

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

LAND APPEAL NO. 92 OF 2021

(Arising from Kibaha District Land & Housing Tribunal in Land Appeal No. 96 of 2018;
Originating from Kongowe Ward Tribunal at Kibaha in Case No. 17 of 2018)

SAID SHABANI NGUBI..... APPELLANT

VERSUS

REHEMA SAID KUGA.....1ST RESPONDENT
FATUMA SAID KUGA.....2ND RESPONDENT
JUMA SAID KUGA.....3RD RESPONDENT

Date of Last Order: 05.09.2022
Date of Judgment: 03.10.2022

JUDGMENT

V.L. MAKANI, J.

This is a second appeal. The appellant SAID SHABANI NGUBI lost in Kongowe Ward Tribunal (the **Ward Tribunal**) and again at Kibaha District Land and Housing Tribunal (the **District Tribunal**) in Land Appeal No. 96 of 2018 (Hon. S.L. Mbuga, Chairperson).

By way of an amended Petition of Appeal the appellant filed this appeal based on seven grounds of appeal. But Mr. Nassoro, Advocate representing the appellant abandoned three grounds (the first, sixth and seventh grounds) and argued the remaining four grounds which are reproduced hereinbelow:

1. *That the Hon. Chairman of the District Land and Housing Tribunal erred in law in making the decision without making an order the wise assessors who gave their opinions, to give out their opinion.*
2. *Hon. Chairman of the District Land and Housing Tribunal erred in law in making the decision, without considering the opinion of the assessors who opined that the decision and proceedings of the Ward Tribunal quashed and set aside and the suit be re-tried de novo (sic!).*
3. *Hon. Chairman of the District Land and Housing Tribunal erred in law in delivering the decision without first reading the opinion of the assessors to the parties before deliver of the decision.*
4. *Hon. Chairman of the District Land and Housing Tribunal erred in law to uphold the decision of the Ward Tribunal which heard the matter while was not properly constituted and the proceedings do not show the Coram of the members of the Tribunal sat to adjudicate on the matter.*

The appeal was argued orally. As said above, Mr. Nassoro represented the appellant and the respondents appeared in person.

Arguing the second ground (which is now the first), Mr. Nassoro said that it is the procedure of the law that in the District Tribunal when hearing cases, the Chairman is supposed to sit with at least two assessors. This is according to section 23(1) of the Land Disputes Court Act CAP 216 RE 2019. He said in the present case, the Chairman

sat with two assessors namely, Happiness Kihampa and J.R. Mhagama but after hearing the matter the Chairperson did not direct the assessors to give their opinion as per the Regulation 19(2) of the District Courts Regulations GN 174 of 2003 (the **Regulations**). He said the Chairperson therefore erred for not directing the assessors to give their opinion and this vitiates the proceedings of the District Tribunal.

As for the third ground, Mr. Nassoro said the judgement of the District Tribunal at page 3 states that the Chairperson agrees with the opinion of the assessors that the appeal had no merit. He said this finding does not correspond with what is on the record. He said though there were no directions for the assessors to give their opinion, but the said opinions are on record. He said the assessor Happiness Kihampa wrote in her opinion of 13/11/2018 that the decision of the Ward Tribunal be quashed and the matter be re-tried and Shabani Ngugi be joined; and assessor Mhagama in his opinion of 07/11/2018 said the proceedings of the Ward Tribunal are a nullity and they be quashed and the matter at the Ward Tribunal start afresh. Mr. Nassoro said the argument by the Chairperson that she agreed with

the assessors had no merit and was not the truth as it did not comply with section 24 of the Land Disputes Courts Act.

As for the fourth ground, Mr. Nassoro said judgment was delivered before the opinion of the assessors was read out to the parties. He said several cases including the case of **Edina Adam Kibona vs. Abslom Swebe Shelly, Civil Appeal No. 286 of 2017 (CAT-Mbeya)** (unreported) the Court of Appeal gave directives that the opinion of the assessors has to be read out to the parties before the delivery of the judgment. He believed that if the opinion of the assessors were read out the Chairperson would have been reminded of what the assessors had said and the decision would have been different.

