

**IN HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF DODOMA  
AT DODOMA**

**LAND APPEAL NO. 48 OF 2022**

(Originating from the District Land Housing Tribunal for Dodoma in Land Application No. 180  
of 2020)

**ATHUMAN MDILYA.....APPELLANT**

**VERSUS**

**GERALD SINGANO MAGILI .....RESPONDENT**

**JUDGEMENT**

Date of Last Order: 11/07/2023

Date of Judgement: 16/10/2023

**A. J. Mambi, J.**

This judgment emanates from an appeal at the instance of the appellant, **ATHUMAN MDILYA**. Initially the respondent sued the appellant at the District Land and Housing Tribunal for Dodoma (herein *the DLHT*) claiming among others ownership of a parcel of land, Plot No. 265/7 at Miyuji within Dodoma City (herein *the suit land*). The DLHT having heard the parties decided in favor of the respondent where it ordered the appellant among others to vacate the suit land. Dissatisfied, the appellant is before this Court challenging the DLHT decision basing on ten related grounds of appeal to wit: -

- 1. That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma misdirected himself in reusing to admit the exhibit of the Appellant against the law.*

2. *That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma erred in law and in fact in deciding for the Respondent whereas there was no proof that, the said Respondent had legally purchased the land in dispute.*
3. *That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma erred in law and in fact in deciding for the case without joining the alleged vendor of the land in dispute who claimed to be also the owner of the disputed land.*
4. *That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma misdirected and was biased in considering and unfairly analyzing the evidence of the Appellant whereas unfairly favoring the evidence of the Respondent.*
5. *That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma erred in law and in fact in deciding for the Respondent whereas his evidence was contrary to the pleadings lodged the tribunal.*
6. *That, the Honorable trial tribunal erred in law and in fact in deciding for the Respondent whereas the proceedings were tainted with irregularities and illegality.*
7. *That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma erred in law and in fact in deciding that, the land in dispute was allocated to the Respondent after survey whereas the evidence show that the process of survey has not been completed.*
8. *That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma erred in law and in fact, in endorsing the alleged sale of the disputed land between the Respondent and PW3 which lacked evidence and it was not completed.*

9. *That, the Honorable Chairman of the District Land and Housing Tribunal for Dodoma misdirected himself in recording the evidence of the Appellant that, he was bequeathed the land in dispute from his father in 2015 whereas the Appellant testified that, he inherited in 2005.*

10. *That, the Honorable Chairman District Land and Housing Tribunal for Dodoma erred in law and in fact in deciding for Respondent whereas his evidence was weak, contradictory and wanting*

11. *That, the Honorable District Land and Housing Tribunal for Dodoma erred in law and in fact delivering decision against the law.*

12. *That, the Honorable District Land and Housing Tribunal for Dodoma erred in law and in fact delivering one sided judgment and granting some orders not pleaded.*

Submitting in support to the grounds of appeal, Ms. Mbasha the learned counsel for the appellant contended that there was misjoinder of one party who is PW3 (Benito Mwakitose) as necessary party as per page 17 and 18 of proceedings. The learned counsel was of the view that argued, since PW3 in his evidence claimed to be the owner of the suit land as the respondent did not pay the whole amount, he was supposed to be part the suit. It was Ms. Mbasha's view that due to the allegations that PW3 was a seller and the former owner of the disputed land then it was necessary for PW3 to be joined as necessary party to determine the legality of the sale agreement. Reference was to the decision of the court in **Mexons Investment Ltd vs CRDB Bank Plc**, Civil Appeal No. 222 of 2018 at page 12.

Ms. Mbasha went on submitting that the matter was **marred by irregularity**. She contended that the opinion of Assessors was not

recorded under the proceedings as per page 38 of the proceedings. The learned counsel further argued that even at page 14 of the judgment there is a variation between the judgment and proceedings in terms of records. She contended that while the judgment shows the opinion was read on 19/5/2022, the proceedings show the opinion were supposed to be read on 3/6/2022. Ms. Mbasha referred this court on regulation 19 (2) of the Land Dispute Courts (The District Court Land) of 2002 and the decision of the court in **Dora Mwakikose vs Annamary Mwakikose**, Civil Appeal No. 129 of 2019 CAT Mbeya at page 11. She also referred the decision of the court in **Edna Adam Kibona vs. Solomon Swebe**, Civil Appeal No. 286 of 2017 she argued that failure to record the opinion of the assessors in the proceedings is fatal.

