

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

**LAND APPEAL NO. 163 OF 2021**

*(Originating from the District Land and Housing Tribunal for Ulanga at Mahenge, in  
Land Application No. 84/2017)*

**KIHOMA G. MGOHI ..... 1<sup>ST</sup> APPELLANT**

**ANGELINA G. MGOHI ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAID A. KINEMITE ..... RESPONDENT**

**JUDGMENT**

*Hearing date on: 12/08/2022*

*Judgment date on: 24/08/2022*

**NGWEMBE, J.**

The appellants in this matter were dissatisfied with the decision of the District Land and Housing Tribunal for Ulanga at Mahenge in Land Application No. 84 of 2017. Being so aggrieved, they rightly knocked the doors of this temple of justice

Briefly, the genesis of this land appeal, is when respondent sued the appellants jointly for trespass over 3¼ acres of land located at Golani Village within Ulanga district in Morogoro region. The respondent claimed to be a natural owner of the suit land founded in year 1980 by clearing a virgin land with his father Abdallah Kinemite. In the cause of



using his land, his father died in 2016 and he remained in full occupation of the suit land. Sometimes in year 2017 the appellants with no apparent cause and without any colour of justification, invaded the suit land. The appellants' case was simple, that the suit land belonged to their grandfather and their mother who used to cultivate it from year 1974. The said mother in her lifetime allocated the said land to the 2<sup>nd</sup> appellant who kept using it undisturbed until 2017 when the respondent trespassed therein.

In turn the chairperson of the tribunal after hearing both parties and their witnesses, proceeded to record assessors' opinions, which were concurrently in favour of the appellants. Despite the assessors' opinions, yet the chairperson departed from the assessors' opinion and proceeded to decide in favour of the respondent. Thus, an order for vacant possession and costs were issued against the appellants.

The appellants being dissatisfied with that decision, proceeded in this court with an invitation to nullify the trial tribunal's decision. They have advanced five (5) grievances against the judgement and decree of the trial tribunal namely:-

- 1) The trial chairman erred in law and fact on ground that opinions of wise assessors were neither recorded in the judgment nor read to the parties before judgment was delivered, the trial chairman did not disclose in his judgment whether he has considered the assessors' opinion or not and if not, why;
- 2) Despite the necessity to visit *locus in quo* based on the nature of the dispute before the trial tribunal, the tribunal did not do



- it so as to verify the suit land as evidenced from the applicant and respondents described two different pieces of land;
- 3) The trial chairman erred in law by awarding the applicant relief of ownership while that relief was not prayed for in the pleading;
  - 4) The trial chairman erred in law and fact by relying on hearsay evidence of the applicants' witnesses; and
  - 5) The trial chairman erred in law by failure to show on the findings of ownership how the applicant in the trial tribunal acquired the suit land.

The court record in this appeal shows that, the respondent was served with summons and requisite documents, but did not appear before this court. In other subsequent services the respondent refused to sign the summons, which was affected by Shashi Investment (Court Process Server), in the presence of Golani Hamlet Chairperson on 23<sup>rd</sup> April, 2022. Following consistent non-appearance of the respondent, on 03/08/2022 this court ordered the appeal be heard *ex parte* and by way of written submissions.

The appellants were represented by Ms. Sarah Kilambo Matembo, advocate under instruction of Mr. Mashaka Edgar Mfala learned advocate who filed his written submissions for the appellants. In so arguing those grounds of appeal, the learned advocate abandoned grounds 3 & 4, and proceeded to submit on grounds 1, 2 and 5.

On ground one, the learned advocate argued that, up to the date of delivery of the trial tribunal's judgment, parties were not informed of the assessors' opinion, and the chairman did not disclose if he has considered the opinion of assessors in his judgment or if he did not

consider them and the reasons attached therein. Justified this argument by referring this court to section 23 (2) of **the Land Disputes Courts Act, [Cap 216, RE 2019]** together with regulation 19 (2) of **the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN No. 174 of 2003**. Cited further the cases of **Adam Kibona Vs. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017 (unreported)** and **Sikuzani Saidi Magambo and Kirion Richard Vs. Mohamedi Noble, Civil Appeal No. 197 of 2018 (unreported)**. Reciting various observations in the decisions above, rested on this ground by insisting that there was a serious irregularity calling for this court to quash, set aside and nullify the tribunal's judgment.

In regard to the second ground, the appellants counsel hold that, parties at the trial tribunal were referring and describing different pieces of land. Thus, there was a dire need for the tribunal to visit *locus in quo*. Failure of the tribunal to visit *locus in quo*, left the real issue undetermined. He challenged the tribunal, though visiting *locus in quo* is not mandatory, under the circumstance of this case, the tribunal was obliged to visit *locus in quo*. This could help to ascertain the disputed pieces of land and verify the evidences adduced by the parties.

Buttressed by referring to the cases of **Joseph Muniko Mwita (suing under constituted special power of attorney by Mwita Makidya and Mrs Mwita Anthony Wambura) Vs. North Mara Gold Mine Ltd, Commercial case No. 09 of 2019** which referred the case of **Akosile Vs. Adeye [2011] 17 NWLR (PT.1276)**, wherein the court illustrated the rationale for visiting *locus in quo*.

Referred in pages 2 and 3 of the impugned judgment, by pointing that there was a confusion in size and boundaries of the disputed land.

Also, the parties described the suit land inconsistently going into detail of description. He insisted, there was ambiguity and confusion suggesting two different pieces of land, this necessitated the tribunal to solve it by visiting *locus in quo*, he added.

Facing the fifth ground, he challenged the chairman to have failed to show how the respondent acquired the suit land. He referred at page 6 of the judgment that the respondent did not establish how she acquired that suit land. Went further to justify his argument by referring this court to the case of **Salum Mateyo Vs. Mohamedi Mateyo [1987] TLR. 111** to insist the burden of proof in civil cases to the claimant, also referred to section 110 and 111 of **The Evidence Act, [Cap 6 RE. 2019]**. He rested the submission by praying that, this court be pleased to nullify the judgment and decree of the trial tribunal and award costs.

This being an appeal, I pay homage to the precious principle which require the first appellate court to be cautious in varying decisions of the trial court, unless there are strong justification. Equally important, I have considered the first ground which raises pure point of law, if properly established point on procedural irregularities. The second ground is a mixture of facts and law, while the last ground (5) is on facts alone. I will determine them seriatim when need arise after considering the first issue which is purely legal issue.

On the first ground, Mr. Mfala forcefully, argued that the trial tribunal committed serious irregularity. He pointed out that the proceedings did not show if assessors aired their opinions as required by law and same were considered by the chairman in composing the tribunal's judgement. To be able to determine this ground, I have



scanned the hand written proceedings and the trial tribunal's judgment. The file did not have any written opinion of assessors. Instead, on 14/01/2020 the chairman recorded what was purported to be assessors' opinion. I vote to quote the relevant part hereunder: -

"OPINIONS OF THE TRIBUNAL ASSESSORS

*1<sup>ST</sup> Assessor (Raymond A. Mgonja): The respondents have right to own the disputed land and the evidence adduced was clear. The lawful owners of the disputed land are the respondents. The applicant's application should be rejected.*

*Sgd (Chairman)*

*14/01/2020*

*2<sup>ND</sup> Assessor (Asma N. Masambe): The evidence adduced during the trial proves that the disputed land is the lawful property of the respondents. The application be rejected.*

*Sgd (Chairman)*

*14/01/2020"*

As the record does not tell, it is not clear if the above was the reading of assessors' opinion or the very recording of the same. It is not known where the chairman found that opinions. Whether the opinions were given orally or in writing, it remains to the chairman's secret. But this court cannot assume, opinion of assessors as it was held by the Court of Appeal in the case of **Alakara Nakudana Vs. Oningoi Orgumi, Civil Appeal No. 177 of 2019** in similar scenario held: -

*"We are constrained to hold that it would be unsafe to assume that the assessors gave their opinion to the parties before the Chairman reached the judgment"*



In similar vein the Court of Appeal held in the case of **Sebastian Kudike Vs. Mamlaka ya Maji Safi na Maji Taka, Civil Appeal No. 274 of 2018.**

The trial tribunal's judgement constitutes 10 pages comprising well-reasoned and fair analysis of the parties' evidence. Despite the aesthetic, assessors' opinions were missing. According to the law, assessors' opinion is one of the significant constituents of the District Land and Housing Tribunal's judgment. The chairperson did not even mention in his judgment as to whether the opinions of assessors were solicited, leave alone considering them.

The law is clear like a day light unencumbered by clouds, that assessor's opinion is mandatory as per sections 23 (1) (2) and 24 of **The Land Disputes Courts Act** quoted hereunder: -

**Section 23 (1)** *"The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.*

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

In this case, no doubt the tribunal was properly constituted as alluded earlier, two assessors were present throughout. But under the above provision, assessors' opinion is mandatory, so they must give out their opinion before the tribunal's judgment is composed. On the modality of giving their opinion, Regulation 19 (2) of **GN. No. 174 of 2003** provide as follows:-



*"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**"*

The legislature went further to guide the tribunal in section 24 as follows: -

**Section 24** *"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."*

From the above mandatory provisions of the law, the trial chairperson was required to observe the following; *first* - to ask for assessors' opinion before composing the tribunal's judgment; *second* - to make sure that the assessors air their opinion in writing and obviously in Kiswahili language; *third* - the said opinions must be read over in court and in the presence of parties; *fourth* - the tribunal's chairman in composing the tribunal's judgment have to state the opinion of each assessor, make his verdict whether he concurs or departs from the assessor's opinions; *fifth* - should the chairman depart from the assessors' opinion, he is bound to give reasons for that departure. I treat this to be an easy digest of the legal requirement under section 23 and 24 of Act, alongside with its regulations (**GN. No. 174 of 2003**).

The above is a legal position provided for by the statute and judgements of the Court of Appeal. There is a good number of decisions by the Court of Appeal including the cases of **Emmanuel Oshoseni Munuo Vs. Ndemaeli Rumishaeli Massawe, Civil Appeal No. 272 of 2018, Peter Makuri Vs. Michael Magwega, Civil Appeal No.**



**107 of 2019, Daudi Hagha Vs. Salum Ngezi and another, Civil Appeal No. 313 of 2017 and Edina Adam Kibona Vs. Absalom Swebe (supra)**, these are few cases among many. In **Peter Makuri's case**, the tribunal's record did not show if the Chairman received opinions from the assessors, also in his judgment he never referred to the assessors' opinion. At the end the Court observed: -

*"It is a mandatory legal requirement that in adjudicating land matters before the Tribunal, the Chairman sits with aid of assessors. The assessors sitting in are vested with mandate to participate by asking questions, giving opinion albeit in writing before the Chairman proceeds to compose a decision of the Tribunal. And all these must be reflected on record of proceedings. Besides, where the Chairman disagrees with the opinion of the assessors, he must record reasons. In the absence on record of the opinion of assessors, it is impossible to ascertain if they did give any opinion for consideration in composing the judgment of the Tribunal."*

In the same vein, the court went on to analyse procedural compliance by the tribunal as follows: -

*"In the present appeal, there is no doubt that the Chairman sat with two (2) assessors from the commencement of the hearing. However, the record is silent on the Chairman soliciting the assessors' opinion, causing them to be read out to parties and incorporating those opinions in his judgment as required by sections 23 (2), 24 of the Act and Regulation 19 (2) of the Regulation; and if he had any differing opinions to be reflected on the record"*

Having failed to follow the legal requirement as above, the tribunal committed a serious procedural irregularity. This ground of appeal has merit. Also due to its nature, there is no point in dealing with the remaining grounds, the remedy befitting the irregularity disposes the matter in total.

However, this court and the Court of Appeal have endeavoured now and then to give the simplest interpretations of the procedural provisions of the **Land Disputes Courts Act** along with the regulations. The precedents are flocking over the legal information sources, through both Online and physical access. It is disappointing to learn that the land tribunal chairpersons keep committing same irregularities. These irregularities vitiate the whole proceedings and necessarily attract nullification of proceedings, judgement and decree and end up with retrial orders. The government and parties incur loss and costs, leave alone resurrection and escalation of the disputes purported to have been resolved in land tribunals. This court finds that it would be fair to the community if chairpersons would avoid common procedural irregularities to the maximal rate possible.

It is also unfortunate that nullification and retrial in omission of this kind has been an inevitable remedy. It is not with joy that in all the above cited cases, the Court of Appeal nullified the proceedings, judgement and decree and ordered retrial.

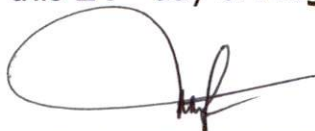
Inevitably I have to follow the same trend by invoking powers of this court under section 42 and 43 (1)(b) of the Act, to nullify the whole proceedings, judgement and decree of the trial tribunal, and proceed to order retrial of the whole matter before another chairperson and new set



of assessors. Considering that the matter was heard *ex parte* and appeal has been allowed on tribunal's error, no cost is awarded.

**I Accordingly Order.**

Dated at Morogoro this **24<sup>th</sup>** day of **August, 2022.**



**P. J. NGWEMBE**

**JUDGE**

**24/08/2022**

**Court:** This judgment is delivered in Chambers at Morogoro on this 24<sup>th</sup> day of August, 2022, **Before S.J. Kainda, DR** in the presence of Mr. Abdul Bwanga hold brief for Ms. Yustina Odilo Advocate, for all the appellants and in the absence of the respondent.

**Right to appeal Explained.**



**SGD: HON. S.J. KAINDA**

**DEPUTY REGISTRAR**

**24/08/2022**

I Certify that this is a true and correct copy of the original	
.....	<i>S.J. Kainda</i>
Deputy Registrar	<i>28/8/2022</i>
Date	.....at Morogoro