

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL CASE NO. 39 OF 2023**

***(Arising from Application No.458/2020 of District Land and  
Housing Tribunal for Kinondoni at Mwananyamala)***

**JOHANNES LAURENT MKAMI ..... APPELLANT**

**VERSUS**

**SILVERSTER HARRY LEKULE ..... RESPONDENT**

**JUDGMENT**

*08<sup>th</sup> June 2023 & 21<sup>st</sup> July 2023*

**L. HEMED, J.**

The parties to this matter are close neighbours residing at Ubungo Kisiwani, within Ubungo Municipality in Dar es Salaam. The Appellant one **Johannes Laurent Mkami** owns an unsurveyed piece of land registered under residential licence No. KND/UBG/UKS 27/29KND & 006959. The Respondent one **Silvester Harry Lekule** is the proprietor of the plot of land known as KND/UBG/UKS 227/ & KND 006969.

Before the District Land and Housing Tribunal for Kinondoni at Mwananyamala, the appellant had sued the respondent herein *vide*

Application No.458/2020 alleging trespass. On her party, the respondent disputed the claims and alleged the suit piece of land to belong to her. Hon. R. Mwakibuja, the Chairperson of the Tribunal who presided over the matter having deliberated over the matter found the claims baseless and eventually dismissed them with no orders as to costs. The Appellant was dissatisfied by the said decision of the tribunal hence this appeal on the following grounds: -

*"1. That, the Trial Tribunal erred in law and fact by failing to scrutiny, analyse and evaluate the evidence on record and thereby reached to erroneous decision.*

*2. That the Trial Tribunal site visit made on 15/8/2022 in this matter was done contrary to the procedure hence occasioned a failure of justice.*

*3. That the Trial Tribunal was irregularly constituted in hearing and determination of this matter hence vitiated the proceeding and occasioned miscarriage of justice."*

The appellant prays for this court to allow the appeal by quashing the proceedings of the Tribunal and nullify the judgement and decree and costs of this appeal.

The matter was argued by way of written submissions. **Mr. Rajabu Mrindoko**, learned advocate, acted for the appellant while the respondent appeared and acted in person. I have decided to start with the 3<sup>rd</sup> ground of appeal on the obvious reason that it is a ground on procedural irregularities. If found with merits, then, it will dispose of the entire appeal.

In respect of the 3<sup>rd</sup> ground of appeal, Mr. Mrindoko submitted that, the appellant's case was heard in the presence of two assessors namely **Balozi Liundi** and **Mr. Mrusuri**. During hearing of the defence case, the trial chairperson proceeded with the aid of only one assessor, one **Balozi Liundi** without an explanation thereto. He asserted that the trial Chairperson was required to sit with two assessors as per section 23(2) of the Land Disputes Courts Act or give explanation as to why she decided to proceed with one assessor as per section 23(3) of the Land Disputes courts Act.

It was submitted further by the appellant's counsel that, on 29/1/2021, 1/3/2021 and 28/5/2021 the tribunal was not properly

constituted as the proceedings do not show the name of Chairperson and the assessors who were present. He contended that, such irregularity is fatal to the extent that it vitiates the proceedings. He therefore prayed that the proceedings and the judgement be declared a nullity and be set aside with costs.

In reply thereof, the respondent stated that section 23(3) of the Land Disputes Courts Act allows the Chairperson to proceed with the trial even in the absence of assessors. He referred to page 4 of the impugned judgement which states the reasons as to why the Chairperson proceeded with one assessor in the absence of **Mr. Murusuri**.

In rejoinder submissions, Mr. Mrindoko reiterated his submissions in chief and argued that, the trial Chairperson was supposed to give reasons or explanation in the proceedings of 22/9/2021, when she decided to proceed with defense hearing in the absence of another assessor and not in the judgement.

