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## **Assessment of the Need of Involving Assessors in Adjudication of Land Cases at District Land and Housing Tribunal in Tanzania**

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### **ABSTRACT**

*The District Land and Housing Tribunals (DLHT) is supposed to be dully constituted when presided by a chairman and two Assessors who are supposed to have knowledge in land and housing matters and customs and norms of a given area in which the Tribunal is established. Since the said Assessors are involved in all land cases at the DLHT, their role remain questionable in other land disputes that are not related to customary law and practice of the particular community. Albeit the minimum academic qualification of Assessors is form four leaver of which knowledge of the land law is still questionable to these persons. The study was conducted to assess the current role of assessors and the need of involving them in all land disputes at DLHT by testing as to whether assessors' presence in all cases including those cases with no any customs and norms element serves any purpose in the administration of justice. In ascertaining this objective the researcher used traditional doctrinal research by analyzing the relevant legislations and literatures. The findings of the study reveal that the act of involving Assessors in all land disputes has brought yet another cause of delaying cases hence defeats the whole purpose of using specialized Tribunals for Land Disputes. This is so because assessors are lay person, with knowledge only on customs and norm they have no knowledge in land laws yet they are required to give their opinion on matters of law.*

**Key words:** Land disputes; Assessors; District Land and Housing Tribunal; Tanzania

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## 1. Introduction

One of the underlying principles of the Land Act,<sup>2</sup> and Village Land Act,<sup>3</sup> is to ensure the establishment of an independent, expeditious and just system for adjudication of land disputes. The Land Disputes Courts Act,<sup>4</sup> was specifically enacted to provide for the implementation of expeditious land dispute resolution through Village Land Councils (VLC), Ward Tribunals (WT), Districts Land and Housing Tribunals (DLHT), High Court (Land Division) and Court of Appeal.<sup>5</sup> The District Land and Housing Tribunal was established as a response to implement the said underlying principles of the Land Act,<sup>6</sup> and the Village Land Act.<sup>7</sup> Nevertheless, the great challenges facing DLHT in adjudication of land disputes is the involvement of assessors as part of the quorum in all land cases regardless of their lack of skills and expertise in the area of land laws. It should be noted that assessors are neither lawyers nor expert personnel in certain matter relating to land laws. Historically, assessors were introduced to offer certain expert opinion to judges or magistrates in administration of justices. The involvement of assessors in all land cases at DLHT is therefore uncertain as to which role is intended to be served by them in cases that they lack knowledge and skills.

Assessors as part of the quorum of the DLHT are required to give out their opinion before the chairman reaches the judgment though their opinions are not binding to the chairman.<sup>8</sup> The chairman may depart from assessors' opinion where he deems fit to do so provided that he gives reasons for differing with such opinion.<sup>9</sup> Assessors are expected to be conversant with customs and norms of a given area for them to be in a better position to assist the chairman who is only conversant with land laws. However, cases that have customary elements at DLHTs are very few in numbers as most of cases are those which requires the expertise in land laws. With such situation involving assessors in all land cases while they are lack the requisite expertise adds no value in the administration of justice and defeats the whole intention of the legislature of assessors to assist the chairman in reaching a just decision.

Therefore, it is unclear as to the role of assessors in adjudication of land disputes since they are not experts in any field relating to land matters. It is in this basis, the focal point of this study is premised so as to assess the need of involving assessors in all land cases at the DLHT so as to establish whether involving them in all land cases regardless their lack of expertise adds any value or not in the administration of justice and promotes expediency of the trials as part of the rationale of establishing the specialised Tribunals for land matters.

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<sup>2</sup> Act No 4 of 1999

<sup>3</sup> Act No 5 of 1999

<sup>4</sup> Act No 2 of 2002

<sup>5</sup> Section 3 (1) Ibid, Section 167 of the Land Act, no.4/1999.

<sup>6</sup> Act no.4/1999

<sup>7</sup> Act no.5 of 1999

<sup>8</sup> Section 23 (2) of the Land Dispute Courts Act, No. 2 of 2002.

<sup>9</sup> Ibid, Section 24

## 2. The Concept of Assessors and Its Evolution

The term Assessor means a person called in to assist a court in trying a case requiring specialized technical knowledge.<sup>10</sup> The word Assessor is derived directly from the Latin language which meaning one who sits with another, or an assistant, and in English law the word Assessor denotes a person who, by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any questions which might be put to him by the judge on the subject in which he is an expert.<sup>11</sup>

Historically the use of assessors in litigation can be traced back from the common law jurisdiction where there was a proverb goes as “*two heads are better than one*”. Its origin can be traced back to the 1930s and 1940s when judges in admiralty matters in England would appoint expert assessor to advise them on nautical and technical issues.<sup>12</sup> In common law jurisdictions, assessors are usually non-lawyers who sit together with a judge to provide either expert advice (such as on maritime matters) or guidance on local practices.

During Colonial era where as in administering its colonies and protectorates in Africa, Britain sought to extend, as far as practicable, the same standards of law and justice as prevailed in England. However, the primary law administered in most British colonial courts was English law; local African customary laws were often allowed to exist alongside, if they met certain conditions. Customs were recognized only in subordination to colonial law, and were denied such recognition where they were considered ‘repugnant to natural justice, equity and good conscience’ or contrary to the ‘general principles of humanity.’<sup>13</sup>

Customary law is still recognized and applicable in Tanzanian as provided under section 11 of the Judicature and Application of Laws Act. The application of customary law has been restricted to matters of a civil nature.<sup>14</sup> However customary law still has an impact on the working of the lower level primary courts, in which assessors can support and even overrule a magistrate’s decision, and from which prosecutors and advocates are forbidden as the concerned individuals conduct their case. Assessors are not trained in English law and their adjudication is

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<sup>10</sup> Oxford Dictionary 5<sup>th</sup> Edition, Oxford University Press

<sup>11</sup> Dickey, A.(1970 )The Province And Function of Assessors In English Courts

<sup>12</sup> Henry, Lerm, an Article on Two heads are better than one; Assessors in High Court Civil Cases,

<sup>13</sup> Ibhawoh,B, (2009) Historical globalization and colonial legal culture: African assessors, customary law, and criminal justice in British Africa, of Global History (2009) 4, pp. 429–451 <sup>a</sup> London School of Economics and Political Science 2009

<sup>14</sup> Robins, S (2009) A place for tradition in an effective criminal justice system Customary justice in Sierra Leone, Tanzania and Zambia

largely customary in style. Even in the High Court assessors have a limited advisory role in sharing their opinions with the presiding judge.<sup>15</sup>

### 3. Justification for Involvement of Assessors in Land Disputes Settlements

Generally, the role of assessor in dispensation of justice is to assist judges or magistrates in matters that requires special skills or expert which the judge or magistrate may not necessarily have. In the case of *Richardson v Redpath Brown & Co. Ltd*,<sup>16</sup> the court emphasised that the rationale for the use of assessors was founded on advances in both technological and scientific knowledge in various disciplines because judges and magistrates were only professionally trained, often lacked the expertise and technical and scientific know-how to match that of the experts who were testifying before them. For fear of the inability of judges to competently adjudicate complex matters, the practice of using expert assessors to assist judges developed.<sup>17</sup> In South Africa the same practice was adopted in 1944 where they passed a legislation to govern the role of assessors in both civil and criminal matters in the lower Courts.<sup>18</sup>

The tendency of using Assessors in adjudication of land disputes originated from pre-colonial regime and later on Tanzania adopted this practice from Common Law Countries. The role of Assessors from Colonial era to date has not changed; assessor's role is to aid or assist the Court to reach a just decision.<sup>19</sup> Though, the Judge or magistrate is not bound by the opinion of assessors, he must give reasons in the judgment for differing with the opinion of assessors once he decides to differ.<sup>20</sup>

