

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

**LAND APPEAL NO. 272 OF 2021**

(Originating from Kinondoni District Land and Housing Tribunal in Land Application No.377 of 2016)

**EPPA MATHIAS MRITA.....1<sup>ST</sup> APPELLANT  
JOHN MATHIAS MRITTA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ANETH IBRAHIM MSUYA.....RESPONDENT**

Date of Last Order: 19.08.2022  
Date of Judgment: 26.09.2022

**JUDGMENT**

**V.L. MAKANI, J**

The appellants named above lost at Kinondoni District Land and Housing Tribunal (the **Tribunal**) in Land Application No.377 of 2016 (L.R. Rugarabamu, Chairman).

The respondent was the applicant at the Tribunal, and she was suing on behalf of MWANAIDI ABDIEL MSUYA who she claimed was the owner of the land with 331 square meters located at Manzese Darajani, Kinondoni Municipality within the City of Dar Es Salaam (the

**suit land**). It was claimed that Mwanaidi Abdiel Msuya inherited the suit land from her late father, and that later on the appellants herein trespassed into the suit land. The decision of the Tribunal was in favour of the respondent herein. Being dissatisfied with the said decision, the appellants have preferred this appeal with eleven grounds reproduced herein below:

- 1. That, the Tribunal erred in law and fact in evaluating evidence for failure to note that the respondent irregularly altered her original nature of claim instead claimed that the suit land belongs to the deceased and is administrator of the estate as per exhibit P1 hence occasioned a failure of justice.*
- 2. That the trial Tribunal erred in law and fact by holding that the suit land belongs to one Mwanaidi Abdul Msuya vide exhibit P2 (Leseni ya Makazi) issued on 8/2/2013 by Kinondoni Municipality without regarding on its validity and evidence of the respondent and his witnesses hence occasioned failure of justice.*
- 3. That the trial Tribunal erred in law and facts in holding that respondents land has been invaded without identifying who invaded the same between the two appellants hence reached in wrong decision that the appellants are trespassers and should demolish their structure.*
- 4. That the trial Tribunal erred in law and facts in holding that the respondent's land has been invaded by relying solely on the expert opinion report which was not properly produced and admitted in the course of hearing by the said expert witness hence vitiated the proceedings and occasioned miscarriage of justice.*

5. *That the trial Tribunal erred in law and facts in relying on expert report without regarding that the 2<sup>nd</sup> appellant was not involved on the boundary recovery exercise hence condemned the 2<sup>nd</sup> appellant unheard.*
6. *That the trial Tribunal erred in law and facts in relying on expert report and evidence of PW2 Abdallah Msumi in determining the size of the suit land hence reached in a wrong decision.*
7. *That the trial Tribunal erred in law and facts in evaluating evidence for failure to consider the sketch map and evidence taken during site visit which was conducted by the tribunal before commencement of the hearing on the size of the land purported to be trespassed.*
8. *That the trial Tribunal erred in law and facts in disregarding the ample and strong evidence showing that the suit land lawful belongs to the 2<sup>nd</sup> appellant.*
9. *That the trial Chairman who composed decision and his predecessor erred in law and on practise by not recording the reason and the manner of taking over the suit hence vitiated the proceedings.*
10. *That the trial Tribunal erred in law and facts for failure to record the opinion of assessors in the proceedings before scheduling the matter for judgment hence vitiated the proceedings.*
11. *That the Tribunal was improperly constituted in the trial and in the determination of this matter hence vitiated the proceedings and occasioned failure of justice.*

The appellants prayed for the appeal to be allowed and the decision of the Tribunal be set aside. The appellants also prayed to be declared the rightful owners of the suit land.

With leave of the court the appeal proceeded by way written submissions. Mr. R. Mrindoko, Advocate drew and filed submissions on behalf of the appellants, while Ms. Irene Nambuo, Advocate from the Legal and Human Rights Centre drew and filed submissions in reply on behalf of the respondent.

I have noted that the grounds of appeal basically revolve around the analysis of the evidence and the irregularity of the procedure at the Tribunal. As procedure warrants, the grounds on the irregularity of the procedure have to be tackled first and these are the ninth, tenth and eleventh grounds.

As for the ninth ground Mr. Mrindoko said that the proceedings of the Tribunal were irregular. That from the commencement of the proceedings the matter was presided over by four different chairpersons. However, there are no reasons assigned by the successor Chairpersons during the change. That the matter was ordered for a site visit on 14/9/2017 before Hon. Mlyambina and the site visits were conducted on 3/10/2017 and 1/3/2018 respectively. He said from 25/9/2018 Hon. Lung'wecha took over without recording

the reasons for taking over. He recorded the agreed issues and adjourned the matter to 9/4/2019 when the trial started. He said Hon. Lung'wecha recorded the evidence of PW1, PW2, PW3, DW1 and DW2.

Mr. Mrindoko said on 15/01/2021 Hon. L.R Rugarabamu took over without assigning reasons and scheduled the matter for assessor's opinion on 19/3/2021. Hon. Wambali then took over on 25/10/2021 and delivered the judgment. That the reasons for taking over were also not recorded and according to Mr. Mrindoko such conduct is contrary to the requirement of Order XVII Rule 10(1) of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) and the cases of **National Microfinance Bank vs Augustino Wasaka t/a Builder Paints & General Enterprises 310 (2007) TLS LR** and **Joseph Wasonga Otieno vs. Assumpter Nshunju Mshama, Civil Appeal No.97 of 2016 (CAT-DSM)**. He said failure to state reasons for taking over amounts to procedural irregularity which goes to the root of the matter and therefore this appeal originates from proceedings which are a nullity. She thus argued the court to quash the proceedings judgment and decree of the Tribunal.

On the tenth ground of appeal Mr. Mrindoko said that the proceedings do not show that assessors gave their opinion. He said the predecessor Chairman ordered the opinion of assessors to be read on 19/3/2021 but the record shows that opinion was read on 18/10/2021 in the absence of assessors who are alleged to have given the opinion. That the records do not indicate that the same opinion was recorded. That the opinion ought to have been recorded in the proceeding. That the proceedings were not in compliance with regulation 19 (2) of the Land Dispute (District Land and Housing Tribunal) Regulation GN. 174 of 2003. Mr. Mrindoko sought assistance from the case of **Tubone Mwambeta vs. Mbeya City Council, Civil Appeal No.287 of 2017** and the case of **Edina Adam Kibona vs. Absalom Swebe, Civil Appeal No.286 of 2017** (unreported)

On the eleventh ground Mr. Mrindoko submitted that the Tribunal visited *locus in quo* with only one assessor namely Prof. Kulaba. He said that is contrary to section 23 (3) of the Land Disputes Courts Act Cap 216 RE 2019. He said on 1/3/2018 the Chairman visited the *locus in quo* without assessors hence scheduled the matter for hearing. That on 21/1/2019 the Chairman framed issues without assessors and on 10/07/2019 the evidence was recorded without indicating the

presence of assessors. However, at the end they were seen asking questions. That the judgment was delivered on 25/10/2021 but the records do not show that the assessors were present. He said omission goes to the root of the trial and results to the failure of justice as there was no fair trial. He prayed for the appeal to be allowed with costs.

Replying on the issue related to the irregularities, Ms. Nambuo said during the change of the Chairpersons reasons were always assigned for the said change. She said the same is evidenced by the narration in the appellants' submission. That the appellants' submissions show that they were aware of the changes of the presiding chairpersons. That it was communicated to both parties and the Chairpersons took over in accordance with Order XVII Rule 10 of the CPC.

On the tenth ground, she said that it is evidenced that assessors gave their opinion as shown in the first paragraph of page 6 to the judgment of the Tribunal. Therefore, stating that the same was not read is trying to mislead this court.

On the eleventh ground, Ms. Nambuo said that appellants have been replicating arguments and fabricating facts. That one cannot be denied his rights by relying on technical issues. She relied on the case of **Markt. Co. Ltd vs A.A Sharrif (1980) TLR 61**. She said that appellants failed to prove their case on balance of probabilities. She prayed for the appeal to be dismissed with costs.

Mr. Mrindoko reiterated the contents of the main submissions as regards the grounds on irregularities.

The change of judicial officers including Tribunal Chairpersons is governed by Order XVII Rule 10(c) of the CPC which states:

*"Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."*

The provision above is clear that a successor judge or magistrate may take over and proceed to hear a matter to its conclusion where another judge or magistrate has been prevented to proceed on account of death, transfer or any other cause. This principle also



covers other judicial officers including Chairpersons at the Tribunal as was elaborated in the case of **M/S Flycatcher Safaris Limited vs. Hon. Minister for Land & Human Settlement Development & The Attorney General, Civil Appeal No. 142 of 2017** where the Court of Appeal stated:

*"In essence the law is well settled on succession of judicial officer. Successor judicial officers are empowered to deal with the evidence taken before another presiding judicial officer where the predecessor judicial officer is prevented from concluding the trial or suit by reason of death, transfer or other cause."*

The rationale behind Order XVIII Rule 10(c) of the CPC is well illustrated in the case of **Leticia Mwombeki vs. Faraja Safarali & Others, Civil Appeal No. 133 of 2019 (CAT-DSM)** (unreported) where the Court of Appeal stated:

*"The essence of the cited order is to ensure that trial commenced by the trial judge or magistrate is completed by the same presiding judicial officer and in case he/she is unable, it is incumbent on the successor judicial officer to assign reasons for the continuation of the trial of a partly heard case. The rationale behind is that the one who sees and hears the witness is better placed to assess the credibility of such witness which is crucial in the determination of the case before the court and furthermore, the integrity of judicial proceedings hinges on transparency without which justice may be comprised."*

Now what does the records in the Tribunal reflect? Indeed, the matter was presided over by four different Chairpersons and none of them assigned reasons for taking over from the other. The record shows that the matter started before Hon. R. Mbilinyi on 8/7/2016 and on 19/10/2016 Hon. Mlyambina Y.J (as he then was) took over. However, no reasons were assigned for the taking over. The records further depict that framing of issues were before Hon. Lung'wecha on 25/9/2019, but there are no reasons as to why Hon. Lung'wecha took over from Hon. Mlyambina. Likewise, Hon. Lung'wecha proceeded with hearing until 17/9/2019 when Hon. S.H. Wambali took over but no reasons are assigned for the taking over from Hon. Lung'wecha. The matter was scheduled for 25/11/2019 and on the said date Hon. Lung'wecha was on record again and still there are no reasons as to why the matter shifted once again to Hon. Lung'wecha. On 6/11/2020 Hon. L. R Rugarabamu appeared on the scene as the presiding Chairman and he on 18/10/2021 recorded that opinion of the assessors has been read to the parties. In the same trend, Hon. Rugarabamu did not state the reasons for taking over from Hon. Lung'wecha. The trend was culminated on 25/10/2021 when Hon. S.H. Wambali delivered the judgment of the Tribunal and once again,

no reasons were assigned as to how he came about to deliver the judgment instead of Hon. Rugarabamu.

In the case of **Joseph Wasonga Otieno** (supra) the Court of Appeal stated that:

*“On the account of the successor taking over the continuation of the trial without recording reasons as to why the case was before him, we find this in the present matter irregular and highly prejudicial as we noted in our previous decisions. Therefore, the proceedings by the successor Judge including the judgment and the decree cannot be salvaged”*

Similarly, in the present instance, since the record is very clear that there were different Chairpersons and none of them assigned reasons for the change, then the proceedings of the Tribunal are highly irregular, and by the wording in **Joseph Wasonga Otieno** (supra) the said proceedings, judgment and decree cannot be salvaged. In the circumstances, the proceedings herein are therefore vitiated, and the judgment and decree are quashed and set aside. This ground is thus meritorious.

On the issue of assessors' opinion, the same are on record. However, the coram is silent as to whether the assessors were present on 18/10/2021 when opinions were read over to the parties. Even on

25/10/2021 when judgment was delivered, the coram is also silent as to the presence of the assessors. This means the assessors were not present and this is contrary to section 23 (1) and (2) of the Land Disputes Courts Act Cap 216 RE 2019 which requires the assessors to sit throughout the proceedings with the Chairman and actively participated in the said proceedings. In other words, the fact that the assessors were not present means the Tribunal was not properly constituted and I hold as such. This ground too has merit.

Ms. Nambuo argued that these ground are mere technicalities which the court can do away with. However, it should be noted that the provisions of section 23(1) and (2) of the Land Disputes Courts Act are in mandatory terms and hence go to the root of the matter and cannot be simply ignored as was said in the case **Mondorosi Village Council & Others vs. Tanzania Breweries Limited & Others, Civil Appeal No. 66 of 2017 (CAT-Arusha)**(unreported).

Having established that the proceedings are irregular and hence vitiated, I shall therefore not discuss the remaining grounds of appeal which in essence emanates from the very same irregular proceedings.

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

It is so ordered.



*V.L. Makani*  
**V.L. MAKANI**  
**JUDGE**  
**26/09/2022**