

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

CIVIL APPEAL NO. 11 OF 2023

(Originating from Land Application No 378 of 2016 of the District Land and Housing Tribunal for Mwanza)

MARIETHA HAMKA KOYAGE.....APPELLANT

VERSUS

MODESTA LUNYILIJA..... RESPONDENT

JUDGMENT

07th August & 11th August, 2023

Kilekamajenga, J.

The appellant preferred the instant appeal challenging the decision of the District Land and Housing Tribunal in Land Application No. 378 of 2016. Through the legal services of the learned advocate, Miss. Matrida George Joseph, the appellant advanced four grounds seeking justice before this court. Due to the reasons stated below, I find no reason to reproduce the grounds of appeal. When the appeal was scheduled for hearing, the learned State Attorney, Mr. Steven Makwega appeared for the appellant whereas the learned advocate Kevin Mashore appeared for the respondent. The appellant's counsel prompted the court to consider the blatant illegality on the proceedings of the trial tribunal. He briefly informed the court that, on 01st November 2022, the Trial Tribunal ordered the case to come for assessors' opinion. However, such opinions were not read. Based on such an anomaly, the counsel prayed for the file to be remitted back to the chairman for the assessor(s)



to give opinion and thereafter compose the judgment. The counsel's submission was supported by the counsel for the respondent and prayed for the parties to bear their own costs.

On this point, I was moved to consider the position of the law in such circumstances. Under the law, a case in the District Land and Housing Tribunal must be presided over by a chairman who sits with not less than two assessors.

Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019 provide that:

"23 (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors; and

(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment".

Also, **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** emphasizes that:

"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 the hearing to give his opinion in writing** and the assessor may give opinion in Kiswahili”.*

After the assessors’ opinions, the chairman is obliged to consider them; however, the chairman is not bound to follow such opinion. **Section 24 of the Land Disputes Courts Act** provides that:

"24. In reaching decisions, the chairman shall take into account the opinion of assessors but shall not to be bound by it, except that the chairman shall in the judgment give reasons for differing with such opinion”.

Furthermore, the opinion must be read in the presence of the parties and the proceedings should indicate that the opinions were read. The Court of Appeal of Tanzania was confronted with a similar irregularity in the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble**, Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported) where it stated that:

"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal’s proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the

opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed".

Furthermore, in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) Court of Appeal of Tanzania held that:

"Therefore, in our own 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."

Similarly, in the land mark case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported). The Court of Appeal of Tanzania reiterated that:

"...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.”

The Court of Appeal further stated that:

*“...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinions before the determination of the dispute. As such, **their opinion must be on record.**”*(emphasis added).

See also, the cases **of Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil appeal No. 286 of 2017, CAT at Mbeya (unreported); **General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa**, Civil Appeal No. 13 of 2012; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali**, Civil Appeal No. 70 of 2017.

In this case, the record shows that, in the District Land and Housing Tribunal, the case commenced in 2016; the case finally came to an end in 2022 with one assessor. As argued by the counsel for the appellant, on 01st November 2022, the case was scheduled for assessors’ opinion on 24th November 2022. Thereafter, the record is silent on whether such opinions were given despite the fact that there is a paper containing what seems to be assessor’s opinion. As long as the proceedings are silent on whether the assessor’s opinion was read to the parties,

I cannot assume that the remaining assessor gave his/her opinion. Also, in passing I noticed that, the District Land and Housing Tribunal decided in favour of the respondent who however did not testify during the trial. I am actually puzzled to find out that the trial decided in favour of a person who did not give evidence of ownership of the disputed land. For the reason stated above, the counsel's observation has merit and failure to record assessors' opinion may vitiate the proceedings. I hereby nullify the proceedings of the trial tribunal and set aside the decision thereof. The matter is left for any interest party to file a fresh suit before a competent forum. Order accordingly.

DATED at **Mwanza** this 11th day of August, 2023.



Ntemi N. Kilekamajenga.
JUDGE
11/08/2023



Court:

Judgment delivered this 11th August 2023 in the presence of the counsel for the appellant, Mr. Steven Makwega but in the absence of the respondent. Right of appeal explained.



Ntemi N. Kilekamajenga.

JUDGE

11/08/2023

