IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 287 OF 2017

TUBONE MWAMBETA .....APPELLANT

VERSUS

MBEYA CITY COUNCIL .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Chocha, J.)

Dated the 12th day of August, 2016
in
Land Appeal No 25 of 2015

JUDGMENT OF THE COURT

28th November, & 5th December, 2018

MUGASHA, J.A.:

In the District Land and Housing Tribunal of Mbeya (the Tribunal), **TUBONE MWAMBETA** the appellant, instituted a land dispute against **MBEYA CITY COUNCIL**, the respondent.

The brief facts constituting the claim were to the effect that, the appellant claimed to be the owner of a piece of land situated at South Gombe Uyole Mbeya which he had purchased from one Joyce Ibrahim

Jombe and Josephat Ndolela Msonga on 5thNovember, 2013 and 6th December, 2013 respectively. On 10th December, 2013 he applied to be granted a building permit, paid for it and was given a receipt dated 27th December, 2013 by the respondent. Thereafter, he commenced construction but to his surprise on 10th Febuary, 2014 was served with a stop order not to proceed with the construction on account of not having a proper building permit. A week later he was required to demolish the structure on the ground that he is not the owner of the respective plot or else should submit documentation if he was the legal owner of the said plot. Later, his structure was demolished on 5th March, 2014 by the respondent on the ground that, he had not obtained a valid building permit. This made the appellant commence action against the respondent claiming to be paid a sum of Tshs. 48,781,000/= being costs of the demolished structure and general damages at a sum of Tshs. 100,000,000/=. The appellant was not successful in both the trial Tribunal and the High Court.

Aggrieved, the appellant has lodged the present appeal. In the Memorandum of Appeal, he has raised three grounds namely:

1. The learned appellate judge erred to confirm the holding that the Appellant relied upon insufficient evidence to prove his acquisition of the suit land in contested surveyed area denied him a valid title at law.
2. The learned appellate judge erred to ignore the proved documentary communication between the parties as not signifying the required building permit in favour of the appellant.
3. The learned appellate judge erred to ignore as of no legal effect the admission by the respondent's senior official that they wrongfully demolished appellant's house and without paying him compensation.

When the appeal was called on for hearing, the appellant was represented by Mr. Justinian Mushokorwa, learned counsel. The respondent was represented by Mr. Hangi Chang'a, learned State Attorney and Ms. Triphonia Kisiga, Senior Solicitor of the respondent.

At the outset, the Court *suo motu* required parties to address it on the propriety of the trial pertaining to the involvement of assessors and their role in the conduct of the trial in question.

Mr. Mushokorwa submitted that, apart from the opinions of the assessors not being included in the record of appeal, the proceedings of the Tribunal do not reflect if the Chairman invited assessors to give their opinions before composing the judgment. However, he was of the view that, since the Chairman indicated in the Judgment to have agreed with the opinions of the assessors, the Court should assume and believe that, section 23 (2) of the Land Disputes Courts Act [**CAP 216 RE. 2002**] was complied with. When it was brought to his attention that the opinions of the assessors are in the original record, he replied that sufficing to conclude that the assessors were indeed invited to give their opinions.

In a further probe by the Court on the inactive role of assessors at the trial, Mr. Mushokorwa was of the view that, since they constitute part of the Tribunal, the assessors were given opportunity to ask questions and as such, they actively participated in the conduct of the trial. For this proposition, the learned counsel based his argument on the terms of "the

tribunal examination" appearing at pages 42, 53 and 55 of the record of appeal.

Furthermore, he was of the view that, such defects are curable under section 45 of the Act save where injustice is occasioned to the parties which is not the case in this matter. In this regard, Mr. Mushokorwa added that, since none of the parties has been adversely affected by the said defects, the Court should be guided by Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1997 Cap RE. 2002 (the Constitution) which enjoins the Court not to be unduly tied with technicalities and instead render substantive justice.

