IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 29 OF 2020

(Originating from the District Land and Housing Tribunal for Lindi at Lindi in Land Application No.40 of 2018)

MICHAEL STANSLAUS TARABA.....1ST APPELLANT

VRB CONSTUCTION CO. LTD.....2ND APPELLANT

VERSUS

AMANA BANK LIMITED.....1ST RESPONDENT

NKAYA CO. LIMITED.....2ND RESPONDENT

ABDULSALAM MOHAMED ABAID.....3RD RESPONDENT

JUDGMENT

24 August & 21st Oct., 2021

DYANSOBERA, J.:

This appeal arises from the decision of the District Land and Housing Tribunal for Lindi at Lindi (DLHT) in the Land Application No.40 0f 2018 whereby the present appellants were the applicants and the present respondents hold the same position which they have now. After a full trial, the trial Tribunal dismissed the application by the appellants with costs and went further and declared that the sale of the suit premises was rightly executed by the 1st and 2nd respondents to the 3rd respondent.

The brief facts of the case are imperative to the present appeal and are that; on 21/11/2018 the appellants jointly sued the respondents for illegal sale of the suit house at Tshs.80,000,000/=(eight million shillings) while its actual market value was Tshs.300,000,000/=.Also, in their

application the appellants herein then applicants prayed for the following reliefs; a declaration that the suit house was illegally sold by the 1st and 2nd Respondents to the 3rd Respondent hence null and void, nullification of the whole sale transaction of the suit house as it was sold below market value, the suit house be restored back to the 1st Applicant's ownership and/or possession, costs of the application be borne by the respondents, general damages as shall be assessed by the Tribunal and any other relief(s) as the Tribunal shall deem just and/or equitable so to grant.

During the trial Michael Stansalaus Taraba (PW1) owner of the suit land located in plot No.54 and 56 Block "C" at Mitwero area within Lindi District and Region, a shareholder and managing director of the second appellant, in December 2012, entered into loan agreement of USD 490,000/= with the first respondent for purchasing road construction machines. The machines were bought and he paid money to the supplier (High Aland Estate Co. Ltd.) and the security for the said loan were the suit houses and the registered cards of the machines which are under the custody of the first respondent. Further, in 2017 the appellants had another agreement with the first respondent. Lucas Mahala resigned as co-director of the second appellant owning five shares and his shares were transferred to Joan Michael, the Director of Finance responsible for loans from banks and issuing cheques.

According to terms of the loan agreement the second appellant was the borrower while the first appellant was the guarantor. On 24/6/2013 the notice was issued showing that the appellants were indebted to Tshs.790, 502,457.37 up to June 2013 and was given 60 days' notice to pay back the loan failure of which a receiver to sale the mortgaged

property would be appointed. The notice was issued to the second appellant but was received by the first appellant. Seeing that the first appellant paid the Tshs.570, 000,000/= as part of the loan within five months and was supposed to pay back the loan in twelve months.

PW1 averred further that his house was sold on 22/2/2018 unprocedural. It was also agreed that in case of default the sale price would be Tshs.140, 000,000/= but the suit house was sold at Tshs.80, 000,000/ by public auction. By virtue of PW1's investigation he realised that no customer met the target to buy the suit house that is why at the beginning he sued the first and second respondents as he was not aware as to who bought the suit houses.

The first appellant told the trial Tribunal that he lives alone in the suit house since his wife lives in Dar es Salaam. Also, he was neither informed by his night watch if he heard the advertisement nor got a newspaper advertising the auction to sale the suit house. When the suit house was being sold the appellants had an outstanding debt of two million plus. More ever, PW1 told the trial Tribunal that the order for maintenance of *status quo* was issued on March, 2018 while the sale of the suit land was on 22/2018. On March 2018 when he came back from Dar es Salaam, PW1 found a notice on the wall requiring him to give vacant possession since the house was already sold by the first respondent vide the second respondent. The first appellant approached the first and second respondents though he got bad response thus he filed the main application and miscellaneous application. But in September, 2018 PW1 got a notice requiring him to give vacant possession as the suit land had already been purchased.

According to the testimony, the complaint by the first appellant centred on the procedure of sale of his suit property which was not adhered to on the ground that it was sold at the lowest price compared to its actual value. He also complained that he was supposed to be issued with Form No.45 being a demand notice. He further told the trial Tribunal that the sale price was on the lower side according to valuation report (exhibit P4) conducted by the first respondent which was Tshs.186,000,000/= as a market value though they agreed that the force price of the suit house was Tshs.140,000,000/= in case of default to pay the loan. But when the valuation was conducted the suit house was not yet finished to meet the price of Ths.186,000,000/= as it appears in the valuation report but PW1 continued developing the same up to Tshs.300,000,000/= until the suit house was sold.PW 1 emphasised that the procedure of selling the suit house was not adhered and also it was contrary to what they had agreed that in case of default it should be sold at 75% of the value of the suit house though in the real sense the suit house was sold at 43% that was contrary to what they agreed.

The defence was as follows; Abdusalam Mohamed Abeid (DW1), a businessman of supply and construction on 6/2/2018 saw an advertisement vide Mwananchi Newspaper (Exhibit D1) about the sale of the suit house located at Mitwero area in Lindi Municipalilty. He said that the auction was done on 22/2/2018 and he participated. He was announced by the auctioneer as the highest bidder. He thus bought the suit house at the price of Tshs.80, 000,000/=. On the spot paid Tshs.20, 000,000/= and the remaining amount was paid after fourteen (14) days. Thereafter, he was issued with a certificate of sale (Exhibit D3) and

wrote a letter to the first respondent to handle the right of occupancy which was done. He managed to transfer the title to his own name which is exhibit D2. DW1 testified further that the said disputed property was sold by second respondent insisting that the auction was open and free and many people participated and he became the highest bidder, DW 1, thus prayed the house to be handed over to him as he had purchased it for keeping his construction tools and as a residence of his engineers.

Mohamed Kasian Mohamed, DW2, an officer from Amana Bank or the first respondent recalled that he supervised loans and claims from their customers. He knew the second appellant since he was granted a loan by the first respondent. He also testified that he knew the first appellant on two aspects as a guarantor of the loan taken by the second appellant and as the director of the second appellant. It was DW2's further testimony that the second appellant is their client since 2012 who took a loan for the period of 2012 to 2013. Then, at the end of 2013, the second appellant took the second term loan. The first appellant mortgaged his suit house for securing the loans of Tshs. 790,000,000/= from the first respondent. The mortgage was created vide mortgage agreement (exhibit D 4). Furthermore, DW2 told the trial Tribunal that the mortgaged properties had a value of Tshs.140, 000,000/=. He also testified on the last loan taken by the second appellant that was secured by the debenture of the appellants and personal guarantee. Furthermore, DW2 told the trial Tribunal that the appellants were still indebted to the outstanding debt of Tshs.220, 000,000/= as shown by exhibit D5. DW2 clarified that the balance of the loan is Tshs.220,000,000/=, the actual principal loan balance profit is

Tshs.157,220,250.00, the profile is Tshs.40,010,050.02 and penalty for delaying to pay back the loan is Tshs.24.703, 978.56. DW2 was emphatic that the bank followed all the appropriate procedures to sell the mortgaged properties and that they notified the appellants with 60 days default notice (exhibit D6). Exhibit D6 was in default by the appellants to pay Tshs.790, 502,457/= within sixty days. The first appellant received and signed exhibit D6 on 24/6/2013. The notice required the appellants to pay the whole amount being claimed by the first respondent. Following the default the second procedure was followed thus on 4/2/2018 the first respondent advertised by public auction to sell the suit house vide Mwananchi Newspaper (Exhibit D7). DW2 elaborated that on 22/2/2018 the public auction to sell the suit properties was successfully conducted and the third respondent emerged as the highest bidder who paid the whole purchase price and on 5/3/2018 was given certificate of sale and the Right of Occupancy. DW2 disputed the argument that the order of temporary injunction came before the sale rather, it was issued after the sale of the suit land was done. He also insisted that the suit houses were sold at Tshs.80, 000,000/= and the valuation report shows that the suit houses are valued at Tshs.140, 000,000/= thus they were not sold at the lowest price.

After hearing the parties, the trial Tribunal found for the respondents reasoning that the sale of the suit houses was rightly executed by the first and second respondents to the third respondent who is a bonafide purchaser and the lawful owner of the suit houses plot No.54 and 56 Block "C" located at Mitwero area in Lindi Municipality.

This finding aggrieved the appellants. They have come to his court on the following grounds of complaint: -

1. That the proceedings of the trial tribunal are irregular in that they were conducted contrary to and in violation of the law.

   In alternative to ground 1 above

2. That the finding and decision of the trial Tribunal is not supported by evidence on record.
3. That the trial Chairperson erred in law and fact in holding that the

   procedure for sale of the suit house were adhered by the Respondents.

When this matter was called for hearing on 24.8.2021, the appellants were represented by Mr. Stephen Lekey, the learned advocate, whereas the respondents were represented by Mr. Rainery Songea, the learned counsel. The learned advocates opted to argue this appeal by oral submission.

In his submission, Mr. Lekey pointed out that there are three grounds of appeal but the 2nd and 3rd grounds are in alternative to the first ground. According to him, in the 1st ground there two things. One, is that the trial was conducted without aid of assessors. Two, is the change of Chairmen without assigning reasons. As to the first issue the learned Counsel for the appellants citing section 23(1) of the Land Disputes Courts Act, argued that it requires the Tribunal to be duly constituted when held by a chairman and not less than two assessors who shall be required to give their opinions before the Chairman gives the judgment. He also cited Rule 19 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2002 GN. No. 174 of 2002

which states that before a chairperson arrives at their decision should requires every assessor to give his/her position in writing. Mr. Lekey submitted that in the present case as seen at page 48 of the certified proceedings of the Tribunal order three, it directed the assessor to give their opinions before the judgment. The Tribunal stated the judgment on 11.9.2020. This Court was referred to page 52, last paragraph where it is shown that before Chairman delivered the judgment, the matter was adjourned to 12.11.2020. It was delivered on that day as per order. The learned advocate for the appellants insisted that there is no indication on the record as to when and how those opinions went in record. He also submitted that in a rather interesting scenario, the chairman at pages 8 and 9 of the impugned judgment cited what he says to be opinions of assessors. Thus, Mr. Lekey was of the view that the procedure went against the law and cannot be taken as a chairman reached judgment. To fortify his argument, he cited the case of **Stade Mwaseba v. Edward Mwakatundu**, Misc. Land Appeal No. 5 of 2020, High Court of Tanzania at Mbeya. He argued that in the cited case the Hon. Chairman referred to assessors' opinions at the time of writing the judgment. The court questioned as to when and how assessors' opinions made way into the record. At page 8 at the second paragraph, the court said that since the opinions were given in the absence of the parties it was not easy for the parties to know the nature of the opinion of the assessors and whether they were considered in the judgment and whether it was opinion of assessors who were present.

Mr. Lekey went further and cited another case of **Wigesa Matenga v. Kirobe Masirori**, Land Appeal Case No. 44 of 2019 HC-Musoma Registry, whereby Hon. Galeba, J (as he then was) at p. 2 of the

decision discussed on noncompliance with those provision and said that a lawful judgment envisages both the Chairperson and assessors to participate. The record must bear witness that truly both participated. Thus, in view of his submission, the record before this court do not bear witness that both participated. In addition, the learned advocate for the appellants took this court to the number of decisions of the Court of Appeal where it decided on such issue. For instance, he referred this court to the case of **Edna Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, (unreported) whereby the Court made emphasis at page 6 by stating that opinion must be in the record and must be read to the parties and that must be done before the judgment is composed and not during the composition.

With respect to the case under consideration, Mr. Lekey argued that the Chairman referred to the opinion of assessors in her judgment. Thus, according to the decision of the Court of Appeal, such opinions had no useful purpose and the only remedy is to nullify the proceedings and judgment of the trial Tribunal and order a trial de novo.

Mr. Lekey arguing on the second part of the first ground of appeal, he said, this case proceeded by Hon. S.H. Wambili, Chairman up to 23.1.2020 as reflected at page 9 of the Tribunal. At page 10, the proceedings show Hon. Mjanja to have taken over the proceedings and to have finalised. The learned counsel for the appellants insisted that there are no reasons on record showing why there was change of those Chairmen. Mr. Lekey termed these proceedings as a nullity. \

An argument was also advanced by Mr. Lekey that it is true that the Land Dispute Courts Act and the Regulations do not talk on such a

scenario, nevertheless, section 51(2) as revised by Written Laws (Misc. Amendments) Act 2010 necessitates the Civil Procedure Code to apply. In his view, O. XVIII rule 10 (1) of the said Code talks on the change of a Magistrate/Chairman, he scenario which this court has occasionally discussed. He referrded this court to the case of Jonathan **Wilsaa Nkya v. Isaya Gibson Matambo**, Land Appeal No. 4 of 2017. He submitted that in that case this court was guided by O. XVIII rule 10(1) of CPC. He referred this court to another case of **Joseph Wasenga Otieno v. Asumpta Mashinju Mshamu**, Civil Appeal No. 97 of 2016 whereby this court found that as a nullity and nullified all judgments of the Tribunal.

It was Mr. Lekey's prayer that this Honourable Court allow the appeal and nullify both proceedings and judgment.

Submitting on the second ground, Mr. Lekey dwelt on the purchase price as reflected at page 14 of the typed judgment. He insisted that the finding is different from the evidence received by Tribunal if the Chairperson had gone through the record, she would have realized that the property was sold below the market price. To buttress his argument, he cited the case of **Mbuthia v. Jimba Credit Finance Corporation and Another** (1986-1989) EA 3401.

Mr. Lekey further submitted on the evaluation report (exhibit P4) arguing that its authenticity was not challenged hence it is still authentic. He contended that the property was valued at a price of 186,000,000/= and forced sale was Tshs. 140,000,000/=. He referred at page 26 of the typed proceedings whereby PW1 stated that fact without being cross – examined. Also that, according to PW1, during the

valuation the property was not yet finished, it could not have depreciated in 2018 (six years later) to the extent of the amount it was sold.

In that view Mr. Lekey argued that there is neither evidence nor indication that the property had already depreciated. He cited section 133 (1) and (2) of the Land Act, [Cap. 113 R.E. 2019] and submitted that the mortgagee must conduct valuation to show after the sale that the price they got is best price reasonably obtainable at the time of sale comparable interest in land of the same character and quality obtained in open market. He fortified his argument by making reference to the case of **Lengai Lemakblo Laizer @ Paul Lengai v. CRDB Bank PLC and Ors**, Land Case No. 58 of 2018 High Court of Tanzania at Arusha stated that it was imperative for mortgagee to conduct valuation at the time of sale. He emphatically argued that in this case sale was by public auction.

In addition, Mr. Lekey contented that even if this court considers exhibit P4 still the suit property was sold at the lowest price contrary to the law particularly section 133(2) of the Land Act (supra) which provides that sale shall not be below 25% or more of the market value. The learned counsel for the appellants argued that taking Shs. 186,000,000/= minus 25% of the value suit property, the same should have been sold at Tshs. 139,000,000/= the costs market value Tshs. 140,000,000/= minus its 25% the property had to be sold at Tshs. 105,000,000/=. But the evidence shows the suit property was sold at Tshs. 85,000,000/= which is in contravention of mandatory provisions of the law.

It was further submitted that if the buyer has been registered and the sale is procured with irregularities are procedural the court cannot nullify the sale if the irregularities are procedural. He also submitted that in case the irregularity is not procedural then section 133 (2) of the Land Act(supra) allows the mortgagor to apply to the court to declare void a transaction of the property sold below 25%. Mr. Lekey emphasised that the words of section 133(2) are words of a statute which are clear and unambiguous. He went further and argued that such a provision was decided in the case of **NBC v. Jackson Nahimawa Sinzoba Kwila** [1978] LRT No. 78 requires no interpretation. He submitted that it is the cardinal principle of law that where there is a conflict between case law and statute a statute prevails. Thus, he prayed this court to declare the sale as void.

As to the third ground Mr. Lekey submitted that there is no dispute that default notice was issued but on whom it was issued. He further submitted that it is not disputed that 1st appellant is the Director and shareholder of 2nd appellant, the notice of default was received by 1st appellant. In view of that the learned counsel for the appellants raised a question of whether the mortgagor was served with the default notice in writing.

Furthermore, the learned counsel for the appellants argued that in the present case, the DLHT treated the notice issued to 2nd appellant as notice to 1st appellant. The learned counsel was of the view that such decision is wrong since there was misdirection and it is clear in law as it was stated in the case of **Salomon v. Salomon** (1897) AC 22 that the company has a separate and distinct legal personality from the shareholders and directors even when the director appears to be the

sole shareholder. He went further and argued that in this case, the mortgagor is the 1st appellant who was to be personally served with the default notice as required by law and not to treat the service made to the company as service done to him personally. The acts done by the first appellant in his capacity as Director or shareholder of 2nd respondent cannot be imputed or argued to be in the knowledge of the 1st appellant in his personal capacity. Thus, he argued that on the basis of section 127 (2) (d) of Land Act(supra) the mortgagee wrongly and prematurely exercised his right of sale and he had not issued the mortgagor with notice default. In the light of that submission Mr. Lekey prayed the sale to be nullified and appeal be allowed with costs in this court and in the court below.

In response Mr. Songea submitted that land cases are different from normal civil cases thus he referred this court to section 45 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] which requires the court to deal with substantial justice and avoid technicalities which do not go to substantive justice. He also argued that it is the law that if there were mortgaged property then the law should take its course.

Responding to the service of notice, the learned counsel for the respondents submitted that at page 14 of the typed proceedings, the first appellant testified that the company had no other employee, he was the sole Managing Director and supervises all transactions of the company and admitted to have received the notice of default. Also, the learned counsel argued that the notice showed the debt owed and how it should be paid though upon default a receiver will be appointed to sell the mortgaged property. On the same vein Mr. Songea argued that during cross examination the first appellant mentioned his name and

said he was also for the second applicant (the second appellant). The learned counsel for the respondent argued that he was a witness who appeared for both appellants and was dealing with the first respondent when advancing the loan. Mr. Songea argued that their interest is justice and therefore, the technicalities have no place.

On the issue of servicing the notice to the second applicant Mr. Songea maintained that it was the first appellant who had to react. He further stressed that the notice was properly served if anybody apart could have come to complain for the second appellant, such complaint could have held water. Notice was properly served and the first appellant cannot seek a hiding that the second appellant was not properly served. In view of that submission Mr. Songea argued that the appellants defaulted repayment of the loan. Besides, the learned counsel for the respondents pressed the invocation of section 45 if at all there were irregularities. He also submitted that section 133 (2) is clear that any sale is termed under value if it is sold below 25 but in this case the valuation was 186 million as market value and the sale price was 80 million.

He also referred at page 20 of the typed proceedings where the first appellant admitted that the property was sold at 43%. Thus, Mr. Songea was of the view that if that is the case it cannot be said that the property was sold below the market value because when a financial institution sells a property the aim is to recover its money and not necessary to attain at the market value. Mr. Songea submitted that the aim of valuation is before granting the loan is to see the value of the property and the amount of the loan to be granted. Also is to ascertain the amount the bank can recover in case the debtor defaults. He also

argued that in the case at hand evaluation was done, appellants defaulted then the respondent correctly appointed the second respondent to recover the loaned money. In view of that submission the Mr. Songea submitted that the appellants failed to prove fraud nevertheless there was compliance of the law by the first respondent and for emphasis referred to the case of Lengai.

Submitting on the change of Chairperson Mr. Songea argued that the case of Jonathan is distinguishable but the principle applies where a trial has commenced. He submitted further that in the instant case, the changes were made before the hearing commenced on 23.1. 2020. He further submitted that issues were framed before Mjanja and hearing started on that date. Beforehand and before hearing started. Mr. Songea emphasised that the Chairman who heard the case is the one who decided it. He went further and argued that in the cited case of Kinumbi the Chairman heard the evidence hence the change of Chairmen ensued. Thus, these two cases are different and the cited case is inapplicable. Alternatively, he submitted that if Wambili started hearing the case, then the referred case could have been applicable to this case.

Mr. Songea replied the allegations on the constitution of assessors in the trial Tribunal that the proceedings are clear that tribunal was properly constituted from the beginning to the end. But he argued that the challenge can be on how the opinions were given. The learned counsel argued on the cited cases by the appellants that are of the High Court which do not bind this court rather are merely persuasive. And he submitted that if there is a conflict between the law and case laws the former prevails. In view of that, the learned counsel submitted that section 23(1) and (2) of Cap. 216 and Reg. 19 provides that the tribunal

will be properly constituted if assisted by assessors who will be required to give their opinions before the judgment. He went further and urged that the Section and Regulation are similar but they are silent on the requirement of reading the opinions to the parties. Besides, Mr. Songea referred at page 8 and 9 of the judgment whereby the Chairperson reproduced what was written by assessors. He also argued that assessors' opinions which are typed were present throughout the case and believed to feature the file. He also argued that the law does not make mandatory that the opinions should be read to parties. Therefore, he argued that substantial justice was determined as such it won't be fair to nullify proceedings on the reason that the opinions were not read to parties. Finally, the learned counsel for the respondent argued that the law is clear and was compiled with thus, the statute should be followed and the Tribunal was properly constituted.

Submitting on the analysis of the evidence, Mr. Songea argued that the first appellate court has a duty to re – appraise the evidence. He also submitted that all the evidence tendered was considered. He added that the first appellant was indebted, had mortgaged his property, was served with notice and defaulted appearance. To cement his argument Mr. Songea referred this court to the case of **NBC v. Dar Education and Office Stationery** [1995] TLR 272 where it was held that where a mortgagee is exercising his power of sale under the mortgage deed the court cannot interfere unless there was corruption or collusion with the purchaser in the sale of property. The learned counsel cited also a litany of case laws covering this area such as the case of **M and M Food Processors Ltd v. CRDB Ltd and 2 Others,** Land Case No. 362 of 2013, **Mashishanga Salum Mashishanga v. CRDB PLC and 2 Ors,**

Land Case No. 3 of 2016, **Sikudhani Abdallah Mshana and Anor. v. Bank of Africa (T)LTD**, Land Case No. 83 of 2017 (Arusha) and **The other case is Omary Abubakar Pesambili v. Aziza Iddi Sekilo and 4 Ors**, Misc. Land Appeal No. 114 of 2020.

Mr. Songea concluded his submission by arguing that the appellants failed to prove their claims before the DLHT as per law requires. Besides, the evidence of the respondents was heavier than that of the appellant thus the judgment of the lower court was justified and the appellants have not been prejudiced by anything.

In the rejoinder, Mr. Lekey submitted that the provision of section 45 of the Land Dispute Courts Act relates to rejection of witnesses and in no way concerns the issues raised by the learned advocate for the respondents. He emphasised that the property should be sold at a market value otherwise that prejudices the appellants as it is property. In addition, he submitted that the cited cases were not supplied with copies so that he can respond. Though Mr. Songea has not stated the principles obtaining in those cases. With respect to the NBC's case, it is about one fact which this court is entitled to interfere. But he argued that by referring to the case of Mbuthia where price is low, it is in itself evidence of fraud and the court is entitled to interfere.

Reacting to the evidence that the property was sold at 43% but the evidence given by a witness and its evaluation are two different things. To know the property was sold at what percentage is a question of simple mathematical calculation as Hon. Mwenempazi, J. did in the case of Lengai Laiza. Mr. Lekey submitted that a simple calculation will reveal that the property was sold against the law and it is not in dispute that

the former valuation was done for the purpose of a loan. That is entirely different from the valuation which is to be done during the sale. It is not the duty of the appellant to prove that the value at the time of sale complies with section 133 but it is the duty of the seller.

More so, Mr. Lekey submitted that this court in the case of Lengai placed the duty on the seller. He went on and submitted that it is the law that the High Court is not bound by its decision of the fellow brethren but when one judge differs, he has to give reasons. Besides, the learned counsel subscribed to the submission by his fellow advocate on the change of the Chairperson but maintained his first sub-ground on assessors. He insisted that the case laws he cited do not contradict the law but supplement what the law provides. In light of that submission Mr. Likey argued that opinion must be stated before the parties in order to avoid a danger of including other opinions. He also took this court the practice in criminal cases where opinions are read before the parties.

On the third ground he argued that during cross – examination PW1 conceded that he was on behalf of the second appellant. Besides, the first appellant introduced to the Tribunal that they were two different persons one representing himself and two representing the company. In the light of that submission Mr. Lekey argued that the advocate wants to invent a wheel. He also submitted that the decision of **Salomon v. Salomon**(supra) has not been taken as a bad law but the advocate is trying to leave veil of incorporation which is not the case here. At last, the learned counsel for the appellants submitted that justice is the law and what is done according to law is just unless and until that law is declared as unjust. He concluded by reiterating their submission.

I have gone through the record of the trial Tribunal, memorandum of appeal and submissions of both parties. I propose to deal with the grounds of appeal as appearing in the memorandum of appeal for my determination.

Starting with the first ground, I will go straight to the record of the Tribunal. First, it is not disputed that the Tribunal was properly constituted from the beginning of the trial to the point when it was closed and when the Tribunal ordered for the determination of the legal issue of Res Subjudice raised on its own motion. But when the judgment was delivered the record does not show if the assessor were present and involved. This is reflected at page 58 of the typed proceeding of the Tribunal. The law governing the composition of the Tribunal is very clear that as to how assessors should give their opinion to the learned Chairperson of the Tribunal. The Land Disputes Courts Act, [Cap. 216 R.E. 2019] under section 23 (1) and (2) reads:

> "23-(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a 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 judgment."**

Also, the provision of Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2002 GN 174 of 2003(The Regulations) 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"**

From the above provisions of the law and Regulation that the composition of the Tribunal is both the Chairman and the assessors. Therefore, for the Tribunal to be dully composed it must be seen in the proceedings vide the coram which will include the assessors who heard the matter from the beginning of the trial to the closure of defence case and at the time of taking the opinion of the assessors. In the present case there is no doubt that the Chairman did not involve at all the assessors in giving their opinion. For clarity I will reproduce what had transpired at page 48 of the typed proceedings of the Tribunal whereby the Chairman recorded as follows:

"(I) Defence case is closed
(II) Judgment on 11/9/2020
(III) Assessor to give their written opinion before Judgment date.
DATE: 11/9/2010(sic)
CORAM: R; E MJANIA (sic).....CHAIRPERSON
1st APPLICANT: Mr. Mtembwa advocate for all applicants
2nd APPLICANT:
1st RESPONDENT: Absent
2nd RESPONDENT:
3rd RESPONDENT: Miss Prisila Advocate for 3rd Respondent holding brief of advocate for 2nd and 3rd Respondent.

ASSESSORS: Present

TRIBUNAL ORDER

-Parties have to address on whether the filing of application No.40/2018 was Res Subjudice to application No.12/2018 both of this Tribunal.

SDG, R. MJANJA

CHAIRPERSON

12/8/2020"

Surely, the typed proceedings of the Tribunal do not feature a date and coram which the learned Chairman invited the assessors and received the written opinion of the assessors. According to that prevailing state it prompted me to go through the entire file of the tribunal in order to see when the learned Chairman called the parties and assessors so as to receive and hear what the assessors had written as their opinion. Upon my perusal, I encountered two hand written papers prepared by Rajab Jumaa and M. Y. Chombe. These two written papers were regarded as the opinions submitted by the said assessors and considered by the learned Chairperson in composing the impugn judgment. In fact, the two written papers are not dated and do not feature tribunal's stamp of receiving the same. Surprisingly, this court does not know when and how those two written papers regarded and considered as opinion of the assessors came into existence into the record of the Tribunal.

In view of that finding, it is quite clear that the chairman did invite the assessors to give their opinion as required by the law and it hindered the parties to know the nature of the opinion and whether or not were considered in the impugn judgment. It must be known that assessors

opinion are not treated as secrete thing but are open to the parties so as to enable the parties to know the nature of the opinion and if they were considered in the judgment composed by Chairman. The procedure is the same as how court assessors give their opinion in the murder case where assessors constitute the court. And the law has made an option to the Chairman to follow the opinion of the assessors or not but with the reasons for the rejection. The Court of Appeal discussed this scenario extensively in the number of cases such as the case of **Edna Adam Kibona v. Absolom Swebe (Shell)** (supra) where the Court observed: -

> "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"

The practice taken by the Chairman of the Tribunal was purely an assumption of the opinion of the assessors which were not part of the proceedings of the record. The practice procured by the Chairman is a bad practice which offends the law and amount to irregularity and vitiates the proceedings. The Court of Appeal in the case of **Ameir**

Mbaraka and Azania Bank Corp Ltd v. Edgar Kahwili, Civil Appeal No.154 of 2015(unreported) stated: -

> "Therefore 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 a serious regularity"

In the light of the above observation, the omission by the Chairman goes to the root of the matter and occasioned a failure of justice and there was no fair trial since parties were not accorded an opportunity to know the opinion of the assessors at the end of the trial and before the judgment was composed.

Also, I have seen no reason to determine the remaining issues since the irregularity pinpointed and evaluated is incurable and it goes to the root of the matter. Therefore, I hereby nullify the proceedings and judgment of the District Land and Housing Tribunal. The same are set aside.

I order that, if parties are still interested, an expedited retrial before the District Land and Housing Tribunal for Lindi presided over by another Chairman and a new set of assessors should be commenced.

It so ordered.

W.P. Dyansobera

Judge

21.10.2021

THE HIGH COURT OF TANZANIA

This judgment is delivered under my hand and the seal of this Court this 21st day of October, 2021 in the presence of Mr. Stephen Lekey, the learned Advocate for the appellant and Mr. Rainery Songea learned advocate for the respondents.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge