

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

AT DAR ES SALAAM

LAND APPEAL NO. 290 OF 2023

(Arising from Application No. 318 of 2016)

AHMED SALUM MFAUME.....APPELLANT

VERSUS

GETRUDE VENDELIN KISIMA..... RESPONDENT

JUDGMENT

9th and 31st October, 2023

L. HEMED, J.

At the District Land and Housing Tribunal for Temeke (DLHT), the dispute was on trespass to a piece of land known as Plot No. 204 Block 'A', Chamazi, in Temeke Municipality, Dar es Salaam. The respondent herein **GETRUDE VENDELIN KISIMA** sued the Appellant herein **AHMED SALUM MFAUME** and another person one **RICHARD SEBASTIAN KAMUGISHA** seeking for the following reliefs: -

"1. Declaratory Order that the Applicant is the lawful owner of the disputed land.

2. *Permanent injunction restraining the 1st Respondent from trespassing and interfering with possession of Applicant in respect of the disputed land.*
3. *Demolition order to demolish the structure erected in the disputed land thereof.*
4. *Payment of Tshs. 5,000,000/= being special, aggravated and exemplary damages arising out of trespass.*
5. *General damages to be assessed by the court.*
6. *Costs.*
7. *Any other relief as the court may deem just."*

The defendants could not file defence to dispute the claims. Therefore, the matter proceeded *ex parte* and at the end the trial Tribunal found in favour of the respondent herein who was declared owner of the suit piece of land. It was also ordered the respondent to vacate from the 10 metres which the Tribunal found to have been encroached by the appellant.

The Appellant was aggrieved by the said decision hence the instant appeal on 7 grounds. I have opted not to reproduce them verbatim.

The appeal was argued by way of written submissions which were promptly filed as was ordered by the court. The appellant was represented by **Mr. Alex Enock**, learned advocate, while the respondent was assisted by **Women's Legal Aid Centre**.

I will start with the 3rd ground which is on the failure of the trial Tribunal to consider the opinion of the assessors contrary to section 24 of the Land Disputes Courts Act, [Cap. 216 RE 2019]. The learned counsel for the appellant asserted that the trial Chairman violated section 23(2) of the Land Disputes Courts Act (*supra*) by failure to record and consider the opinion of assessors.

In reply thereto the respondent submitted that the Chairperson took into consideration the requirement of section 24 of the Land Disputes Court Act, (*supra*). She contended that the trial Chairperson stated the opinion of assessors and gave reasons for supporting it.

I have gone through the proceedings of Application No. 318 of 2016 and found that the Applicant's (Respondent) case was heard and concluded on 02/05/2019. On the said date, the trial Tribunal ordered judgment to be delivered on 24/10/2019. Proceedings of the trial Tribunal reveal that judgment was delivered on 17th January 2020. There is no where in the proceedings showing that assessors were given opportunity to give their opinion in the presence of parties before the Chairman embarked to compose judgment. Even the order dated 2/5/2019 made at the conclusion of hearing

did not fix the date on which assessors would have given their opinion. The order readth:-

"...Order

Judgment to be delivered on 24/10/2019.

Sgd: R. Ntibampema

Chairperson

2/5/2019"

From the above quoted proceedings, it is evident that assessors were not involved in resolving the dispute before the trial tribunal as they were not availed with an opportunity to give their opinion before the parties. This is *de jure* contrary to section 23(2) of the Land Disputes Courts Act [Cap 216 RE 2019] which provides thus:

*"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 duty to require the opinion of the wise assessors given, is imposed on the Chairman under Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, which provides thus:

*“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.”*[Emphasis added]

The involvement of assessors as required under the law, also gives them mandate to give opinion before the Chairman composes the decision of the Tribunal. Unfortunately, this did not happen in the instant case as assessors were not given the opportunity to read their opinion to the parties. It should be noted that, the requirement for the assessors to read, their opinion to parties was insisted by the Court of Appeal in **Tubone Mwambeta vs Mbeya City Council**, Civil Appeal No. 287 of 2017, that: -

*“We are increasingly of the considered view that, since Regulation 19(2) of the Regulations requires 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 and whether or not such opinion has been considered by the chairman in the final verdict.**”*[Emphasis added]

In the instant case, apart from the 'opinion' to have been acknowledged at the conclusion part of the judgment, the proceedings do not show if the wise assessors had been given the opportunity to write and read the opinion to the parties. It is trite law that acknowledgement of the assessors' opinion in the judgment is not enough to signify active participation of assessors in the proceedings, rather such opinion must be reflected in the proceedings. This position was insisted by the Court of Appeal in **Ameir Mbarak and Azania Bank Corp. vs. Edgar Kahwili**, Civil Appeal No. 154 of 2015, that:

"Therefore, in our considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgment of the Chairman in the judgment. In the circumstances, we are of a considered view that, assessor did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity."[Emphasis added]

From the foregoing, it is undoubtful that the trial Chairperson committed serious irregularity for not availing assessors to prepare and read their opinion to parties.

Before I pen off, I wish to point out another serious irregularity in the proceedings of the trial Tribunal which I came across while perusing the records. The proceedings show that the Applicant's case had only one witness, one **Getrude Vendeline Kisima** who testified as PW1. According to the records, PW1 adduced evidence without taking oath contrary to the Evidence Act, [Cap 6 RE 2019] and section 4 of the Oaths and statutory Declaration Act, [Cap. 34 RE 2019]. I have read the testimony of PW1, she started by these words: -

"PW1 I Getrude Vendeline Kisima 58 years Christian do hereby state as follow...."

From the above phrase, there is no where stated as to whether the witness 'sworn' before adducing evidence. Failure to take oath, has the effect of making the purported testimony a nullity. Since the applicant's case had only one witness whose evidence was made without an oath, the respondent's case before the tribunal remains with no evidence on record.

Having found merits in the 3rd ground of appeal, I do not find necessary to determine the other grounds as it will have an academic effect. In the upshot, I allow the appeal with the following orders:

1. The proceedings, judgment and decree of the trial Tribunal are hereby quashed.
2. The matter is remitted back to the trial Tribunal for retrial before another Chairperson and new set of assessors.
3. The appellant is entitled to costs of this appeal. It is so ordered.

DATED at DAR ES SALAAM this 31st day of October, 2023.




L. HEMED

JUDGE