In the alternative, he urged the Court to salvage the record by leaving it intact, return the file to the Chairman with a direction that, he enters on the record the manner in which he invited assessors to give their opinion. When probed by the Court on the practicability of such move and the fate of the High Court proceedings which are part of the record already before the Court, he unyieldingly maintained that, his proposition was possible but without stating how.

On the other hand, Mr. Chang'a in his brief and focused submission pointed out that, since the proceedings of the Tribunal do not show if the assessors were invited to give their opinion and in the wake of the parties not being aware of the existence of the opinions in the original record, that is a serious irregularity which vitiated the trial. He cemented his argument by referring us to section 23 (1) and (2) of the Act, arguing that in enacting such provisions, the Legislature had contemplated the mandatory involvement of the assessors in the adjudication of land disputes. He added that, since the record is silent on the active participation of the assessors it is unsafe to conclude that,the trial was conducted with the aid of the assessors. He argued this to be against the principle of law which prescribes the involvement of assessors in adjudication which is another anomaly which adversely impacted on the conduct of the trial.

In view of the stated shortfalls, Mr. Chang'a urged us to nullify the entire proceedings and judgments of the Tribunal, the High Court and order a fresh trial before another Chairman with a new set of assessors. Since this is an old matter, he sought the indulgence of the Court to order an expedited trial.

After a careful consideration of the record and the submission of the learned counsel, the issue for our determination is the propriety of the trial which was a subject of appeal before the High Court and before the Court.

Initially, we deem it crucial to restate that, the composition of the Tribunal and the role of those who constitute it are creatures of section 23 (1) and (2) of the Land Disputes Courts Act (supra) which provides as follows:

> *"(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."***
> [Emphasis supplied].

Moreover, a duty is imposed on the Chairman under Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which provides that:

> *"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."***
>
> [Emphasis supplied].

According to the cited position of the law, a duly constituted Tribunal is that which is composed of the Chairman and a minimum of two assessors. Therefore, it is important to bear in mind that, the Chairman alone does not constitute the Tribunal. The involvement of assessors as required under the law also gives them mandate to give opinion before the Chairman composes the decision of the Tribunal.

The role of the assessors will be meaningful if they actively and effectively participate in the proceedings before giving their opinion at the conclusion of the trial and before judgment is delivered.

Corresponding remarks were reiterated by the Court in **THE GENERAL MANAGER KIWENGWA STRAND HOTEL VS ABDALLA SAID MUSSA,** Civil Appeal No. 13 of 2012 (unreported) which originated from the employment cause whereby, two assessors who were present were disabled from effectively participating at the trial. Thus the Court relied on the case of **ABDALLAH BAZAMIYE AND OTHERS VS THE REPUBLIC** [1990] TLR 42 at 44 having held:

> *"...it is apparent that the two assessors who remained in the conduct of the proceedings up to the end, were disabled from effectively participating and " aiding the trial judge who would have otherwise benefited fully if he took into judicious account all the views of his assessors...their full involvement... was an essential part of the process...Denying the assessors of their statutory right as provided under the Act rendered their participation ineffective*

and led to a mistrial and consequential miscarriage of justice."

The Court declared the trial a nullity and ordered a trial *de novo*.

The cited decision was followed by this Court in **SAMSON NJARAI AND ANAOTHER VS JACOB MESOVORO,** Civil Appeal No 98 of 2015 (unreported) in determining an appeal which originated from the District Land and Housing Tribunal whereby, the Court said, even if the assessor had no question to ask, the proceedings should show his name and mark "NIL" or else it will be concluded that he/she was not offered the opportunity to ask questions and did not actively participate in the conduct of the trial.

The Court further articulated the consequences of not having the opinions of the assessors in the record in **AMEIR MBARAK AND AZANIA BANK CORP LTD VS EDGAR KAHWILI**, Civil Appeal No. 154 of 2015 (unreported) where it categorically said:

"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 acknowledgement 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 serious irregularity".