With regard to **exhibits**, Ms. Mbasha contended that it was wrong for the chairman to refuse the exhibit presented by the appellant as per page 26 and 27 of the proceedings. She submitted that the appellant laid foundation as to why he presented certified copies and that the documents complied with s. 68 of Cap 6. It was Ms. Mbasha's view that this showed the trial chairman misdirected himself as all matters of tribunal are governed by regulation 10(1) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003 (herein *the DLHT Regulations of 2003*) which requires a party to presents exhibit not basing on CPC and Evidence Act Cap 6. The learned counsel went on arguing that section 68 (7) of the Evidence Act provides for the exception to issue notice. Ms. Mbasha referred this Court on pages 7, 12 and 18 of the proceedings with regard to the evidence of PW1. She submitted that PW3 in his evidence admitted that he sold the suit land when he bought in 1998 but there was no any proof of sale agreement. On top of that Ms.

Mbasha submitted that PW3 did not say where he bought the land and at the same time stating that he sold the land but he was not paid all money.

Referring this Court on page 18 and 19 of the DLHT proceedings, Ms. Mbasha contended that since PW3 stated he had never met with respondent (the buyer of his land) except 2020 then the sale agreement was very valid and wanting in such circumstances.

Referring page 7 of the judgment the trial tribunal Ms. Mbasha contended that chairman unfairly analyzed the evidence of the appellant as he was biased. The learned counsel added that the chairman improperly recorded the evidence of the appellant in that all contradicting cross-examination were not recorded and analyses of the examinations in chief and re-examination were not reflected as per page 5 of the judgment. The learned counsel for the appellant went on referring this Court at page 25,26,29 and 36 of the proceedings and argued that the evidence of the appellant show that he acquired the land in 2005 and not 2015. Ms. Mbasha continued faulting the decision of the DLHT arguing that at one point the chairman in his decision was accepting oral testimony of the appellant but at the same point he was refusing that evidence. Ms. Mbasha further submitted that under the plaint the respondent was claiming that he was allocated the suit land by the city council but at page 7 of the proceedings he produced a very new fact that he bought the land from PW3. She referred the decision of the court in **James vs A.G.** 2004 TLR page 161. The learned counsel also referred this Court on **Masaka Mussa vs Rogers Andrew Lumenyela & 2others**, Civil Appeal No. 497 of 2021. Ms. Mbasha continued submitting that the evidence of PW4 at page 20 of the DLHT proceedings indicated that survey was not completed but wondered how the chairman decided that the land was allocated to the respondent. The learned counsel for the respondent

further submitted that the trial tribunal chairman erred by delivering a one-sided judgment and granted orders not claimed in the proceedings. The counsel referred this Court on **Masaka Mussa** (supra) and **Lukumbo vs NBC and others**, Civil Appeal No. 503 of 2020.

Responding to the submission in support of the appeal Ms. Maria the learned counsel for the respondent on non-joinder of PW3 submitted that there was no non-joinder of the parties as that was not raised at the trial tribunal considering the fact that it is the same advocate who represented the appellant at the trial tribunal. It was Ms. Maria's view that non-joinder is not to be raised at the appeal stage. Reference was made to the decision of the court in **Kassim Salum Mnyukwa vs R**, Criminal Appeal. No. 405 of 2019 page 7. The learned counsel further contended it was not necessary to join PW3 as necessary party as he appeared just as a witness. The learned counsel continued to submit that the conflict was that the appellant invaded the area of the respondent and there was no conflict between the seller and the buyer.

With regard to irregularities, Ms. Maria contended that unlike section 24 of Cap 216 there were no any irregularities at the trial tribunal. She added that even Regulation 19 of Regulation 2002 was complied with in that the opinions of the assessors were referred under the judgment as the law requires.

With regard to exhibit, Ms. Maria contended that it is not true that the exhibit by the appellant was refused unfairly. She argued that the disputed document that the appellant was tendering was a photocopy and the procedures of tendering photocopied document was not followed. She further argued that the appellant did not inform the tribunal as to which provision he was using to tender the document. The counsel submitted

that the law is clear on tendering of copies that one need to issue notice which is s. 68 of the Evidence Act was not complied with.

With regard to the assessment of evidence Ms. Maria contended that there was no dispute that the respondent informed the tribunal how he acquired the land in 2015 as supported by his witness. She further submitted that even PW3 at page 18 is admitting that he sold the land to the respondent. The learned counsel for the respondent went on submitting that the land in dispute was surveyed and the respondent was allocated the surveyed land by CDA as also testified by PW2 (Land officer).

Basing on this evidence from the respondent side, Ms. Maria contended that even if there was outstanding payment but that could not have nullified the whole transaction. The counsel added that, failure of the respondent to meet with the seller PW3 was not an issue. She argued that in light of the strong evidence from the respondent side, that there was no any biasness made by the tribunal chairperson in his judgment and that the judgment was in line with Order XX of CPC Cap 33. She added that if there was biasness, the appellant had time to reject the tribunal chairman.

The learned counsel continued submitting that the decision of the tribunal did not solely base in the variation of the years (2005 and 2015) but it covered the analysis of all evidence of from both sides. She argued that after the purchase of the suit land it was surveyed and thereafter the process of transfer of the land was finalized by the CDA which means there was need discussing relying much on the evidence of PW3. She argued that was no contradictory evidence on the part of the respondent, since the evidence of the respondent in the proceedings show he acquired the land in 2015 before the land was surveyed.

With regard to reliefs, Ms. Maria contended that it is not true that the trial tribunal chairman made unclaimed reliefs and orders as claimed by the appellant counsel. Ms. Maria submitted that the tribunal made orders basing on the claims by the respondent and that the demolition order was the result of eviction order.

In her rejoinder Ms. Mbasha for the appellant maintained the grounds of appeal and her the submissions in chief. She further contended that the issue of ownership was not raised in the pleading except during evidence. With regard to exhibits Ms. Mbasha maintained that the law allows to tender copies of document without notice. She further maintained that they were not told as to when the sale agreement was executed. Ms. Mbasha contended that during trial one can complain about biasness but not at the stage of judgment writing. Ms. Mbasha finally submitted that the respondent did not show the originality of his ownership of the suit land.

Before going further, I find it prudent at this juncture to first address the issues of illegalities and irregularities in relation with misjoinder/non-joinder of parties and the issues of illegality related to assessors as per 7<sup>th</sup> ground of appeal. Having addressed those issues the next main issue for determination shall be whether the DLHT in its decision analyzed properly the evidence before it.

Beginning with the issues of misjoinder or non-joinder of parties, the appellant main contention is that there was a misjoinder of one party, Benito Mwakitose, PW3 who in his evidence at the DLHT testified that he was the one who sold the suit land to the respondent. The question to be answered is, was there any misjoinder and non-joinder of the parties? In my view there was no misjoinder or non-joinder of the parties. This means



that it was not necessary to join the seller of the suit land, Mr. Benito Mwakitose as necessary party.

Generally a necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. The term necessary party is defined in the **Black's Law Dictionary**, 8<sup>th</sup> Edition to mean;

***"a party who, being closely connected to a law suit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings"***

In other words, in absence of a necessary party no decree can be passed. His presence, however enables the court or Tribunal to adjudicate more "effectually and completely". See also ***Shahasa Mard vs Sadahiv ILR (1918) 43 Bom 575 at p 581*** and ***Kasturi v Iyyamperumal (2005) AIR 2005 at P.738***. Two tests have been laid down for determining the question whether a particular party is a necessary party to a proceeding:

- (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and
- (ii) It should not be possible to pass an effective decree in absence of such a party. (See also ***C.K.Takwani on Civil Procedure at page 162-163***).

It is also common ground that, over the years, courts have made a distinction between necessary and non-necessary parties. The Court of Appeal in **Tang Gas Distributors Limited vs Mohamed Salim said &**

**2 Others**, Civil Application for Revision No. 68 of 2011 (unreported), when considering circumstances upon which a necessary party ought to be added in a suit stated that: -

(i) *".....an intervener, otherwise commonly referred to as a **NECESSARY PARTY**, would be added in a suit under this rule.....even though there is no distinct cause of action against him, where:-*

(ii)

(a).....

(iii) (b) ***his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit.***

Again, in **Abdullatiff Mohamed Hamis vs. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017(unreported), the Court of Appeal when faced with an akin situation, it stated that: -

*'The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the **particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.**'*

Similarly, the Court of Appeal in **Juliana Francis Mkwabi Vs Lawrent Chimwaga**, Civil Appeal No. 531 of 2020(unreported), when confronted with the issue of whether the Dodoma Municipal Council was a necessary

party in the circumstances of the case, it found that the Council was not a necessary party who ought to have been joined in the proceedings, because;

*"in the circumstances of the case subject of this appeal, Dodoma Municipal Council was not an indispensable party to the constitution of a suit and in whose absence no effective decree or order could be passed."*

In the instant case Mr. Benito Mwakitose was not the owner of the suit land when the matter was instituted at the DLHT as he had already sold the land to the respondent. Nevertheless, despite being not the owner of the suit land he still appeared to testify as the witness.

With regard to the opinions of assessors, the law is clear that after completion of hearing of the case the DLHT chairman is required to record the opinion of assessors that are presented to him in writings by the said assessors. The assessors are further tasked to read their opinions to the parties. The law further provides for the composition of the DLHT. More specifically, the composition of DLHT and how to deal with the opinion of the assessors are envisaged under 23(1) and (2) of the Land Disputes Courts Act, [Cap. 216 R.E. 2019] provides 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.***

*(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 their opinion before the Chairman reaches the judgment.***"

Similarly, Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides that;

*"Notwithstanding sub-regulation (1) **the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.***"

Reading between the lines on the above the provisions of the laws, it is clear that the involvement of assessors is mandatory. The law mandates assessors to give their opinion at the conclusion of the hearing and their opinion must be recorded in the proceedings and reflected on the judgment.

The court in ***TUMBONE MWAMBETA vs. MBEYA CITY COUNCIL, Land Appeal No. 25 of 2015 CAT*** at Mbeya (unreported) at page 16 it was held that;

*"...the omission to comply with the mandatory dictates of the law cannot be glossed over as mere technicalities....the law was contravened and neither were the assessors actively involved in the trial nor were they called upon to give their opinion before the Chairman composed the judgment. This cannot be validated by assuming what is contained in the judgment authored by the Chairman as he alone does not*

*constitute a Tribunal. Besides, the lack of the opinions of the assessors rendered the decision a nullity and it cannot be resuscitated at this juncture by seeking the opinion of the Chairman as to how he received opinions of assessors..."*

I also wish to refer the decision of the court in **EDINA ADAM KIBONA vs ABSOLOM SWEBE (SHELI)** Civil Appeal No.286 of 2017 (CAT). The court in this case at page 5 and 6 observed that;

*"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgement. **However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgement was composed, the same have no useful purpose**".*

Going through the records of the DLHT especially page 37 and 38 of the proceedings, it appears that the trial chairman having finished hearing the matter before it on 22/04/2022 he adjourned it until 03/06/2022 for receiving opinions from the assessors. Indeed, on 03/06/2022 the proceedings show that the DLHT Chairman received and recorded the opinions of assessors. More specifically, the proceedings. At page 38 the DLHT proceedings reads;

**'Tribunal**

*The matter is for judgment and reading assessors opinion*

**Order**

1. *Assessors' opinions have been ready (sic) to the parties by the assessors themselves whom both opined that the applicant is the lawful owner of the suit land.*
2. *Judgment on 29.06.2022.*

*J. F Kanyerinyeri  
Chairman  
22.04.2022"*

Looking at the proceedings, there is no dispute that the DLHT Chairman complied with the requirement of the law as he received the opinions of assessors and the opinion were then to read to the parties on 03/06/2022. However, going through the DLHT judgment at page 14 shows that the opinions of assessors were recorded on 19/05/2022. The judgments read;

*"In the cause of hearing this application I sat with two assessors namely Mama **Jane Magembe** Mzee **E. N Kabohola** whom both opined as here under: -*

***"Baada ya kupitia mwenendo wa shauri hili Pamoja na mashahidi na vielezo mmiliki halali wa eneo Kiwanja Na. 265/7 ni mwombaji Singano Magili"***

*Sdg  
J. Magembe  
Assessor  
19.05.2022*

***"Kutokana na maelezo yaliyoyotolewa na wadaawa na mashahidi wao Pamoja na vielelezo kwa maoni yangu mmiliki wa Kiwanja na. 265/7 Miyuji ni Gerald Singano."***

*Sdg  
E. N. Kabohora  
Assessor*

18.05.2022"


It is clear from the above quoted paragraphs there is a variations on the dates of reading the opinion of the assessors under the proceedings and the judgment. One can also wonder how comes the assessors signed the judgment while the judgment is required to be signed by the chairman only. These show that the proceedings and the judgment at the tribunal were tainted by irregularities that are incurable. Having observed those irregularities this Court need to consider the best way to address those irregularities. In my view the best way is to refer the matter back to the trial tribunal back to rectify the anomalies on the judgment. I wish to refer the decision of court in ***Fatehali Manji V.R, [1966] EA 343***, cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. The court observed that:-

*"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where **the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person...**"*

It is trite law that an order for retrial should only be made where the interests of justice require it. However, basing in my considered view,

there is no any likelihood of causing an injustice to any party if this court orders the remittal of the file for the Tribunal to properly deal with the matter immediately. In this regard, it could be wise for this matter to be referred back to the tribunal for any chairman at the tribunal to recompose the new judgment basing on the opinion of the assessors with similar dates appearing on the proceedings and judgment. The Tribunal should consider this matter as priority and deal with it immediately within a reasonable time to avoid any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for correction to be dealt expeditiously within a reasonable time. Having observed that the proceedings at the Tribunal was tainted by irregularities, I find no need of addressing other grounds of appeal. I order the DLHT to properly compose the new judgment basing on the directives that I have made in this judgment.


This matter is remitted to the District Land and Housing Tribunal to comply with the orders of this court. Any party will be at liberty to appeal against the judgment to be made by the tribunal in accordance with the relevant provisions of the law.



**A. J. MAMBI**  
**JUDGE**

**16/10/2023**

Judgment delivered in Chambers this 16<sup>th</sup> day of October, 2023 in presence of all parties.



**A. J. MAMBI**  
**JUDGE**  
**16/10/2023**



Right of appeal explained.



  
**A. J. MAMBI**

**JUDGE**

**16/10/2023**