

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

LAND APPEAL NO. 23 OF 2021
*(Originating from Kinondoni District Land and Housing Tribunal in
Land Application No.32 of 2020)*

FRANK AMIRICHE TAWALE.....APPELLANT

VERSUS

ADAM JOHN KENEDY.....1ST RESPONDENT

ANYUBATILE SANGA.....2ND RESPONDENT

Date of Last Order: 21.09.2022

Date of Ruling: 06.10.2022

JUDGMENT

KADILU, J.

The appellant lost the case at Kinondoni District Land and Housing Tribunal (**The Tribunal**) in Land application No.32 of 2020. Mjanja, Chairman). The applicant at the tribunal, herein the appellant alleged that he loaned to the 1st respondent Tsh 73,800,000/= to be repaid in two months period. However, he alleged that the period of two months lapsed and he reported the matter to Stakishari Police station whereby the 1st respondent was detained. The 2nd respondent allegedly, deposited his tile deed in respect of the house situated at Plot No.769, Block E, Sinza Dar es Salaam (**the suit house**) in consideration for the release of the 1st

respondent. The principal amount was still due and therefore the appellant approached the Tribunal for, among other orders, declaration by the tribunal to sell the suit house in order to realize the outstanding amount, compensation and costs thereto. The application was dismissed for lack of merit. Being dissatisfied by the decision, the appellant has preferred this appeal basing on four grounds hereunder reproduced:

- 1. That, tribunal erred in law and fact to decide in favour of respondents without taking in to consideration of tenable evidence and evaluation of the appellant strong evidence in support of the case.*
- 2. That the trial tribunal erred in law and fact to determine the case while the composition of the Tribunal is contrary to section 23 (2) and (3) of the Land Dispute Courts Act Cap 26 re 2019 (**Cap 216**).*
- 3. That the trial tribunal erred in law and facts to compose judgment without taking in to account assessors' opinion in the decision assenting or dissenting with their opinion.*
- 4. That the trial tribunal erred in law and facts to transfer a partly head case from assigned chairperson to the successor chairperson without recording the reasons for the same.*

The appellant prayed for the appeal to be allowed with costs. This appeal was argued by way of written submissions. Mr. Musa Mhagama, Advocate represented the applicant while the respondents enjoyed the services of Rehema Mgovano, Advocate.

On the first ground, Mr. Mhagama said that evidence of the appellant was based on PW1 and PW2 on how the money was given to the 1st respondent on cash and through bank account. That respondent never challenged the testimony. The same PW1 and PW2 testified on how the 2nd respondent surrendered certificate of occupancy to the appellant as security in due payment of the amount owed to 1st respondent. The same was not challenged by the respondents at the trial tribunal. He added that respondents did not bring key witnesses who witnessed the surrender of certificate of occupancy to the appellant.

He argued that the evidence by the appellant proves that he had strong case than that of respondents and that respondents did not prove their claim in terms of section 112 of the Evidence Act [Cap. 6 R.E. 2019]. The learned Counsel supported his argument further with the case of **Hemed Said vs Mohamed Mbilu (1984) TLR 113.**

Mr. Mhagama argued the 2nd and 3rd grounds together. He said that the law requires the proceedings at the tribunal to be with the aid of two assessors. That the proceedings at the tribunal were conducted with the aid of one assessor contrary to section 23 of the Land Disputes Courts Act. He termed it as a serious irregularity. Further, he submitted that the chairman allowed both assessors to give opinion without having heard the whole case. He sought assistance from the case of **Erica Chrisostom vs Chrisostom Fabian & Another**, Civil Appeal No.137 of 2020 (CAT-Bukoba).

On the 4th ground, the learned Counsel submitted that the trial at the tribunal commenced with Hon. Wambili Chairman, but later it continued with Hon. R. Mjanja, Chairperson who concluded the defence case and delivered the judgment. Reasons for the change of the presiding Chairpersons were not stated according to the law. He made reference to the case of **Mariam Samburo vs Masoud Mohamed Joshi**, Civil Appeal No.109 of 2015 (CAT) (unreported). He thus prayed for this court to allow the appeal with costs.

In reply, the counsel for the respondents said that the Counsel for the appellant observed that the evidence of PW1 and PW2 were enough to prove that the 1st respondent was given money through cash and bank.

She said that the fact that there were no proof by any agreement which would explain the mode of payment and the amount payable, exchequer receipt or bank statement was enough to rule out the said application. In surrendering a certificate of occupancy, neither the appellant nor the 1st respondent was involved in any way.

She stated that even the alleged agreement between the applicant and the 2nd respondent was illegal as it was not freely entered. The said agreement was procured in Stakishari Police station and therefore, the environment was not free. It was contrary to section 10 of the Law of Contract Act [Cap. 345 R.E. 2019]. The agreement (Exhibit P2) was thus invalid, she said. The Counsel for the respondents said that there was no evidence on how the amount of Tsh. 73,800,000/= was handed over to the 1st respondent. In all these, she said that the appellant at the tribunal did not prove their case.

On the 2nd ground, the Counsel said that the matter was firstly scheduled for hearing on 22/4/2020 and was adjourned due to the absence of one of the assessors. It was fixed for hearing on 11/6/2020 and on that date, both assessors were present. On 16/11/2021 hearing was adjourned due to absence of both assessors. On 8/2/2021 one of the assessors was bereaved and the hearing proceeded. Assessors were absent and the

matter kept on being adjourned until 6/9/2021 when the defence case was heard and closed.

She said that what was done was in accordance with the law. That the proceedings commenced with two assessors and opinion was given in presence of one assessor who was present at the commencement of the proceedings in accordance with section 23 (3) of Cap 216.

On the 3rd ground, she submitted that the tribunal spelt out how it considered assessors' opinions. This, she said, is vivid in page 7 of the judgment. The opinion was given by Prof. Kulaba who was present from the beginning and Mzee Liundi who took over during the defence, in that regard she distinguished the present case from the case of **Erica Chrisostom vs Chrisostom Fabian & Another**, (*supra*).

On the 4th ground, she submitted that after closure of the applicant's case, the matter fell on BRN sessions whereby it was assigned to another Chairperson, Hon. R. Mjanja. The change of Chairperson on BRN program is different from changing a partly heard case from one Judge to another. Under BRN, the aim is to clear backlog cases. He urged this Court to apply the principle of overriding objective in **Yakobo Magoiga Gichere vs Penina Yusufu**, Civil Appeal No.55 of 2017 (CAT-Mwanza) to decide this appeal. She prayed for the appeal to be dismissed with costs.

The appellant did not file any rejoinder. Having gone through the parties' submissions and the records of the case file, the main issue for consideration is whether this appeal has merit. To start with the 1st ground of appeal, the appellant claims that the Chairperson of the tribunal erred in law and fact to decide in favour of the respondents without taking in to consideration and evaluate the tenable evidence of the appellant. With respect, the record in the case file and judgment issued by the Chairperson do not support this assertion.

The Chairperson dealt with the case by raising two issues as indicated in page 2 of the judgment. Documentary and oral evidence of both sides were presented, admitted and analysed from page 3 to page 6 of the tribunal's judgment leading to the conclusion of each issue raised. As such, this ground of appeal has not been proved and it is hereby dismissed for lack of merit.

I will resolve the 2nd and 3rd grounds of appeal jointly as they both relate to the issue of assessors and their opinions. It is on record that the presence of assessors during the proceedings in the DLHT was in an intermittent manner. For example, on 11/6/2020 when the complainant's case opened, the record shows that there was no assessor who was

present. However, on 16/11/2021, the matter was adjourned for the reason that there were no assessors. On 8/2/2021 when the matter proceeded, one assessor attended, but the other was absent. The matter continued with one assessor. On 22/4/2021, both assessors were present, but on 6/9/2021 when the defence case started, only one assessor attended and the Chairperson made the following order:

"Shauri hili kuanza kusikilizwa leo upande wa utetezi akiwepo mjumbe mmoja."

Further, the coram is silent as to whether assessors were present or not on 16/11/2021 when the judgment was delivered. Notwithstanding, their opinions were read over to the parties and copies of opinion of each assessor were kept in the case file. It is a requirement of the law that DLHT cannot be properly constituted unless presided over by a Chairperson and not less than two assessors. Regulation 19 (1) and (2) of Land Disputes Courts Regulations, 2003 provides:

"The tribunal may, after receiving evidence and submissions... pronounce judgment on the spot or reserve the Judgment to be pronounced later... The chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give opinion in Kiswahiii."

Although the chairman is not bound with the assessors' opinion, he/she cannot opt-out the requirement of recording their opinions before composing the judgement. The departure from the assessors' opinion leads to another bounding requirement of giving sufficient reasons as stipulated under s. 24 of the Land Disputes Courts Act. It is not sufficient for the chairman to simply state that, the opinions of assessors were considered without writing them down in the proceedings. If such opinions do not feature in the proceedings, their acknowledgment in the judgment is not acceptable.

The Court of Appeal of Tanzania has decided so in different cases including the case of *Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble* Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported), in which the Court observed that:

"It is also on record that though, the opinions of the assessors were not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed."

Other cases are *Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili*, Civil Appeal No. 154 of 2015 (unreported), the land mark case of *Tubone Mwambeta v. Mbeya City Council*, Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported), *Edina Adam Kibona v. Absolom Swebe (Sheli)*, Civil appeal No. 286 of 2017, CAT at Mbeya (unreported); *General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa*, Civil Appeal No. 13 of 2012; *Y. S. Chawalla and Co. Ltd v. Abbas Teherali*, Civil Appeal No. 70 of 2017.

The fact that the coram is silent on the presence of assessors is fatal to the proceedings as it contravenes section 23 (1) and (2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] which requires the Tribunal in the proceedings to sit with a chairman and not less than two assessors.

The law also stipulates that assessors who participate in the proceedings should be required to give their opinions before the Chairman has decided the matter before him. The style of assessors' participation to the proceedings as demonstrated in this case is not as contemplated in the Act and is in contravention of the provisions of Cap. 216. This ground too has merit.

On change of presiding officers without stating the reasons, the record shows that the case was presided over by Hon. S. Wambili, Chairman up to when the appellant's case was closed. Thereafter, it proceeded under

another Chairperson named, Hon. R. Mjanja. On 6/9/2021 when the appellant case was closed, Hon. Wambili informed the parties that the matter will proceed under another chairperson by stating as follows:

"Shauri amepangiwa mheshimiwa R. Mjanja, Mwenyekiti kuendelea na usikilizaji kutoka leo."

The Hon. Chairman did not assign reasons for the re-assignment of the case to another Chairperson. However, on the same day when Hon. R. Mjanja took over, he informed the parties the reasons for reassignment of the case to him in the following words:

"Shauri hili limepangwa kwangu kwa ajili ya kulisikiliza katika mpango maalumu wa kumaliza mashauri ya muda mrefu."

Therefore, I agree with the Counsel for the Respondents that the reasons for reassignment of the case to another Chairperson was explained to be the clearance of backlog cases. As such, this ground of appeal is devoid of merit and it is hereby dismissed. Since the discussed grounds are both substantive and procedural, it infers that the whole decision was reached at, from irregular proceedings.

In view of the above, the appeal is allowed. The whole proceedings, judgment and decree of the tribunal are hereby quashed and set aside. I order the file to be returned to the Kinondoni District Land and Housing

Tribunal for retrial before another Chairperson. In the circumstances of this case, each party shall bear his own costs.

It is so ordered.



Kadilu

KADILU, M.J.,

JUDGE

6/10/2022

Judgement delivered on the 6th Day of October, 2022 in the presence of Mr. Mussa Mhagama, Advocate for the Appellant, and Mr. Michael Kayombo, Advocate holding brief for Rehema Mgovano, Advocate for the Respondent.



Kadilu

KADILU, M. J.

JUDGE

6/10/2022.