In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, as earlier intimated, 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. Unfortunately, this did not happen in the instant case. 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. We are fortified in that account by section 24 of the Land Disputes Courts Act, which categorically provides:

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

As expressly stated under the law, the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the Tribunal, it embraces giving their opinions before the determination of the dispute. As such, their opinion must be on record. In **MS HENRY LEONARD MAEDA AND ANOTHER VS MS JOHN ANAEL MONGI AND ANOTHER,** Civil Appeal No 66 of 2013, (ureported) the Court had to strike out the appeal for being incompetent because, though in the original record the assessors gave their opinion, it was not incorporated in the record of appeal. In the case at hand, apart from the assessors (Mr. Kalongole and Mr. Mwamfupe) appearing in the Coram from pages 39 to 56 of the record, it is not shown if they

participated in the proceedings as they were not given opportunity to ask questions or seek clarifications. Worse still, at the conclusion of the defence at page 55 of the record, the Chairman did not invite them to give their opinions as required by Regulation 19 (2) of the Regulations. The Chairman just slated the date of judgment to be on 22nd April, 2015 and later postponed to 23rd April, 2015. Surprisingly, the opinions of the assessors were slotted in the original court file. We do not know as to when and how the same became part of the record. Besides, parties were not aware of the existence of such opinions.

In view of the said anomalies, can it be safely vouched that the trial was conducted with the aid of the assessors? Our answer is in the negative because, as earlier stated, since the law requires the Chairman to sit with the assessors when adjudicating land disputes, their inactive involvement in the proceedings and not requiring them to give their opinion is contrary to the law.

We have carefully considered if the omission is curable under section 45 of the Act and if it can be ignored and treated as a mere technicality in terms of Article 107A (2) (e) of the Constitution as suggested by Mr.

Mushokorwa. Section 45 of the Land Disputes Courts Act provides as follows:

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."*

In **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL,** Civil Application No. 100 of 2004 (unreported) the Court addressed the purposive approach in interpreting article 107A (2) (e) of the Constitution as follows:

"... In our decided opinion, article 107 A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered."

We fully subscribe to the said position and in the case at hand, with respect, we are not in agreement with Mr. Mushokorwa because the omission goes to the root of the matter and it occasioned a failure of justice and there was no fair trial. Moreover, **One,** under article 107B of the Constitution the Court is enjoined to follow the letter of the Constitution and the Law in the exercise of its judicial functions. **Two,** one cannot be said to be acting wrongfully or unreasonably when he is

executing the dictates of the law. See- **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL,** (supra). **Three,** the omission to comply with the mandatory dictates of the law cannot be glossed over as mere technicalities as suggested by Mr. Mushokorwa. We say so because the law was contravened as neither were the assessors actively involved in the trial nor were they called upon to give their opinion before the Chairman composed the judgment. This cannot be validated by assuming what is contained in the judgment authored by the Chairman as he alone does not constitute a Tribunal. Besides, the lack of the opinions of the assessors rendered the decision a nullity and it cannot be resuscitated at this juncture by seeking the opinion of the Chairman as to how he received opinions of assessors as suggested by Mr. Mushokorwa. This adversely impacts on this appeal as there was a miscarriage of justice.

In view of the aforesaid incurable irregularities, we agree with Mr. Chang'a that the trial was vitiated. As to the way forward, we accordingly exercise our revision power under section 4(2) of the Appellate Jurisdiction Act **[CAP 141 RE, 2002].** We hereby nullify the proceedings and judgments of both the Tribunal and the High Court in Land Appeal Case No. 26 of 2015 and the proceedings and Ruling in Misc Civil Application No. 86 of

2016 granting leave to appeal because they all stemmed from a nullity. We further order an expedited retrial before the Tribunal presided over by another Chairman and a new set of assessors.

It is so ordered.

DATED at **MBEYA** this 3rd day of December, 2018.

B.M. MMILLA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL