

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 30 OF 2019
(From Land Application No. 46 of 2018 of
District Land and Housing Tribunal of Rungwe)

EDWARD BUKUKU.....APPELLANT

VERSUS

JULIUS MWASONGWE.....1ST RESPONDENT

ANANGISYE KASEBELE.....2ND RESPONDENT

JUDGMENT

Date of last Order: 06/08/2020

Date of Judgment: 23/09/2020

NDUNGURU, J.

Edward Anyelwisye Bukuku, the Appellant herein has preferred an Appeal to this Court against the Judgment and Decree of the District Land and Housing Tribunal for Rungwe at Tukuyu in Application No.46 of 2018.

In so far as is relevant for my determination this Appeal arises as follows: The Appellant, one Edward Anyelwisye Bukuku sued the Respondents one Julius Mwasongwe and Anangisye Kasebele respectively at the District Land and Housing Tribunal for Rungwe (herein referred to as trial tribunal) in Application No. 46 of 2018.

In that case, the Appellant claimed that he is the lawful owner of the suit land. The Appellant told the trial tribunal that, he purchased the suit land from the late Abraham Mwasongwe and the customary right of occupancy has been issued to him. Further he told the trial tribunal that, the suit land is trespassed by the first Respondent.

On the defence side, the first Respondent testified that, he is the owner of the suit land. He also told the trial tribunal that, he won the same against the one Abraham Mwasongwe before the same tribunal and at the High Court.

Again the first Respondent told the trial tribunal that, the Appellant is one who trespassed the suit land because he was behind the bars for 20 years. Further, he told the trial tribunal that, the Appellant illegally bought the suit land.

On the other hand, the second Respondent, one Anangisye Kasebele, told the trial tribunal that, he is the administrator of estates of the late Abraham Mwasongwe. He also told the tribunal that, the suit land was owned by the late Abraham Mwasongwe and the same sold to the Appellant.

After full trial the trial tribunal declared the first Respondent to be a lawful owner of the suit land and disallow the Application with costs. Being aggrieved, the Appellant lodged the present Appeal on two

grounds of complaint to challenge the Judgment and Decree of the trial tribunal.

Thereafter, by leave of this Court, the Appellant filed the one additional ground of Appeal. The grounds of complaint are as follows:

1. That, the trial Chairman erred in law and facts to determine the case that it is re – judicata while in the previous case the Appellant was not involved in any way even giving him the information about the disputes.
2. That, the trial Chairman erred greatly in law by waving out and ignoring the documentary evidence adduced by the Appellant that proves his legality on the suit land.
3. That, the learned Chairman grossly both erred in law and facts for further to involve the wise assessors in determining the suit.

When the Appeal was called on for hearing, all parties were appeared in personal without legal representation. Parties agreed to dispose this Appeal by way of Written Submission. The parties filed their Written Submission in support and against the Appeal save for the second Respondent.

In supporting his Appeal, the Appellant commenced his submission by abandoning the first and second grounds of Appeal. The Appellant

submitted only on the issue of involvement of wise assessors at the trial tribunal.

In relation to the issue of assessors, the Appellant contended that, the record of the trial tribunal does not show if the opinions of the wise assessors were availed in the presence of the parties hence the wise assessors were not fully participated during the trial at the District Land and Housing Tribunal for Rungwe.

He cited Section 23 (1) of the Land Disputes Courts Act (Cap 216 R.E. 2002) and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003 to bolster his submission. He went on to submit that, this error vitiates the Proceedings and Judgment of the trial tribunal. Finally, he prayed for the Court to nullify the Proceedings and Judgment of the trial tribunal and order trial de novo.

In rebuttal, the first Respondent argued that, the written opinions of the wise assessor are available in the tribunals record. He added that, these wise assessors were fully involved before the trial tribunal. He cited Section 24 of the Land Disputes Court Act (Cap 216) to cement her submission.

Further, he argued that, his evidence was strong enough and convinced the wise assessors chairman of the trial tribunal. In conclusion, he prayed for the Court to dismiss this Appeal with costs.

On the other hand, the second Respondent did not file any reply to the Appellant's Written Submission.

Having carefully scanned the written submissions filed by the parties and the record of the trial tribunal. The issue calling for the determination is whether or not this Appeal has merits.

In the first place, I wish to state that, in terms of sub-section (1) and (2) of Section 23 of the Act (supra), the District Land and Housing Tribunal is composed of one chairman and not less than two assessors.

At this juncture I see it is very important to reproduce the said two subsections which provides that:

"(1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors.

(2) 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 supplied)

Further Regulation No. 19 (1) of the Regulations (supra) which provides that:

"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 assessors may give his opinion in Kiswahili."

In the light of the authorities cited above, it is clear that, the law imposes a duty on the chairman to require every assessor present at the conclusion of the hearing to give his opinion in writing before making its judgment.

In the case of **Sikuzani Said Magambo and another vs. Mohamed Roblo**, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania (unreported) the court had addressed the legal impact for the failure by the chairman to accord an opportunity for the assessors to give out their opinion in the following words:

"...When the chairperson of the tribunal closed the defence case, he did not require the assessors to give their opinion as required by the law. It is also on record that, though, the opinion of the assessors was not solicited and reflected in the Tribunal's proceedings the chairperson purported to refer them in his judgment. It is thus our considered view that, since the record of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal judgment. It is also

out further view that, the said opinion was not availed and read in the presence of the parties before the judgment was composed.”
(emphasis mine)

Further, the Court of Appeal of Tanzania had the following to say with regard to what was to befall owed to the anomalies occasioned therein:

"On the strength of our previous decision cited above, we are satisfied that the pointed omission and irregularities amounted into fundamental procedural errors that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and the entire proceedings before the tribunal as well as those of the first appellate court."

Also see the case of **Y. S. Chawalla & Co. Ltd. vs. Dr. Abbasi Teherati**, Civil Appeal No. 70 of 2017, Court of Appeal of Tanzania and **General Manager Kiwengwa Stand Hotel vs. Abdallah Saidi Mussa**, Civil Appeal No. 13 of 2012, Court of Appeal (both unreported).

In the present case at hand, when the chairman closed the case for the defence on 13th day of March, 2019, he did not require the assessors to give their opinion as required by the law. The fact is confirmed at page 8 of the typed proceedings of the trial tribunal which reveal as follows:

ORDER

1. *Opinion to be rendered on time by assessors.*
2. *Judgment on 21/03/2019.*

A.J. Majengo
Chairman
13/03/2019

For avoidance of doubt, that opinion must be in the record and must be read to the parties before the judgment is composed. I am aware that in the instant case the tribunal's record has the opinion of assessors in writing which the chairman of the trial tribunal purports to refer to them in his judgment.

However, in view of the fact that the record does not show that assessors were required to give them, I am wondering how and at what state they found their way in the court record. In my considered view they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose.

That being the position of the law, there is no way this court can depart from that position. In my opinion the omission goes to the root of the matter and occasioned a failure of justice and there was no fair trial because the parties have the right to know the opinion of the assessors at the conclusion of the trial before judgment.

From the observation above, the aforesaid incurable irregularities, I subscribe to the submission given by the appellant that the trial was

vitiated. Consequently, I hereby nullify the proceedings and judgment of the trial tribunal.

I further order expedited retrial before the tribunal presided over by another chairman and the new set of the assessors if the parties are still interested on the matter.

It is so ordered.




D. B. NDUNGURU
JUDGE
23/09/2020

Date: 23/09/2020

Coram: D. B. Ndunguru, J

Appellant: Present

1st Respondent: Present

2nd Respondent: Present

B/C: M. Mihayo

Court: Judgment is delivered in the presence of the Appellant and Respondents in person.




D. B. NDUNGURU
JUDGE
23/09/2020

Right of Appeal explained.