IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 48 OF 2021

(Arising from the appeal of the District Land and Housing Tribunal of Geita at Geita in Land Application No. 55 of 2018.)

SERIKALI YA KIJIJI CHA MULANGA---------- APPELANT

VERSUS

LAURENT BAHATI KAFUTE----------1ST RESPONDENT

AIRTEL TANZANIA PUBLIC LIMITED COMPANY (PLC)----------2ND RESPONDENT

JUDGMENT

Last Order: 10.11.2021
Ruling Date: 08.12.2021

M. MNYUKWA, J.

This is a land appeal where by the Appellant SERIKALI YA KIJIJI CHA MULANGA hereafter referred to as the Appellant, appealed against a decision of the District Land and Housing Tribunal for Geita, at Geita hereafter referred to as the "DLHT" by Hon. Masao, E. Chairperson, which was decided in favour of LAURENT BAHATI KAFUTE, the 1st Respondent to include Airtel Tanzania Public Limited Company (PLC) the 2nd

Respondent. The brief background of the matter was that, the 1st Respondent sued the Appellant and the 2nd respondent over a piece of land he claims that the appellant granted access and leased to the 2nd Respondent to erect a communication tower and collects revenue with no cloth of right for he claims that the piece of land belongs to him. The matter was determined before the DLHT of Geita at Geita and it was decided in favour of the 1st respondent. Dissatisfied, the appellant approached this court with this instant appeal with 8 grounds of appeal thus: -

1. *That the trial chairman erred in law and fact holding that the PW1 father was a village chairman of the appellant the fact which was improperly evaluated to favour the 1st respondent.*
2. *That trial chairman erred in law and fact by holding in favour of the respondents allowing the contradictory evidence between PW1 and PW2 which consequently ended in prejudicing the appellant.*
3. *That the trial chairman erred in law for failure to appreciate the reasons advanced by the appellant that the administrator of the estate was inevitable taking into consideration the evidence of PW2.*
4. *That the trial chairman erred in law in granting the right of ownership over the landed property to the respondent without getting to the bottom of the law governing village land as a result*

the respondent was given the right over dispute land which he does not deserve.

5. *That the trial chairman erred in law holding in favour of the respondent without complying with procedures governing assessors.*
6. *The trial chairman erred in law by disregarding the village minutes tendered as exhibits.*
7. *That the trial chairman erred in law holding in favor of the respondent without taking into consideration of what he saw during visit to the scene.*
8. *That the trial chairman erred in law for holding in favor of the respondent while the respondent sued a wrong party that is Serikali ya Kijiji instead of the village council (Halmashauri ya Kijiji).*

The 1st respondent duly filed a reply to the memorandum of appeal and the 2nd respondent did not file a reply to the memorandum of appeal, but in his written submission opted to support the appeal and in support of the appeal, prays to submit on the 5th and 8th grounds of appeal. By the order of the court dated 16.09.2021, this appeal was argued by way of written submissions, the order that all parties complied. The appellant filed his written submissions on 30.09.2021 serviced by Mr. Serapian Matiku, learned state attorney, the 1st respondent filed reply to the written

submission on 15.10.2021 serviced by Mr. Pauline Michael, advocate and the 2nd respondent filed his reply on 28.09.2021 serviced by Imma advocates and the appellant filed a rejoinder on 20.10.2021.

The appellant was the first to submit. On the first ground of appeal, the appellant claimed that the DLHT erred in law and fact in evaluating the evidence holding that PW1 father was a village chairman of the appellant. Referring to page 13 of the typed proceedings the same was the evidence of PW2 and not PW1 as can be reflected at pages 18 and 19 of the judgment.

On the second ground of appeal, the appellant claims that the DLHT erred in fact as his judgment based on the contradictory evidence between PW1 and PW2. On the contradiction, he claims that PW1 stated that the tower was erected sometime on April 2018 while PW2 stated that it was in 2017. To top up, he also claims that the judgment refers to words that were not uttered by the PW2.

On the third ground of appeal, the appellant claims that the trial Chairman erred for failure to appreciate reasons advanced by the appellant that the administrator of the estate was inevitable. He avers that the evidence of PW1 that he was given the disputed plot and that of PW2 stating that PW1 inherited the same from his father, then PW1 was

to appear as the administrator of the estate of the late Bahati Kafule and no other. He contends that PW2 evidence did not corroborate the evidence of PW1 rather was against it.

On the forth ground of appeal, he submitted that the trial chairman erred in law in granting the right of ownership over the landed property to the first respondent without getting to the bottom of the law governing village land. He claims that the respondent failed to sue the proper party. Referring to section 8 of the village Land Act, Cap. 114 R.E 2019 he avers that the law requires that the village land be under the village council and it was not proper for the 1st respondent to sue Serikali ya Kijiji. Insistingly, he referred to section 26 of the Local Government (District Authorities) Act Cap 287 RE; 2019 that a village council is a body corporate and Serikali ya Kijiji (village government) is improperly sued and the decree could not be executed.

On the fifth ground of appeal, the appellant claims that, the trial chairman erred for failure to comply with the procedure governing assessors. He claims that it is a requirement of law that assessors be present at a trial throughout referring to section 23(2) of the Land Disputes Act Cap 216 RE: 2019. He went on that, at the end of trial before judgment, assessors are required to give their opinion in writing under

Regulation 19 (1) and (2) of the Land Dispute Courts (the District Land and Housing Tribunal) Regulations, 2003 GN No. 174. He claims that the proceedings do not reflect the legal requirement and the judgment only acknowledges the assessor's opinion which is bad in law. In support of his argument, he cited the case of **Sikuzani Saidi Magambo & Another vs Mohamed Roble,** Civil Appeal no. 197 of 2018 CAT.

On the sixth ground of appeal, he claims that the trial Chairman erred for disregarding the village minutes tendered as exhibits during trial. He avers that, the appellant tendered the village general assembly resolutions which was admitted and marked as exhibit "D" but was not considered by the trial chairman when composing the judgment.

On the seventh and eighth grounds which he submitted together, he stated that the trial chairman erred in law for not considering what he observed on a scene when the tribunal made a visit. He avers that the observation had neither been reflected on the proceedings nor being discussed on the judgment which is bad in law. To bolster his argument, he referred to the cited case of **Sikuzani Saidi Mgambo** (supra).

The appellant's learned counsel, therefore, retire his submissions prays for this court to allow the appeal, quash and set aside the judgment and decree of the DLHT with costs.

The 2nd respondent submitted in support of the appeal and opted to submit on the fifth and eighth grounds of appeal.

On the eighth ground of appeal, he avers that the 1st Respondent sued a wrong party that Serikali ya Kijiji instead of the village council (Halmashauri ya kijiji). He avers that only a body with a legal personality can sue or be sued. Citing section 26(2) and 142(1) of the Local Government (District Authorities) Act Cap 287, he insisted that the lease agreement exhibit D4 was entered by the Mulanga village council and not the appellant who was not the party to the lease agreement. Cementing on the act of the 1st respondent, he maintained that the 1st respondent sued a wrong party not privy to the contract and acquire no status to hold the village land. To bolster his argument, he refers to pages 18 to 19 in the case of **M/S Mkurugenzi Nowu** (supra) that the issue of suing a wrong party had the effect on the entire trial.

On the fifth ground he submitted that the trial chairperson erred for failure to comply with procedures governing assessors at a trial, he referred to section 23(1) and (2) of the Land Dispute Courts Act Cap 216 RE 2019 and Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No. 174 of 2003. He went on that, the tribunal is properly composed when sited with not less than

two assessors and at the end of the trial before the composition of the judgment, they will be required to give their opinion. He claims that the same was not done in the instant case for the opinion of assessors are not reflected in the proceedings and therefore before the judgment assessors opinions were not known to parties. Defending his arguments, he cited the case of **Juma S. Kibayasi (the administrator of the Estate of Mariam J. Kibayas) vs. Job Hosea (the administrator of the Estate of Mariam J. Kibayas) & 2 Others**, Civil Appeal No. 14 of 2018. He insisted that the essence of Regulation 19(2) of GN. 174 of 2003 requires the assessors to give their opinion open to parties for them to know what was opined by the assessors and whether or not the same opinions were considered by the chairperson. He, therefore, retires supporting the appellant's appeal.

The first respondent learned counsel submitted as against the appellant and the 2nd respondent. Breaking through, he insisted that the irregularities fronted by the appellant such as naming the appellant as Serikali ya Kijiji cha Mulanga and not Halmashauri ya Kijiji cha Mulanga, and that PW1 father was a village chairman instead of PW2 father are minor and do not go to the roots of the matter and therefore prays to be ignored. To cup it all, he referred to section 6 of Written Laws

(Miscellaneous Amendment) Act No. 03 of 2018 and section 45 of the Land Disputes Courts Act, Cap. 216 RE: 2019.

On the first ground of appeal, he acknowledges the trial chairman erred recording that PW1's father was a village chairperson instead of PW2 but he insisted that the same did not occasion a failure of justice and therefore curable under section 45 of the Land Disputes Courts Act, Cap 216 RE: 2019.

On the second ground of appeal, he went on insisting that the contradictions were set off when PW2 was cross-examined and he referred to page 14 of the typed proceedings.

On the third ground of appeal, he claims that the appellant learned counsel took a wrong direction toward the administration of the estate for there was no issue of inheritance raised.

On the fourth ground, he avers that the assertion that the suit was brought against a wrong person is an afterthought for the reasons that it is not reflected in the proceedings and was not raised at a trial. Citing the case of **Rashid Abdallah Dochi vs Leonard Gerald Bura,** Land Case No. 05 of 2017 he avers that this is a curable defective under section 6 of the Written Laws (Miscellaneous Amendment) Act No. 03 of 2018. He insisted that the learned counsel did not explain whether there is a

difference between "Serikali ya Kijiji" and "Village Council". He went on referring to the case of **M/S Mkurugenzi NOWU Eng vs Godfrey M. Mpezya**, Civil Appeal No. 188 of 2018 cited by the 2nd respondent that the case is distinguishable and it was decided before the coming into force of the GN. No. 3 of 2018. He went further that; it was a slip of the pen for the 1st respondent aimed at suing Halmashauri ya Kijiji cha Mulanga. He insisted that the defects are curable under section 6 of GN. No. 03 of 2018. He insisted that no execution is intended to be effected against the appellant rather, to the 2nd respondent as the judgment of the DLHT directs.

On the fifth ground of appeal, he avers that the procedures as to the assessors were duly followed and it is reflected on page 17 of the judgment. He avers that the cited case of **Juma S. Kibayasi** (supra) is distinguishable. In the case at hand, he insisted that assessors were engaged and opined in the favor of the appellant and the 2nd respondent while the cited case assessors were never involved.

On the sixth ground, he denied the claim of the appellant that the tendered exhibit "D" was disregarded. Referring to page 15 of the judgment, he insisted that the village minutes exhibit "D" was regarded and was not useful in the determination of the case in favor of the

appellant. He asserts that the minutes that contain resolution as to the ownership of the suited land was passed after the lease was entered and executed.

On the seventh ground, he avers that the law does not make it mandatory to visit the disputed land, and for the reasons that the proceedings and judgment did not reflect that there was a visit it is clear that the visit was not done. Insisting, he cited the case of **Halfan Sudi vs Abieza Chichili** 1998 TLR 527 that the court records represent what happened.

He, therefore, prays this court to dismiss the appeal.

The appellant made a rejoinder where he reiterates what he had submitted in chief and insisting that the 1st respondent sued a wrong party is not a minor anomaly as claimed by the 1st respondent learned counsel, insisted on unprocedural dealing with assessors at a trial, non-consideration of the exhibit tendered and the visit locus quo which is not reflected in the proceedings and in the judgment. He maintains his prayer that this court to dismiss the appeal with costs.

In respect of what has been submitted by both parties, and before I proceed with the other grounds of appeal, I will go to fifth ground of appeal as to whether the trial chairman erred in law by holding in favour

of the respondent without complying with procedure governing assessors in dispensing.

In parties' submissions in respect of the fifth ground, the appellant and the 2nd respondent contend that the judgment of the DLHT was given in disregarding to the law under Regulation 19(1) and (2) of the Lands Disputes Courts (the District Land and Housing Tribunal) Regulations GN No. 174 of 2003 and section 23(1) and (2) of the Land Dispute Courts Act, Cap 216 RE 2019. They went on that, the tribunal is properly composed when sited with not less than two assessors and at the end of the trial before the composition of the judgment, they will be required to give their opinion in witting. In support of their arguments the learned counsels referred to the case of **Juma S. Kibayasi (the administrator of the Estate of Mariam J. Kibayas) vs. Job Hosea (the administrator of the Estate of Mariam J. Kibayas) & 2 Others**, Civil Appeal No. 14 of 2018.

