

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**MWANZA SUB - REGISTRY**  
**AT MWANZA**  
**LAND APPEAL NO. 41 of 2022**

**MAGETA MALIMA (Administrator of the Estate of JUMBE  
MALIMA) .....APPELLANT**

**VERSUS**

**1. IDDI MAGETA**  
**2. ALEX MAGETA**  
**3. ANTONY EDWARD**  
**4. CLEMENT ROBERT**  
**5. ELIAS WILSON**  
**6. JENIEA ANOTONY**

**-----RESPONDENTS**

**RULING**

*Last Order: 17.02.2023*  
*Judgment: 22. 02.2023*

**M.MNYUKWA, J.**

In the District Land and Housing Tribunal of Mwanza at Mwanza  
(Tribunal) the appellant unsuccessfully sued the respondents. The 2<sup>nd</sup>, 3<sup>rd</sup>,



4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents were declared as the lawful owner of the disputed land and that they deserves to be paid costs of the suit.

Aggrieved, the appellant instituted the present appeal before this Court advancing five grounds of appeal. When the appeal was coming for hearing the appellant was represented by Kassim Gilla and the respondents afforded the legal services of Mr. Mashaka Tuguta, the learned counsel too.

Before the parties submitted on the merit of the appeal or otherwise, I find it pertinent for the counsels of both parties to address the Court on whether the witnesses were properly affirmed/sworn and the involvement of the assessors, that is, if they were fully involved as they were changed in between the trial.

Mr. Kassim Gilla readily conceded by starting his submission on the issue of the change of assessors. He refers to page 40 of the typed proceedings that on 15/1/2018 when the trial commenced, the assessors were Methusela and Lusato and that PW1 testified as reflected on page 42 of the Tribunal's Proceedings and during cross examination on the same day as reflected on page 50 and 51, the assessors were Methusela and Lusato.



The counsel went on that, as reflected on page 51 of the proceedings, when PW2 testified, after completion of evidence as shown on page 55 of the trial Tribunal proceedings, the assessors were Mrs. Juma and Mr. Lusato. He added that, in the proceedings dated 27/05/2021, the assessors who gave opinion were Mr. Lusato and Mr. Methusela. He remarked that, the assessors were completely changed at some time and even at the time of giving opinion, Mr. Lusato gave his opinion while he was not involved in the case.

He concludes on the issue of assessors by referring to section 23(3) of the Land Disputes Courts Act, Cap 216 R.E 2019 which requires the Tribunal to continue with one assessors if the other is absent and if both are absent, to continue without assessors as the law do not bless the change of the assessors during the trial. To support his argument he refers to the decision of the Court of Appeal in the case of **B.R Shindika t/a Stella Secondary School v Kihonda Pitsa Makaroni Industries Ltd**, Civil Appeal No 128 of 2017 where the Court of Appeal nullify the Proceedings of the trial, Tribunal and ordered re-trial due to change of assessors.

On the issue as to whether the witnesses were properly sworn/affirmed, he submitted that, the evidence on record shows that,

PW1 and PW2 when testified, did not state the words purported to be used when taking oath. He stated that, on his view that was not proper as it is contrary to the provision of section 3 and 4 of the Oath and Statutory Declaration Act, Cap 34 R.E 2019. He also refers to the case of **Greenwaste Pro Limited v Mwajabu Ally**, Civil Appeal No 370 of 2020 where the Court of Appeal insisted that, oath should be administered according to the law, that is Cap 34 R.E 2019, and that any trial which the oath is not properly administered, the said trial is nullity.

He finalized his submissions in chief by praying the Court to nullify the Proceedings, Judgement and Decree of the Tribunal and order re-trial. As to costs, he prayed each party to bear its own costs as the issue was raised by the Court *suo moto*.

Contesting, the counsel for the respondents, Mr. Mashaka Tuguta admitted that, it is true that in the typed proceedings, there was change of assessors. However, he was of the view that, the change of assessors is fatal if it will occasion injustice to the other party, and that as the appellant was not prejudiced, the anomaly is cured under the provision of section 45 of the Land Disputes Courts Act, Cap 216 R.E 2019. He remarked that, the Court of Appeal in the case of **Yakobo Magoiga Gichere v Peninah Yusuaph**, Civil Appeal No 55 of 2017 used the above section to cure the



anomaly. He finalized that, as far as the appellant was not prejudiced, change of assessors cannot render the trial nullity.

On the issue of oath, he submitted that, the Chairman used his own style to show that all witness took oath before testifying by stating either the witness affirm or sworn. He said that, as section 2 and 4 of the Oath and Statutory Declaration Act, Cap 34 R.E 2019 requires the witness to affirm or swear, the style used by the Chairman is enough to show that the witnesses testified before him. He therefore prays for this Court to consider that all witnesses took oath before testifying.

Rejoining, Mr Kassim Gilla mainly reiterates what he had submitted in chief.

From the parties' submissions, it is clear that, they are in agreement that there is change of assessors. However, Mr. Mashaka Tuguta asked the Court to revisit both the typed and the handwritten proceedings to satisfy itself if indeed there was change of assessors in the trial. Mr. Mashaka also had the view that, if the court found that, there was change of assessors, that anomaly is curable under section 45 of the Land Disputes Courts Act, Cap 216 r.E 2019.



In determining the above two legal issues raised by the Court, I revisited both the handwritten and the typed proceedings. In relation to the second legal issue as to whether the witnesses sworn or affirmed before taking their oath, I think this issue should not detain me much. Upon revisiting the Trial Tribunal proceedings, the Chairman wrote after taking the personal particulars of the witness that; **Court: "The PW1 affirms."** The same applies to the witness who sworn.

To that end, it is my considered view that oath was administered to all witnesses as correctly stated by Mr. Mashaka that the arbitrator used his own style to show that, the witnesses took oath before they testified. I find the case of **Greenwaste Pro Limited** (supra) cited by the counsel of the appellant is distinguishable with the circumstances of our case at hand because in that case, the arbitrator did not administer oath to DW1 and DW2.

In the first legal issue it is all about the change of assessors during the trial. While both parties agreed that, the typed proceedings shows that there was change of assessors, I also revisited the handwritten proceedings as I have earlier on stated to satisfy myself if indeed there was change of assessors.





On determining this issue, I resort to refer to the handwritten proceedings as it is the original record in which the typed proceedings is extracted from it. The handwritten proceedings shows that, when the hearing commences on 15/01/2018, the assessors were Mr. Methusela and Mr. Lusato. On that day PW1 testified, and the assessors who examined him were Mr. Methusela and Mr. Lusato. On the same day, PW2 also testified, the assessors were the same, Mr. Lusato and Mr. Methusela. The Trial Tribunal business on that day ended after the matter was adjourned until 19/03.2018.

There was several adjournment in between until the matter continued with hearing on 05/09/2019 whereby the same assessors Mr. Methusela and Mr. Lusato continued with the hearing of the matter when PW3 testified. As PW3 was the last witness of the appellant, the matter was adjourned and scheduled for defence hearing on 12/11/2019.

Again, there was adjournment and defence hearing started on 11/02/2020. The assessors were Mr. Methusela and Mr. Lusato and DW1 testified. On the same day DW2 also testified in which the same set of assessors form part of the column of the Trial Tribunal. The matter was again adjourned untill 15/03/2021 where there was change of assessors as the coram of that day reads that, the assessors were Mrs. Juma and Mr.



Lusato. On that day, DW3 and DW4 testified. That was the end of the defence case and the presiding Chairman ordered the assessors to give their opinion on 08/04/2021.

On the day of giving opinion, the record shows that, Mr. Methusela took his position as the assessor together with Mr. Lusato. The record also reveals that, Mr. Methusela and Mr. Lusato were the one who wrote opinion.

The above records shows that, there was change of assessors when DW3 and DW4 testified, it was only Mr. Lusato who commenced hearing of the case was present throughout of the case as Mr. Methusela was absent in some hearing and his position was replaced by Mrs. Juma who is very new to the case as she only sit as asseosor when DW3 and DW4 testified.

The records also depicts that, when the order of writing opinion to the assessors was given, it was Mrs. Juma who was present but it is Mr. Methusela who wrote the opinion despite of the fact that, he was not present when DW3 and DW4 testified. This means that, he did not examine the demeanour of the witnesses and perhaps he was not aware of what they have testified as he was not present.





As it was correctly submitted by the parties that, the law gives the clear guidance on the assessors as part of the coram of the Tribunal. The provision of section 23(1) of the Land Disputes Courts Act, Cap 216 R,E 2019 provides that:-

*"23(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a chairman and not less than two assessors.*

*(2) The District Land and Hosuing Tribunal shall be duly constitutd when held by a chairman and two assessors who shall be required to give out their opinin before the Chairman reaches the Judgenent.*

*(3) Notwithstanding the provisions of subsection (2) if in the course of any proceedings before the Tribunal, either or both memebtrs 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 such absence.*

The above provisions are very clear that the Tribunal is composed by chairman and at least two assessors. The law went further by describing the circumstances as to when one of the assessors is absent. The law as it is now, allow one assessor who was present at the commencement of the trial to continue and complete proceedings.



Apparently, the record of the trial Tribunal as shown above reveals that, only one assessor who was Mr. Lusato was present throughout the entire trial in the Tribunal. Neither was assessor Mrs. Juma present at the commencement of the trial nor when PW1, PW2, DW1 and DW2 gave their testimony. Assessor Mr. Methusela was not present when DW3 and DW4 were testifying. This is the apparent contravention with the requirement of section 23(3) of the Land Disputes Courts Act, Cap 216 R,E 2019.

The Court of Appeal in the case of **Emmanuel Christopher Lukumai v Juma Omari Mrisho**, Civil Appeal No 21 of 2013 when declaring the trial tribunal proceedings nullity, had this to say:

*"The said omission goes to the root of the matter and it occasioned a failure of justice and there was no fair trial since the law was contravened as the Tribunal was not properly composed which cannot be validated by the Chairman as he alone does not constitute a Tribunal..."*

Furthermore, in the erstwhile Court of Appeal of East Africa in the case of **Joseph Kabui v Reginam** (1954-55) EACA Vol XXI-2,260, the Court held that:

*"Where an assessor who has not heard all the evidence is allowed to give opinion on the case, the trial is nullity."*



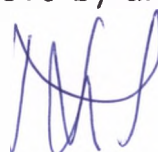
The counsel for the respondent was of the view that, the said anomaly can be cured by the provision of section 45 of the Land Disputes Courts Act, Cap 216 R,E 2019. For easy of reference, I find it pertinent to reproduce the aforesaid section. The section reads:

*"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice".*

With due respect, it is my firm opinion that the said anomaly cannot be cured by the overriding objective since the anomaly goes to the root of the matter and occasion a failure of justice as there was no fair trial due to change of assessors.

I therefore invoke the revisional power to nullify the proceedings and set aside the Judgement and the Decree of the Tribunal delivered on 23<sup>rd</sup> May 2022.

As to the way forward, I further order the matter to be remitted back to the Tribunal for a dispute to be heard denovo by another Chairperson



with a new set of assessors. The Chairperson so appointed should expediate the matter as much as practicable. Since the anomaly is raised by the Court, I make no order as to costs.

It is so ordered.

Dated at Mwanza this 22<sup>nd</sup> day of February 2023



  
**M.MNYUKWA**

**JUDGE**

**22/02/2023**

The right of appeal is explained to the parties.

  
**M.MNYUKWA**

**JUDGE**

**22/02/2023**

**Court:** Judgement delivered on 22<sup>nd</sup> February 2023 in the presence of both parties.

  
**M.MNYUKWA**

**JUDGE**

**22/02/2023**