IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CIVIL APPEAL NO. 112 OF 2015

S.D.A.CHURCH KEISANGURA..... APPELLANT

VERSUS

NYAIKWABE MASARE ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Kalombola, J.)

dated the 23rd day of October , 2013
in
Land Appeal No. 63 of 2011

JUDGMENT OF THE COURT

25th & 30th May, 2016

LUANDA, J.A.:

This is a second appeal. The dispute in this appeal is on ownership of a piece of land. The matter commenced in the District Land and Housing Tribunal of Tarime (the Tribunal) and then went to the High Court of Tanzania (Mwanza registry). In both the Tribunal and the High Court, the appellant lost.

In this appeal, Mr. Stephen Magoiga and Mr. Lenin Njau, learned advocates represented the appellant and the respondent respectively.

Mr. Magoiga has raised eight grounds in the memorandum of appeal and he argued them generally.

However, in the course of hearing the appeal, the Court raised a point of law ***suo motu*** as to whether the Chairman of the Tribunal who sat with two assessors complied with the mandatory requirement of S. 24 of the Land Disputes Court Act, Cap. 216 RE 2002 (the Act). We posed that question because the record does not show the chairman to have given reason in differing with one assessor. Mr. Magoiga supported the observation made by the Court that it is true the Chairman had not assigned any reason as to why he differed with one assessor. He prayed that the proceedings should be quashed; decree set aside and the Court to order for a retrial. Mr. Njau also joined hands with the Court's observation. But he said the omission did not occasion any miscarriage of justice. He then attacked the grounds of appeal which were argued generally by Mr. Magoiga in that it amounted to have not argued at all. Instead, Mr. Magoiga argued other grounds which were not raised in the memorandum of appeal, he submitted.

The starting point is section 23(1) and (2) of the Act which reads:-

> 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 judgment.*

The above quoted subsections of Section 23 of the Act clearly stipulates how the Tribunal is constituted; it is the Chairman and two assessors and that on completion hearing of an application, the assessors are required to give their opinions before a Chairman hands down a decision. However, in reaching a decision, the opinions of assessors are to be taken into account, though their opinions are not binding and that the Chairman is mandatorily required to give reasons in case he

differs with them. This is provided under S.24 of the Act which provides:-

> *24. In reaching decisions the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion.*

In the instant case at page 57 of the record shows that no reason(s) was/were given for differing with the opinion of one assessor. That omission goes contrary to the mandatory requirement of S. 24 of the Act cited and reproduced supra. The proceedings cannot stand. We also wish to point out that to brush aside the opinion of assessors without assigning any reason is a sign of disrespect.

This issue of non compliance with S. 24 of the Act, as already pointed out, was raised by the Court. One may wish to know as to whether the course taken by Court in raising the issue on its own motion is proper. In **Marwa Mahende VR** [1998] TLR 249 the Court was hearing an appeal in which **Mahende** was challenging the

concurrent finding of the lower courts which convicted him with robbery. But the appellant was convicted and sentenced in absentia. The appellant, it appears, was apprehended and sent to prison to serve his sentence. This Court on its own motion raised the issue of the correct procedure to be followed when a trial court convicts an accused person in absentia as provided under S. 226(2) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA). The Court said:-

> *"Doubt was expressed as to the propriety of this move by the Court. We think, however, that there is nothing improper about this. The duty of the Courts is to apply and interpret the laws of the Country.* ***The superior courts have the additional duty of ensuring proper application of the laws by the courts below".*** *[Emphasis is ours].*

Exercising our revisional powers as they are provided under S. 4(2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002, we quash the

proceedings, judgment and set aside the decree of the trial Tribunal. Since the decision of the High Court has no leg to stand on, we also quash the same and set aside the decree. The matter to be tried ***de novo*** before another Chairman and a new set of assessors. Each party to bear its own costs.

It is so ordered.

DATED at **MWANZA** this 26th day of May, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL