

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TABORA DISTRICT REGISTRY**

**AT TABORA**

**LAND APPEAL NO. 07 OF 2022**

*(Arising from Land Appeal No. 89 of 2021 before the District Land and Housing Tribunal for Tabora and Original Land Case No. 09 of 2021 before Nsenda Ward Tribunal)*

**MWAMVITA JUMA ..... APPELLANT**

**VERSUS**

**ADAM NTIBONEKA KIVEMA ..... RESPONDENT**

*Date of Last Order: 07.11.2023*

*Date of Judgment: 28.02.2024*

**JUDGMENT**

**KADILU, J.**

The appellant herein was the respondent in Land Case No. 09 of 2021 before Nsenda Ward Tribunal which was decided in her favour. Dissatisfied with the decision, the respondent appealed to the District Land and Housing Tribunal (DLHT) for Tabora via Land Appeal No. 89 of 2021 which was allowed. Aggrieved, the appellant preferred the appeal to this court armed with the following grounds:

- 1. That, the Chairman of the DLHT erred in law and fact in differing with the opinion of the assessors without assigning reasons.*
- 2. That, the Chairman of the DLHT erred in law and fact by holding that the respondent acquired the land in dispute by adverse possession while it was never proved and the appellant was never given an opportunity to address the tribunal on that issue.*
- 3. That, the Chairman of the DLHT erred in law and fact for failure to consider the appellant's evidence in the decision.*

On the strength of these grounds, the appellant prayed for the appeal to be allowed and the decision of the Ward Tribunal to be upheld. The respondent filed a reply to the petition of appeal in which he refuted all the grounds of appeal. He argued that the DLHT was justified in deciding the dispute in his favour because his evidence was heavier than that of the appellant. He urged this court to dismiss the appeal with costs. Both parties appeared in person as they had no legal representation. Hearing of the appeal proceeded by written submissions.

In support of the appeal, the appellant submitted that the law obliges the Chairman of the DLHT to sit with assessors and allow them to give their opinion at the end of the hearing. She argued that although the Honourable Chairman is not bound by the opinion of the lay assessors if he decides to differ from the said opinion, he is required to record the reason(s) thereof. The appellant submitted that in the case at hand, the assessors gave their opinion in the DLHT, but the learned Chairman disregarded the opinion without assigning any reason for doing so. According to her, that was in contravention of Section 24 of the Land Disputes Courts Act [Cap. 216 R.E. 2019].

Concerning the second ground of appeal, the appellant stated that the learned Chairman of the tribunal decided the case based on the doctrine of adverse possession without hearing the parties about it. She said the evidence adduced in the ward tribunal was not on adverse possession therefore, the decision of the Chairman was not supported by evidence on

record. The appellant argued that the learned Chairman misdirected himself by relying on the principle of adverse possession and holding that the respondent occupied the disputed land for 23 years uninterruptedly. She explained that the Chairman wrongly decided the dispute in favour of the respondent who was the complainant in the ward tribunal.

In the appellant's view, adverse possession cannot be invoked by the complainant because the principle of adverse possession is usually used as a shield and not as a sword. To support her argument on adverse possession, the appellant relied on the case of ***Attorney General v Mwahezi Mohamed & Others***, Civil Appeal No. 391 of 2019, Court of Appeal of Tanzania at Tanga.

Regarding the last ground of appeal, the appellant submitted that it was wrong for the Chairman of the appellate tribunal to disturb the findings of the ward tribunal about ownership of the land in dispute. She added that the respondent did not prove in the balance of probabilities that he was the lawful owner of the land in dispute. To buttress her argument, she cited the cases of ***Shah v Aguto*** [1970] 1 EA 263, ***Leopold Mutembei v Principle Assistant Registrar of Titles, Ministry of Lands Housing and Urban Development & Another***, Civil Appeal No. 57 of 2017, Court of Appeal of Tanzania at Mwanza, and ***Paulina Samson Ndawanya v Theresia Thomas Madaha***, Civil Appeal No. 45 of 2017, Court of Appeal of Tanzania at Mwanza.

The respondent on his part, submitted that the learned Chairman was not bound by the opinion of the assessors but rather, the law. He maintained that there is no way the Chairman can be considered in violation of Section 24 of the Land Disputes Courts Act [Cap. 216 R.E. 2019].

On the second ground of appeal, the respondent stated that the evidence presented before the ward tribunal and on the *locus in quo* established that he had occupied the suit land for 23 years without any interruption from the appellant so, the principle of adverse possession was applied correctly in this case. He supported his argument with the cases of ***Lemayani v Mhavi*** [1972] HCD 149, ***Hemed Said v Mohamed Mbilu*** [1984] TLR 113, and ***Farah Mohamed v Fatuma Abdallah*** [1992] TLR 205. He concluded that he presented the evidence which was justifiable in the ward tribunal therefore, he prayed this court to uphold the decision of the DLHT and order the appellant to hand over the disputed land to him.

I have keenly examined the petition of appeal, records of the lower tribunals, and submissions by the parties. The point for my consideration is whether the appeal is meritorious or not. On the first ground of appeal, the appellant complains that the Chairman of the appellate tribunal erred by disregarding the opinion of the assessors without stating the reasons contrary to Section 24 of the Land Disputes Courts Act. It is on record that on 22/03/2022, Mr. Erasto Shenkalwa (assessor) opined that the parties have to be assisted by the Village leaders to resolve the dispute between

them. On the same day, Mrs. Joyce Kuzoleka opined that the appellant was the lawful owner of the disputed land.

Notwithstanding, the Chairman of the tribunal did not consider any opinion of the assessors in his judgment. The appellant interpreted this conduct as completely ignoring the opinion as if the learned Chairman did not sit with the assessors or the assessors did not give their opinion.

Section 24 of the Land Disputes Act provides that:

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

As hinted earlier, although the Chairman is not bound by the assessors' opinion, he/she cannot opt out of the requirement of giving reasons for departure from the opinion of the assessors. The decision to depart from the assessors' opinion leads to another bounding requirement of giving sufficient reasons as stipulated under s. 24 of the Land Disputes Courts Act. The Court of Appeal of Tanzania has decided so in different cases including the case of *Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble* Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported), in which it was observed that:

*"It is also on record that though the opinions 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."*

Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2002 requires every assessor present at the trial after the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties 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. Needless to say, the tribunal's judgment does not reflect the opinion of the assessors anywhere. I therefore allow the first ground of appeal.

I now turn to resolving the second ground of appeal in which the appellant complains that the Chairman of the tribunal based his decision on the principle of adverse possession which the parties did not present evidence to prove.

It appears that the learned Chairman came across the issue of adverse possession while in the course of composing judgment. I have perused the proceedings of the ward tribunal and found that there is nowhere the principle of adverse possession was discussed by the trial tribunal. The appellants' discontent is that no witnesses testified about adverse possession

but it became the basis for the DLHT's decision. For the foregoing, it is the finding of this court that the parties were not heard properly in respect of Land Case No. 09 of 2021 on the point of adverse possession as the learned Chairman of the DLHT raised it suo motto and proceeded to resolve it without engaging the parties. In the case of *Said **Mohmed Said v Muhusin Amiri & Another***, Civil Appeal No. 110 of 2020, Court of Appeal of Tanzania at Dar es Salaam, it was stated that:

*"...a trial judge is obligated to decide the case on the basis of the issues on record. As to what should a judge do in the event a new issue crops up in the due course of composing a judgment, the new question or issue should be placed on record and the parties must be allowed to address the court on it."*

From the case cited above, I find that since the point was raised by the learned Chairman *suo motu*, it was improper for him to proceed unilaterally without inviting the parties to address him on the point. I fully agree with the appellant that the honourable Chairman was not justified in basing his decision on the principle of adverse possession which is not supported by evidence on record. On the way forward, I am mindful of Section 45 of the Land Disputes Courts Act which provides thus:

*"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or*

*improper admission or rejection of evidence has occasioned a failure of justice.”*

In the matter at hand, I am satisfied that the omission by the Chairman of the tribunal to invite the parties to address him on the point that cropped in the course of composing judgment is fatal and has occasioned a miscarriage of justice. I hold that view because the parties were deprived of the right to be heard on this point which is a cornerstone of the principle of fair trial. The right to a fair trial is a fundamental right enshrined under Article 13 (6) (a) of the Constitution which provides that when the rights and duties of any person are being determined by the court or any other agency, that person is entitled to a fair hearing.

As such, I find the second ground of appeal meritorious and allow it. Since the discussed grounds of appeal are both procedural, it infers that the whole decision of the District Land and Housing Tribunal reached was, in contravention of the procedural requirements. For obvious reasons, I will not resolve the third ground of appeal in which the appellant is challenging the weight of the parties' evidence adduced before the ward tribunal.

Given the above, the appeal is allowed. The judgment and decree of the District Land and Housing Tribunal for Tabora are hereby quashed and set aside. I order the file to be returned to the Tribunal for rectification of the observed irregularities before a different Chairperson. In the circumstances of this case, each party shall bear his costs.



**Order accordingly.**

  
**KADILU, M.J.**  
**JUDGE**  
**14/02/2024.**

Judgment delivered in chamber on the 28<sup>th</sup> Day of February, 2024 in the presence of Mrs. Mwamvita Juma, the appellant.



  
**KADILU, M.J.,**  
**JUDGE**  
**28/02/2024.**