

**IN THE HIGH COURT OF ZANZIBAR
HOLDEN AT TUNGUU**

CIVIL APPEAL NO. 32 OF 2023

(FROM CIVIL CASE NO. 23 OF 2022)

(LAND TRIBUNAL GAMBA)

**ADAM MRISHO HAJI APPELLANT
VERSUS
KHAMIS ZAHORO RESPONDENT**

JUDGMENT

K. SHAMTE J.

Dated 7th March, 2024

This Appeal arises from the decision of the Land Tribunal, Hon. Subeti (RM) in Civil Case No. 23 of 2022 at Gamba. The background to the case is that the Appellant, **Adam Mrisho Haji** filed a suit at the Land Tribunal against the Respondent, **Khamis Zahor**. The Appellant claimed a piece of land at Kiwengwa Cairo in the Northern Region of Unguja.

The Appellant claimed that he had cleared a bush and set up a farm in 1998 and early 1999 where he grew various crops. However, in 2009, the Respondent argued that the disputed land was registered in the name of Ussi Fadhil, who had sold it to the Respondent. As a result, the Appellant's claim failed and the Land Tribunal judgment was in favour of the Respondent.

The Appellant was not satisfied with the decision and has filed an appeal on eight (8) different grounds.

1. That, the Honorable Tribunal manifestly erred in law and fact in proceeding with trial and delivery decision without quorum being properly constituted under the law;
2. That, the Honorable Tribunal manifestly erred in law and facts for ignoring and refusing to consider the evidence adduced by the Appellants' witness in his judgment;

3. That, the Honorable Tribunal manifestly erred in law and facts for failure to take the opinion of assessors in determining the suits, thus reaching an erroneous decision;
4. That, the Honorable Tribunal fatally erred in-law and fact by relying on weak and contradictory evidence of the Respondent while ignoring strong evidence by the Appellant that clearly proved his case to the required standard of proof;
5. That, the Honorable Tribunal manifestly erred in law and facts by declaring the Respondent a lawful owner of the land in dispute without determining his legal status as no title deed from the responsible Authority to prove the ownership, thus entering a wrong decision;
6. That, the Honorable Tribunal manifestly erred in law and facts by delivering judgment based on the wrongly tendered and admitted Respondent's documentary exhibits which were not read aloud before the court after being admitted in evidence as Exhibits;
7. That, the Honorable Tribunal erred in law and facts by entering judgment in favor of the Respondent without taking into consideration that the Respondent abandoned the disputed land in 2009;
8. That, the trial tribunal judgment is incurable defective for being accompanied by defective decree that does not reflect and conform with the judgment as the decree has not contained a description of the property.

During the appeal hearing, the Appellant was represented by Counsel Victoria Mwiliko, while the Respondent was represented by Counsel Mohammed Khamis. On December 19th, 2023, both learned counsels prayed that the appeal to be disposed of by way of written submissions.

Based on the written submission in support of grounds of appeal. This Court granted the prayer and directed the parties to file their respective written submissions in the following schedule:

- (a) The Appellant's submission in chief is filed on or before 29th December 2023.
- (b) Respondent's reply to the Appellant's Written Submission be filed on or before 29th December 2023.
- (c) Rejoinder submission, if any, be filed on or before 15th January, 2024.

I have carefully reviewed the submissions made by the Appellant's counsel, the grounds of appeal, and the proceedings and found that the

Memorandum of Appeal raises three legal issues that need to be determined.

The primary issues that require my attention relate to the first and third grounds of appeal, which the learned counsel has presented as the first argument in her written submission. The first ground relates to the delivery of the decision without quorum, and another is failure to take into account the opinion of the assessors in determining the suit as submitted in grounds three. These actions resulted in an erroneous decision.

Therefore, I will assess on whether the Tribunal had a sufficient number of members present to make a decision and whether the assessors were appropriately involved in making that decision. Additionally, I will examine whether the assessors' opinion was recorded and documented.

In the first ground, Counsel Mwiliko submitted that the defence case was closed and the matter was adjourned for judgment on 17th November 2022 without any schedule for the assessor's opinion. She referred to the case of **Rev. Peter Benjamini V. Tumanini Mtazamba @Mwema**, Land Appeal No. 69 of 2019 in the High Court of Tanzania, where the format of quorum and how it should be read:

"Date: 10th August, 2021

Coram: S.J Mashaka – Chairman

T/c : Magoma

Members: T.J Kashisha and J.N. Ndoma

Applicant: Present in person

Respondent: Present in person

Tribunal: The case is coming for assessor's opinion

Applicant: I am ready for the opinion

Respondent: I am ready too".

In the third argument, Mwiliko stated that the assessors were not adequately involved in the decision-making process, as required by section 37 of the Land Tribunal Act No. 7 of 1994. She contended that the trial tribunal's records do not indicate that the trial chairman consulted the assessors before rendering a verdict.

According to her written submission which refers to page 23 of the trial tribunal proceedings, Mwiliko argued that the assessors' opinions were presented as if they had participated and been consulted, but in reality, they had not participated and been consulted as required by the law. The Land Tribunal Act stipulates that the panel should comprise a Chairman and two

assessors who shall hear the dispute over which the tribunal has jurisdiction, as stated in section 13 of the Act.

During the proceedings, Counsel Mwiliko referred to two cases, namely **Emmanuel Christopher Lukumani V. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013, and **Bartazay S. Matanya & 2 Others V. Mariam Juma Mtemvu & Others**, Land Appeal No. 137 of 2019. These cases establish that every assessor must sign their opinion.

Regarding the first grounds of appeal, Mr. Mohamed Khamis, who is the counsel for the Respondent, submitted that the assessors were properly involved in the proceedings and judgment. He further stated that the assessors' involvement is evident on page 6 of the judgment, where they inserted their signatures in the judgment, indicating their participation in the decision-making process. Mr. Khamis relied on the case of **David Annois Ibonde V. Mselem Shazil Ame** (Represented by his recognized agent Khamis Ame Khamis) Civil Appeal No. 6 of 2021 High Court of Zanzibar.

He further contended that the composition of the tribunal's quorum was proper, and the assessors were fully involved as required by law in both proceedings and judgment.

To determine the legality of the proceedings and judgment, this Court finds that it is important to evaluate the merits of the case concerning the issues of quorum and assessors. These two grounds may have a significant impact on the case and should therefore be carefully considered.

In the Land Tribunal, assessors are mandatory and they are required to participate in the entire trial. According to Section 5 of the Act, the panel shall comprise a Chairman, Deputy Chairman, or Magistrate, and two Assessors. This panel will be responsible for hearing the dispute that falls within the jurisdiction of the Tribunal as stated in Section 13 of the Land Tribunal Act No. 7 of 1994.

In the current appeal, it is apparent from the Tribunal proceedings that the Honourable Chairman Hon. Subeti (RM), who presided over the matter between the parties sat with two assessors whose names appear in the proceedings, Mohamed Ameir (Assessor No. 1) and Haji Sheha (Assessor No. 2) when the hearing of the case was conducted.

Upon reviewing the original file and court proceedings; this Court ascertained that:

- (a) On the fixed date of judgment, the assessors were indeed present. Unfortunately, the judgment was not read due to the plaintiff's absence, as recorded on page 24 of the court proceedings.
- (b) Based on the same records, the judgment seems to be delivered on August 3, 2023. However, it appears that on that date, the Tribunal did not deliver any judgment, (refer original file and page 25 of the proceedings).
- (c) Additionally, there is no record of the assessors' opinions in both the original and appeal files.
- (d) There are errors regarding dates, months, and years in both files, the Court concluded that the judgment was invalid.
- (e) The court has determined that on the date of the original judgment and on all subsequent dates, a quorum was not present.
- (f) The Tribunal's Chairman did not specify a date for the judgment's delivery; however, it was signed on the same date.

Therefore, this Court is uncertain whether there was a quorum and assessors were present on the judgment date, and whether both assessors' signatures were properly indicated on that date. Further, the Court was not able to determine whether assessors were involved in the decision-making process as required by the Land Tenure Act No.12 of 1992. As a result, it's clear that the appeal should be dismissed or restarted *de novo*.

In the case of **Peter Makuri V. Michael Magwega**, Civil Appeal No. 107 of 2019 (unreported), the effect of not recording and reading out the assessors' opinions was stated clearly. The omission of not requesting or receiving the assessors' opinion, and not considering it in the Tribunal decision, is a serious error. This error is considered fatal as it goes to the root of the matter. Regardless of whether the chairman agrees or not with the opinion, it is important to read out the opinion to all parties and consider it in the decision.

The Land Tribunal Act No. 7 of 1994 requires the Chairman of the Tribunal to sit with a minimum of two assessors. (section 37).

37. "All decisions of the Tribunal, whether the final judgment or interim matter, shall be made by majority vote of the three members of the panel, the chairman and two assessors.

However, the Chairman shall have a deciding vote in all questions of law."
The Land Tribunal Act emphasizes the importance of assessors' active participation in cases referred to under sections 5(1) and (3). Therefore, a

judgment delivered without a quorum and without involving the assessors can invalidate the entire judgment.

This court has found a serious irregularity that cannot be ignored. The assessors who sat with the Chairman should be included in the trial Tribunal proceedings. According to the law, the opinion given by assessors in the Tribunal must be recorded, regardless of whether the Chairman agrees or disagrees with it. If the Chairman disagrees, he must record the reasons for his disagreement in his decision, rather than neglecting them completely.

The Law Reform Commission Tanzania considered the role of assessors in the Report on the "Review of Legal Framework Governing Land Dispute Settlement in Tanzania". In their report, they cited the case of **Moses David V. Alouis Anthony Ghiselli**, Land Appeal No. 16 of 2017 HC Bukoba (unreported) on pages 15-16. The court's view was that a tribunal cannot function without assessors.

Such irregularities were among the reasons that made the Court of Appeal of Tanzania order a retrial in the case of **William Stephen V. Ms. Leah Julius** (Administratrix of the estate of the late Neeva Saboro) Civil Appeal No. 65 of 2013 Court of Appeal of Tanzania at Arusha.

Additionally, I agree with Abdulhakim J. in the case of **Riziki Seif Salum V. Ali Issa Khamis**, which was heard in the High Court for Zanzibar at Chake-Chake, Civil Appeal No. 22 of 2022 (from the original Decree Civil Case No. 03 of 2021 of the Land Tribunal). Abdulhakim J. stated that the assessors are an integral part of the Land Tribunal and should be involved in the entire proceedings, even when a matter of law is involved.

The court is in satisfaction that there was not proper quorum and the Tribunal fails to consider and record the assessors' opinion. The Court has also found that grounds one and three presented are enough to dismiss this appeal. Therefore, the remaining grounds of appeal will not be considered. As previously stated, the trial before the Land Tribunal is deemed invalid, and the judgment is now nullified. There will be a trial *de novo* before another Magistrate.



KHADIJA SHAMTE MZEE
JUDGE

Dated at Zanzibar this 7th March 2024