Unlike in common law, in Tanzania assessors are not intended to provide expert advice or guidance on local practice but merely a customary based assistance but bad enough they hear all land cases and give their opinion even in non customary cases which are purely matters of laws. Tanzania also adopted the practice of using assessors especially at the Primary Courts, the High Court when trying capital offenses and at the DLHT, however contrary to other jurisdiction who appoint expert assessors, the situation in Tanzania is very different as the so called assessors have no any sort of expertise capable of assisting the magistrate, judge or the Chairman. The only justification for involvement of assessors in adjudication of land disputes is to assist chairman of the District Land and Housing Tribunal in adjudicating land disputes relating to customs and practice of their community. Their main role is to opine on matters relating to

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<sup>15</sup> Robins, S (2009) A place for tradition in an effective criminal justice system Customary justice in Sierra Leone, Tanzania and Zambia

<sup>16</sup> [1944]1 All ER 110)

<sup>17</sup> Henry, L, an Article on Two heads are better than one; Assessors in High Court Civil Cases" Accessed on

<sup>18</sup> *Ibid.*

<sup>19</sup> Massay, G, (2013) Adjudication Of Land Cases In Tanzania: A Bird Eye Overview Of The District Land And Housing Tribunal, A paper prepared for internal reflections and discussion at the Land Rights Research and Resources Institute –HAKIARDHI in July 2013.

<sup>20</sup> Section 24 LDCA, no. 2 of 2002

customary law and practice of the community. Chairman is deemed to be expert of land laws and matters related to law, while assessors are supposed to be very conversant with customs and practice relating to land in the particular community. This is evidence with the requirement that an assessor should be appointed from the area where the Tribunal is located and who is knowledgeable in land related customs and practice.

#### **4. The Need of Involving Assessors in All Land Cases at DLHT**

The Land Dispute Courts Act provides that, the District Land and Housing Tribunal shall be composed of a chairman and not less than two assessors.<sup>21</sup> Therefore, the tribunal is said to be dully constituted when held by a chairman and two assessors who are required to give out their opinion before the chairman reaches the judgment.<sup>22</sup> The general rule for a Tribunal to be dully constituted is when it is held by a chairman and two assessors, however the exception to the general rule is when in the course of any proceedings before the Tribunal either or both members 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 absence.<sup>23</sup> Involvement of Assessors at the DLHT is a compulsory legal requirement and failure of it renders the decision thereof null and void.

The law empowers the Minister responsible for land to appoint not more than seven assessors, three of whom are supposed to be women for each established District Land and Housing Tribunal after consultation with the Regional Commissioner.<sup>24</sup> Assessors are supposed to serve for the term of three years and may be eligible for re-appointment.<sup>25</sup> For a person to be eligible for appointment as assessor of the DLHT, he must be a citizen of the United Republic of Tanzania, aged 21 years and above who ordinarily resides in the area where the DLHT is established must have a minimum education of form four with some knowledge in land and housing matters as well as customs and norms of the area in which the Tribunal is established.<sup>26</sup> Notably, it is not easy to establish the knowledge of a person without a formal examination or experiences in the same which can be implied regarded for elders. Basing on the above qualifications, it is questionable as to whether a mere form four leaver is competent enough to opine on all issues relating to land law.

Assessors are expected to be conversant with issues of customs and norms as per regulation 33 (1),<sup>27</sup> in order for them to assist the Chairman in reaching a just decision, however it is not all

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<sup>21</sup> Ibid, Section 23(1)

<sup>22</sup> Section 23 (1) &(2) of the LDCA, no. 2 Of 2002

<sup>23</sup> Section 23(1) of the Land Disputes Courts Act, No. 2 of 2002

<sup>24</sup> Section 26(1) of the Land Disputes Court Act, Cap 216/2002

<sup>25</sup> Section 26 (3) of the LDCA, No.2 of 2002

<sup>26</sup> Regulation 33 (1) (a) & (b) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulation, GN No. 174/2003

<sup>27</sup> of GN .No. 174/2003

cases that have the elements of customs and norms of a given area. Most of the land cases are those which require land law knowledge and experience in land matters, under such circumstances it is questionable whether a total involvement of Assessors in all land cases even those which do not fall under customs and norms is necessary. In this regards, assessors are placed in a position of assisting the chairman in adjudication of land disputes. Instead of requiring the lay men Assessors to give their opinion in matters that they have no skills and expertise, their involvement in land cases could only sound better if it could be restricted to cases involving customary law and practice of the particular community.

As per the qualifications provided in the land Disputes Courts Regulation<sup>28</sup> for a person to be appointed as an assessor; It is doubtful as to whether assessors fit in the shoes of assisting the chairman on land laws while they have no such skills taking into account that they are lay person with no knowledge in land law or in any expert issues relevant to adjudication of land disputes except for the mere knowledge on customs which is a very minor component in land cases at DLHT. Their involvement in all land cases, their role is still questionable in purely law based land cases as they lack such skills and knowledge to give their reasoned opinion.

## **5. Other Jurisdiction's Experience on the use of Assessors**

The practice of involving assessors is not new in England, assessors are particularly important in procedures where expert knowledge or experience is required, and where without their assistance it may be necessary to provide complex or often contradictory expert evidence or other professional forums designed to deal with such matters. In England, the Admiralty Court summons one or more assessors to assist a judge as it conflicts with similar acts of damage, conservation, and actions related to personal injury or death on vessels and fishing vessels. In all other Admiralty proceedings the assessors are summoned only at the request of the parties or by court order. The directive to the direction summons will determine whether the case will be with assessors and although this is a matter for the Court only, the parties can casually agree not only on whether assessors are needed, but also on the type of assessors and, in some cases, who will fill the office.

The Position in England is that assessors are called by the Court or if an application is made by parties in special cases where necessary especially in cases that require the expertise of the assessor. There is no permanent hearing for all cases even those cases that are incompetent, and for a person to be called an assessor in England, he must be competent. This position is very different from Tanzania's position especially in the District Land and Housing Tribunal where assessors are made part of the process of adjudication in all cases of land even in unconventional and cultural contexts, and they do not have the necessary skills in international law to better serve the chairperson.

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<sup>28</sup> Reg. 33(1) (a) & (b) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulation, GN No. 174/2003

## 6. Challenges associated with the use of Assessors in adjudication of all land cases at DLHT

Despite the important role played by Assessors at DLHT in assisting the Chairman in reaching a just decision, the use of Assessors in all land cases has caused more critics than expected to the extent that the whole purpose of establishing these specialized Tribunals have been defeated. Considering that the Land Dispute Courts Act was enacted as the response to implement one of the underlying principles of the Land Act,<sup>29</sup> and Village Land Act,<sup>30</sup> which is to ensure the establishment of an independent, expeditious, and just system for adjudication of land disputes. The land courts system established by this Act operates to ensure that land disputes are adjudicated in a just and expeditious way by an independent institution.<sup>31</sup>

While Assessors at DLHT, play a very limited role due to lack of skills on land laws as they have only knowledge in customs and norms and whereas cases with the customary elements are very few in DLHT, involvement of Assessors in all land cases can be weighed to be of so much disadvantage compared to the value they add. Apart from delay of completion of land cases before the DLHT, their involvement also have caused so many irregularities in the adjudication process which as a result have occasioned to failure of justice as so many decisions by DLHT end up being nullified by higher Courts that is the High Court and the Court of Appeal of Tanzania.

It has been evidenced in some cases, The Court of Appeal of Tanzania nullified the lower Tribunal's decisions due to improper procedures regarding assessors. In the case of *Edgar Kahwili Vs. Ameir Mbaraka & Azania Bancorp*,<sup>32</sup> whereas in this case issues for determination were whether it was necessary to record the opinion of assessors even when they were in agreement with the chairman of the tribunal, the Court asserted that unclear involvement of assessors in the trial renders such trial a nullity and that it was mandatory for the opinion of assessors to be on record. Another issue was on the change of assessors during the trial, the Court averred that changing of assessors during the trial was in contravention of Section 23 (3) of the Act as the provision did not contemplate a complete change of all assessors in its latitude. The end result was that the Court found that the trial tribunal was not properly constituted as the said assessors were not present throughout the whole trial and that the two omissions could not be cured as they went to the root of the matter and resulted to the failure of justice hence the Court nullified the proceedings and judgment of the trial tribunal.

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<sup>29</sup> Act no. 4 of 1999

<sup>30</sup> Act no. 5 of 1999

<sup>31</sup> Massay, G, (2013) Adjudication Of Land Cases In Tanzania: A Bird Eye Overview Of The District Land And Housing Tribunal, A paper prepared for internal reflections and discussion at the Land Rights Research and Resources Institute –HAKIARDHI in July 2013.

<sup>32</sup> Civil Appeal no. 154 of 2015, CAT at Iringa (Unreported)



On the other hand, In the case of *Chadiel Mduma Vs. Denis Mushi*,<sup>33</sup> the Court of Appeal referred to the case of *Sabry Hafidhi Khalfan Vs. Zanzibar Telecom Ltd. (Zantel)*<sup>34</sup> where the Court of Appeal nullified the said decision and pointed out that opinions of assessors can be of great value and assistance to a trial judge and in the administration of justice in general. Courts of law therefore, should always accord their opinions with deserving attention and weight and not to discard them lightly without offering any reason amount to disrespect and undermining role. It is not only to accord their opinion with deserving attention and weight but also their opinion should appear in the records. Failure to include their opinion in the record may vitiate the decision in case of appeal or revision.

As it was emphasised in the case of *Hamisa S. Mohsin and two others Vs. Taningra Contractors*,<sup>35</sup> where the Court of Appeal nullified the decision of High Court and that of Temeke District Land and Housing Tribunal for reason that although the Chairman stated that he agreed with the opinion of assessors but the said opinion of assessors were missing in the records. The Court of Appeal went further that;

*“It is our considered view that since the law requires assessors to give their opinion, such opinion must be on record in order to ascertain if truly, the chairman in preparing the Tribunal’s judgment did consider the opinion of assessors.”*

In this regard, the chairman of the tribunal is duty bound to sit with two assessors in every case. And he must accord these assessors with an opportunity to give their 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., in the case at hand the chairman closed the case for the defence and he did not require the assessors to give their opinion as required by the law, that is deemed fatal irregularity and vitiate the proceedings.<sup>36</sup>

In another case of *Edina Adam Kibona Vs. Absolom Swebe (Sheli)*,<sup>37</sup> the Court of Appeal observed that;

*“For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in*

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<sup>33</sup> Civil Appeal no. 41/2013, CAT at Dar es salaam, (unreported)

<sup>34</sup> Civil Appeal no. 47/2009, CAT (unreported)

<sup>35</sup> Civil Appeal no. 51/2013, CAT at Dar es salaam (unreported)

<sup>36</sup> Civil Appeal no. 286/2010 CAT at Mbeya (unreported)

<sup>37</sup> Civil Appeal No. 286 Of 2017, CAT at Mbeya (Unreported)

*further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose.”*

There are so many decisions that are being nullified by the Court of Appeal for failure of properly following the procedures on how to involve assessors in determination of land cases at the DLHT, the act of nullifying the decision of the trial tribunal occasions a miscarriage of justice since justice delayed is justice denied, also parties to the nullified cases incur so much costs in prosecuting their cases hence there is wastage of both time and resources.

The above situation could be harmonized by only involving assessors in few cases that have customary elements and the remaining cases which are purely based on land law be determined by the chairman only or by totally excluding assessors as party of the qorum of the tribunal just as the way it is in other District Courts for the purpose of ensuring expedient trials.

## **7. Conclusion**

Basing on the stipulated qualifications for assessors, the role of assessor in non customary cases adds no value in adjudication of land disputes unless pre-requisite knowledge, experience and skills in land law is added as qualification for a person to be illegible for the appointment as an assessor. The involvement of assessors in all land cases while they lack knowledge in land laws is a good for nothing procedure in the administration of justice. It is high time that in order to avoid miscarriage of justice and the expense of appeals, the Land Disputes Court Act be amended by either involving assessors in only those cases that require their knowledge in customs and norms or by involving assessors who have the requisite knowledge, experience in the land law or completely exclude assessors in the adjudication of land cases at DLHT.

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## **9. Author’s Biography**

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