Having gone through the rival submissions, the issue for determination is whether the 3<sup>rd</sup> ground of appeal is meritorious. As aforesaid, the appellant is of the view that the Trial Tribunal was irregularly constituted in hearing and determining the matter, to the

extent of vitiating the proceedings. I have scrutinized the records of the trial tribunal in this matter and found that at the commencement of the hearing until the closing of the appellant's case, the trial chairperson presided over the matter with two assessors namely, **Balozi Liundi** and **Mr. Murusuri**. This was done properly and in accordance with the provisions of section 23(2) of the Land Disputes Courts Act [Cap.216 RE 2019], which provides that: -

***"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."*** (Emphasis added)

The above section provides for mandatory requirement for the trial chairperson to sit with two assessors during trial. However, the proceedings of the matter at the trial tribunal show that, from 22<sup>nd</sup> September, 2021, when the defence case commenced until judgement, the trial chairperson was assisted by only one assessor, namely **Balozi Liundi**. The proceedings of 22<sup>nd</sup> September 2021 show that on that day **Mr. Murusuri**, the assessor was absent, but hearing proceeded

notwithstanding his absence. The proceedings of 22/9/2021 are reproduced hereunder: -

*" Akidi: R. Mwakibinja – M/Kiti*

*Wajumbe: Balozi Liundi*

*Mwombaji: Yupo, Mainda Omari for*

*Mjibu Maombi: Yupo*

*Karani: Oresta Kunguru*

*Baraza: Shauri linaendelea upande wa utetezi.*

*Mdaiwa: Niko tayari*

*KESI YA MDAIWA..."*

I am aware that under section 23(3) of the Land Disputes Courts Act, [Cap.216 R.E 2019] the chairperson is permitted to proceed and conclude the matter in the absence of one or both assessors who were present at the commencement of hearing. It provides thus:-

*"...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 the proceedings is or are absent, the Chairman and the remaining member (if any) **may continue** and conclude the proceedings notwithstanding such absence."*(Emphasis added).

The above section is an exception to the general rule that requires the chairperson to sit with assessors during trial. The word '**may continue**' as used in the above provision gives options to the trial chairperson to decide on whether to continue or otherwise where one or both assessor(s) who was/were present at the commencement of hearing is/are absent. The grounds for making such decision of proceeding without assessor(s) are not provided, it is left to the discretion of the Tribunal on a case-by-case basis. When the Tribunal makes decision whether or not to proceed with assessor(s) parties have to be involved. At times the tribunal opts to proceed in the absence of the assessor(s), parties have the right to know the reason(s) for so doing and such reason(s) must be recorded in the proceedings.

The proceedings of 22<sup>nd</sup> September 2021 show that the trial chairperson did not involve parties in determining whether or not to proceed with defence case notwithstanding the absence of one assessors. Additionally, the proceedings do not show the reason(s) for proceeding in the absence of one assessor. It is an established principle governing proceedings that a court's record must speak for itself and the presiding court officials must see to it that everything that happens during the trial, specifically those relevant to the trial must be recorded

in the proceedings. This was also stated by the Court of Appeal of Tanzania in **Makoye Charles vs Republic**, Criminal Appeal 109 of 2020 [2021] TZHC 5694, that, "*The records of the Court must speak for themselves...*" The reason why the trial Tribunal proceeded with the matter in the absence of Mr. Murusuri, the assessor, was revealed to parties in the impugned judgement and not in the proceedings. The reason has been stated at page 4 of the said judgement, thus-

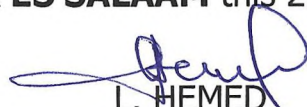
*"...Shauri hii lilianza kusikilizwa na wajumbe wa Baraza wawili ambao ni Mr.Murusuri na Balozi Liundi lakini kabla shauri halijafika mwisho, Mr.Murusuria akawa nje ya ofisi kwa muda mrefu, hivyo kupelekea shauri kuendelea kusikilizwa na mjumbe mmoja hadi kufikia hatua ya hukumu..."*

It is elementary knowledge that judgment is the product of proceedings and whatever in the judgment that does not feature in the proceedings is an afterthought. I am of the firm view that failure by the trial chairperson to record reasons in the proceedings for continuing with trial in the absence of one assessor is fatal. It vitiates the proceedings from the date of omission to the date of delivering judgment.



From the foregoing, I find the 3<sup>rd</sup> ground of appeal with merits and worth to dispose of the appeal. Having found the 3<sup>rd</sup> ground of appeal meritorious, there is no need of wasting time canvassing the rest of the grounds. Consequently, the proceedings from 22<sup>nd</sup> September 2021 to the date of delivering judgment, the Judgement and the Decree in Application No.458/2020 are hereby quashed. The case file is remitted to the trial Tribunal for retrial from the proceedings of 22<sup>nd</sup> September, 2021. In the circumstance of this matter, each party to bear its own costs. It is so ordered.

**DATED at DAR ES SALAAM** this 21<sup>st</sup> day of July, 2023.

  
L. HEMED  
**JUDGE**

