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

**(CORAM: MWARIJA, J.A., NDIKA, J.A., And KWARIKO, J.A.)**

**CIVIL APPEAL NO. 129 OF 2019**

**DORA TWISA MWAKIKOSA ..... APPELLANT**

**VERSUS**

**ANAMARY TWISA MWAKIKOSA ..... RESPONDENT**

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

**(Mambi, J.)**

**dated the 8th day of June, 2016**
**in**
**Land Appeal No. 44 of 2015**

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# JUDGMENT OF THE COURT

17th & 25th November, 2020

## MWARIJA, J.A.:

The respondent, Anamary Twisa Mwakikosa, the wife of the late Leonard Twisa Mwakikosa (the deceased) and the sister in-law of the appellant, Dora Twisa Mwakikosa was the applicant in the District Land and Housing Tribunal for Mbeya (the Tribunal). She instituted Land Application No. 190 of 2012 against the appellant following a dispute between them over a parcel of land which the respondent claimed to be part of the deceased's land. The respondent alleged that the appellant had trespassed and started construction of a house on that parcel of land

(the dispute land). Thus, in her amended application, the respondent claimed for the following reliefs:

> "(a) *A declaration that the Respondent is a trespasser to the Applicant's land.*
>
> *(b) An order for immediate clean vacant possession of the suit premises.*
>
> *(c) An order for payment of general damages for disturbances due to unlawful trespass by the Respondent to the sum of Tshs.10,000,000/=.*
>
> *(d) An order for payment of mesne profit for non use of the disputed plot by the applicant to the tune of Tshs.15,000,000/= from the date of filing this application to the date of delivering of the judgment.*
>
> *(e) An order for the respondent to demolish and remove the structures erected and other materials collected in the disputed land.*
>
> *(f) Costs of this application be granted for.*
>
> *(g) Any other relief as this Honourable Tribunal may deem fit and just to grant."*

The appellant denied the claim contending that she had a right over the dispute land, the same having been given to her by her late father in 1971.

Before the Tribunal, the respondent (PW1) relied on her evidence and that of her witness, Benedict Twisa (PW2) while on her part, apart from her evidence, the respondent (DW1), called two witnesses, Grace Twisa Nyondo and Daniel Steven Mbili (DW2 and DW3 respectively).

The evidence by PW1 was to the effect that, following the demise of her husband in 2003, she was appointed by the Primary Court of Mwanjelwa, Mbeya District, to be the administratrix of the deceased's estate. She tendered a copy of letters of administration issued on 13/11/2012 by the said Primary Court in Probate and Administration Cause No. 11 of 2003 as an exhibit (exhibit P1). She testified further that she came to find out that the appellant had trespassed into the deceased's land and carried out construction of a house, which was at the material time, unfinished. The respondent's witness, PW2 who is her in-law, testified that being the younger brother of the deceased, was aware that the appellant did not have a right over the dispute land and therefore, her act amounted to trespass.

On her part, the appellant, who is the sister of the deceased, told the Tribunal that the dispute land was given to her by her late father and therefore, being the rightful owner, was justified in constructing her house thereon. Her evidence as regards ownership of the dispute land was supported by DW2 and DW3. In her evidence, DW2 said that she is the sister of the appellant born to a different mother. She went on to state that, the appellant's parents separated when the appellant was one year old. With regard to the dispute land, she averred that to her knowledge, the land was given to the appellant by her father. It was DW3's testimony also that he had knowledge that the dispute land belonged to the appellant. He told the Tribunal that he came to be apprised of that fact way back in 1972 when he approached the appellant's father with a view of being offered that parcel of land which was at the material time, unoccupied. According DW3, he was told by the appellant's father that he had benefacted it to the appellant.

Having considered the evidence led by the parties, the Tribunal found that the respondent had failed to prove her claim. It thus dismissed the application and declared the appellant the rightful owner of the disputed land.

The respondent was aggrieved by the decision of the Tribunal and therefore, appealed to the High Court. In its decision, the High Court (Mambi, J.) reversed that judgment and proceeded to declare the respondent the lawful owner thereof. The decision aggrieved the appellant hence this second appeal which is predicated on the following four grounds of complaint.

> *"1. That, the learned Honourable Judge erred in law in granting ownership of the disputed house to the Respondent which was not part of the estate of the late Leonard Twisa Mwakikosa.*
>
> 2. *The learned Honourable Judge erred in law to entertain and determine Land Case Appeal No. 44 of 2015 filed by Anamary Twisa Mwakikosa (a stranger) who did not act as an Administratrix of the estate of the late Leonard Twisa Mwakikosa.*
> 3. *That Honourable High Court Judge erred in law in entertaining the issue of locus quo which was not part of the record of the trial Tribunal. "*

At the hearing of the appeal, Mr. Simon Mwakolo, learned counsel appeared for the appellant while the respondent was represented by Mr. Kamru Habibu, also learned counsel. In terms of Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), the counsel for the appellant and the respondent had filed their written submissions in support of the appeal and the reply submission respectively.

Before he could embark on arguing the grounds raised in the memorandum of appeal, Mr. Mwakolo sought the leave of the Court under Rule 113 (1) of the Rules so as to rely on a point which was not raised in the memorandum of appeal, to fault the impugned decision. The Court granted him leave and thus raised the following ground:

> The learned High Court Judge erred in law in failing to find that the proceedings of the District Land and Housing Tribunal were defective for the Chairman's failure to comply with the provisions of Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003).

Consequently, Mr. Mwakolo based his arguments on this ground and abandoned the grounds raised in the memorandum of appeal. He started his argument by referring the Court to section 23 (1) of the Land Disputes

Courts Act [Cap. 216 R.E. 2002] (now R.E. 2019) (the Act) which provides for the composition of the Tribunal and the requirement that the assessors who sit with the Chairman must give their opinions before the Chairman reaches the judgment. The learned counsel then went on to argue that, in this case, although in his judgment, the Chairman stated that he agreed with the opinion of the assessors who sat with him and even though their written opinions are in the original record, it is not shown in the record that at the close of the hearing on 9/3/2014, the assessors gave their opinions. If that was done, the learned counsel went on to argue, that should have been reflected in the proceedings.

According to the learned counsel, the failure on the part of the Chairman to let the assessors give their opinions in the presence of the parties vitiated the proceedings because, in effect, Regulation 19 (2) of the Regulations was breached. To bolster his argument, Mr. Mwakolo cited this Court's decisions in the cases of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 and **Ameir Mbarak & Azania Bank Corp Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (both unreported).

On those arguments, the learned counsel urged us to quash the proceedings and the judgments of the two courts below and order a trial *de novo* before another Chairman and a new set of assessors.

Mr. Habibu did not oppose the arguments made by the appellant's counsel. He conceded that the proceedings of the Tribunal were a nullity on account of the Chairman's failure to fully comply with the provisions of Regulation 19 (2) of the Regulations.

Having considered the submission made by the appellant's counsel, we agree with him, as did the respondent's counsel, that the proceedings of the Tribunal were tainted with procedural irregularities arising from the Chairman's failure to comply with Regulation 19 (2) of the Regulations. As submitted by the appellant's counsel, s. 23 (2) of the Act mandatorily requires the Chairman to take the opinion of the assessors before he reaches the judgment. Section 23 (1) and (2) provides as follows:

> *"23 –*
>
> *(1) The District Land and Housing Tribunal established under section 22 shall be composed of 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 manner in which the assessors are required to give their opinions is provided for under Regulation 19 (2) of the Regulations. Regulation 19 (1) and (2) states as follows:

*"19 – (1) The Tribunal, may, after receiving evidence and submissions under regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later:*
*Provided that a judgment of the Tribunal shall not be reserved under any circumstances for a period exceeding three months from the date of the conclusion of such proceedings.*

*(2) 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."*

In the case at hand, as shown above, the record does not reflect that the assessors were required to give their opinion in the presence of the parties after the closure of defence case. The written opinions of the assessors did however, find their way into the record in an unexplained way. Nevertheless, in his judgment, the Chairman stated that he considered those opinions. In our considered view, since the parties were not aware of existence of the assessors' opinions, we agree with the counsel for the parties that in essence, the provisions of Regulation 19 (2) of the Regulations were flouted.

The failure by the Chairman to require the assessors to state the contents of their written opinions in the presence of the parties rendered the proceedings a nullity because it was tatamount to hearing the application without the aid of assessors. We are supported in that view by our previous decision in the case of **Tubone Mwambeta** (supra) cited by the appellant's counsel. When confronted with a similar situation as in this case, we held as follows:

*"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."*

*[Emphasis added]*

- See also the cases of **Sikuzani Said Magambo and Another v. Mohamed Roble,** Civil Appeal No. 197 of 2018 and **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (both unreported). In the latter case, the Court observed as follows:

*". . . as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili:* ***That opinion must be in the record and must be read to the parties before the judgment is composed."***

*[Emphasis added].*

In all the three cases cited above, after having found that the omission was fatal, the Court ordered a retrial.

That said and done, we allow the appeal and as a result, the proceedings of the Tribunal and the High Court are hereby quashed and the judgments are set aside. Consequently, we order that the application be heard afresh before another Chairman and a new set of assessors.

Each party shall bear its own costs.

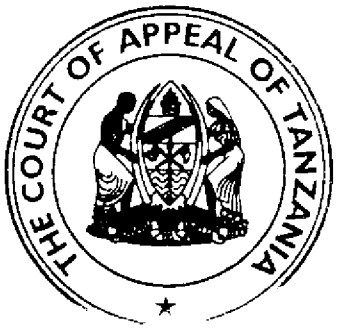
**DATED** at **MBEYA** this 24th day of November, 2020.

A. G. MWARIJA
**JUSTICE OF APPEAL**

G. A. M. NDIKA
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

The Judgment delivered this 25th day of November, 2020 in the presence of Mr. Ramsey Mwamakamba, counsel for the Appellant and Ms. Anamary Twisa Mwakikosa, the Respondent present in person is hereby certified as a true copy of the original.




E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**