On the other hand, the 1st respondent avers that the procedures governing assessors were properly followed by the DLHT as the remained assessor gave her opinion.

In this ground of appeal, this court is called on to determine the issue as to whether the assessors were properly involved during the

hearing and at the conclusion of the trial before the DLHT. In the situation of the case at hand, the records are clear as to the extent the trial tribunal dealt with the assessors. The complains in this appeal is that the DLHT erred for not complying with Regulation 19 (1) and (2) of the Lands Disputes Courts (the District Land and Housing Tribunal) Regulations GN No. 174 of 2003 which provides that: -

> *"Regulation 19 (2) Not withstanding sub-section (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in kiswahili".*

Upon perusal in the available records, I find that the case was all along heard by A. M. Kapinga, Chairperson and on 26.03.2020 he set a date for the visit of the locus quo and filing of final submissions and was assisted by two assessors, Kinuno and Deus. This suggests that the trial during the hearing was conducted with the aid of assessors as it is provided for under section 23 of the Land Disputes Courts Act, Cap 216 R.E 2019 which states that:

> *"23(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 judgement."

Without any record of what happened to the presiding chairman, the matter on 16.11.2020 presided over by E. Masao, Chairman who was not assisted by any assessor, set a day for a visit of a locus quo which in fact was conducted on 15/02/2021, and no assessors appears to form part of the corum. The same date, the trial chairman fixed a date for judgment to be 26.03.2021. The judgment was delivered in 12.04.2021 and on record, it is one assessor Rhoda Kinuno whose opinion can be traced. In the judgment, the chairperson acknowledges the opinion of the assessor but tracing on records, it is not shown if the Chairperson requires the assessor who was present to give her opinion. The records do not show if the Chairperson complied with Regulation 19 (2) of the Lands Disputes Courts (the District Land and Housing Tribunal) regulations GN No. 174 of 2003 cited above. This anomaly is fatal and vitiated the proceedings.

In the case of **Edina Adam Kibona vs Absolum Shebe (sheli)**, Civil Appeal no. 286 of 2017 (Unreported) the Court of Appeal had this to say: -

> *"We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, it terms of Regulation 19(2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgement is composed."*

Again, in the case of **Tubone Mwambeta v Mbeya City Council,** Civil Appeal No 287 of 2017 as it was cited in the case of **Juma Kibayasi** (supra), the Court of Appeal stated that:

> *".... We are increasingly of the considered view 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 is mine in the bolded words)

Coming into our case at hand, the case file has the original opinion of assessor in writing, written by Rhoda Kinuno which has been referred by the Chairman in his Judgement as it is reflected on page 17 of the Judgement, but in view of the fact the records does not show that the assessor was required to give her opinion, it is surprising as when and where the assessor was required to give her opinion by the Chairperson. Worse enough, the records are silent if the opinion of assessor was availed to the parties so as to know what the assessor opined. On that basis, I am inclined to the 2nd respondent's averment that the opinion was not availed to the parties.

In the case of **Edina Adam Kibona** (supra) the Court of Appeal remarked that:

> *"... 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 further view of the fact that they were not read in the presence of the parties before the judgement was composed, the same has no useful purpose."*

Guided by the above authorities, I find that the failure by the Chairman of the DLHT to require the assessors to give their opinion before composing judgement and read over to the parties the said

opinion vitiates the proceedings and the judgement of the DLHT. I hereby nullify and set aside the judgment. The proceedings of the DLHT are also nullified and set aside.

Since the fifth ground of appeal dispose of the matter, I find no need to exercise my mind to discuss other grounds of appeal.

In the final result, I order retrial of the case before another Chairperson with a new set of assessors be commenced. Each party to bear his own costs.

It is so ordered.

M.MNYUKWA
JUDGE
8/12/2021

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
8/12/2021

Judgment delivered on 8th day of December, 2021 via audio teleconference whereby all parties were remotely present.

M.MNYUKWA
JUDGE
8/12/2021