

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

LAND APPEAL NO. 27 OF 2023

*(Originating from Land Case No. 69 of 2022 of Maswa District Land and
Housing Tribunal at Maswa)*

HOJA BUSALU APPELLANT

VERSUS

JOHN PIUS KULWARESPONDENT

JUDGMENT

2nd October & 17th November, 2023

MASSAM, J.:

Respondent filed Land Application No, 69 of 2022, before the District Land and Housing Tribunal of Maswa at Maswa, suing the appellant claiming that, in the year 2018 the appellant cut down the trees which makes the boundaries between the land of the Respondent and another person who is not party to this suit. The appellant claimed that, he bought those trees from one **Kunyala Jindika**.

It is also on records that, both parties are neighbors but their property lands has no boundaries.

Again, the respondent at the trial tribunal complained that, he bought his land property way back in 1997 from one **Samwel Makula** and during that time the land was bordered with sisal and later he planted trees to improve the boundaries. The appellant also claimed that he bought the disputed trees from the land property of the respondent.

The trial tribunal heard the matter inter parties and held in favour of the respondent herein above by declaring that, the trees which are within the boundaries belongs to the respondent, the appellant trespassed the respondent's land and cut the trees, hence he is strictly forbidden to enter into the respondent's land and cut down the trees.

Being aggrieved by the decision of the trial tribunal, the appellant herein appealed to this court with three grounds of appeal namely, **First** That, the Tribunal erred in law and in fact for failure to consider the assessors opinion, **Second** the Tribunal erred in law for acting factus officio. **Third**, the Tribunal erred in law and in fact for failure to resume as a tribunal after visiting locus in quo.

When the matter was called the for hearing, the appeal was orally urged. Both parties appeared in person (unrepresented)

Arguing in support of his grounds of appeal, the appellant submitted that, the dispute started at their village where by the respondent destroyed his trees, and he admitted the same before the village officers and ordered to pay fine. He was aggrieved with the order and went to complained to the ward executive officer who ordered them to settle the matter amicably but it was unsuccessfully.

Furthermore, he stated that, the Ward Tribunal heard the matter and held in favour of the respondent, but the appellant appealed to the District Land and Housing Tribunal of Maswa at Maswa and again he won the case. The appellant aggrieved therein. They returned to the Ward Tribunal of Maswa for settlement and they failed and went back to the DLHT of Maswa at Maswa and the respondent won the case hence he appealed to this court as the opinion of assessors were not considered.

On his reply to the appellant's submissions, the respondent stated that, the submission from the appellant is contradictory because he did not bring any witnesses or exhibits to prove his claim and again, he is not his neighbour.

In his rejoinder, the appellant submitted that, the respondent showed the Ward tribunal the property which was not in dispute.

I have thoroughly crossed through the trial tribunal records on the evidence given, and the arguments by both parties at the appeal level, and the issue for consideration is whether **this appeal has been brought with sufficient cause.**

To start with the 1st ground that, the Chairman of the Tribunal erred in law and in fact for failure to consider the assessors opinion, is that, after carefully perusal of the court proceeding specifically at 9 it reveals that **"Baraza, – Shauri linakuja kwa maoni ya wajumbe wa baraza nao wametoa maoni yao, then the next step was, Amri – hukumu tarehe 15/02/2023"**

Thereafter on 15th February, 2023, the honourable Chairman proceeded to visit locus in quo and pronounce a judgment.

From the above findings, it is factual that, the opinion of the assessors were not highlighted in the tribunal proceedings. In other words, there is no record that the assessor's opinion were read over before the parties since they are nowhere to be seen in the proceedings, hence I may say that, nothing was read over to the parties as per the above quotation.

The Court of Appeal of Tanzania in numerous cases stated that the assessors' opinion must be expressly indicated in the record. The same

was stated in case of **Hamisa S. Mohsin v Taningra Contractor Land Appeal No. 133 of 6 2009**, where the Chairman did not indicate what opined, the judgment was null and void and again, in the case of **Edina Adam Kibona v Absolom Swebe (Shell), Civil Appeal No. 286 of 2017** it was held that, "...

the opinion of assessors must be given in writing and be reflected in the proceedings before a final verdict is issued".

