IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO 126 OF 2020

(From the decision of District Land and Housing Tribunal for Kinondoni District at Kinondoni Land Application No. 345/2012)

AMANI A. ABEID..... APPELANT

VERSUS

HUSSEIN KISENGO.....RESPONDENT

JUDGMENT

Dated 22nd & 23rd June, 2021

J.M. Karayemaha, J.

The Appellant **AMANI A. ABEID** Sued the Respondents Namely, **HUSSEIN KISENGO** herein before the District Land and Housing Tribunal for Kinondoni at Kinondoni (hereinafter the District Land and Housing Tribunal) through application No. 345/2012. Reliefs prayed by the applicant thereat were:

1. *THAT, the trial Tribunal grossly erred both in law and in fact for declaring the Respondent as the lawful owner of the land, the fact which was proved by him (the Respondent)*
2. *THAT, the trial tribunal erred in law for awarding ownership If the land, which the Respondent himself denied to have ownership of the land.*

3. *THAT, the trial Tribunal erred in law and fact for not considering the proximity of the coconut tree from the Appellants wall fence vis a vis that of the Respondent.*
4. *THAT, the trial Tribunal erred in law and in fact when based its reasoning on the fact that the Appellants sale Agreement did not contain the coconut trees, instead of measuring the size of the Appellant's bought land and see to whom does the coconut in dispute fall between the Appellant and Respondent.*

After a full trial, the District Land and Housing Tribunal granted the application by declaring the respondent lawful owner of the suit property and the coconut trees therein. He ordered further that the coconuts that were growing up to the respondent's fence to be cut down to avoid further dispute also for safety purpose. In addition the respondent thereto was ordered to bear the costs.The Appellant was aggrieved. He then lodged the present appeal, and advanced four grounds of appeal, which are:

1. *THAT, the trial Tribunal grossly erred both in law and in fact for declaring the Respondent as the lawful owner of the land, the fact which was not proved by him (the Respondent).*

2. *THAT, the trial Tribunal erred in law for awarding ownership of the land, which the Respondent himself denied to have ownership of the land.*

3. *THAT, the trial Tribunal erred in law and fact for not considering the proximity of the coconut tree from the Appellant's wall fence vis a vis that of the Respondent.*

4. *THAT, the trial Tribunal erred in law and in fact when based its reasoning onthe fact that the Appellant's sale Agreement did not contain the coconut trees, instead of measuring the size of the Appellant's bought land andsee to whom the coconut in dispute fall between the appellant and the respondent.*

In the course of preparing for the hearing, I noted that there two serious anomalies that needed attention before indulging deep into the grounds of appeal. They are:

1. *That the Trial Tribunal conducted the trial in contravention of section 23 (1) of the Land Disputes Courts Act, Cap216 R.E 2019 when it conducted the trial with the aid of one assessor.*

2. *That it heard and decided the case before it without the aid of assessors.*

On discovering these issues I called upon parties to address the Court on this aspect. Parties ably addressed the court on the same date.

Addressing the court Mr.Mwalali for the appellant submitted that the Coram of the trial tribunal was not complete. Guided by section 23 (1) of the Land Disputes Courts Act (Cap 216 R.E. 2019) (hereinafter LDCA), the learned advocate remarked that it was mandatory for the tribunal to be constituted by having one chairman and not less than two assessors. He observed that

all along the whole tribunal conducted the trial with the aid of one assessor.

On the second anomaly, Mr. Mwalali submitted that the presence of assessors at the trial in the tribunal is a requirement of law as provided for under section 23 (2) of the LDCA. He remarked that assessors should be present during the trial from the beginning to the end of the application and are obliged to give their opinion. Mr. Mwalali submitted adding that the Chairperson should require the assessors to give opinions before delivery of judgment and the same must be seen in the tribunal's judgment in terms of section 19 (1) and (2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations of 2003 G.N. 174 of 2003 (hereinafter the Regulations).

The learned counsel observed further that proceedings show clearly that assessors were not given a chance to give their opinion. By so doing, the trial tribunal failed to comply with the law.

On his party, the respondent didn't see any problem in what the Trial Tribunal did. To him the tribunal had good reasons to do so.

After carefully going through the record of the District Land and Housing Tribunal as well as the submissions by Mr. Mwalali, I wish to state the following. As correctly pointed out by Mr. Mwalali, section 23 (1) of the LDCA,provides for the composition of the District Land and Housing Tribunal as follows:

*"S 23 (1) **The District Land and Housing Tribunal** established under section 22 **shall be composed of one chairman and not less than two assessors;***

I have closely observed the trial tribunal's record and learnt that from the beginning of the trial the Coram was of one chairman and one assessor, namely, Mwiru Kinyondo. Section 23 (1) of the LDCA makes it mandatory that every tribunal must be constituted with ***"one chairman and not less than two assessors."*** Where the trial tribunal has failed to comply with this provision, in my settled view, renders the trial a nullity.

Regarding the second anomaly, it is very clear that the District Land and Housing Tribunal flouted the procedures as far as the issue of participation of assessors in the trial of the application is concerned. The record of the District Land and Housing Tribunal clearly shows that the assessor took part in the trial, that is, during hearing of the matter. However, the record does not show that thesaid assessor recorded his opinion and read it in the presence of parties before the chairman had composed a judgment as required by law. The proceedings of the District Land and Housing Tribunal, specifically, of 23/6/2016 show that after paying a visit to the locus in quo, the learned trial chairman fixed a judgment date. It reckoned from the record that on that date the assessor was present. The chairman never informed the assessor to prepare his opinion or give it right away. In the same line, when the matter was called for judgment on 17/8/2016 the chairman informed parties asthat:

"Tribunal

The file is with the tribunal assessors for opinion. I fix another judgment date.

Order

Judgment on 23/9/2016 at 13:00pm

sgd

17/8/2016"

The record of the Trial Tribunal demonstrates that the judgment was delivered on 7/10/2016. My understanding of the above quoted orders don't entail that the chairman ever invited the assessor to give his opinion as per the requirement of the law before parties. These orders were too general; they were not specific to establish that the assessor was invited to give his opinion. This was indeed a glaring omission. As correctly pointed out by Mr. Mwalali, section 23 (2) of the LDCA,requires the assessors to give out their opinion before the chairman composes a judgment. It provides thus;

> *"S 23 (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]

This duty is further elaborated in the regulations made under the above law, that is, the District Land and Housing Tribunal, Regulations. Regulation 19 (2) provides thus:

> *19 (2) 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 provided]

In his judgment, the trial chairman is quoted referring to the assessors' opinion. But the question is, when and where did the assessors give his opinion? The answer to this question is certainly not available as the record of the trial tribunal is silent on this. This means there was noncompliance with the provisions of the law cited above. The above provisions have been restated in many High Court and Court of Appeal decisions including the cases of **Mwita Swagi v Mwita Geteva** (supra), **Tubone Mwambeta v Mbeya City Council,** (Supra) (both unreported) ***General Manager Kiwengwa Stand Hotel v Abdallah Said Mussa,*** Civil Appeal No. 13 of 2012, ***Ameir Mbarak and Azania Bank Corp. Ltd v Edgar Kahwili,*** Civil Appeal No. 154 of 2015. In ***Edina Adam Kibona v Absolom Swebe (Sheli),*** **Civil Appeal No. 286 of 2017, CAT, Mbeya sub registry (unreported)** the court held that assessors' opinion must be given in the presence of parties. The Court observed at page 6 of its judgment:

> *"... we are aware that the original record has the opinion of assessors in writing... However, the record does not show how the opinion found its way in the court record".*

The court then concluded thus:

> *"...the chairman must require every assessor present to give his opinion. It may be in Kiswahiii. That opinion must*

be in the record and must be read to the parties before the judgment is composed."

In ***Ameir Mbarak's*** case (supra) when the Court of Appeal noted that the record of the trial proceedings did not show if the assessors were accorded the opportunity to give their opinion as required by the law, but the chairperson only made reference to them in his judgment as in the current case, observed that:

> *"...in our considered view,* ***it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgment of the chairman in the judgment.*** *In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and* ***this was a serious irregularity."*** [Emphasis added]

In the instant matter the original record contains written opinion of assessors. However, the record does not show when and how that opinion got into that record. This, in my humble view, clearly points out that the same was not given in the presence of parties. It was put in the record through unknown procedure. It worth noting that was very crucial on the part of the Chairman to call upon the assessor to give his opinion in writing and read the same to parties. The Court of Appeal emphasized on the rationale behind in the case of **Tubone Mwambeta v Mbeya City Council,** (Supra) that:

> *"... 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]

In the case on board the chairman, did not, at the conclusion of the hearing of the application indicate that he availed time to assessor to give his opinion or did he give opportunity to parties to know the nature of the assessor's opinion. With that glaring omission, which in fact, is total failure to comply with the requirements of the law, it means the whole trial and the resulting judgment were a nullity.

Now, having taken such a stance for the above obvious reasons, I do not think I am called upon to labour on the grounds of appeal. Findings on the raised irregularity suffice to dispose of the whole appeal.

On the strength of the above cited statutory and case laws, I am behooved to hold that the District Land and Housing Tribunal failed to constitute the Coram and actively involve the assessor in the determination of the application. This was a total disregard of the clear provisions of section 23 of the LDCA and Regulation 19 of the Regulations. Conspicuously, the omission is fatal and vitiates the proceedings. Consequently, the proceedings are quashed and the judgment and decree thereto are set aside. The record should be remitted back to the trial tribunal for a fresh

and expeditious trial before another chairman sitting with a new set of assessors.

As this matter is not yet concluded between parties, each party shall bear its costs on the ground that the retrial was caused by the District Land and Housing Tribunal.

It is accordingly ordered.

Dated at Dar es Salaam this 23rd day of June, 2021

J.M. KARAYEMAHA

JUDGE

23/6/2021