

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CIVIL APPEAL NO. 97 OF 2015

**AWINIEL MTUI.....1ST APPELLANT
ROGATE MINJA.....2ND APPELLANT
LILIAN MAMUYA.....3RD APPELLANT
VODACOM.....4TH APPELLANT**

VERSUS

**STANLEY EPHATA KIMAMBO (ATTORNEY
FOR EPHATA MATHAYO KIMAMBO.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania (Land
Division) at Arusha)**

(Ngwala J.)

Dated 21st day of December, 2012

in

Land Appeal No. 36 of 2009

RULING OF THE COURT

25th & 26th February, 2016.

MBAROUK, J.A.:

When the appeal was called on for hearing, Mr. John Materu learned advocate for the appellants prayed the Court to invoke section 4 (2) of the Appellate Jurisdiction Act and nullify the proceedings of the trial Tribunal together with its judgment and the proceedings of the High Court and its judgment and finally order a re-trial before another Chairman with another set of assessors. He

also prayed for no order as to costs. He said, what prompted him to pray for the nullification of those proceedings is that, after he has gone through a recent decision of this Court in **Samson Njarai and Another v. Jacob Mesoviro**, Civil Appeal No. 98 of 2015 (unreported) where it was held that it is not proper for the District Land and Housing Tribunal not to show clearly as to how the assessors in the trial participated in the conduct of the trial as required by the law. He added that, in the instant case the record of appeal has shown that the Chairman of the trial Tribunal has failed to show clearly how the assessors participated in the proceedings of the trial before him. He therefore reiterated his earlier prayer to nullify all the proceedings and order a retrial before another Chairman and another set of assessors.

On his part, the respondent simply left the matter to the Court to reach to a just decision as the issue raised was new and technical to him being a lay person.

On our part, after going through the records, we discovered that the trial Tribunal has not shown how the assessors participated in the conduct of the proceedings of the trial and how the trial Chairman considered the opinion of those assessors.

To be specific, the following are the irregularities found in the record of proceedings at the trial Tribunal. **Firstly**, at page 84, 86, 88, 89, 91 and 93 the record shows that, it was generally recorded that it was the Tribunal which asked questions, but it is not clearly shown who among the members of the Tribunal asked the questions. We are of the opinion that, the record ought to have clearly stated the participation of each assessor in asking questions. If a Chairman or one member among the assessors do not have a question to ask, the record should have shown NIL after recording his name.

As in the instant case the record just generalized that it was a Tribunal which asked the questions, we are of the view that it was wrong, as the record should have shown specifically as to how each

among the members participated in asking questions. (See, **Samson Njarai** (*supra*)).

Secondly, the record shows that on 29-7-2008 the proceeding started with assessors S. R. Materu and H. Gwaya and on 8-7-2009 there was a change of assessors where assessor H. Gwaya was replaced by assessor M. M. Kilucha. Reading section 23 (3) of the Land Disputes Court Act, Cap. 216 R.E. 2002, we are of the opinion that where two assessors have started the hearing of proceedings and one of the assessor leaves the hearing of the trial in between, the other assessor will proceed in the absence of the one who left without replacement. To appreciate the contents of section 23 (3) of the Land Disputes Courts Act, the same reads as follows:-

"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both assessors of the Tribunal who were present at the commencement of

proceedings is or are absent, the Chairman and the remaining assessors (if any) may continue and conclude the proceedings notwithstanding such a absence.”

(Also, see **Samson Njarai** (*supra*)).

Thirdly, the record does not show in the judgment of the trial Tribunal as to how the Chairman considered the opinion of assessors in that trial. We are of the opinion that the Chairman of the trial Tribunal ought to have shown in the judgment of the Tribunal as to how he considered the opinion of the assessors who participated in hearing the trial. We are of the view that as far as the assessors are part and parcel of Tribunal and have participated therein, the Chairman ought to have shown in the judgment as to how he has considered their opinion.

Fourthly, the record shows that when assessor M. M. Kilucha joined the trial on 8-7-2009, all the witnesses had already testified,

but he gave his opinion. We are of the view that, it was wrong to allow an assessor who has not heard the testimonies and demenour of the witnesses in a trial to give his/her opinion of the trial. We think he had nothing to opine on as he did not have heard anything from the witnesses. The erstwhile Court of Appeal on Eastern Africa in the case of **Joseph Kabui v. Reginam** [1954-55] E.A.C.A. Vol. XXI-2, 260, the Court held:-

"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity."

Cumulatively, those irregularities render the proceedings before a trial Tribunal a nullity. We are therefore constrained to agree with Mr. Materu that the entire proceedings and judgment in the District Land and Housing Tribunal of Arusha in Application No. 220 of 2005 together with the subsequent proceedings and judgment in the High Court Land Appeal No. 36 of 2009 are a nullity. For that reason, we therefore nullify them and order a trial ***de novo***

before another Chairman and another set of assessors, with no order as to costs. It is so ordered.

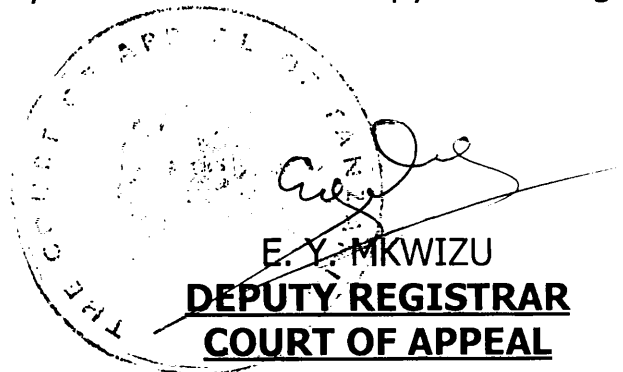
DATED at **ARUSHA** this 25th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL