IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 312 OF 2017

ZUBEDA HUSSEIN KAYAGALI ..... APPELLANT

VERSUS

1. **OLIVA GASTON LUVAKULE**
2. **TANU JAMES GWOMA ..... RESPONDENTS**

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

(Rumanyika, J.)

dated the 11th day of March, 2015
in
Land Appeal No. 20 of 2014

JUDGMENT OF THE COURT

28th April & 3rd May, 2021

KWARIKO, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Tabora District Registry (Rumanyika, J.), in Land Appeal No. 20 of 2014 dated the 11th March, 2015. Formerly, the first respondent sued the appellant and the second respondent in the District Land and Housing Tribunal of Kigoma at Kigoma (the Tribunal) over ownership of Plot No. 43 Block "A" Kumsenga Area in

Kasulu Township. She lost the suit but she successfully appealed against that decision before the High Court of Tanzania at Tabora.

At the trial, the first respondent's case was that she bought the disputed property from the second respondent on 28th November, 2008. The second respondent said that he was allocated the disputed land by the Kasulu District Land Office on 20th November, 2007 but due to his personal problems he could not develop it thus decided to sell it to the first respondent.

On her part, the appellant's case was that she bought unsurveyed land from one Christina Makako in 2004 which was later surveyed and given provisional Plot No. 46 but after the approval of the survey by the Minister, it was given No. 43 "A" on 11th July, 2007.

In its decision, the Tribunal decided in favour of the appellant on the ground that her evidence had more weight than that of the first respondent. In allowing the first respondent's appeal, the High Court found that Plot Nos. 43 and 46 are two distinct plots and based on the evidence of the Land Officer, declared that the disputed property belonged to the first respondent.

Before this Court, the appellant has raised the following four paraphrased grounds of appeal;

1. *That, the learned first appellate Judge erred in law in holding that Plot No. 46 before approval is a distinct plot while it is the same plot which became No. 43 "A" after the survey made by the Director of Land and Human Settlements.*
2. *That, the learned first appellate Judge erred in law and facts in reversing the decision of the trial tribunal on the ground that in proving land ownership, the evidence of a land officer is superior thus taking the evidence of PW2 to be reliable while disregarding the strong evidence of the appellant's witnesses proving ownership by the appellant, of the dispute plot.*
3. *That, the learned first appellate Judge erred in declaring the first respondent the lawful owner of the dispute plot in disregard of the available evidence on the record that the appellant bought it from DW4 in 2004 before the survey carried out in 2006. The learned Judge should have found that the second*

respondent could not, without extinction of the former owner's right, have any title to pass to the first respondent.

4. *That, the learned first appellate Judge erred in law in failing to find that the first respondent did not have the duty of proving general damages on the ground that the same is in the discretion of the court.*

At the hearing of the appeal, Messrs. Mussa Kassim, Mugaya Mtaki and Mr. Kamaliza Kamoga Kayaga, all learned advocates, appeared for the appellant, first and second respondents respectively, ready for hearing.

However, before the hearing could commence, we wanted to satisfy ourselves on the following two matters. One, whether the Tribunal properly recorded the evidence. Two, whether the assessors were fully involved at the hearing and determination of the case. We thus called upon the counsel for the parties to address us on those issues.

For his part, Mr. Kassim conceded that the Chairman of the Tribunal did not append his signature after taking the evidence of each witness. He submitted further that, although he was not

aware of any provision of law which obliges the Chairman to sign at the end of each witness's evidence, for the purpose of authenticity of the evidence, he was required to append his signature. The learned counsel also submitted that the written opinion of each of the assessors is not in the record of appeal and was not considered in the judgment of the Tribunal. He argued that, the omission to consider assessors opinion is in contravention of Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003 (the Regulations). He submitted that the omission renders the proceedings of the Tribunal as well as the resultant appeal proceedings before the High Court a nullity. As to the way forward, the learned counsel urged us to order a retrial of the case.

On the other hand, while concurring with the foregoing submission, Mr. Mtaki added that the Chairman did not even mention the names of the assessors in the course of the hearing but only in the judgment. He further submitted that the absence of assessors' written opinion contravened also section 23(2) of the Land Disputed Courts Act [CAP 216 R.E. 2019] (the Act).

Mr. Kayaga, on his part concurred with his learned friends that the omission rendered the proceedings of the Tribunal and that of the High Court a nullity. He prayed however for an order that each party should bear its own costs.

We shall start by considering the issue of the assessors' involvement in the hearing of the case before the Tribunal. Section 23 (1) and (2) of the Act provides thus:

> *"(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 this provision, the Tribunal is properly composed when it is comprised of a Chairman and not less than two assessors. Moreover, the assessors are required to give their opinion before the Chairman reaches the judgment. Regulation 19 (2) of the Regulations provides thus:

> *"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."*

This provision states clearly that at the conclusion of the hearing, the Chairman is obliged to require every assessor present to give his opinion in writing. Now, upon perusal of the record of appeal, we have found that when the hearing was closed on 24th October, 2013, the Chairman did not require the assessors to give their opinion and instead he fixed the date of judgment to be 30th December, 2013. In his judgment, the Chairman did not even indicate that he had considered the opinion of assessors if at all they submitted the same. He only indicated therein that he was assisted by two assessors namely Samson Nayingo and Maria Katuku.

In a similar situation like the instant case, in the case of **Ameir Mbarak and Azania Bank Corp Ltd v. Edgar Kahwili,** Civil Appeal No. 154 of 2015 (unreported) the Court stated thus:

> *"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 acknowledgment 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."*

[See also **Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 (unreported).

Moreover, in order for the trial to be taken to have been effectively conducted with aid of assessors, the Chairman ought to require each assessor present to give his or her written opinion and the same be read over to the parties for them to know the nature of the opinion which would be considered by the Chairman in the judgment. This requirement was not complied with in the instant case. To underscore this position of the law, in the case of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 (unreported) where the opinion of assessors was not reflected in

the record but only referred in the judgment of the Tribunal, the Court stated thus:

> *"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 this 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."*

Additionally, before the Chairman reaches the final verdict, he is supposed to consider the opinion of the assessors though not bound by it but should give reasons for such differing with such

opinion. This is the requirement under section 24 of the Act which provides thus:

> *"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."*

Therefore, in order to comply with this provision of law, the Chairman should receive the opinion of assessors and consider it in the judgment.

Consequently, on the strength of the law and the cited authorities, we find that the failure by the Tribunal Chairman to involve the assessors in reaching the decision vitiated the proceedings and judgment of the Tribunal and as correctly urged by the learned counsel of the parties, the effect is to nullify the proceedings. In the circumstances, we invoke section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and hereby nullify them and set aside the judgment. As a result, the proceedings of the High Court which arose therefrom are also hereby quashed and the judgment is set aside. Since this issue is sufficient to dispose of

the appeal, we do not find it useful to address the aspect of improper recording of evidence.

As to the way forward, the learned counsel for the parties urged us to order retrial of the case. We have no sound reason to differ with them. We thus order a retrial of the case before a different Chairman and a new set of assessors. As the issues leading to the determination of the appeal were raised by the Court *suo mottu,* we make no order as to costs.

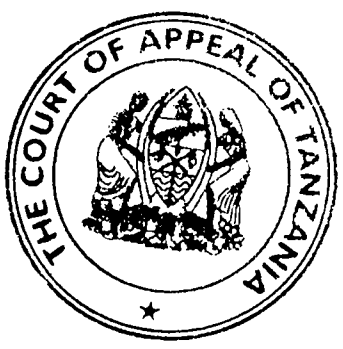
DATED at **TABORA** this 3rd day of May, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of May, 2021 in the presence of Mr. Mussa Kassim, learned Counsel for the Appellant and Messrs Mugaya Mtaki and Mr. Kamaliza Kamoga Kayaga, learned Counsel for the first and second Respondents respectively, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL