

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MWARIJA, J.A., KEREFU, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 272 OF 2018

EMMANUEL OSHOSENI MUNUO.....APPELLANT

VERSUS

NDEMAELI RUMISHAELI MASSAWERESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Moshi)**

(Mwingwa, J.)

dated the 23rd day of February, 2016

in

Land Appeal No. 19 of 2015

JUDGMENT OF THE COURT

30th Nov. & 3rd December, 2021

MAKUNGU, J.A.:

In the District Land and Housing Tribunal for Moshi at Moshi (the trial Tribunal) the appellant, Emmanuel Oshoseni Munuo, lodged Land Application No. 79 of 2012 alleging that he is a lawful owner of the premises located on Plot No. 269, Block "F" Bomang'ombe Urban Area within Hai District (the disputed premises). He prayed for the following reliefs: -

- (i) A declaration that the respondent is a trespasser to the disputed premises;*
- (ii) the respondent to be ordered to give vacant possession of the disputed premises;*

- (iii) *an injunction order restraining the respondent and or his agents from interfering with the applicant's quite possession of the disputed premises;*
- (iv) *the respondent to pay the applicant general damages for loss of use, pain and anguish;*
- (v) *costs of the application be paid by the respondent and*
- (vi) *any other relief that the tribunal deems fit to grant.*

The respondent disputed the appellant's claims in his written statement of defence. He claimed to be the lawful owner of the disputed premises though the same was still registered in the name of the applicant. He claimed further that there was an oral sale agreement between him and the applicant entered in the year 2002. From that oral agreement the applicant surrendered the letter of offer of the disputed premises to him.

Having heard the parties on 21st May, 2015 the trial Tribunal, dismissed the appellant's application for failure to establish his case and declared the respondent the lawful owner of the disputed premises. The trial Tribunal also ordered the local authority concerned to transfer and register the ownership of the disputed premises in the name of the respondent. The appellant was aggrieved with that decision and he thus appealed to the High Court of Tanzania (Land Division) at Moshi (Mwingwa, J.) vide Land Appeal No. 19 of 2015.

On 23rd February, 2016 the High Court dismissed the appellant's appeal with costs for lack of merit. Still unsatisfied, the appellant lodged

the current appeal challenging the whole decision of the High Court. For obvious reasons to come into light shortly, we shall not reproduce the appellant's grounds of appeal appearing in the memorandum of appeal.

When the appeal was called on for hearing Ms. Fay Grace Sadallah, learned advocate appeared for the appellant who was also present in Court. The respondent, though dully served on 15th November, 2021 did not enter appearance thus, the hearing of the appeal proceeded in his absence under Rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Before we moved on to determine the merits of this appeal, we *suo motu* requested Ms. Sadallah to address us on the propriety or otherwise of the appeal and more particularly on the legality of the judgment and proceedings of the trial Tribunal. This was due to the fact that the trial was conducted with the assistance of assessors as required by the provisions of section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 [now R.E 2019] (the Act) but the said assessors kept on changing throughout the trial. In addition, it is on record that at the completion of the trial, the Chairperson of the Tribunal indicated in the trial Tribunal's proceedings of 10th March, 2015, found at page 80 of the record of appeal that there was no opinion given by the said assessors but in his judgment at pages 83-84 of the same record, he reproduced the opinion of one of the assessors and relied upon it in his decision. The Chairman stated that:

"Having heard parties, assessors sat with trial Chairman were lady Theddy Temu and gentleman elder Kimita (RIP) since Kimita is dead the tribunal received opinion from Theddy Temu who opined in the favour of the respondent"

Expounding on the questions raised by the Court, Ms. Sadallah readily conceded on the pointed out anomalies by arguing that it was improper for the assessors to change during the trial and also for the trial Tribunal to include the opinion of the assessor in his judgment which were not included in the trial Tribunals proceedings. On that basis, the learned counsel argued that the trial was vitiated as both the judgment and proceedings of the trial Tribunal were incurably defectively. She was however unable to cite any law or make reference to any decision of the Court to that effect. She finally urged us to nullify the proceedings of the trial Tribunal as well as those of the first appellate court together with the judgment thereof as she said, it emanated from nullity proceedings. On the way forward, she urged us to order for retrial.

This matter is straight forward as the record speaks it all. For this reason, we shall not make unnecessary repetitions of what has already been submitted by the counsel for the appellant but we think, it is important for us to stress on what does the law provide in the circumstances.

Composition of the District Land and Housing Tribunal which we have been referring all along as the trial Tribunal is a matter of law. Section 23 (1) and (2) of the Land Disputes Courts Act, Cap 216 R.E 2002 [now R.E 2019] provides for such composition in the following terms: -

*"(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 dully 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].

In the present matter we agree that the composition of trial Tribunal was not proper as the Chairman had all along been sitting with either one assessor or undisclosed set of assessors and at times changing assessors in contravention of the above quoted law.

We wish to observe that the form and language in which the assessors are required to give their opinion is also provided under Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 (the Regulations) which provides: -

"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 assessors who sat with the Chairman in the present matter for some unknown reasons did not sit throughout. They had been interchanging and thus their participation was not fully, a fact which we think, contributed to their failure to give opinion as required by the law. We say so because the record of appeal does not suggest that even lady Theddy Temu whose name appeared in the judgment suggested that she had the opportunity to give her opinion in writing as required by Regulation 19 (2) of the Regulations. We have thoroughly gone through the record of appeal but we could not locate the assessors’ opinion in writing before the Chairman’s order fixing a judgment date. In **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported), cited in **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported) the Court while dealing with an akin situation had this to say: -

“In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, ... they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed ... 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].

Also, see **Emmanuel Christopher Lukumai v. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013, **Y. S. Chawala & Co. Limited v. Dr. Abbas Tehonrali**, Civil Appeal No. 70 of 2017 and **B. R. Shindika t/a Stella Secondary School v. Kihonda Pista Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017 (all unreported).

Being guided by the above decisions, we as well, in the present matter, find that the proceedings of the trial Tribunal was not proper. The failure by the Chairman to require the assessors to give their opinion in writing, we hold, was a fatal irregularity as it was decided in the cited cases above. We could end here and nullify all the proceedings and judgment of the trial Tribunal and the first appellate court and order retrial, but we think, we should as well make one important remark.

We wish to remark briefly that, the first appellate court did not deal with issues of procedure. It concentrated on the substance which for the reasons we have endeavored to discuss could not legally stand. As we

have noted and submitted by Ms. Sadallah, procedural flaws in this matter are many with almost the same effect. Therefore, for the purpose of this decision, we think we should end here.

In the event, we accept the invitation extended to us by the learned counsel of the appellant and hereby invoke our power under section 4 (2) of the Appellate Jurisdiction Act, to nullify, all the proceedings and the decisions of the trial Tribunal together with those of the High Court and order this matter to be retried. Since the anomalies and irregularities giving rise to the nullification were raised by the Court, *suo motu*, we make no order as to costs.

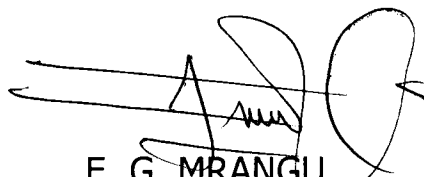
DATED at ARUSHA this 2nd day of December, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of Ms. Fay Grace Sadallah, learned counsel for the appellant and the Respondent is present in person, is hereby certified as true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL