.

Starting with the issue of the size, demarcation and boundaries of the disputed land. In determining land disputes, lower tribunals must assure themselves with size, location, demarcation and value of the land. That is the requirement of the law in Regulation 3 (2) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 (the regulation) and precedents in **Daniel D. Kaluga vs. Masaka Ibeho & Four Others**, Land Appeal No. 26 of 2015; **Rev. Francis Paul vs. Bukoba Municipal Director & 17 Others**, Land Case No. 7 of 2014, **Martin Fredrick Rajabu vs. Ilemela Municipal Council and Another**, Civil Appeal No. 197 of 2019 and **Aron Bimbona vs. Alex Kamihanda**, Misc. Land Case Appeal No. 63 of 2018. When this requirement

is faulted, the decision cannot stand in an appeal stage. Importance of adhering to this regulation is to distinguish the disputed land from other land and to enable execution of the decree.

The issue of presence of assessors during hearing of the case at the District Land and the Housing Tribunal is controlled by section 23(1) and (2) of Cap 216 thus;

'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.'

It is apparent in the court record that there were some stages especially the first days of the hearing of the matter the Chairman seat without assessors.

It is in the record that there was no involvement of assessors in some stages of the hearing, The trial tribunal is said to be duly constituted when composed by a chairman and two assessors to form part of the coram and their involvement must be vividly reflected in the entire proceedings. The non-involvement of assessors is fatal and renders the entire trial tribunal proceedings a nullity.

Having carefully scrutinize the available record, I have realized that assessors were not present in the trial tribunal throughout the hearing of the prosecution case which started on 10/02/20220 as it is required by the above cited provision of law. The records shows that when the matter was at defence side, that was 20/09/2021 then the tribunal was composed by two assessors who were recorded by names to be Matiko and Swagarya. This is fatal and that irregularity goes to the root of the matter decided in the case of **Hamisi Athuman Ramadhan vs. Constance Banyankambona and 2 others**, Land Appeal No. 61 OF 2021 HC at Mwanza.

The contradictions on preparation and delivering of assessors' opinion is depicted in the record of the court. Provision of assessors' opinion is the requirement of the law as stipulated in Regulation 19(2) of the Regulations which provides that:

' Notwithstanding subsection (1) the Chairman shall before making his judgement, require every assessors present at the conclusion of hearing to give his opinion in writing and the assessors may give his opinion in Kiswahili.'

Upon thorough perusal of the record of the trial tribunal. I have found that when the chairman closed the case for the defence on 27/09/2021 he ordered assessors' opinion to be delivered on 28/09/2029. Just as submitted by the parties' counsels, it is on recorded that the assessors' opinion were read in tribunal on 28/09/2021 but one assessor wrote his opinion on 29/09/2021. The question here is what was read on 28/09/2021 in the tribunal? Was there any opinion? As far as Regulation 19(2) of the Regulations is concerned, the assessors must give their opinion in writing and that opinion must be availed in the presence of the parties so as to know the opinion of assessors and whether the chairman considered that opinion or not. Record show on 28/09/2021 when the opinion was read in the tribunal, parties were not present and even assessors who read their opinion were not present in the tribunal. What a gross irregularity. With due respect, what Hon. Chairman was doing is not the procedure at all.

In the case of **Tubone Mwambeta vs Mbeya City Council**, Civil Appeal No. 287 of 2007 (unreported) as quoted with approval in the case of **Dr. Clemance Kalugendo vs. Peter Andrew Athumani**, Civil Appeal No 92 of 2018, CAT at Dar es Salaam (unreported), the Court of Appeal specifically held that;

'In view of the settled position of the law, where the trial has been conducted with the aid of assessors... they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgement is composed. We are increasingly of the considered view that, since Regulation 19(2) requires every assessors present at the trial at the conclusion of hearing to give his opinion in writing, such opinion must be availed in the presence of 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.'


It is without doubt that in the case at hand, the opinion of assessors was not read to the parties before the judgement as the court records show that parties were not present even assessors were not present when assessors' opinion were read out. One assessor's opinion was not prepared when it was read. In view of the above authority that was fatal irregularity and vitiated the proceedings.


For the aforesaid shortcomings, I entirely agree with parties' counsel that the proceedings of the trial tribunal is tainted with grave procedural irregularity which was occasioned by the failure of the chairman of the trial tribunal to comply with the mandatory provisions of Law. I find no need of analysing the rest of irregularities.

I am aware of the provision of section 45 of the Act as prayed by the counsels for the respondents that, this court should consider when forming its decision, that no decision of the trial tribunal will be reversed or altered on account of any error, omission or irregularity in the proceedings, unless such error, omission or irregularity has in fact occasioned a failure of justice. Nevertheless, in the circumstances of the case at hand and for the aforesaid shortcomings, my mind is settled that the omission of the chairman to fully involved the assessors is grave and occasioned miscarriage of justice to both parties.

I therefore, proceed to exercise my revisional powers under section 43(2) of the Land Dispute Courts Act, Cap 216 R.E 2019, by nullifying and setting aside the entire proceedings and judgement of the trial tribunal. As to the way forward for justice to be done I order a retrial of the case before a different chairperson and a new set of assessors. Since the omission was not caused by any parties, I make no order as to costs.

It is so ordered.


M. L. KOMBA
JUDGE
05 May, 2023



THE HIGH COURT OF TANZANIA
MUSOMA

Judgement Delivered in chamber in the presence of the respondents and in absence of the appellant.



NK
M. L. KOMBA

JUDGE

05 May, 2023