

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO.47 OF 2019

*(From Judgment and Decree of the Land Application No, 178 of 2010,
District Land and Housing Tribunal for Ilala at Mwalimu House (Hon.
Mgulambwa, Chairperson)*

**JOSEPHAT PIUS (Administrator of Estate of
Pius Ndulu).....APPELLANT**

VERSUS

**ISRAEL MWALABA (Administrator of Estates of Israel
Mwalaba).....RESPONDENT**

JUDGEMENT

M. OPIYO J.

The instant appeal originates from the Judgment and decree of District Land and Housing Tribunal for Ilala District sitting at Mwalimu House Land in Application No, 178 of 2010, delivered by Hon. Mgulambwa, Chairperson on 19/2/2018. In the trial tribunal's holding, the respondent was declared the lawful owner of the suit land and further the appellant was ordered to vacate from the same immediately. The dispute at the trial tribunal was centered on a piece of land, located at Tabata area, within Ilala Municipality in Dar es Salaam, identified as Plot No. 223, Kitalu "N". Both parties at the trial tribunal claimed to have ownership rights over it. Being aggrieved by the decision of the trial tribunal, the appellant lodged the appeal at hand based on the following grounds.

1. That the trial Tribunal erred in law by entertaining an application whose statutory prescribed limitation of time had long expired at the time of filing the said application.
2. That the trial Tribunal erred in law and fact by determining the application whose subject matter had been overtaken by events as the letter of offer entitling the respondent to claim ownership had been revoked since 11th May 2005 and the ownership of the suit land shifted to the appellant.
3. That the trial Tribunal erred in law and in fact by declaring the respondent a lawful owner of plot No.223 Block 'N' Tabata Ilala Municipality while the letter of offer purporting to grant ownership to him was revoked for his failure to meet attached development conditions, compensation to original occupiers at the time of grant and payment of annual land rents.
4. That the trial Tribunal erred in law and fact when it ordered the appellant to vacate from the suit land without determining his legal status as a lawfully recognized occupier by the government after acquiring the suit land from the original owner, constructed his residential house, resided there in and has been paying annual land rents in his name since 1995.
5. That the trial Tribunal erred in law and in fact when it failed to order compensation to the Appellant, who was/is a bonafide purchaser of the suit property and for his unexhausted improvements effected over the suit land for a long period of time.

6. That the trial Tribunal erred in law and fact for failure to resolve the ownership dispute between the parties as required under the law.

The appeal was disposed by way of written submissions; the appellant was represented by Jovin M. Ndungi, learned counsel while Daibu Kambo, learned counsel appeared for the respondent.

Before submitting on the grounds of appeal as listed here in above, the appellant's counsel notified this court on the procedural irregularity that according to him if succeeds will dispose this appeal entirely. Since both parties had the opportunity to address the court on the irregularity spotted by the counsel for the appellant through their written submissions, I find it necessary to deal with it at this point.

It was the submissions of Mr. Ndungi that, at the trial tribunal the assessors were not fully involved. He maintained that, the assessors were not fully involved because the trial chairperson did not require the assessors to give their opinion in writing as required by regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003. The records of the proceedings at the trial tribunal do not show if the assessors were accorded opportunity to give their opinion as required by law, but only the trial chairperson supposidly made reference to their opinion at page 5 of the typed judgment at the last but one paragraph when she held *"... thus in total 1 do concur with opinion of my wise assessors thus this application has merit, ..."*

Mr. Ndungi further argued that, it is now already a mandatory requirement of the law that when the trial is conducted with the aid of the assessors, they

must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed. Since regulation 19(2) of the Regulations cited hereinabove, 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 chairperson in the final verdict. This is the position of the law which has been stated a in a number of cases including; **Tubone Mwambeta v. Mbeva City Council. Civil Appeal No.287 of 2017 (Unreported). Ameir Mbarak and Azania Bank Corp Ltd v.Edger Kahwili. Civil Appeal No.154 of 2015 (Unreported), The General Manager Kiwengwa Stand Hotel v. Abdullah Said Musa. Civil Appeal No. 13 of 2012 (Unreported)** all quoted in **Edina Adam Kibona v.Absolom Swebe (Sheli), Civil Appeal No.286 of 2017 (Unreported)**, he contends.

The counsel concluded his submissions on this issues by insisting that since the trial chairperson did neither require the assessors to give their opinion in writing nor their opinion were read in the presence of the parties, therefore this honourable court should invoke its jurisdiction under the provision of section 43 (1)(b) and 43(2) of the Land Disputes Courts Act, [Cap 216 R.E 2019] to nullify the proceedings, judgment and decree of the trial tribunal and order a fresh retrial before another chairperson and with a set of new assessors.

Mr. Kambo, learned counsel for the respondent, in replying to the submissions by the appellant's counsel on assessors involvement at the trial tribunal argued that, the appellant instead of submitting on the 6 grounds of

his appeal, has prayed to introduce the 7th ground of appeal and went on to address this court on the same complaining on the existence of a irregularity that occurred at the trial tribunal. To him that practice is improper. The best way was for the appellant to apply for an amendment of the Memorandum of Appeal in order to introduce the said ground of appeal. After discrediting the procedure used in bring the issue in court, he opted to stay mute in its substantive worthiness.

Having heard the parties' submissions through their respective counsels regarding the proper involvement of tribunal assessors at the trial tribunal, I decided to go through the records to see whether what is being contended truly exists. Without doubts the contentions by the appellant's counsel are true. The tribunal assessors' participation in the decision of the trial tribunal is highly doubtful. From what is contained in the records at hand, one can say in clear cut words that the assessors were not at all involved in giving out their opinion before the delivery of the judgment by the trial tribunal. When going through the records of the trial tribunal, I found a written single page paper titled, "*MAOMBI NO. 178/2010, MAONI.*" The said document appears to have been signed by both assessors, meaning thereby, they have given a joint opinion, which in itself is not acceptable in law. With these defects, I find the trial tribunal's practice as far as the involvement of the assessors is concerned to have contravened the provisions of Regulation 19(2) of the Land Dispute Courts Act, G.N 174 of 2003 which requires every assessor to give his or her opinion and for quick reference I will reproduce the regulation as follows;-

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

Therefore, in my humble observation based on the above analysis, the assessors were either not involved at all in the decision of the trial tribunal owing to their absence on the date of judgment, or if were involved then not on the date of the delivery of the impugned judgment. Even if they were present but the law doesn't allow for joint opinion as per the above quoted regulation, see also {see **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No.286 of 2017 (Unreported)** and **Mhando Said (as a Legal Representative of the Estate of Said Kijayo) versus Yoakim Luselo, Land Appeal No. 136 of 2019, High Court Land Division at Dar Es Salaam, unreported**).

In the event, I nullify the proceedings, judgment and decree of the trial tribunal and remit back the case file to the trial tribunal for trial *de novo*, before a different chairperson and a new set of assessors.



**M. P. OPIYO,
JUDGE
8/9/2020**