

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

**(IRINGA SUB - REGISTRY)**

**AT IRINGA**

**LAND APPEAL NO 27757 OF 2023**

(Appeal from the judgment and decree of the District Land and Housing  
Tribunal of Iringa in Application No. 95 of 2015)

**EMILITHA KAMBINDA.....APPELLANT**

**VERSUS**

**JAPHET MADENGE.....1st RESPONDENT**

**SUMKA MBUBA..... 2ND RESPONDENT**

**JUDGMENT**

*Date of last Order: 11/06/2024*

*Date of Judgment: 27/06/2024*

**LALTAIKA, J.**

The appellant herein **EMILITHA KAMBINDA** is dissatisfied with the decision of the District Land and Housing Tribunal of Iringa in Application No. 95 of 2015. She has appealed to this Court by way of a Memorandum of Appeal containing the following grounds:

1. *That, the trial chairman failed to resolve all the framed issues for determination on who is the lawful owner of the disputed land and reliefs the parties were entitled to.*
2. *That, the successor chairman did not give reasons for taking over the matter from the predecessor chairman.*
3. *That, opinion of only one assessor was recorded while the law requires the chairman to sit with two assessors.*
4. *That, the tribunal acted functus officio against its previous order of proceeding ex-parte against the first respondent.*
5. *That, the trial chairman raised an issue that without calling respective parties to address it.*
6. *That, the chairman of the trial tribunal erred in law and fact by pronouncing a judgment in favor of the respondents whose evidence was not proved on the balance of probabilities and thereby throwing over-board the evidence of the appellant which was proved on the balance of probabilities.*

When the appeal was called on for mention on the 7<sup>th</sup> day of May 2024, parties opted for hearing by way of written submissions. Consequently, the following schedule was ordered: (i) Filing of Appellant's written submission 21/05/2024 (ii) Filing of Respondents' reply 4/6/2024 (iii) Filing of Appellant's rejoinder if any 11/06/2024 (iv) Mention for necessary orders to ascertain compliance with this order and schedule the date of hearing 11/06/2024. I hereby register my commendations to the learned **Advocates Mr. Jassey**

**Mwamgiga and Mosses Ambindwile** who appeared for the Appellant and Respondents respectively, for spotless compliance with the court order. The next part of this judgement is a summary of submissions by both parties.

Mr. Mwamgiga submitted that before embarking on the submission, it was pertinent to highlight that the court, when extending the time limitation for filing the instant appeal, found the impugned decision of the District Land and Housing Tribunal to have serious illegalities. Among these, on 20th October 2015, the tribunal ordered the case to proceed ex-parte against the 1st respondent. Despite the order not being vacated, on 28th August 2018, the 1st respondent gave his testimony, indicating that the court acted *functus officio* against its own decision.

Additionally, Mr. Mwamgiga reasoned, the tribunal did not resolve the framed issues. He recounted that the matter was originally heard by A. Mapunda (chairperson), who heard one witness, and then succeeded by C. Hatson (chairperson), who heard the rest of the witnesses without assigning reasons for the change. Based on these findings by the court, the appellant prayed that the highlighted illegalities, which were serious enough to nullify the decision, should lead the court to allow the appeal with costs.

Mr. Mwamgiga observed that the trial tribunal failed to resolve all the framed issues for determination. The tribunal's judgment indicated two framed issues, Counsel contended, who is the lawful owner of the disputed land and what relief(s) the parties were entitled to. Unfortunately, Mr. Mwamgiga contended, the tribunal did not resolve any of these issues. Instead, it introduced a new issue regarding the validity of a sale agreement between the applicant and Thomas Madenge, which was not originally framed.

This omission, counsel reasoned, meant that the rightful owner of the land remained unknown, and the parties were not entitled to any relief. The learned Counsel emphasized that Court of Appeal has consistently held that a judgment is fatally defective if it leaves contested material issues unresolved. He referenced cases of **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid** [2005] T.L.R 61(ii) and **Stanslaus Rugaba Kasusura and the Attorney General v. Phares Kabuye** [1982] T.L.R 338(ii).

Mr. Mwamgiga submitted further that it was a settled principle of law that a successor judge, magistrate, or chairman must record reasons for taking over a case partly heard by another. To buttress his argument he

cited the case of **Mariam Samburo v. Masoud Mohamed Joshi and 2 Others**, Civil Appeal No. 109/2016 (unreported) C.A at DSM page 7. Failure to record reasons for taking over a suit, Counsel averred, amounts to procedural irregularity and cannot be cured by the overriding objective principle. In the case at hand, Mr. Mwamgiga recounted, A. Mapunda heard PW1's testimony, and C. Hatson took over without giving reasons, rendering the proceedings and judgment defective.

Additionally, contended Mr. Mwamgiga, before terminating the suit, the trial chairman only recorded the opinion of one assessor, Z. Chalamila contrary to Section 24 of the Land Disputes Courts Act [cap 216 R.E 2019] which stipulates that the chairman shall take into account the opinion of assessors, though not bound by it.

The learned Advocate emphasized that the learned chairman must record the opinions of both assessors if they hear the matter. Since only one assessor's opinion was recorded, opined Mr. Mwamgiga, the tribunal was improperly constituted, making the proceedings and judgment a nullity. He referenced the case of **Saada Abdallahman Wellu v. Hamidu Mustafa Sapi and Another**, Land Appeal No. 37 of 2016 (unreported) HC at Iringa page 3-4.

Mr. Mwamgiga pointed out that another illegality was that the tribunal acted *functus officio*. Despite ordering the suit to be heard *ex-parte* against the 1st respondent, the tribunal allowed the suit to proceed *inter-partes* without vacating the *ex-parte* order. The 1st respondent, Japhet Madenge, prosecuted his case as a defense witness (DW1), rendering the tribunal's decision a nullity. He supported his argument by citing this Court's case **FINCA Tanzania v. Leonard Andrew Korogo**, Misc. Civil Application No. 5 of 2021 HC at Musoma (unreported).

The learned Counsel reiterated that the trial chairman, knowing he did not resolve the framed issues, raised a new issue about the validity of a sale agreement between the appellant and the seller of the suit land. He emphasized that this issue was neither framed nor discussed, rendering the decision null and void.

Due to these substantial illegalities, Mr. Mwamgiga asserted that there was no need to delve into the merits of the case, as doing so would imply that the defective decision was properly procured. Consequently, the appellant abandoned the 6th ground of appeal and reiterated that the appeal should be allowed with costs and the decision of the trial tribunal set aside.

**Mr. Ambindwile, Counsel for the Respondents**, on his part began by addressing the grounds of appeal listed in the appellant's Memorandum of Appeal. Noting that the appellant had abandoned the sixth ground of appeal, Mr. Ambindwile stated that he would address the five remaining grounds in the order listed, except for the second ground, which would be argued last.

Regarding the first ground of appeal, Mr. Ambindwile argued that the appellant was misguided in claiming that the Chairman failed to resolve the issues framed. He asserted that the issues were adequately addressed: the Chairman evaluated the evidence and concluded that the appellant's claim over the suit land was null and void, affirming the second appellant as the rightful owner of the land. Consequently, Mr. Ambindwile reasoned, the second issue, regarding the reliefs entitled to the parties, was resolved by dismissing the matter with costs, granting the respondents relief as to the costs of the case.

In response to the third ground of appeal, Mr. Ambindwile contended that the appellant was incorrect in claiming the tribunal was not properly constituted. He clarified that Section 24 of the **Land Disputes Courts Act** [Cap 216 R.E 2019] requires the Chairman to consider the opinion of

assessors, which was done in this case. The proceedings showed that the tribunal was presided over by two assessors and a chairman throughout the hearing, thus being properly constituted.

Addressing the fourth ground of appeal, Mr. Ambindwile argued that the appellant's claim that the tribunal acted *functus officio* was unfounded. He distinguished the current case from the cited case of **Finca Tanzania vs. Leonard Andrew Korogo**, (Supra) explaining that the 2nd respondent appeared as a witness, not a party, which did not contravene the ex-parte order.

For the fifth ground of appeal, Mr. Ambindwile asserted that the appellant's claim that the Chairman raised a new issue without affording the parties the right to be heard was misconceived. He explained that the question of whether the sale of land to the appellant was proper fell under the broader issue of who the rightful owner of the disputed land was. Therefore, Mr. Ambindwile emphasized, the Chairman did not introduce a new issue without allowing the parties to address it.

Regarding the second ground of appeal, Mr. Ambindwile acknowledged that the case at the tribunal was presided over by two different Chairmen



without an explanation for the change. He cited the case of **M/S George Centre Limited vs. The Honourable Attorney General and another**, Civil Appeal No. 29 of 2016 CAT at Arusha (unreported), which established that a succeeding Judicial Officer lacks jurisdiction if no reasons are assigned for the succession. Thus, he suggested that the proper **recourse was to nullify the proceedings** presided over by the succeeding Chairman and order a retrial before the original Chairman from where it ended.

In conclusion, Mr. Ambindwile prayed that each party bear its own costs, citing the case of **Omary Fundi Kondo Humbwaga (Administrator of the Estate of the late Fundi Kondo) vs. Said Mwijuma Humbwaga and another**, Land Appeal No. 27 of 2019 HC at Dar es Salaam, which highlighted that the illegality was not an error occasioned by either party. Based on the foregoing submissions, Mr. Ambindwile prayed that the court hold in favor of his submission.

**I have dispassionately considered the rival submissions in** the light of the grounds of appeal. I choose to narrow my analysis to procedural irregularity. Both parties acknowledged that the case was presided over by two different Chairmen without any reasons recorded for the change. The case of **M/S George Centre Limited vs. The Honourable Attorney**

**General and another**, Civil Appeal No. 29 of 2016 CAT at Arusha (unreported), establishes that such a procedural irregularity affects the legality of the judgment.

Based on this precedent, this court must nullify the proceedings presided over by the succeeding Chairman and order a retrial before the original Chairman or another Chairman with proper reasons recorded for the succession. Consequently, the proceedings from the point of the succeeding Chairman taking over are hereby nullified. The case is remitted back to the trial Tribunal to be heard from the point where the original Chairman left off.

Each party shall bear its own costs.

It is so ordered.



**Court**

A handwritten signature in blue ink, appearing to read 'E.I. Laltaika'.

**E.I. LALTAIKA  
JUDGE  
27.06.2024**

This judgement is delivered under my hand and the seal of this court this 30<sup>th</sup> day of May 2024 in the presence of Mr. Lazaro Hukumu for the Appellant and Mr. Cosmas Masimo for the Respondent.



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
27.06.2024**

**Court**

The right to appeal to the Court of Appeal of Tanzania is fully explained.



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
27.06.2024**