

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

LAND APPEAL NO. 215 OF 2021

*(From the Decision of the District Land and Housing Tribunal of Ilala
District at Mwalimu House in Land Application No.58 of 2019)*

TERESIA JOSEPHATE MOSHA.....APPELLANT

VERSUS

**PETER TEMU T/A KAMECONS BUILDING AND CIVIL
WORKS.....1ST RESPONDENT
AZANIA BANK LTD.....2ND RESPONDENT
MABUNDA AUCTION MART.....3RD RESPONDENT**

JUDGMENT

Date of Last Order: 05. 12.2022

Date of Judgment: 27.01.2023

T.N. MWENEGOHA, J:

At the root of the dispute, is a mortgage agreement between the 1st and 2nd respondent, dated 4th of October, 2013. That, the 1st respondent, Peter Kairo Temu was given a loan by the 2nd respondent, Azania Bank Limited, to the tune of 40, 000,000/= (forty Million Tanzanian Shillings). As security to the loan in question, the 1st respondent mortgaged a landed property, located at Plot No. 39, Block J, Kinyerezi area in Ilala Dar Es Salaam, with Certificate of Title No. 95507. Upon default on repaying the loan as agreed, the 2nd respondent instructed the 3rd respondent, Mabunda Auction Mart, to sale the suit land, hence this dispute.

On the 1st of March 2019, the appellant herein, being against the mortgage agreement between the 1st and 2nd respondents, moved the District Land and Housing Tribunal for Ilala, hereinafter referred to as the Trial Tribunal. She wanted among others, a declaration nullifying a mortgage agreement between the 1st and the 2nd respondents. Her reason for seeking the said order was that, she did not consent to the mortgage in question as it involved a matrimonial property. That, she is in fact a legal wife of the mortgagor (1st respondent). However, the judgment of the Trial Tribunal came out against her and in favour of the respondents. Dissatisfied with the same, she filed the instant appeal based on the following grounds; -

1. That, the trial Chairman erred both in law and facts for making a decision without giving reasons when deferring with the opinion of assessors.
2. That, the trial Chairman erred both in law and facts in making the decision without reading the opinion of assessors to the parties.
3. That, the trial Chairperson erred both in law and facts in deciding that the appellant consented to the mortgage between the 1st and 2nd respondents, without making proper evaluation of the evidence.
4. That, the trial Chairman erred in law and in fact in making a finding that the appellant took no action against the respondents upon notice of the mortgage in 2018 up to 2019.
5. That, the trial Chairperson erred both in law and facts in making a finding that the 2nd respondent had a right to auction the mortgaged property without proof of statutory notice served to the appellant.

The appeal was disposed by way of written submissions. The same proceeded *ex parte* against the 1st and 3rd respondents. Advocate Juma Nassoro appeared for the appellant, while the 2nd respondent was represented by Advocate Upendo Mbagu.

Having gone over all five grounds of appeal, submissions for and against the same and the records of the Trial Tribunal, the issue in need of determination is whether the appeal has merit or not. With regard to the area of interest pointed out above, this Court is prompted to start evaluating and analysing with the 2nd ground of appeal. On the said ground, the appellant faulted the Trial Chairman for making a decision without reading the opinion of assessors to the parties. It was argued by Mr. Nassoro that, the records of the Trial Tribunal do not show that, the opinion of assessors were read over to the parties before the decision was made. This is contrary to the settled principles of law given in a number of authorities, including the case of **Edina Adam Kibona versus Absalom Swebe Sheli, Civil Appeal No. 286 of 2017, Court of Appeal of Tanzania, (unreported)** where it was held as follows:-

"We wish to recap at this stage that in trials 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. That opinion must be in the record and must be read to the parties before the judgment is composed".

Replying the 2nd ground of appeal, Advocate Upendo Mbagha for the 2nd respondent maintained that, the allegations that the opinion of assessors were not read is baseless and aims at confusing the Court. That, the authority quoted by the appellant in support of her arguments on this ground is distinguishable with the case at hand. That, the opinions of assessors were read to the parties on the 6th of May, 2021.

In rejoinder, the appellant's counsel reiterated his submissions in chief and insisted that, the Court should go through the records of the Trial Tribunal to see if the opinion of assessors were read to the parties on the 6th of May, 2021 as claimed by the counsel for the 2nd respondent.

After going through the records of the Trial Tribunal, I found that, defence hearing was concluded on the 1st of April, 2021 and the orders given by the trial Chairperson were as follows; -

1. Judgment on 06/05/2021 at 13.00hrs.
2. Assessors' opinion on 05/05/2021.

However, the records are silent on the said dates as to what exactly happened. It is not known if the Tribunal sat on the material dates. The said records show that, from 01/04/2021, the Tribunal met again for business on the 7/05/2021. It is on this date where the records reveals something about the opinion of assessors. The trial Chairperson recorded the following statement; -

"Leo maoni ya washauri wa baraza yanasomwa mbele ya mawakili wa pande zote mbili".

In plain English, the above quoted statement of the trial Chairman can be translated as follows..." *Today, the opinions of tribunal assessors are going to be read over in the presence of the counsels for both parties*".

The question that remains unanswered to me is whether the same were actually read as stated in the said records. I say so because the records do not show if they were read to the counsels for the parties as the trial Chairman recorded. To me I find the statement of the trial Chairperson as quoted herein above to be very specific that, parties were being informed of what was going to happen in the Tribunal of that material day. The said statement does not prove to my satisfaction that, the said opinions of the assessors were real read to the counsels of the parties as claimed by Advocate for the respondent. After all, I distance myself from believing what she said, because the dates she gave this Court to prove her assertions are wrong dates. As I have elaborated above the records demonstrate that Trial Tribunal did not sit at all on that date (06/05/2021).

Moreover, another thing that caught my attention, adding to the proof that the assessors' opinion were not read on the 07/05/2021 is the fact that, on the quorum of the said day, the list of members is not there. Meaning thereby, the assessors were not present on that date. Hence no one among the assessors was there to read what he or she opined. Records reveal that from 07/05/2021 the next Tribunal session was on 11/08/2021 when the judgment came to be delivered. Again, the quorum section of members is blank, meaning the same was delivered in their absence.

Therefore, my conclusion is that, the opinion of assessors were not read to the parties as claimed by the counsel for the appellant. I take note however that, the written opinions of assessors are attached. But the rule requires the same to be read over to the parties upon conclusion of hearing. This is a settled rule, and has been given in a number of authorities, see Regulation 19(2) of the Land Disputes Regulations of 2003 and **Edina Adam Kibona versus Absalom Swebe Sheli** (supra). With these findings, I agree with the appellant that the trial Chairperson erred in law when he delivered the decision of the Tribunal without causing the opinion of Tribunal assessors to be read to the parties. Hence the 2nd ground of appeal is allowed.

Referring to the remaining grounds of appeal, number 1, 3,4 and 5, they will not detain me into discussing the same as I see the findings of the 2nd ground are enough to dispose the entire appeal.

Eventually the appeal is allowed. The decision of the Trial Tribunal is quashed and the orders are set aside. Further, I order a retrial of the case before a new Chairperson.

Order as to costs.




T.N MWENEGOHA

JUDGE

27/01/2023