

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

**MISC. LAND APPEAL NO. 98 OF 2021**

**(Arising from Appeal No.91 of 2020 at the District Land and Housing  
Tribunal for Ilala District and Application No. 41/2020 at Kimanga Ward  
Tribunal.)**

**ALLOYCE KESSY ..... APPELLANT**

**VERSUS**

**ASTERIA FRANCIS MDOE ..... RESPONDENT**

**JUDGMENT**

*21/04/2022 & 24/05/2022*

**A. MSAFIRI, J**

This appeal originates from Kimanga Ward Tribunal, the Dispute No. AR 41 of 2020. The said dispute was a land dispute between the appellant and the respondent over a boundary which divide their houses/plots. The appellant and the respondent are neighbours and have been in boundary dispute since 2011 and there have been previously disputes No. 46/2011 and No. 63/2011 before the same Ward Tribunal.

In the Dispute No. AR 41 of 2020 which is the origin of this appeal, the complainant was Asteria Francis Mdoe who is now the respondent while Alloyce Kessy who is now the appellant was then the respondent. *Alle*

Before the Ward Tribunal, the complainant was claiming that the respondent has trespassed into part of her land and built a toilet and a wall. That in the previous disputes, the Ward Tribunal has ordered for the said toilet and wall to be demolished but the respondent had rebuilt them contravening the Ward Tribunal's order. After hearing, the Ward Tribunal decided in favour of the complainant and ordered the respondent to demolish the structures built on the complainant's land and in addition, to pay compensation to the complainant.

Aggrieved, the then respondent Aloyce Kessy filed the first appeal to the District Land and Housing Tribunal for Ilala (District Tribunal). Hearing of appeal was by way of written submissions, and as per the Court record's both parties filed their written submissions accordingly. Then the District Tribunal after determination of the appeal, decided the same in favour of the respondent Asteria Francis Mdoe. The appellant was again dissatisfied and filed the appeal at hand, advancing six grounds of appeal.

The appeal was argued orally whereby both parties were legally represented. On the appellant's side, there was advocate Frank Ntuta, while on the respondent side, appeared advocate Eliezer Kileo.

Having heard the submissions from the parties, I was set to determine the appeal. However, while composing the judgment on appeal, I observed a procedural irregularity in the proceedings of the Appellate District Tribunal which to my view, goes to the substance of decision of the appellate Tribunal and may prejudice the rights of the parties to the matter.

*A. K.*

Hence, I summoned the counsels for the parties and task them to address the Court on the irregularity. The procedural irregularity observed is that; the proceedings of the appellate District Tribunal are silent on the presence of the assessors. This is seen clearly from the proceedings of the District Tribunal from 04/12/2020 when the parties appeared for the first time before the District Tribunal to 04/6/2021 when the judgment was delivered. However, since the appeal was heard by written submissions, I did not see this as anomaly at first.

But on 31/03/2021, the records shows that the Chairperson recorded that there was no assessors opinion. The matter was set for judgment on 23/4/2021. Again, on the same date, the Chairperson recorded that there was no assessors' opinion. The matter was again set for judgment on 04/05/2021. On 04/06/2021, again it was recorded that "Washauri hawajatoa maoni". The matter was set for 15/6/2021 and on that date, the judgment was delivered in the presence of Mr. Ntuta for the appellant who was also holding brief of Mr. Kileo for the respondent.

The records are silent on whether the assessors' opinion were delivered, and when they were delivered. As observed earlier, the quorum of the appellate Tribunal has never revealed the presence of assessors. Surprisingly, in the impugned judgment, at page two, it is shown that two assessors namely Mzee Mwakalasya and Bi Jokha gave their opinions in writings which was read before the parties on 14/06/2021. The Chairperson went on to decide on the appeal, by agreeing with the assessors opinion that the Ward Tribunal was right in its decision and upheld its judgment. *Aelle.*

However, in the proceedings as per the Court record, there is no quorum of 14/06/2021 which the appellate Tribunal Chairperson claims it was the date when the opinion of the assessors were read over to the parties. There is a quorum of 15/6/2021 when the judgment was delivered.

Furthermore, I have observed that there are two written opinions attached in the Court file. It seems the two written documents were supposedly written by the assessors and are both signed on 10/6/2021. However, as already said, the proceedings does not reveal when these opinions were read over to the parties and whether these assessors were party of the composition of the appellate Tribunal.

As I said earlier, having observed these irregularities apparent on the face of record, on 12/5/2022 I asked the counsels for the parties to address the Court on the same and the consequences thereof.

Mr. Ntuta for the applicant started his submission by citing section 34 of the Land Disputes Court Act, Cap 216 which provides that the District Tribunal sitting in appellate jurisdiction, shall sit with not more than two assessors. He said that, contrary to the said provision, the appellate District Tribunal never sat with assessors during the hearing of this appeal as the first bite.

He added that, it is mandatory that the opinion of assessors should be read over to the parties before the delivery of judgment. That the fact that this was not done, it vitiates the whole proceedings and nullifies the judgment. *Aelle.*

In his reply, Mr. Kileo for the respondent submitted that there are four facts which are not disputed in this matter; (i) that, the appeal was argued by way of written submissions; (ii) the assessors gave their opinion according to the written submissions from both parties; (iii) the Chairperson in his judgment, based his decision on the assessors' opinion; and (iv) the assessors' opinion are in the court records.

Mr. Kileo argued that the proceedings are silent on the presence of assessors for the reasons that they could not attend physically in Court while they were supposed to submit their opinions subject to the written submissions.

On the point that the opinion must be read over to the parties in Court, the counsel submitted that this is a small irregularity which is not fatal as it is not based on law as the counsel for the appellant did not cite any law which provides for that. He stated further that in any way the Chairperson is not bound to align with the decision or opinion of the assessors. He prayed for this appeal to be dismissed with costs.

Mr. Ntuta reiterated his submission in chief and added that, the proceedings of the appellate District Tribunal are silent on the presence of the assessors even before the order of written submission was issued. He argued that, the fact that the assessors' opinion were only seen in the judgment while the proceedings are silent on them, raises doubt as to whether there was indeed the assessor's opinion. *Add.*

Having heard the submissions from both parties represented by their advocates, the issue here is whether there is glaring errors on the face of record which vitiates the proceedings as put by the advocate for the appellant.

It is obvious that the proceedings of the appellate Tribunal are silent on the physical presence of assessors. The advocate for the respondent pointed that, this was because the appeal was heard by way of written submissions. However, I agree with the advocate for the appellant that even before the order of the Tribunal on the written submission was issued, the records shows that the assessors have never been physically present as part of the quorum of the appellate Tribunal. Therefore, it is not known when the assessors received the written submissions from parties and then assisted the Chairman as per the requirement of section 34(1) of the Land Disputes Courts Act.

With due respect, I also differ with Mr. Kileo's submission that, the fact that the assessors' opinion was not read before the parties is a small irregularity and is not based on law. As I have observed, the proceedings of the appellate Tribunal shows that the assessors' opinion was not read over to parties. However, in the Tribunal's judgment, the Hon. Chairperson at page 2, stated that the assessors' opinion one Mzee Mwakalasya and Bi. Jokha were read over to the parties on 14/6/2021.

There is no record of proceedings on this, instead the proceedings shows that the assessors' opinion were never read to the parties. *Adls.*

It is true that it is not disputed that the written opinion of the assessors are in the records. They are signed by assessors on 10/6/2021. However, as observed herein above, the records are silent on when and where did the assessors' gave their opinion. Is this omission a small irregularity as put by Mr. Kileo? With due respect to Mr. Kileo, I find this omission a glaring irregularity.

Although the appeal was heard by written submission still the Hon. Chairperson was required to comply with the provisions of Section 23(2) of the Land Disputes Courts Act which provides thus;

*Section 23(2):*

*"The District Land and Housing Tribunal shall be dully constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment".*

Also section 34 requires the District Tribunal to sit with not less than two assessors when hearing an appeal. As it is the requirement of the law, the non-compliance cannot be termed as "small irregularity" as put by Mr. Kileo.

In the case of **Ameir Mbarak and Azania Bank Corp. Ltd vs. Edgar Kahundi**, Civil Appeal No. 154 of 2015, in similar circumstances where the Court of Appeal noted that the records of the proceedings did not show if the assessors were accorded the opportunity to give their opinion, but the Chairperson only made reference to them in his judgment; it held that; *Aelle.*

*"..... in our considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgment".*

In the case of Edina Adam Kibona vs. Absolom Sebe (Sheli), Civil Appeal No. 286 of 2017, CAT, Mbeya Registry (Unreported), the Court of Appeal held that the assessors' opinion must be given in the presence of parties. It was observed that;

***"..... we are aware that the original record has the opinion of assessors in writing .... However, the record does not show how the opinion found its way in the court record".***

The Court then concluded thus;

*....the Chairman must require every assessor present to give his opinion. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before judgment is composed".*

In the present matter, although the District Tribunal sat as the first appellate court, the law makes it mandatory to sit with the assessors. The duty of the assessors is to assist the Chairperson although the Chairperson is not bound by their opinion.

With this glaring omission which in fact is a total failure to comply with the requirements of the law, it means the whole proceedings and the resulting judgment were a nullity. *Adle.*



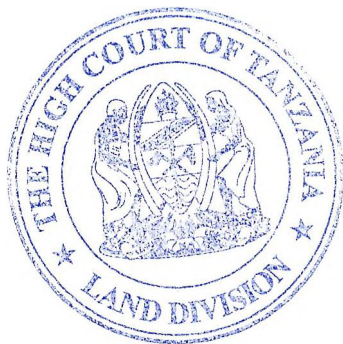
On the obvious errors apparent on the face of record, I have no option but to hold that the appellate District Land and Housing Tribunal failed to observe the mandatory provisions of the Land Disputes Act. Conspicuously, the omission is fatal and vitiates the proceedings.

Consequently, I hereby quash the proceedings and set aside the judgment and decree of Appeal No. 91 of 2020 before the District and Housing Tribunal of Ilala at Ilala. I remit the case file back to the District Tribunal for the appeal to be reheard as per the requirements of the law. Appeal allowed to that extent only.

Each party to bear their own costs of this appeal.

Order accordingly. Right of further appeal explained.

Dated at Dar es Salaam this 24<sup>th</sup> day of May, 2022.



A handwritten signature in blue ink, appearing to read "A. Msafiri". The signature is written over a horizontal line.

**A. MSAFIRI**  
**JUDGE**