

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 21 OF 2013

EMMANUEL CHRISTOPHER LUKUMAI.....APPELLANT

VERSUS

JUMA OMARI MRISHO.....RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
(Labour Division) at Dar es Salaam)**

(Mziray, J.)

dated the 24th day of November, 2011

in

Land Appeal No. 31 of 2010

RULING OF THE COURT

10th & 15th February, 2017

MUGASHA, J.A.:

In the District Land and Housing Tribunal of Kinondoni (the Tribunal), **EMMANUEL CHRISTOPHER LUKUMAI** the appellant, instituted a land dispute against **JUMA OMARI MRISHO** the respondent. The appellant sought and he was declared a rightful owner of land measuring three and a half (3½) acres located at Kunduchi Salasala area.

Aggrieved, the respondent unsuccessfully appealed to the High Court where Judgment was entered in favour of the respondent. Still dissatisfied the appellant has filed the present appeal.

When the appeal was called on for hearing, the appellant was represented by Mr. Mafuru Mafuru, learned counsel. The respondent was absent. However, from what we gathered from the record, we found it pertinent and required the appellant's counsel to address the Court on very crucial points of law on the propriety of the trial whereby, the assessors where changed in between the trial and the opinion of assessors is lacking.

Mr. Mafuru readily conceded that, there was a change of assessors in between the trial and one of the assessors was not present throughout the trial as required by section 23 of the Land Disputes Courts Act [Cap. 216 R.E. 2002]. He also submitted that, the opinion of the assessors is not reflected in the record. In this regard, Mr. Mafuru argued that, the omission is fatal, it vitiated the trial and the remedy is to nullify the proceedings and judgments of both the trial Tribunal and the High Court. The learned counsel urged us to order a fresh trial.

The issue for our determination is the propriety of the trial which was a subject of appeal before the High Court and before us.

The composition of the Tribunal which is mandated to adjudicate land disputes is spelt out under section 23(1) and (2) of the Land Disputes Act (supra) which states:

- (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."*

According to the cited provision, the chairman alone does not constitute a Tribunal. A duly constituted Tribunal is composed by a chairman and a minimum of two assessors. The involvement of assessors in adjudication of land disputes before the Tribunal, is a legal requirement which also vest them with mandate to give opinion before the chairman proceeds to compose a decision of the Tribunal. In case of absence of assessors, section 23(3) of the Land Disputes Courts Act (supra), gives following direction:-

" Notwithstanding the provisions of sub-section(2), if in the course of any proceedings before the Tribunal either or both

members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member if any may continue and conclude the proceedings notwithstanding such absence".

[Emphasis supplied]

The law clearly stipulates that, at least one of the assessors must be among the assessors in attendance throughout the trial. The rationale behind is to enable the assessors to make an informed or rational opinion. The consequences of unclear involvement of assessors vitiate the trial and it is rendered a nullity (**See Ameir Mbaraka and another vs Edgar Kahwili, Civil Appeal No.154 of 2015** (unreported). Furthermore, where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity.(See **Joseph Kabul vs Reginam [1954-55] EACA Vol XXI -2.**

In the matter under scrutiny, the judgment of the tribunal at page 49 of the record reflects as follows:-

"...Both wise assessors are of opinion that the disputed land belongs to the applicant. I agree with them."

Despite the Chairman's acknowledgement to have agreed with what the assessors opined, on record, their opinion is missing. Since the law requires assessors to give their opinion, in our view, it must be on record in order to ascertain if the Chairman in preparing the Tribunal judgment did consider the opinion of assessors. Besides, where the Chairman disagrees with the opinion of the assessors, he must record reasons. In the absence on record of the opinion of assessors, it is impossible to ascertain if they did give any opinion for consideration in composing the judgment of the Tribunal.

Another irregularity which is apparent on record is the change of assessors which offends section 23(3) of the Land Dispute Courts Act (supra). The provision does not envisage a complete change of all assessors who were in attendance when the trial commenced. However, in the present matter this is what transpired at the trial apart from the Chairman being present throughout:

Firstly, when the trial commenced on 1/6/2009, at page 34- 37 of the record, Emmanuel Christopher Lukumai (PW1) and John Petro Bundade (PW2) gave their testimonial account in the presence of two assessors namely, Mandara and Kinyondo. **Secondly**, on 8/7/2008, from page 37 to

38 of the record, Sion Kyungu (PW3) testified in the presence of one assessor one Mandara. **Thirdly**, at the hearing of the defence case on 15/12/2009, Juma Omary Mrisho (DW1) gave his testimonial account in the presence of three assessors namely; Mlole, Mandara and Kinyondo. **Fourthly**, on 1/2/2010 Joseph Mbegate (DW3) gave her testimony in the presence of assessors Mlole and Mandara.

Apparently, it is only one assessor Mandara who was present throughout the trial. Neither was assessor Mlole present at the start of the trial nor when DW3 gave his testimony. Assessor Kinyondo was not in attendance when PW3 was testifying. In this regard, since neither of the two sets of assessors was present throughout the entire trial, the trial was not conducted by a duly constituted Tribunal as required by section 23(1) and (2) of the Land Disputes Courts Act (supra).

The said omission goes to the root of the matter and it occasioned a failure of justice and there was no fair trial. We say so since the law was contravened as the Tribunal was not properly composed which cannot be validated by the Chairman as he alone does not constitute a Tribunal. Furthermore, the lack of the opinion of assessors rendered the decision a nullity.

In view of the aforesaid incurable irregularities, the trial was vitiated. Consequently; we accordingly exercise our revisional power under section 4(2) of the Appellate Jurisdiction Act [**CAP 141 RE, 2002**]. We hereby nullify proceedings and judgments of both the Tribunal and the High Court in Land Appeal No. 31 of 2010 because they are offshoots of a nullity. We further order a fresh trial before another Chairman with a different set of assessors. We make no order as to costs since the anomaly was raised *suo motu* by the Court.

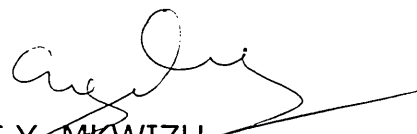
DATED at DAR ES SALAAM this 13th day of February, 2017

B.M. LUANDA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL