

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO.235 OF 2020

(Arising from the District Land and Housing Tribunal for
Kilombero/Ulanga in Land Application No.25 of 2011 dated 10th January,
2013)

ELYUDI MPAGAME APPELLANT

VERSUS

RASHIDI SEKI 1ST RESPONDENT

AMI H. SEKI 2ND RESPONDENT

JUDGMENT

Date of Last order: 29.11.2021

Date of Judgment: 03.12.2021

A.Z.MGEYEKWA, J

This is first appeal, it stems from the decision of the Land Application No.25 of 2011 of the District Land and Housing Tribunal for Kilombero/Ulanga decided the matter in favour of the respondents.

The material background facts to the dispute are not difficult to comprehend. They go thus: Elyudi Mpagame claimed that he occupied

20 acres located at Ihenga area Mofu Ward within Kilombero District. He claimed that the suit land was allocated to him by Mofu Village Council, thus, he developed the suit land by constructing a permanent house and planted banana, coconuts trees and cocoa. The appellant lodged a case before the District Land and Housing Tribunal for Kilombero claiming that the respondents trespassed his farm and destroyed some trees and crops. He seek for declaration orders that he is the lawful owner of the suit land, declaration that the respondents have trespassed the suit land thus he wanted the tribunal to restrain the respondents from trespassing the disputed land. The respondents in their written statement of defence denied the said allegations.

The District Land and Housing Tribunal for Kilombero determined the matter and found that the application is devoid of merit, the same was dismissed with costs.

Aggrieved, the appellant lodged the instant appeal before this court through Land Appeal No. 235 of 2020 on three grounds of grievance namely:-

- 1. The tribunal erred in law and fact in arriving at its decision by involving and or considering the opinion of the assessor who was not present at the hearing of the whole evidence in the application.*

2. That the tribunal was improperly constituted.

3. That the Honourable Chairman erred in law and fact in its decision for failure to properly evaluate the evidence adduced by the appellant during the trial.

When the appeal was called for hearing on for hearing on 22nd November, 2021, the appellant had the legal service of Mr. Pongolela David, learned counsel and the respondents enjoyed the legal service of Mr. Kusalika, learned counsel. The Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to save for the rejoinder which was an option.

In his submission, on the first and second grounds, Mr. Pongolela submitted that the main issue for determination is whether the tribunal was properly constituted. The learned counsel referred this court to section 23 (1) and (2) of the Land Disputes Courts Act, Cap.216 [R.E 2019] which provides that:-

1. The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.

2. The District Land and Housing Tribunal shall be dully constituted when held by a Chairman and two assessors who shall be required to give their opinion before the Chairman reaches the judgment.

The learned counsel for the appellant also referred this court to Regulation 19 (2) of the Land Dispute Courts (the District Land and Housing Tribunal) Regulation, 2003 which provides that

“ 3. Notwithstanding sub regulation (1) the Chairman shall before making his judgment require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.”

Mr. Pongolela continued to submit that the assessor who is to give opinion is the one who heard the whole evidence. The learned counsel went on to argue that the rationale of effective participation of assessors is to enable the assessors to give informed opinion regarding the matter before the court. To support his submission he cited the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported). He referred this court to the District Land and Housing Tribunal proceedings dated 16th November, 2012, the Chairman sat with two assessors; Mr. Badisa and Ms. Mhomera. He added that on the same date the tribunal framed issues

and conducted hearing and the parties closed their cases and the matter was set for judgment.

It was his further submission that the Chairman in his judgment particularly on page 2, paragraph 5 considered the opinion of two assessors, Mr. Otilia Mhomera and Mrs. Fatuma Shabani. It was his submission that Mrs. Fatuma Shaban did not participate in hearing the evidence of the parties but she was featured in the said judgment.

The learned counsel for the appellant cited the decision of the Court of Appeal of Tanzania in the case of **Ameir Mbaraka and Another v Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) the court quoted with approval the decision in the case of **Joseph Kabul v Reginam** [1954] EACA Vol. XX1-2. He complained that the trial is nullity for involving the opinion of assessor who was not present at the hearing. He further argued that the parties were prejudiced for improperly constituted tribunal. He lamented that the right to be heard is a fundamental and one of its aspect is to be heard by a properly constituted body, insisting, he contended that inviting an assessor who did not hear the whole evidence not only vitiated the trial but also affected the composition of the tribunal.

Mr. Pongolela did not end there, he contended that there is nowhere in the proceedings where one can trace the opinion of assessors neither the same given before the parties. He added that the opinion only was featured in the tribunal's judgment and no one knows how and when it was found their way in the judgment. To fortify his position he cited the case of **Ameir Mbaraka** (supra). Stressing, Mr. Pongolela contended that where the opinion of assessors is not recorded, it is a serious irregularity which vitiates the trial. Mr. Pongolela submitted that the Court of Appeal underscored the need to require every assessor to give an opinion and the same be featured on the record. To bolster his submission he cited the case of Edina Adam Kibona (supra).

Submitting on the third ground, that the Chairman erred in law and fact in its decision for failure to properly evaluate the evidence adduced by the appellant during the trial. He contended that on 16th November, 2012, the appellant testified to the effect that he obtained the disputed land from Mofu Village in 2000 and the land allocation committee allocated 20 acres to the appellant. It was his further submission that the appellant was taken care of the farm since 2000. He added that the appellant's evidence was corroborated by PW2 the Chairman of the street. Mr. Pongolela went on to submit that DW1 claimed that the land allocation committee allocated the suit land to him in 1995 without

tendering any documentary evidence and did not state reasons why they abandoned the suit land for more than 15 years until the same was allocated to other people. It was his further submission that the appellant's testimony on land ownership is sufficient to tilt the balance compared to the respondent

On the strength of the above submission, the appellant's Advocate beckoned upon this court to allow the appeal with costs.

In reply, the learned counsel for the respondent contended that the tribunal during hearing of the matter was constituted with assessors as required under section 23 (1) and (2) of the Land Dispute Act, Cap. 216 [R.E 2019]. He valiantly argued that the hearing was on 16th November, 2012, however, the judgment was not delivered after a year on 10th January, 2014. It was his view that the judgment was made on 10th January, 2013.

It was his further submission that the appellant failed to address the two grounds of appeal which extent the trial tribunal has erred on the opinion of assessors while the learned counsel for the appellant referred to the case of **Ameir Mbarata** (supra) of 2015 and the matter at hand was decided in 2012. It was his view that both assessors' opinions were material on the said case and the assessors noted that the matter was

before Mofu Ward Tribunal in Case No.20 of 2020 between the parties and the same land. It was his submission that the trial tribunal considered the opinion of assessors therefore the two grounds are demerit.

Submitting on the 3rd ground, Mr. Makanja was brief and straight to the point. He contended that according to the evidence adduced by the respondent on 16th November, 2012 the 2nd respondent (DW2) applied for 60 acres from Mofu village, the same was allocated to him and carried out agricultural activities. He went on to submit that in 2015, he employed the 1st respondent to work in the farm and in course of clearing the farm he noticed that the appellant has trespassed his farm and claimed that he was allocated the said land since 2000. He spiritedly argued that the appellant was allocated the suit land while the same was located to the 2nd respondent as per exhibit D1.

On the strength of the above argumentation the respondents' Advocate stated that the appeal is devoid of merit and should be dismissed with costs.

I have considered the rival arguments by the learned counsels to this appeal. I have opted to address the first and second grounds together because they are intertwined and the third ground will be argued separately. On the first ground, the appellants complained that the

assessors' opinions are not reflected in the judgment, and the Chairman in his judgment considered the opinion of Mr. Fatuma while Mrs. Fatuma was not among the assessors who sat with the Chairman during the hearing of the case.

It is a trite law that assessors' opinions must be reflected in the proceedings. 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** (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].

Likewise, 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 1 9(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." [Emphasis added].*

Applying the above authorities in the instant case, it is clear that the assessors' opinions are not reflected in the tribunal proceedings and the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. I fail to understand how and at what stage the assessors' opinion found their way into the tribunal's judgment. Therefore, I fully subscribe to the learned counsel for the appellant that failure to

record the assessors' opinion makes it difficult to understand 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. As long as the Chairman during the hearing sat with two assessors, they are the one who is supposed to give their opinion and not Mr. Fatuma who was not present when the hearing commenced and ended. It is my respectful finding that there is no proper judgment before this Court for it to entertain in appeal, therefore, 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 Kilombero/ Ulanga in Land Application No.25 of 2011 in the following manner:-

- (i) The Judgment, Decree and proceedings of the District Land and Housing Tribunal in Land Application No. 25 of 2011 are quashed.
- (ii) I remit the case file to the District Land and Housing Tribunal for Kilombero/ Ulanga to start afresh before another Chairman.
- (iii) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 30th July, 2021.


A.Z.MGEYEKWA
JUDGE
03.12.2021

Judgment delivered on 3rd December, 2021 in the presence of Mr. Pongolela David, learned counsel for the appellants' also holding brief for Mr. Kusalika, learned counsel for the respondent and in the absence of the 2nd respondent.


A.Z.MGEYEKWA
JUDGE
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- (i) The Judgment, Decree and proceedings of the District Land and Housing Tribunal in Land Application No. 25 of 2011 are quashed.
- (ii) I remit the case file to the District Land and Housing Tribunal for Kilombero/ Ulanga to start afresh before another Chairman.
- (iii) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 3rd December, 2021.




A.Z.MGEYEKWA

JUDGE

03.12.2021

Judgment delivered on 3rd December, 2021 in the presence of Mr. Pongolela David, learned counsel for the appellants' also holding brief for Mr. Kusalika, learned counsel for the respondent and in the absence of the 2nd respondent.




A.Z.MGEYEKWA

JUDGE

03.12.2021