As for the fifth ground, Mr. Nassoro said according to section 11 of the Land Disputes Courts Act, the quorum of the Ward Tribunal has to be less than 4 or more than 8 members and three should be women. He said the quorum of the Ward Tribunal was 4 members and only 1 member was a woman. He said even if the grounds argued are irrelevant but still going to the merit of the decision of the Ward Tribunal it was wrong to sustain its decision as it was not properly

constituted. He said in the Ward Tribunal the matter was heard on 18/04/2018 but the proceedings do not show the quorum. This omission makes it difficult for the appellate courts to know and decide if the Ward Tribunal was properly constituted. He said the number of the members were stated in the judgment but not in the proceedings. For these reasons, Mr. Nassoro prayed for the court to quash and set aside the judgments, decrees and proceedings of the Tribunals and whoever thinks its necessary shall file a fresh suit. He prayed for the appeal to be allowed with costs.

The respondents did not have any useful response. They adopted their Reply to the Petition of Appeal and emphasised that the matter should not start afresh as it is costly.

I have listened to Counsel and the respondents herein, the main issue for consideration is whether this appeal has merit. The grounds of appeal revolve around the procedural irregularities and mainly on the issue of assessors and coram by the District and Ward Tribunals.

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."

From the above provision it is a requirement that there has to be two assessors from the commencement of the matter and if either of them fails to proceed for whatever reasons one can remain but if they both cannot proceed then the Chairman can continue alone. Accordingly, Regulation 19(1) and (2) of the Regulations states as follows that:

19(1) The Tribunal may, after receiving evidence and submissions under regulation 14 pronounce judgment on the spot or reserve the judgment to be pronounced later. Provided that the judgement of the Tribunal shall not be reserved under any circumstances for a period exceeding three months from the date of the conclusion of such proceedings.

(2) Notwithstanding sub regulation (1) 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 his opinion in Kiswahili."

I have gone through the records of the District Tribunal, and they are all silent on the issue of assessors. From when the proceedings started on 31/07/2018 until 20/12/2018 when judgment was read out to the parties, there is no record that the assessors were present, and this is contrary to Section 23(2) and (3) of the Land Disputes Court Act. In the case of **Tubone Mwambeta vs. Mbeya City Council, Civil Appeal No.287 of 2017 (CAT-Mbeya)** (unreported) 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 (see also **Edina Adam Kibona** (supra)). In the present case since the assessors were not recorded as present during the proceedings it means they did not actively participate in the proceedings, and this is contrary to the law resulting to nullity of the proceedings.

The judgment mentions two assessors Kihampa and Mhagama and their opinions are written and on record. But their names are not recorded in the proceedings as being present, so it is questionable as to where they got the mandate to give/write the opinions. Failure to record the assessors in the proceedings, but at the same time having their opinions on record raises eyebrows as it is not clear how the

opinions found their way in the record while the presence of the assessors does not feature in the proceedings. And further, the fact that the Chairperson refers the opinion in the judgment makes the proceedings more uncertain and this is a fatal omission. 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 stated that:

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

Similarly, the unclear proceedings result to unclear involvement of the assessors rendering the said proceedings a nullity.

Another irregularity pointed out by Mr. Nassoro was that the opinion of the assessors was not read out to the parties before the delivery of the judgment. The Court of Appeal in the case of **Edina Adam Kibona** (supra) stated:

"We wish to recap at this stage that in trial before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19(2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. The opinion must be in the record and must be read to the parties before the judgment is composed."

Indeed, the record is also silent on the reading out of the opinion by the Chairperson before the delivery of the judgment and according to Regulation 19(2) of the Regulations and cemented by the Court of Appeal in the case of **Edina Adam Kibona** (supra) the irregularity is fatal and vitiates the proceedings.

The last issue that was raised by Mr. Nassoro was the issue of quorum at the Ward Tribunal. This ground cannot stand because this issue is raised for the first time in this appeal. At the District Tribunal it was not raised and was therefore not addressed. In view thereof, the matter cannot be raised and entertained in this second appeal while it was not heard and determined at the District Tribunal. (See the case of **Sadick Marwa Kisase vs. Republic, Criminal Appeal No. 83 of 2012 (CAT)** (unreported) and the case of **Hotel Travertine & 2 Others vs. National Bank of Commerce Limited [2006] TLR 133**).

With the cumulative irregularities which are apparent on the record, 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 irregularities are by the Tribunal, there shall be no order as to costs.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
03/10/2022