IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 313 OF 2017

DAUDI HAGHA ..... APPELLANT

VERSUS

1. SALUM NGEZI
2. DAMIAN TOYI ..... **RESPONDENTS**

(Appeal from the judgment of the High Court of Tanzania, at Tabora)

(Mruma, J.)

dated the 12th day of March, 2015
in
Land Appeal No. 16 of 2011
.....

JUDGMENT OF THE COURT

29th October & 3rd November, 2021

LEVIRA, J.A.:

In the District Land and Housing Tribunal for Kigoma at Kigoma (the trial tribunal) the appellant, Daudi Hagha, lodged Land Application No. 22 of 2008 alleging that he owned jointly with the respondents premises located on Plot No.12, Block 'G', Omari Street, Kasulu Township (the disputed premises). He claimed TZS. 3,100,000.00 which he contributed in construction of a house on that plot and TZS. 17,783,325.00 being arrears of rent collected from the disputed premises and used by the

respondents as well as a declaration that, the appellant and the respondents have equal shares in two of the undivided rooms in the disputed premises and costs of the case. The respondents disputed the appellant's claims and thus filed a counter claim seeking rescission of the contract for joint ownership of the disputed premises they had entered with the appellant.

Having heard the parties, the trial tribunal on 7th February, 2011 dismissed the appellant's application and ordered the respondents to refund the sum of TZS.1,725,000.00 to the appellant. The appellant was aggrieved with that decision and thus he appealed to the High Court of Tanzania at Tabora (Mruma, J.) vide Land Appeal No.16 of 2011.

On 12th March, 2015 the High Court dismissed the appellant's appeal. It declared that the appellant has never been a co-owner of the disputed premises and thus it could not declare him so. The first appellate Judge stated that the appellant could not recover rent arrears because he lost his rooms or shares in a decree which was executed against him. However, the learned Judge ordered a refund of TZS. 3,100,000.00 which the appellant had advanced to the respondents prior to the dispute. Still unsatisfied, the appellant has lodged the current appeal challenging the whole decision of the High Court. For obvious reasons to come into light

shortly, we shall not reproduce the appellant's grounds of appeal appearing in the memorandum of appeal.

Before us Messrs. Mussa Kassim and Mugaya Kaitila Mtaki, both learned advocates appeared for the appellant and respondents respectively. At the outset, Mr. Mussa sought and was granted leave under Rule 113(1) of the Tanzania Court of Appeal Rules, 2009 to argue additional grounds of appeal on procedural irregularities in the proceedings of the trial tribunal, which he said, they can dispose of this matter; to wit: -

1. *That the trial tribunal did not sit with assessors throughout the trial.*
2. *That the names of assessors who participated during trial were not clearly shown in the proceedings and their opinion was not written and read out to the parties.*
3. *That there was change of presiding chairmen but there were no reasons assigned to that effect.*
4. *That all the witnesses from both sides were not sworn before giving their evidence.*

Submitting in support of the appeal, Mr. Kassim argued the above first and second grounds together. He stated that hearing of cases before the trial tribunal requires involvement of assessors in all stages, who are supposed to give their opinions before the judgment. The said opinions must be in writings and should be read out to the parties, but that was

not done in this case. He referred us to page 58 of the proceedings where immediately after close of defence case, the order that followed fixed a date of visiting the locus in quo. There is no indication that assessors' opinions were read out contrary to the requirements of the law under Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003 (the Regulations). He added that failure to do so is fatal as it was decided by the Court in **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported).

As regards the names of assessors who participated in the conduct of trial, he submitted that the record is not clear as sometime no name was indicated completely or names were written interchangeably. He referred us to pages 49 of the proceedings where it is only written *"Assessors"* no names were indicated, page 52 written *"Assessors: Hope" and "Msechu",* at 54 it is only written *"ASSESSORS"*, page 55- *"Assessors-Msechu",* at 56 it is only written *"ASSESSORS"* but there were no names indicated. Therefore, he said, it is not known who participated during trial.

Following those flaws, he urged us to nullify the proceedings of the trial tribunal and that of the first appellate court together with the judgment and in lieu thereof, order for retrial.

