IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 92 OF 2018

DR. CLEMENCE KALUGENDO ..... APPELLANT

VERSUS

PETER ANDREW ATHUMANI ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Wambura, J.)

Dated the 23rd day of June, 2017
in
Land Appeal No. 141B of 2015

.....

JUDGMENT OF THE COURT

7th June & 7th October, 2021

WAMBALI, J.A.:

The impugned judgment of the High Court in Land Appeal No. 141B of 2015 emanated from the decision of the District Land and Housing Tribunal for Kinondoni (The Tribunal) in Dar es Salaam in Land Application No. 293 of 2010. In that application, the applicant, Dr. Clemence Kalugendo claimed to be the rightful owner of a piece of land situated at Plot No. 48 Mlalakuwa area in Kinondoni District within the City of Dar es Salaam on the contention that he bought it from Europa

Group of Companies Limited at the price of TZS. 12,000,000.00. Before the Tribunal the appellant contended that the respondent, Peter Andrew Athumani who also claimed ownership over the same piece of land trespassed into the disputed land and built a fence and the structure thereon. At the end of the trial, the Tribunal decided in favour of the respondent, who was the applicant. The current appellant, Dr. Clemence Kalugendo who was the respondent in the application was seriously aggrieved. Nevertheless, he unsuccessful appealed to the High Court, hence the instant appeal. To express his dissatisfaction with that decision he has lodged a memorandum of appeal comprising four grounds of appeal. The appeal is strongly contested by the respondent.

Noteworthy, for the reason which will be apparent shortly, we neither intend to revisit the brief facts of the case as found by the Tribunal and the High Court on appeal nor reproduce herein below the grounds of appeal contained in the appellant's memorandum of appeal.

When the appeal was called on for hearing, Mr. Richard Karumuna Rweyongeza assisted by Ms. Anna Marealle, both learned advocates, appeared for the appellant, whereas on the adversary side, appearance was vividly expressed by the attendance of Mr. Samwel Shadrack Ntabaliba, also learned advocate.

Notably, before we commenced the hearing of arguments for and against the appeal, the Court sought the clarification from the counsel for the parties on whether in view of the Tribunal's record of proceedings the Chairman fully complied with the provisions of section 23 (2) of the Land Disputes Courts Act [Cap.216 R.E.2002] (now R.E.2019) (Cap. 216) and regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003, GN. No. 174 of 2003 (the Regulations), concerning the participation of assessors in the proceedings. Particularly, the clarification was sought as it was apparent in the record of appeal placed before us that assessors who sat with the Chairman were not required to give their opinion in writing and indeed there is no such written opinions in the record.

Responding, Mr. Rweyongeza conceded that there is no indication that the Chairman of the Tribunal required the assessors to give opinion at the end of hearing the evidence from both sides and there is no such written opinion in the record of appeal. In the circumstances, he submitted that the Chairman's omission occasioned injustice to the parties. He maintained that in the absence of the written opinion in the record of appeal it cannot be ascertained if the assessors participated fully in giving their opinion before the judgment was composed as

acknowledged by the Chairman. To this end, he submitted that as assessors are part and parcel of the proceedings at the Tribunal and thus their participation and opinion must be reflected in the record, the omission is fatal and renders the entire proceedings a nullity to the extent of being nullified. In the event, he urged the Court in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) to revise and nullify the proceedings of both the Tribunal and the High Court for being a nullity and order that Land Application No. 293 of 2010 be heard afresh by the Tribunal. The appellant's counsel submission was categorically and fully supported Mr. Ntabaliba. Indeed, the learned counsel for the respondent did not wish to add anything substantial on the argument that the omission by the Tribunal Chairman is apparent as reflected in the record of appeal thus rendering the entire proceedings in both the Tribunal and the High Court a nullity.

Having heard the concurrent submissions of the learned counsel for the parties in the instant appeal, we entirely agree with them that the proceedings of the Tribunal were tainted with procedural irregularities which was occasioned by the failure of the Chairman of the Tribunal to comply with the provisions of section 23 (2) of Cap 216 and regulation 19 (2) of the Regulations. It is beyond doubt that whereas the former

provisions impose a mandatory duty for the Chairman presiding over the Tribunal's proceedings to take and consider the opinion of the assessors before he reaches the judgment, the latter provides for the manner in which assessors who participate during the hearing are required to give their opinions.

In the present appeal, a thorough perusal of the record of appeal indicates that there is no evidence that the Chairman required assessors to give their opinion after the conclusion of the hearing of the evidence for both sides. There is also no evidence that the alleged opinions, if any, were taken in the presence of the parties after the closure of the defence case as required by law. Unfortunately, according to the record of appeal the defect is compounded by the fact that though the Chairman acknowledged to have taken note of the opinion of assessors in his judgment, the requisite written opinions are not part of the proceedings of the Tribunal. For avoidance of doubt section 23 (2) of Cap 216 provides that: -

> *"(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 opinion before the Chairman reaches the judgment."*

On the other hand, regulation 19 (2) of the Regulations provides that: -

> *"Notwithstanding subsection (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."*

The importance of adherence to the requirement of the law under the provisions of regulation 19 (2) of the Regulations has been a subject of several decisions of the Court. For instance, in **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 (unreported) the Court specifically held as follows: -

> *"In view of the settled position of the law, where the trial has been conducted with the aid of assessors... 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. 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."

[For similar observation see also the decisions of the Court in **Sikuzani Said Magambo and Another v. Mohamed Roble,** Civil Appeal No. 197 of 2018 and **Edina Adam Kibona v. Absolom Swebe** (Shell), Civil Appeal No. 286 of 2017 (both unreported). Particularly, in the latter appeal 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".

More importantly, in **Ameir Mbaraka and Azania Bank Corp. Ltd v. Edgar Kahwili,** Civil Appeal No. 154 of 2015 (unreported) the Court stated as follows with regard to the importance of existence of written opinion in the record of proceedings of the Tribunal: -

"Therefore in our considered view, it is unsafe to assume the opinion of the assessors 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."

Similarly, in the instant appeal, as the record of appeal neither indicate that the Chairman directed assessors to give their opinion nor contain the written opinion which he purportedly acknowledged in the judgment of the Tribunal it is unsafe to assume the contrary. In the circumstances, as correctly submitted by counsel for the parties, we are settled that the omission of the Chairman to comply with the requirement of the provisions of section 23 (2) of Cap 216 and regulation 19 (2) of the Regulations is fatal and vitiates the entire proceedings of the Tribunal rendering the same a nullity.

We are however mindful of the provisions of section 45 of the Cap 216 which provides that no decision of the Tribunal will be reversed or altered on appeal on account of any error, omission or irregularity in the proceedings, unless such error or irregularity has in fact occasioned a failure of justice. Nevertheless, in the circumstances of the instant appeal, for the reason we have endeavored to give in our foregoing

deliberation, we are satisfied that the omission of the Chairman occasioned miscarriage of justice to both parties.

Admittedly, according to the record of appeal we have no hesitation to conclude that lack of the written opinion indicate that assessors did not fully participate in the decision making process before the Chairman composed the Tribunal's judgment as required by law. Indeed, we have no hesitation to state that the omission to involve assessors in decision making goes to the root of the proceedings rendering the entire trial a nullity. In the event, the provisions of section 45 of Cap. 216 cannot be brought into play in the circumstances of the appeal at hand.

Consequently, in view of the incurable irregularities we have exposed above which are conceded by the counsel for the parties, we exercise our revision power under section 4 (2) of the AJA to revise and quash the Tribunal and High Court proceedings' in Land Application No. 293 of 2010 and Land Appeal No. 141B of 2015, respectively, and set aside the decree in appeal for being a nullity. Ultimately, for the interest of justice, we order that Land Application No. 293 of 2010 be heard afresh by the Tribunal before another Chairman and a new set of

assessors. In the end, in the circumstances of this appeal we categorically order that each party shall bear his own costs.

DATED at **DAR ES SALAAM** this day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 07th day of October, 2021 in the presence of Ms. Jackline Rweyongeza, counsel for the Appellant and Ms. Jackline Rweyongeza holding brief Mr. Shadrack Ntabaliba, counsel for the Respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL