

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

**LAND APPEAL NO. 81 OF 2020**

*(From the Decision of the District Land and Housing Tribunal of Ilala District at  
Mwalimu House in Land Case No. 269 of 2007)*

**JOYCE MAGASHI.....APPELLANT**

**VERSUS**

**ISRAEL MUSSA MCHUMA.....1<sup>ST</sup> RESPONDENT**  
**ZAKARIA BITARIAN MWITA.....2<sup>ND</sup> RESPONDENT**  
**NMB TEMEKE BRANCH.....3<sup>RD</sup> RESPONDENT**  
**YONO AUCTION MART.....4<sup>TH</sup> RESPONDENT**  
**NURDIN HAMIS BARUTI.....5<sup>TH</sup> RESPONDENT**

**J U D G M E N T**

*Date of Last Order: 29. 07.2022*  
*Date of Judgment: 11.08.2022*

**T. N. MWENEGOHA, J.**

Joyce Magashi, the appellant herein above, filed the case before Ilala District Land and Housing Tribunal, herein the trial tribunal. She was challenging the auctioning of her house, done by the 4<sup>th</sup> respondent, Yono Auction Mart, acting under the instructions of NMB Bank, Temeke Branch, 3<sup>rd</sup> respondent. The facts show that, the 1<sup>st</sup> respondent guaranteed a loan given to the 2<sup>nd</sup> respondent by the 3<sup>rd</sup> respondent. The suit property was used as security for such loan. The 3<sup>rd</sup> respondent on the other hand insisted that, the loan agreement was secured by the suit property and the 2<sup>nd</sup> respondent defaulted to pay the as agreed hence the auction of

the property in question. The case was heard and determined against the appellant, hence this appeal, with the following grounds; -

- 1. That, the trial Chairperson erred in law and procedure by her failure to consider the Appellant's request for judgment on admission by the 2<sup>nd</sup> respondent.**
- 2. That, the trial Chairperson erred in law and facts by failure to consider the evidence adduced by the appellant.**
- 3. That, the trial Chairperson erred in law and procedure by delivering the judgment without availing the parties the chance to hear the opinion of assessors.**
- 4. That, the trial Chairman erred in law and was biased by deciding that, the application lacks merit as no proof of allegations and dismissed it without costs**
- 5. That, the conduct of this application was unprocedural and being tainted with irregularities and illegalities.**

The appeal was disposed by written submissions, Advocate Cleophas Manyangu appeared for the appellant, while the 1<sup>st</sup> respondent was represented by Advocate Mangiteni Marwa. The 3<sup>rd</sup> respondent on the other hand, enjoyed the Legal services from Maleta and Ndumbaro Advocates. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents did not file their written submissions; hence the appeal was heard *ex parte* against them.

In my determination of the appeal at hand, I prefer to start with the 3<sup>rd</sup> ground of appeal, where the appellant faulted the trial tribunal for delivering the judgment without availing the parties the chance to hear the opinion of assessors. It was the argument of Mr. Manyangu that, there is no record in the judgment showing that the assessors gave their opinion

in the presence of the parties. That, the impugned decision did not even mention the names of assessors. In general, the records do not reflect the opinion of assessors. Hence the decision of the trial tribunal is illegal for being given without their opinions. This is contrary to Regulation 19(2) of the District Land and Housing tribunal Regulations, of 2003. He cited among others, the cases of **Kasanfa Shaban vs. Kassanga Hassan Kassanga & Another, Land Appeal No. 2 of 2018 (unreported)**. This fact was supported by the Advocate Marwa for the 1<sup>st</sup> respondent in his reply submissions. He insisted that, the decision of the trial tribunal is tainted with illegalities for not containing the opinion of assessors, their names and gender.

On the other hand, the counsel for the 3<sup>rd</sup> respondent in his reply submissions contended that, hearing of the case started in 2007 and the judgment was delivered in 2021. At the time of delivery of the said judgment, the assessors who heard the case were not present. That is the reason why their opinions were not recorded. That, the law does not remedy this lacuna and the same does not allow a replacement of assessors when their contract expires.

To resolve the issue at hand, I will dwell on Regulation 19(2) of the District Land and Housing tribunal Regulations GN No. 174/2002, which says as follows;-

*"Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili".*

I went through the case file of the trial tribunal to find if the assessors gave their opinion as required in the above quoted provision. The records show that, the impugned decision was delivered on the 20<sup>th</sup> of April 2021. The assessors present on that material date were one Madumba and somebody Faunisa. However, the said records do not show if the opinions of the said assessors were given in that particular day.

I went on to peruse the case file from the trial tribunal. Upon further perusal of the said file, I came across two separate documents. Both titled "**MAONI**". One document written by Rukia Faunisa, dated 19<sup>th</sup> of April 2021 containing the opinion so called with regard to the case before the tribunal. The second document dated 13<sup>th</sup> April 2021 also containing the opinion so called but the writer is unknown, only his or her signature is available on the said document. Unfortunately, both documents are not reflected in the proceedings, only in the judgment at page 13 where the trial tribunal appears to concur with his wise assessors.

However, looking at the two named documents which are taken to be the opinion of the assessors, the same were given days before the decision and not in the presence of the parties. As I have stated here in above, the 1<sup>st</sup> document is dated 19<sup>th</sup> April, 2021, a day before the judgment came out, while the 2<sup>nd</sup> one is dated the 13<sup>th</sup> of April, 2021, 7 days before the delivery of the impugned decision. These facts prove the allegations by the appellant that the decision was delivered in absence of the assessors, or the same was delivered without the opinion of assessors being read to the parties. This is contrary to the provisions of **Regulation 19 (2) (supra)**. The same was well elaborated by the Court of Appeal of Tanzania in the case of **Edna Adam Kibona vs. Absalom Swebe**

**(Sheli), Civil Appeal No. 286 of 2017, Court of Appeal of Tanzania at Mbeya, (unreported), that:-**

*"Assessors must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed..... since Regulation 19(2) of regulations required every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion has been considered by the chairman in the final verdict".*

The court of Appeal in the same case went further to observe in the same case that; -

*"For avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing tribunal purports to refer them in his judgment. However, in view of the fact that he records do not show that the assessors were required to give them, we fail to understand how and what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose".*

In line with this decision, I find the 3<sup>rd</sup> ground of appeal to have merit and allow it accordingly. The irregularity so pointed out in that ground of

appeal is fatal and makes the whole judgment and orders of the trial tribunal null and void.

For the purpose of serving time and energy I will not proceed to discuss other grounds of Appeal as the findings on the 3<sup>rd</sup> ground of Appeal are enough to dispose off the entire appeal to its finality. I therefore, see no need to discuss the remaining grounds of appeal (1<sup>st</sup>,2<sup>nd</sup>,4<sup>th</sup> and 5<sup>th</sup> grounds).

For the reasons I have given herein above, under Section 43 (1) (b) and 45 of the Land Disputes Courts Act, Cap 216 R.E 2016, I nullify the proceedings and judgment of the District Land and Housing Tribunal of Kinondoni and hereby order a trial denovo before another Chairman and a new set of assessors be commenced. Each party to bear his or her own costs.



  
**T. N. MWENEGOHA**

**JUDGE**

**11/08/2022**