

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

**LAND APPEAL NO. 151 OF 2021**

(Arising from Kibaha District Land and Housing Tribunal in Land Application No. 60 of 2011)

**MRS.AUGUSTA GASPAR NDAALIO** (As an Administrator of  
the estate of GASPER NDAALIO).....**APPELLANT**

**VERSUS**

**YOHANA MURICHE**.....**1<sup>st</sup> RESPONDENT**  
**JACKSON MALONDA**.....**2<sup>ND</sup> RESPONDENT**  
**RAMADHANI O. NGALEBA**.....**3<sup>RD</sup> RESPONDENT**  
**LEA LAURENT**.....**4<sup>TH</sup> RESPONDENT**  
**HAMIS HUGO**.....**5<sup>TH</sup> RESPONDENT**  
**ADINANI ANIFA**.....**6<sup>TH</sup> RESPONDENT**  
**AUGUSTINO MDACHI**.....**7<sup>TH</sup> RESPONDENT**  
**BARNABA MWASYONGE**.....**8<sup>TH</sup> RESPONDENT**  
**RICHARD MMASI**.....**9<sup>TH</sup> RESPONDENT**

Date of Last Order: 31.08.2022  
Date of Judgment: 29.09.2022

**JUDGMENT**

**V.L. MAKANI, J**

The appellant AUGUSTA GASPAR NDAALIO is the administratrix of the estate of the late Gaspar Ndaalio. She is appealing against the decision of the Kibaha District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 60 of 2011 (Hon.Lung'wecha, Chairman).

At the Tribunal, the appellant prayed to be declared the legal owner of the land measuring 10 acres situated at Kidimu Village in Kibaha

District (the **suit land**). The application was partly in favour of the respondents who did not enter appearance though duly served and it was dismissed as against the appellant for want of merit. The appellant was aggrieved by the decision of the Tribunal and has preferred this appeal basing on nine grounds reproduced hereunder:

- 1. That, the honourable trial chairman, grossly erred in law and fact in not holding and finding that the oral testimonies of PW1, PW2, PW3, PW4, PW6 and PW7 and contents of letter of offer (Exhibit P3) did not establish that the disputed land was part and parcel of estate (shamba) of the late Gaspar Ndaalio.*
- 2. That, the honourable trial chairman grossly erred in law and facts for failure to apprehend the testimonies of PW6 and PW7 which revealed that the survey of the shamba which formed part \*of disputed land was yet to be completed as per survey law but the letter of offer was issued to the late Gaspar Ndaalio based only on demarcations.*
- 3. That on the totality of evidence on record tendered by the appellant the honourable trial chairman grossly erred in law and fact in not finding and holding that the appellant had proved his case against the above respondents on balance of probabilities standard.*
- 4. That the honourable trial chairman erred grossly in law and facts for failure to evaluate, examine and analyse the evidence tendered before the tribunal by the parties (PW1-PW7 and DW1-DW13) hence the chairman reached to the wrong conclusion.*
- 5. That, the honourable trial chairman erred in law and facts for failure to take in to account the site visit conducted by his successors which by itself revealed that the respondents had trespassed in the disputed land*

*which formed part and parcel of shamba owned by the late Gaspar Ndaalio.*

- 6. That, the honourable trial chairman erred in law and facts for failure to consider the testimonies of the appellant which proved how the disputed land as part of the shamba owned by the late Gaspar Ndaalio was acquired.*
- 7. That, the honourable trial chairman erred in law and facts for considering proceedings which had no reasons for reassignment from his successor chairman Jerome Njiwa, even in his judgment did not state anything regarding taking over of the case and /or reasons thereof.*
- 8. That, the honourable trial chairman erred in law and facts in failure to apprehend the appellants cause of action against the respondents as a result he departed to the yard stick of proof in civil cases which is based on evidence available and whether it tilts the balance.*
- 9. That, the honourable trial chairman erred in law and fact for failure to record the names of the assessors and their opinion in judgment the facts that creates irregularities in the proceedings.*

The appellant prayed for the decision of the Tribunal to be quashed and set aside and an order for the Tribunal to compose judgment based on the evidence presented. The appellant also prayed for costs of the appeal.