Likewise, the Court of Appeal of Tanzania in the case of **Ameir Mbarak and Azania Bank Corp Ltd v Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** came up with the same position that;-

"Therefore, in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment 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." [Emphasis added].

Similarly, in the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No 287 of 2017 (unreported), the Court of Appeal of Tanzania stated that:-

"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors,...they must actively and effectively participate in the proceedings so as to make meaningfully their role of giving their opinion before the judgment is composed...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."

Applying the above establishments in the instant case, it is clear that the original record did not note the opinion of assessors in writing which the chairman of the District Land and Housing Tribunal purports to refer them in his judgment.

Under such circumstances, it is clear that, the judgment of the Tribunal is found to be improper due to that irregularity. So ground no 1 has merit and allowed.

Above and beyond, there is another complain by the appellant in ground no 3 that, the Chairman of the Tribunal erred in law and in fact for failure to resume as a tribunal after visiting locus in quo. Although the appellant submitted nothing about this ground, but this court made reference to the case of **Avit Thadeus vs Isidory Assenga, Civil Appeal No. 6 of 2017 (CAT at Arusha, Unreported)** where the court made reference to the famous case of **Nizar M. H. Vs. Gulamali Fazal Janmohamed**, which explained the procedure to be followed when visiting the locus in quo, by stating that,

*"When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and **their advocates, if any**, and with much **each witnesses as may have to testify in that particular matter**, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof **When the court re-assembles in the***

*court room, all such notes should **be read out to the parties and their advocates, and comments, amendments or objections** called for and if necessary incorporated. **Witnesses then have to give evidence of all those facts, if they are relevant,** and the court only refers to the notes in order to understand or relate to the evidence in court given by the witnesses. We **trust that this procedure will be adopted by the courts in future.**" (Emphasis).*

From the above reference, and after a thoroughly visit of the trial tribunal proceedings, preferably at Pg 10 and 11, it is when the trial Tribunal addressed the parties on the issue of visiting locus in quo and after that, the parties went to the scene and each party show his piece of land after that the court required to reassemble in court room for comments amendments or objection but this court records are silence about it as nowhere show that the said procedure was followed as required by the law the court did not reassemble in court room for comments, amendments or objections regarding to the notes or evidence obtained from the visit and read out all the notes to the parties, and also the witnesses were not re called to testify. Since this is procedural requirement debated by the court of Appeal in **Avit**

Thadeus vs Isidory Assenga, (supra) to be applied when visiting locus in quo, and the same was not properly done by the trial tribunal, this court is of the view that, absence of the clear record of proceedings makes it null ab initio hence, there is no proper judgment before this Court for it to entertain in appeal. Again this ground has merit and allowed.

I have also read ground number 2 and learned that the appellant is accusing the Chairman of the tribunal for acting factus officio. When the appellant was submitting, he never said anything about this ground hence, it has been difficult to evaluate on how did the Chairman act factus officio. In my view, I can say that where a ground of appeal is left unexplained, it is same as he abandoned it, as this court will not know what was he meant in the said ground in order for this court to analyze the same, however, this will depend on the nature of the grounds submitted.

In the circumstances, this court is of the considered view that the District Land and Housing Tribunal did not properly direct its mind to abide with the procedures required when hearing this matter and reached to the sounding decision. The said procedural irregularities are fatal which vitiates the proceedings of the trial tribunal. Subsequently,

since those two irregularities committed by the Trial tribunal Chairman goes to the root of the whole case, and its consequences nullify the whole proceedings of the trial tribunal, in the effect this appeal is here by partly allowed to the extent explained above.

In the results the proceedings in Land Application No. 69 of 2022 and the orders made thereof are hereby quashed and set aside. I remit the case file to the District Land and Housing Tribunal for Maswa at Maswa District for trial de novo before another Chairman and other set of assessors. Regarding the nature and circumstances of this case .No order as to costs.

It so ordered.

DATED at **SHINYANGA** this 17th day of November, 2023.




R. B. Massam

JUDGE

17/11/2023