

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

LAND APPEAL NO. 219 OF 2021

*(Originating from Judgment and the Decree of District Land and Housing Tribunal for
Kibaha District at Kibaha by Honourable S. L. Mbuga, Chairperson dated 29th
September, 2021 in Application No. 200 of 2016)*

BASIL SANGA 1ST APPELLANT
BERNADINA SPIRIAN 2ND APPELLANT
FRANK NDABA 3RD APPELLANT
BALOZI NICHOLOUS LUWAVI 4TH APPELLANT
AMOS KUSUNGA 5TH APPELLANT
MERIDA MTANDA 6TH APPELLANT
SUZANA DANIEL 7TH APPELLANT
NICHOLOUS SHABANI 8TH APPELLANT

VERSUS

MENRAD KAHUMBA RESPONDENT

Date of last Order: 26/08/2022

Date of Judgment: 21/09/2022

JUDGMENT

I. ARUFANI, J

Being aggrieved by the decision of the District Land and Housing Tribunal for Kibaha (hereinafter referred as the tribunal) delivered by Honourable S. L. Mbuga, Chairperson dated 29th September, 2021 in Application No. 200 of 2016, the appellant filed the instant appeal in this court basing on the following grounds: -

- 1. That the Hon Chairperson seriously misdirected himself by not giving a credit to testimony of DW7 who testifies on oath that*

respondent's land vis-à-vis land occupied by appellants are two distinct and different parcels of land altogether.

- 2. That the Honourable Chairperson erred in law and in fact by usurping powers of witnesses by ordering visit of locus in quo instead of being adjudicator waiting to be moved by the parties and their witnesses.*
- 3. That the Honourable Chairperson misdirected himself for not making a finding that dimensions of the respondent land as stated in the pleadings /testimony tallies to the size of existing land as to bar respondent from unlawful enrichment into appellant adjoining land.*
- 4. That the Honourable Chairperson erred in law and in fact in ruling that the appellants were allocated abandoned land (Shamba Pori) while abandoned land did not form party of the respondent's 4.5 acres which was developed by them.*
- 5. That Honourable Chairperson erred in basing her decision on respondent's sale of land agreement which was silent on both lay out of 4.5 acres and boundaries demarcating the same.*

Hearing of this appeal proceeded by way of written submissions and the parties adhered to the scheduled order. While the appellants were represented by Mr. Joseph Assenga, learned advocate, the respondent enjoyed the legal service from Ms. Mary Brown, learned advocate.

Submitting in support of the appeal in already filed five grounds of appeal the counsel for the appellants added other two grounds of appeal which he said are touching jurisdiction of the court and are capable of

disposing of the appeal in its entirety. He referred the court to the case of **Tanzania China Friendship Textile Company Limited V. Our Lady of Usambara Sisters**, [2006] TLR 70 where it was stated that, issues of jurisdiction can be raised at any time and at any stage of a matter even on appeal. The grounds he stated he has discovered after perusing the file of the case are as summarized hereunder: -

(i) That the trial tribunal was not properly constituted and in indeed erred in law in delivering a decision basing on the opinion of a single assessor whose opinion was not read out to the parties and in some dates trial tribunal proceeded with hearing without any assessor being in attendance;

(ii) That in the course of trial at District Land and Housing Tribunal the appellant's right to be heard was infringed.

I will start with these new grounds of appeal which the counsel for the appellants stated are sufficient enough to dispose of the present appeal. If they will not manage to dispose of the appeal, I will revert to the former grounds of appeal filed in the court by the appellants.

In arguing the first new ground of appeal raised in the submission of the appellant the counsel for the appellants stated that, when the matter was ripe for hearing on 7th September, 2017 the chairman of the tribunal was being assisted by two assessors namely Ubwa Ramadhani and Justina Mhagama. He went on stating that, from 28th March, 2018

the tribunal's chairman proceeded to hear the matter in the presence of only one assessor namely Ubwa after retirement of Mhagama whose retirement was accepted by her employer.

He argued that, on 29th November, 2018 the chairman of the tribunal sat and proceeded with hearing of defence evidence in absence of any assessor. He stated it was recorded in the proceedings of the tribunal that Ubwa who was the only remaining assessor to continue with hearing of the matter was sick. He stated that, on 27th March, 2019 the tribunal proceeded with hearing of the matter without recording as to whether the assessor Ubwa was in attendance. He stated the similar anomalies occurred on 23rd May, 2019 and 08th April, 2021:

He argued that, the tribunal's chairman proceeded to hear the matter with Ubwa on 25th June, 2019, 1st October, 2020 and 25th February, 2021. He went on arguing that, on 1st June, 2021 when the tribunal visited the locus in quo it was not recorded anywhere in the proceedings of the tribunal if any assessor was in attendance. He submitted that, composition of the tribunal and manner of delivery of the opinion of the assessor is provided under section 23 of the Land Disputes Courts Act, Cap 216 R.E 2002.

He referred the court to the cases of **Tubone Mwambeta V. Mbeya City Council**, Civil Appeal No. 287 of 2017, **Anna Busuro V.**

Amari Mwita, Misc. Land Appeal No. 41 of 2019 and **Edina Adam Kibona V. Absolom Swebe**, Civil Appeal No. 286 of 2017 (All unreported) where composition of tribunal at hearing of a matter filed in a tribunal and the procedure of receiving opinion of assessors sat with chairman of a tribunal at a trial of a matter were discussed.

He also referred the court to the case of **Benedict Lubuva** (as an Administrator of estate of the late **Mohamed Lubuva**) **V. John Mwigune & 4 Others**, Misc. Land Application No. 27 of 2019 where the court stated that, the anomalies relating to violation of requirements provided under section 23 of the Land Disputes Courts Act and Regulation 19 (2) of the GN No. 174 of 2003 cannot be cured by overriding objective principle.

He submitted that, although proceedings of the tribunal shows that apart from the tribunal's chairman to proceed with hearing of the matter on the dates indicated the trial was conducted without presence of any assessor but the record shows before the tribunal's chairman composed judgment of the tribunal, he required the assessor Ubwa to read his opinion in the presence of the parties. He submitted that is a fatal irregularity which cannot be cured by principle of overriding objective. At the end he based on the above stated reason to nullify the proceedings

and set aside the judgment of the tribunal and order the matter to be tried de novo before another chairman and a new set of assessors.

He argued in relation to the second new ground of appeal that, hearing of the matter was conducted in violation of right to be heard. He argued that, the handwritten record of the proceedings of the tribunal is loud and clear that the tribunal proceeded with hearing of the matter on some of the dates in absence of some of the appellants who were respondents at the tribunal. He stated for instance, on 18th July, 2018 the tribunal proceeded with hearing of the matter in absence of the 4th, 6th and 8th respondents.

He stated on 23rd August, 2018 the tribunal resumed hearing of the matter in absence of the 1st, 4th, 5th and 8th respondents. On 11th October, 2018 the trial resumed in absence of the 1st, 2nd, 6th and 7th respondents and on 23rd May, 2019 hearing proceeded in absence of the 1st, 4th, 5th and 8th respondents. He submitted that, after hearing defence of the 7th respondent on 8th April 2021, the tribunal closed defence case and ordered inspection of the locus in quo to be conducted without hearing defence of 8th respondent.

He argued that, nowhere indicated in the proceedings of the tribunal that the respondent (who was applicant at the tribunal) having noted that 4th and 8th respondents is the one and the same person he never prayed

for withdrawal of the case against the 8th respondent or amend his application to remove the 8th respondent. He stated that shows it is undisputed fact that the 8th respondent was not heard in his capacity as respondent in the matter. He stated his duplicity as 4th and 8th respondents was caused by the respondent who sued him twice and did not bother to pray for either to withdraw the matter against the eighth respondent or to amend his application so as to remove or omit the name of the eighth respondent from the application.

He submitted that, the stated act of proceeding with hearing of the matter in absence of some of the respondents (who indeed were unrepresented) and not affording 8th respondent as a party to the matter a right to testify before the tribunal was fatal irregularity and infringement of right to be heard to the 8th respondent as enshrined under article 13 (6) of the Constitution of the United Republic of Tanzania, 1977 as amended. In fine he prayed the court to base on the above stated ground to nullify all proceedings, judgment and decree of the tribunal.

In response to the submission made by the counsel for the appellant in respect of the first new ground of appeal, the counsel for the respondent stated briefly that, the reason for the tribunal to continue with trial of the matter with one assessor was clearly stated at page 14 of the proceedings of the tribunal. She stated that was caused by the fact that

one of the assessors, namely Mhagama retired from serving as the assessor of the tribunal. She stated the tribunal proceeded with the trial of the matter with one assessor under section 23 (3) of the Land Disputes Courts Act and submitted the tribunal was properly constituted, hence the proceedings and judgment reached by the tribunal was proper in the eyes of the law.

She argued in relation to the second new ground of appeal that, the 4th and 8th respondents was one and the same person who testified as DW4. She argued that, 4th and 8th appellants refused or neglected to clarify his name and made it difficult for the respondent to have correct name of the 4th respondent and that caused the respondent to use both names to identify the said person.

She stated the issue of the 4th appellant to testify as the same person with 8th respondent was made clearly at page 7 of the judgment of the tribunal where it was stated, Nicolaus Shaban Luwavi was the 4th and 8th respondents in the matter which was before the tribunal. She submitted that the appellants were afforded right to be heard by the chairman of the tribunal and they were afforded right to tender their proof of ownership to the land and to call witnesses.

After considering the rival submissions from the counsel for the parties in relation to the two grounds of appeal raised in the matter by

the counsel for the appellants and after going through the record of the matter the court has found the issue to determine in this appeal is whether the raised new grounds of appeal deserve to be allowed to the extent of disposing of the present appeal.

The court has found in relation to the first new ground of appeal that, as rightly argued by the counsel for the appellants hearing of the instant matter when it was before the tribunal commenced by being heard by Hon. S. L. Mbuga, Chairman of the tribunal and he was assisted by Ubwa Ramadhani and Justina Mhagama, Assessors. After framing the issues to be tried in the matter and hearing the evidence of the respondent who was applicant in the matter and testified as PW1, Justina Mhagama retired from serving as assessor of the tribunal as her contract of service had expired.

The chairman of the tribunal stated so clearly in the proceedings of the tribunal of 28th May, 2018 that he would have continued to hear the matter with the remaining assessor Ubwa under section 23 (3) of the Land Disputes Courts Act, Cap 216 R.E 2002. The court has found subsection (1) of the mentioned provision of the law states that, the tribunal shall be composed of one Chairman and not less than two assessors.

Subsection (2) of the same provision of the law states that, the 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. However, subsection (3) of the same provision of the law states as follows: -

"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."

From the wording of the above quoted provision of the law it is crystal clear that chairman of a tribunal is allowed to proceed with hearing and conclude hearing and determination of a matter in absence of one or both members of the tribunal who were present at the commencement of the proceedings of the matter notwithstanding their absence. It is the basis of what is provided in the above quoted provision of the law the Chairman of the tribunal stated he would have continued with hearing of the matter under section 23 (3) of the Land Disputes Act notwithstanding the fact that one of the members of the tribunal namely Mhagama had retired from serving as a member of the tribunal.

The argument raised by the counsel for the appellants in the first new ground of appeal is that, although the Chairman of the tribunal continued to hear the matter with the remaining assessor namely Ubwa

but the Chairman of the tribunal continued with hearing of the matter even on the dates when the remained assessor was not present in the tribunal and at the end of hearing of the matter the said assessor was required to give his opinion which he was required to read in the presence of the parties and thereafter the Chairman of the tribunal delivered the decision of the tribunal.

The court has gone through the proceedings of the tribunal and find that, although it is true that the proceedings of the tribunal does not show in the coram of the dates mentioned by the counsel for the appellants that the remained assessor was present in the tribunal but it is not true that the said assessor was not present in the tribunal on the all dates mentioned by the counsel for the appellants. The court has found the dates when the said assessor was not present in the tribunal was on 29th November, 2018 when it was stated the said assessor was sick and on 1st June, 2021 when the tribunal visited the locus in quo.

The court has found the said assessor was present in the tribunal because the proceedings of the tribunal shows that although he was not recorded at the coram of the mentioned dates that he was present but he was given chance to ask questions of clarification from the witnesses testified before the tribunal and he asked questions to some witnesses. That makes the court be of the view that, if he was not present in the

tribunal it would have not been indicated in the proceedings of the tribunal that he was given chance to ask questions from the witnesses testified before the tribunal.

Notwithstanding the stated position of the matter but the court has found the question to determine here is whether it was proper for the Chairman to proceed with hearing of the matter in absence of the assessor who was supposed to be present and at the end of hearing of the matter required him to give his opinion as to what would have been the decision of the matter which he did not participate fully in its hearing. The court has been of the view that the answer to the stated question is definitely required to be in negative.

The court has arrived to the above stated view after seeing that, the position of the law as stated in the case of **Ameir Mbarak & Another V. Edgar Kahwili**, [2016] TLR 53 is that, an assessor who is absent on some days of hearing of the matter cannot make an informed and rational opinion. It was also held in the case of **Khamis Mahmoud Khamis V. Shamte Yusuph Shamte & Others**, [2020] TLR 453 that, assessor cannot be said to have been fully involved in the trial if part of the evidence relevant to the trial is not to his knowledge. Just to borrow the words of my learned brother Lugakingira, J (as he then was) in the case of **Mariam Ally Ponda V. Kherry Kissinger Hassan**, [1983] TLR 223,

an assessor who has absented himself from part of the trial cannot afterwards be permitted to participate in the determination of the proceedings.

As stated in the case of **Ameir Mbarak** (supra), consequences of failure to involve assessor who was required to give his opinion throughout the hearing of the matter renders the trial a nullity. Since the assessor who participated in the hearing of the matter was absent on some part of the trial and he was invited to make his opinion about what would have been the decision of the matter it caused the decision arrived by the tribunal to be nothing but a nullity. It is because of the above stated reasons the court has found the first ground of appeal raised in the submission of the counsel for the appellants is meritorious and deserve to be allowed.

Coming to the second ground of appeal raised in the submission of the counsel for the appellants the court has found it is true as rightly argued by the counsel for the appellants that, hearing of the matter continued in absence of some of the appellants on some of the dates when the hearing of the matter was conducted. The court has found the proceedings of the tribunal shows on 18th July, 2018 the 4th, 6th and 8th respondents were absent but the tribunal continued to hear the evidence of PW3.

The court has also found on 23rd August, 2018 hearing of the evidence of DW1 continued in absence of the 1st, 4th, 5th and 8th respondents. The record of the tribunal shows further that, on 11th October, 2018 the evidence of DW2 was heard in absence of the 1st, 2nd, 6th and 7th respondents and on 23rd May, 2019 hearing of the matter proceeded in absence of the 1st, 4th, 5th and 8th respondents. To the view of this court and as rightly argued by the counsel for the appellants the tribunal erred in continuing to hear the matter in the absence of the appellants on the dates indicated hereinabove.

The court has come to the stated view after seeing that, as hearing of the matter in some of the dates continued in absence of some of the appellants while there was no order to proceed ex parte against them then the appellants were not properly accorded right of hearing of their matter on the dates when the matter was heard in their absence. It is the view of this court that, right of a party to a suit to hear evidence adduced by other parties to a matter or any witness testified in the matter which is a party before a court or quasi-judicial bodies is one of an individual's rights protected by principle of natural justice.

The stated right as rightly argued by the counsel for the appellants is well protected by Article 13 (6) (a) of our Constitution of the United of Tanzania of 1977 as amended from time to time. To the view of this court

the right provided under the cited Article of our Constitution includes right of a party to hear the evidence adduced by other parties and all witnesses testified in a matter which is a party. It is the view of this court that, the said right can only be taken away by following the required procedures like that of allowing the matter to proceed ex parte against a party who is absent in a matter and not otherwise. Contrary to that, the proceedings conducted without observing the stated fundamental right of a party to a matter will be in danger of being declared null and void.

The court has also found that, as rightly argued by the counsel for the appellants after hearing defence of the 7th respondent on 8th April 2021, the tribunal closed defence case and fixed the matter to proceed with visiting the locus in quo without hearing defence of the 8th respondent. The court has found that, although it true that it was stated in the judgment of the tribunal that the 4th and 8th respondents were one and the same person but as rightly argued by the counsel for the appellant, after knowing the said parties were one and the same person the applicant was required to amend his application to remove one of the names of the said person from his pleadings.

The court has considered the argument by the counsel for the respondent that the said person neglected or refused to give his correct name and that caused the applicant to sue him by using both names but

find that was not proper. The court has come to the stated finding after seeing the common practice where a person is found is using more than one name and it is not known he can be sued in which name the said person is normally sued as one party with all the names in alternatives. To the view of this court and as stated by the counsel for the appellants it was not proper to continue suing the 4th and 8th appellant as different parties while they were one and the same person.

It is because of the above stated reasons the court has found the second ground of appeal raised in the submission of the counsel for the appellants has managed to establish the appellants were not properly accorded right of hearing of their matter and the stated irregularity affected the propriety of the proceedings of the tribunal. The finding made by the court as demonstrated hereinabove caused the court to come to the settled view that, the grounds of appeal raised in the submission of the counsel for the appellants are sufficient enough to dispose of the present appeal and there is no need of going to the grounds of appeal raised in the memorandum of appeal filed in this court by the appellant.

Consequently, the appeal of the appellant is hereby allowed, the proceedings of the tribunal is quashed and the judgment of the tribunal and its decree are accordingly set aside. The court is ordering the matter to be tried de novo before another chairman of competent jurisdiction and

new assessors. As the irregularities caused the court to arrive to the stated finding was caused by the tribunal the court is ordering each party to bear his own costs. It is so ordered.

Dated at Dar es Salaam this 21st day of September, 2022



I. Arufani

I. Arufani

JUDGE

21/09/2022

Court:

Judgment delivered today 21st day of September, 2022 in the presence of Mr. Joseph Assenga, learned advocate for the appellants and in the presence of Ms. Mary Brown, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

I. Arufani

JUDGE

21/09/2022