The appeal proceeded by way of written submissions. Mr. Cleophas Manyangu, Advocate, drew and filed submission on behalf of the

appellant; while Mr. Saiwelo Kumwenda (for the 8<sup>th</sup> respondent) and Edson Kilatu, Advocates (for the 1<sup>st</sup> to 7<sup>th</sup> and 9<sup>th</sup> respondents) drew and filed submissions in reply on behalf of the said respondents.

In his submission, Mr. Manyangu gave a brief background of the matter. He consolidated grounds 1, 2, 3, 4, 5 and 6 and argued them together. He said that the Chairman failed to analyse evidence tendered before him and reached a wrong decision. He said that ten acres pleaded is part of a *shamba* which was acquired by the appellant during operation "*Nguvu Kazi*". That the said *shamba* measured 49.58 hectares according to **Exhibit P3** or 123 acres. He said the Chairman was therefore wrong in demanding the appellant to produce different ownership documents to prove the ownership of ten acres. He said that even **PW1** testified that 10 acres form part and parcel of the shamba acquired by Gaspar Ndaalio during operation "*Nguvu Kazi*". That later on the land was surveyed basing on demarcations. He said **PW6** and **PW7** testified that the appellant was granted Letter of Offer by Kibaha District Council but the 1<sup>st</sup> to 12<sup>th</sup> respondents started to trespass the land in the year 2004 to 2006 and the 13<sup>th</sup> to 25<sup>th</sup> respondents started trespassing from 2009 to 2011 purporting to have been allocated the pieces of land by Kidimu

hamlet. That the site visit demonstrated that all respondents were inside the suit land. Mr. Manyangu said the appellant acquired the suit land prior to all the respondents. That the respondents' documents purported to show they were allocated the land between 2005 to 2011, almost 12 years since appellant was allocated. That Vikawe Village Chairman (**PW2**) stated that appellant was allocated the shamba way back in 1982 and sometimes in 1990 he requested for his land to be surveyed. He said **PW2** was Chairman of Vikawe between 1982 to 1987 and **PW4** was the official at Ministry of Livestock, and he testified that they knew the suit land to belong to the late Gaspar Ndaalio and when the Ministry wanted to survey the land the used Ndaalio's beacons as a starting point to survey the Mitamba Shamba owned by the Ministry. That Ndaalio was granted a Letter of Offer in respect of the shamba measuring 49.58 hectors or 123 acres vide a letter of offer with ref.No.KIB/1773 dated 22<sup>nd</sup> March 1993 (**Exhibit P3**). He said that according to the documents produced by respondents, it is not clear where Kidimu Village got the land for allocation in the years 2000's. That the Kitongoji/hamlet did not have powers to allocate the land according to the law. That according to **PW6** the Letter of Offer issued to Gaspar Ndaalio was

yet to be revoked hence no reallocation. He insisted that the appellant's evidence was thus heavier than that of respondents.

On the seventh ground of appeal, he said that the matter at hand was presided over by four chairpersons. It commenced with Hon. Mgulambwa, then Hon. Bigambo, Hon. Njiwa and finally Hon. Lung'wecha. The site visit was presided by Hon. Njiwa and Hon. Lung'wecha did not hear any witness, he only composed judgment. That the judgment was silent on the reasons for change of the presiding Chairmen. He referred to Order VIII rule 10 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) and in the case of **Joseph Wasonga Otieno vs. Assumpter Nshunju Mshama, Civil Appeal No.97 of 2016 (CAT-DSM)** (unreported) the Court of Appeal emphasized that once a case has been assigned to an individual judge or magistrate it has to continue before that particular judge or magistrate to its final conclusion unless there are good reasons for doing otherwise. He said Hon. Lung'weshwa did not assign any reasons for taking over the case in that respect the proceedings are tainted with irregularities resulting to miscarriage of justice.

On the eighth ground Mr. Manyangu said on 13/06/2011 the appellant instituted this matter against 20 respondents. That on 12<sup>th</sup> December 2011 the appellant amended the application by adding 5 respondents and the land claimed was ten acres. In that regard he said that the former application was not supposed to form part of pleadings of the Tribunal. However, he said that the Chairman in the judgment incorporated the former application by stating that the area in dispute is about 8 to 10 acres. He insisted that the Chairman greatly dealt with the former application which was amended.

On the ninth ground Mr. Manyangu said failure by the Chairman to record the names of the assessors and their opinion in the judgment vitiates the proceedings according to Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003 (the **Regulations**). He relied on the case of **Sikuzani Said Magambo and Kirioni Richard vs Mohamed Roble, Civil Appeal No.197 of 2018**. He prayed for the appeal to be allowed with costs or in alternative the matter be tried de novo.

In reply, Mr. Kilatu on behalf of the 1<sup>st</sup> to 7<sup>th</sup> and 9<sup>th</sup> respondents said that the land in dispute is not part of the estate of Gaspar Ndaalio.

That the land was the property of Pangani Ward. He said Kidimu hamlet was given power to allocate the land to the respondents, therefore the said respondents were not trespassers. That the disputed 10 acres is different from the 49.58 hectares. That respondents were allocated 10 acres sometimes between 2005 and 2011. He said the suit land is village land and therefore kidimu hamlet was given the mandate to allocate by Kidimu Village.

Regarding the opinion of assessors, he said that appellant is mixing things. That at page 7 and 2 he stated that the opinion was read on 23/02/2021 while at page 7 and 8 he stated that the opinion was not recorded at all. He said that the proceedings were succeeded by four chairmen. He said at page 4 and 5 of the judgment the Chairman stated that the opinion of assessors was read on 23/02/2021 and they were of opinion that the lawful owner is the one who owns the title after the area was surveyed and the Chairman differed with them. He insisted that the proceedings of the Tribunal were properly done in accordance with section 23 (3) of the Land Disputes Courts Act Cap 216 RE 2019. He said that the omission of writing the names of the assessors in the judgment is a minor mistake curable under section 45 of the Land Disputes Courts Act. He said further that re-



assignment of the case to four different chairmen is not a mischief which can occasion miscarriage of justice and therefore the ground is baseless.

In his reply on behalf of the 8<sup>th</sup> respondent Mr. Kumwenda submitted that the appellant in his amended application stated that he owns 49.58 acres which were surveyed and 10 acres which are un-surveyed. That the area in dispute is un-surveyed according to the appellants application. He said the appellant had a duty at the Tribunal to prove the ownership of both the surveyed 49.58 acres and the 10 un-surveyed acres. That he proved ownership of 49.58 surveyed acres by tendering a doubtful Letter of Offer and he failed to prove ownership of un-surveyed 10 acres. That appellant did not state the location of his 49.58 acres of land, and the Letter of Offer is generally talking about the farm within Vikawe Village but not specific location of the alleged farm. He said Vikawe is within Town Council which does not locate to a single person more than 3 acres of land. Therefore 49.58 acres is illegally allocated to the appellant. That second paragraph of appellants submission states that the suit land is at Kidimu but he has failed to prove as such. That the Letter of Offer talks about Vikawe. That the 8<sup>th</sup> respondent's ownership and

the rest of the respondents was confirmed by testimonies of the Village Chairman who was in force during those years. That all previous Village Chairmen refuted to have given the appellant 10 acres of land.

Mr. Kumwenda went on saying that the Chairman who composed the judgment is the one who also ordered the date of the assessor's opinion and final submissions. He said that the history of a judge, magistrate or chairman are not the factors to dispense justice, but the pleadings, hearings and final submissions are the good basis to administer justice. He said that the names of the assessors are indicated at every stage and were given their respect and were given specific date on 23/02/2021 to read over what they think and only the Chairman was being awaited therefore there was no need of writing and reading over their opinion again. Both Mr. Kilatu and Mr. Kumwenda prayed for the appeal to be dismissed with costs.

Mr. Manyangu did not file submissions in rejoinder.

The main issue for consideration is whether this appeal has merit. The grounds of appeal are divided into two. Firstly, the analysis of the

evidence by the Tribunal, and secondly, the procedural irregularities complained of by the appellant. I will start with the procedural aspect of the grounds of appeal.

I shall start with the 7<sup>th</sup> ground. To make the ground simple the appellant is arguing that the Chairman erred by not writing reasons of takeover of the matter from his successor Hon. Njiwa. The proceedings reveal that the matter at the Tribunal was presided over by Hon. Mgulambwa on 13/06/2016. Hon. J.M Bigambo took over on 21/02/2013 and stated reasons for the takeover that Hon. Mgulambwa had been transferred. On 03/08/2016 Mr. Njiwa took over and no reasons were assigned. The proceedings further show that on 13/08/2020 Lung'wecha took over the proceedings and he stated that he took over as the presiding Chairman because Hon. Njiwa retired. Therefore, in the entire proceedings, it is only Mr. Njiwa who did not assign any reasons for taking over from Hon. Bigambo. Indeed, the records of the Tribunal has to be clear especially when the file has been handled by several Chairpersons. However, in my considered view, the omission by one Chairman to give reasons for his take over did not prejudice the appellant in any way and it is dismissed.

The 9<sup>th</sup> ground is on the assessors that their names are not recorded in the judgment and this fact creates irregularities in the proceedings. The ground is not quite clear but from the submissions of Mr. Manyangu failure by the Chairman to record the names of the assessors and their opinion in the judgment vitiates the proceedings according to the law.

Section 23(2) and (3) of the Land Disputes Court Act governs the conduct of the assessors. The said section states:

*"23 (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.*

*(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence."*

This means there has to be two assessors from the commencement of the matter and if either of them fail to proceed for whatever reasons one can remain but if they both cannot proceed then the Chairman can continue alone. The provision does not make it a

requirement for the names of the assessors to be reflected in the judgment. However, looking at the judgment of the Tribunal it states that the opinion of the assessors was read over to the parties on 23/02/2021. Indeed, the proceedings also reveal that the opinion was read on the same date, but the coram of the very same date, does not show that on the date the assessors were present and the Chairman did not state the reasons of their absence as the law requires. The involvement of assessors by the Chairman (Hon. Lung'wecha) at the final stage of the proceedings was therefore unclear. The presumption as read from the judgment, and which is the normal practice, is that the opinion of the assessors was read out in the presence of the assessors. But according to the proceedings, as said above, none of the assessors were present on that date, or on 13/08/2020 when Hon. Lung'wecha took over and closed the defence case or even on the judgment date.

Apart from what is stated above, a thorough perusal of the proceedings also showed that indeed, the conduct of the assessors is questionable. Firstly, the assessors who commenced the proceedings are not the ones who gave their opinion. Secondly, the attendance of the assessors was not consistent. Sometimes they were present and

in other times they were absent. Thirdly, according to the proceedings the set of assessors differed from time to time. At times it the assessors were Ubwa and Kalandimya. In other times it was Millinga and Ubwa, then it was Mwesingo and Kalandimya and later Millinga and Kalandimya. The inconsistency meant that the assessors did not actively participate in the proceedings as required by the law because it the assessors were not always present in the proceedings. This was said in the case of **Mwambere vs.Mbeya City Council, Civil Appeal No.287 of 2017 (CAT-Mbeya)**(unreported) where it was stated that where the trial has to be conducted with the aid of assessors they must actively and effectively participate in the proceedings and give their opinion before the judgment is composed.

Now, what does the law provide when the involvement of the assessors is unclear? The Court of Appeal in the case of **B.R Shindika T/A Stella Secondary School vs. Kihonda Pitsa Makaroni Industries Ltd, Civil Appeal No.128 of 2017 (CAT-DSM)** (unreported) the Court inter alia stated that:

*"The consequences of unclear involvement of assessors in the trial renders such trial a nullity"*

Since the involvement of the assessors is unclear as per the requirements of section 23 (1) (2) of the Land Disputes Court Act, the proceedings of the Tribunal are therefore irregular and a nullity in terms of the case of **B.R Shindika T/A Stella Secondary School** (supra).

The grounds of irregularity in the proceedings disposes of the matter. In that respect I will not dwell with the other grounds of appeal.

In the result the appeal is allowed, the proceedings of the Tribunal are nullified, the judgment and decree of the Tribunal are quashed and set aside. I order the file to be remitted back to the Tribunal for re-trial before another Chairman. Considering that the irregularity was by the Tribunal, there shall be no order as to costs.

It is so ordered.



*V.L. Makani*

**V.L. MAKANI**  
**JUDGE**  
**29/09/2022**