**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPEAL NO.93 OF 2020**

(Arising from the District Land and Housing Tribunal for Mkuranga at Mkuranga in Land Appeal No.39 of 2019 dated 20th February, 2020, originating from Ward Tribunal for Mohoro in Land Case No.11 of 2019)

**UBAYA SALUMU MBONDE ..................................... APPELLANT**

**VERSUS**

**JUMA SAID MPUCHALI ........................................... RESPONDENT**

**JUDGMENT**

Date of Last order: 23.07.2021

Date of Judgment: 28.07.2021

**A.Z.MGEYEKWA, J**

This is a second appeal, it stems from the decision of the Ward Tribunal of Mohoro in Land Case No.11 of 2019 and arising from the District Land and Housing Tribunal for Mkuranga in Land Appeal No. 39 of 2019. The material background facts to the dispute are briefly as follows; Juma Said Mpuchali, the respondent in this appeal lodged a Land Case No.11 of 2019 at the Ward Tribunal for Mohoro to recover the family land which

was taken and developed by Ubaya Salumu Mbonde, the appellant. The respondent claimed that the suit land belongs to his later grandfather and he was the lawful owner, they cultivated the said land until 2018 when the respondent trespassed on it. He complained that his father used the suit land since 1970 peaceful.

On his side, the appellant also claimed that he was an administrator of the estate of her late father. He claimed that the Ward Tribunal denied to admit the letter of administration of her late father. The appellant stated that he inherited the suit land from her father though the original owner was her grandfather. The Ward Tribunal decide the matter in favour of the respondent.

Aggrieved, the respondent appealed to the District Land and Housing Tribunal for Mkuranga, at Mkuranga vide Land Appeal No.39 of 2019 where she complained that the trial tribunal faulted itself in relying on the evidence of the respondent. The decision of the District Land and Housing Tribunal upheld the decision of the trial Tribunal and maintained that the respondent is the lawful owner of the suit land. The first appeal irritated the appellant. She thus appealed to this court through Land Appeal No. 93 of 2020 on three grounds of grievance, namely:-

1. *That the Hon. Chairperson erred in law and fact for failure to put into consideration that neither Appellant nor Respondent tendered the letters of administration of estates at trial Tribunal while the evidence on records of prove that each one at the trial Ward Tribunal claimed that prior the suit property was owned by deceased which put their locus stand in question.*
2. *That the Hon. Chairperson erred in law and facts by holding that the trial Ward Tribunal considered the evidence from both side without evaluating the evidence on records of trial ward tribunal.*
3. *That the Hon. Chairperson erred in Law and facts for failure to put into consideration on the ground number by basing on weak reason which is according to the case conflicting with the duty of doing justice which is paramount essential of the tribunal required when determine the case.*

When the appeal was called for hearing on for hearing on 06th May, 2021, the appellant and the respondent appeared in person, unrepresented. By the court order, the appeal was argued by way of written submissions whereas, the appellant filed his submission in chief on 24th May, 2021 and the respondent Advocate filed his reply on 09th

June, 2021 and the appellant's Advocate filed a rejoinder on 17th June, 2021.

In his submission, on the first ground that the Chairperson erred in law and fact for failure to consider that neither the appellant nor respondent tendered the letters of administration of estate thus their *locus standi* is in question. The appellant contended that the trial tribunal faulted himself to consider that both parties had no letter of administration of the estate of the deceased. He went on to submit that the records of the trial tribunal and appellate tribunal reveal that both parties inherited the suit land from their late grandfather and father. To fortify his submission he referred this court to the trial tribunal judgment where the appellant complained that the appellant has invaded his family land and the respondent replied that his father occupied the suit land since 1970.

The appellant continued to argue that before the appellate tribunal he raised the same issue by the appellate tribunal did not consider instead it pronounced the judgment in favour of the respondent and argued that the letter of administration had nothing to do with the case. Insisting, the appellant complained that they have no lcous standi to sue on the land which was owned by the deceased without them being appointed to

administer the said suit land. He urged this court to consider this ground of appeal.

On the second ground, the appellant submitted that the Chairperson erred in law and facts by holding that the trial tribunal considered the evidence from both sides without evaluating the evidence on records. The appellant argued that the trial tribunal stated that the respondent's father started to cultivate the suit land in 1970 and the appellant's grandfather is alive while he passed away in 1973. He lamented that the trial tribunal reached such a decision without evaluating the evidence on record and did not state any reason for its decision. He urged this court to allow this ground and set aside the judgments of both tribunals.

With respect to the third ground, the appellant complained that the trial Chairperson wrongly based on the opinion of the assessors who did not give their opinion, and their opinion were not read before the parties. Fortifying his submission he referred this court to Regulation 19 (2) of the Disputes Court (The District Land and Housing Tribunal) Regulation, 2003 which requires the Chairperson to order the assessors to give their opinion while the requirement of ordering the assessors to give their evidence is paramount. He referred this court to the last paragraph of the judgment of

the appellate tribunal and argued that the weak reason that she concurred with the opinion of assessors while there is nowhere in the whole proceedings of the appellate tribunal where the Chairperson ordered the assessors to give their opinion and the Chairperson read over their opinion.

On the strength of the above argumentation, the appellant beckoned upon this court to allow the appeal entirely with costs.

Opposing the appeal, the respondent started by complaining that the appeal before this court is out of time. He stated that the appellant has filed the instant appeal on 06th October, 2020 while the appellate judgment was delivered on 20th February, 2020. He went on to state that the appellant ought to prefer an appeal before this court within sixty days from the date of the decision of the appellate tribunal. To buttress his submission he referred this court to section 38 (1) of the Land Disputes Court Act, Cap. 216 [R.E 2019] and the case of **Meishoori Loramatu v Saigurani Lormatu**, Misc. Land Appeal No. 16 of 2019 HC (unreported).

As to the second ground, the respondent argued that the appeal has no merit for the reason that the appellant preferred filed a suit at the trial tribunal in his own capacity, not as an administrator of the estate. He went

on to argue that it was upon the appellant to prove that she was an administrator of the estate but the records are silent whether the appellant applied and was granted the letter of administration of the estate of his late grandfather. To bolster his position he referred this court to section 110 (1) of the Evidence Act, Cap.6 [R.E 2019]. He added that the appellant did not tender the letter of administration of the estate in order to establish his *locus standi*, instead, he raised the issue at the appeal stage as a result the Chairperson rejected to admit the said letter of administration of the estate.

The respondent did not end there, he submitted that it is settled position of the law that a matter concerning the estate of the deceased can only be instituted in court by either the administrator who is dully appointed to administer the estate of the deceased person. To bolster his submission he cited section 100 of the Probate and Administration of the Estate Act, Cap. 353 [R.E 2019] and the case of Winfred Peter Milanzi v Regina Petro Mchopa, Misc. Land Appeal No.11 of 2019 HC (unreported). He complained that saying that both parties were required to tender the letter of administration does not hold water since it was upon the appellant to prove his allegations.

On the second ground, the respondent argued that the decision of both tribunals was based on evidence on record and the same revealed that the appellant failed to prove her case on the required standard. He went on to submit that the respondent's witnesses confirmed that the suit property belonged to the respondent and he acquired the same from his late father since 1970. He added that on the other side, the appellant failed to prove her case as per section 110 (1) and (2) of Evidence Act, Cap. 6 [R.E 2019].

With respect to the third ground, the respondent submitted that the appellate tribunal complied with Regulation 19 (2), the assessors Mkulia and Kihulla presented their opinion at the conclusion of the hearing and thereafter the appellate tribunal pronounced the judgment. He went on to state that the records reveal that on 12th February, 2020 the appellate tribunal ordered the assessors to record their opinion, and the same were read over to the parties. He urged this court to find that this ground is a demerit.

In conclusion, the respondent stated that the appeal lacks merit, he urged this court to dismiss the entire appeal with costs.

In a short rejoinder, the appellant reiterated that his submission in chief. He valiantly argued that the appeal is out of time. The appellant complained that the respondent wants to mislead this court since the appeal before this court is in accordance with section 38 of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. He added that the respondent has confused himself the date when he was summoned to appear in court was in October, 2020 and the summons did not show the date when the appeal was filed in this court.

I have considered the rival arguments by the parties to this appeal. Before I start to determine the grounds of appeal I would like to address the point of law raised by the respondent that the appeal before this court is out of time. I have perused the court records and without wasting the time of the court this point of law has no merit since the appeal before this court was filed within 60 days as required by the law.

The District Land and Housing Tribunal delivered the judgment on 27th February, 2020 and the appellant filed an appeal before this court on 16th April, 2020, approximately 49 days passed from the date when the judgment was delivered. Section 38 of the Land Disputes Courts Act, Cap.

216 [R.E 2019] requires that any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court. Therefore, counting the days the 60 days did not lapse. Therefore, the respondent's Advocate point of law is demerit.

Next for consideration is the grounds of appeal, I should state at the outset of my determination that, I concede with the appellant's third ground of appeal that the assessor did not give their opinion and the same was not read over to the parties. It is on record and as per the submission by the appellant, the Chairman did not record the opinion of assessors. Reading the handwritten proceeding of the District Land and Housing Tribunal for Mkuranga, specifically on the last page of the record, the Chairman recorded the submission of both parties, then, on 12th February, 2020 the Chairman set the judgment date and recorded that the assessor to record opinion. Thereafter on 20th February, 2020 the Chairman proceeded to pronounce the judgment.

As rightly submitted by the appellant that the Chairman in his judgment stated that he concurs with the opinion of the assessors and noted that

the assessors' opinions were not recorded. While the assessors' opinion were not featured in the appellate tribunal proceedings. The Court of Appeal of Tanzania in numerous cases stated that the assessors' opinion must be expressly indicated in the record. In the case of **Hamisa S. Mohsin v Taningra Contractor** Land Appeal No. 133 of 2009 where the Chairman did not indicate what opinioned, the judgment was null and void and in the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, 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".*

Equally, the Court of Appeal of Tanzania in the case of **Ameir Mbarak and Azania Bank Corp Ltd v Edgar Kahwili**, (supra) held 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 Page 4 of 6 or not such opinion has been considered by the Chairman in the final verdict."*

Applying the above authorities in the instant case, it is clear that the original record has not the opinion of assessors in writing which the chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in the view of the fact that the records do not show that the assessors were required to give them, I fail to understand how and at what stage the assessors' opinion found their way into the Tribunal's judgment.

Moreover, assessors' opinions cited by the Chairman in his judgment were not read in the presence of the parties before the judgment was composed, therefore, the same has no useful purpose. Under the circumstances, the judgment of the Tribunal is found to be improper. Inspired by the incisive decisions quoted above, applying the same in the instant appeal, it is evident that a fundamental irregularity was committed by the tribunal Chairman. Thus, there is no proper judgment before this Court for it to entertain in appeal. I shall not consider the remaining grounds of appeal as the same shall academic exercise. I shall not consider the remaining two grounds of appeal as the same shall be an academic exercise after the findings I have made herein.

Following the above findings and analysis, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 which vests revisional powers to this court and proceed to revise the proceedings of the District Land and Housing Tribunal for Temeke in Land Application No.119 of 2019 in the following manner:-

(i) The Decree and Order in Application No.39 of 2019 are hereby quashed.

(ii) I remit the case file to the District Land and Housing Tribunal for Mkuranga, the records remain intact, the Chairman to record the assessors' opinion and compose a new judgment.

(iii) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 28th July, 2021.

A.Z.MGEYEKWA

**JUDGE**

28.07.2021

Judgment delivered on 27th July, 2021 in the presence of both parties.

A.Z.MGEYEKWA

**JUDGE**

28.07.2021

Right of Appeal fully explained.