Mr. Kassim's submission in respect of the third ground was to the effect that the trial was conducted by two chairmen but there were no reasons assigned. He referred us to page 55 of the proceedings where the coram showed that the matter was presided over by chairman, **R. J. Kim** who recorded the evidence of the witnesses of the parties but did not write the judgment. Instead, the judgment was written and delivered by chairman, **V. Ling'wentu** as it can be observed from pages 59 to 61 of the proceedings. According to Mr. Kassim, the remedy of such procedural irregularity is to nullify the proceedings and the judgment of the trial tribunal and the first appellate court. He thus urged us to nullify all the proceedings by the chairman, **V. Ling'wentu** starting from 18th October, 2010 to the end of the trial. He said, in real sense, there is no judgment of the trial tribunal.

Lastly, Mr. Kassim submitted that all witnesses who appeared before the trial tribunal were not either sworn or affirmed before they testified as it can be seen at pages 49, 52, 55 and 57 of the proceedings. Therefore, he argued that it is as good as there was no any evidence adduced and thus what is appearing in the record of appeal deserves to be expunged. He urged the Court to expunge the purported evidence and order for retrial. He did not press for costs.

Having made a thorough follow up of the submission by his learned friend, Mr. Mtaki made a very brief reply in concession. He stated that the shortcomings identified and elaborated by Mr. Kassim are obvious and the authorities cited in support thereof are relevant. Thus, as a way forward, he urged the Court to nullify all the proceedings and judgment and order retrial with an order that each party bears its own costs. Mr. Kassim having heard the concession by the respondents' counsel, had no rejoinder to make.

This matter is straight forward as the record speaks it all. The question as to whether the flaws identified by the counsel for the appellant exist in the record cannot hold us much. Indeed, they do and they are so apparent on the record of appeal to the extent that had it not been raised by the counsel for the parties, we were prepared to engage them to address us on the same. For this reason, we shall not make unnecessary repetitions of what has already been submitted by the counsel for the parties but we think, it is important for us to stress on what does the law provide in the circumstances.

Composition of the District Land and Housing Tribunal which we have been referring all along as the trial tribunal is a matter of law. Section

23(1) and (2) of the Land Disputes Courts Act, Cap. 216 RE 2002 [now RE 2019] provides for such composition in the following terms: -

> *"(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 dully 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 added].

In the present matter we agree with the counsel for the parties that the composition of trial tribunal was not proper as the chairman had all along been sitting with either one assessor or undisclosed assessor(s) and at times without assessors in contravention of the above quoted law.

We wish to observe that the form and language in which the assessors are required to give their opinions is also provided under the Regulations which were made to give force to the above provision. Regulation 19 (2) of the Regulations cited above makes it clear 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 added].

The assessors who sat with the chairman in the present matter for some unknown reasons did not sit throughout. They had been interchanging and thus their participation was not fully, a fact which we think, contributed to their failure to give opinion as required by the law. We say so because the record of appeal does not suggest that any of the assessors, be it, Msechu, Katuku or Hope whose single names appear in the record had the opportunity to give his or her opinion in writing as required by Regulation 19(2) of the Regulations. We have thoroughly gone through the record of appeal but we could not locate the assessors' opinions before the chairman's order fixing a judgment date. At page 58 of the record of appeal, the defence side closed its case on 03.03.2010 and the immediate order was to visit the locus in quo on 05.03.2010 which they did and after that the judgment date was fixed to be 28.04.2010. In **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 (unreported), cited in **Edina Adam Kibona** (supra) the Court while dealing with an akin situation had this to say:

> *"In view of the settled position of the law, where the trial has to be conducted with the aid of the 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 ...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].

Also, see- **Emmanuel Christopher Lukumai v. Juma Omari Mrisho, Civil Appeal No. 21 of 2013** and **Y. S Chawalla & Co. Ltd v Dr. Abbas Teharali,** Civil Appeal No.70 of 2017 (both unreported).

As we have demonstrated above, the Chairman did not require the assessors to give their opinion in writing, if at all, they fully participated to the conclusion of the hearing; this failure, we hold, was a fatal irregularity as it was decided in **Edina's** case cited above. We could end here and nullify all the proceedings and judgment of the trial tribunal and the first appellate court and order retrial, but we think, we should as well determine one more irregularity before we do so.

Another procedural irregularity in the record of appeal is that, all the witnesses who testified before the trial tribunal were not sworn as it can be seen at pages 49, 52, 55 and 57 of the record where a total number

of 4 witnesses testified; to wit, 1 from the applicant's side and 3 from the respondents' side. The law requires witnesses either to be sworn or affirmed before giving their evidence, be it in court or before tribunals. The Oaths and Statutory Declarations Act, Cap 34 R.E.2019 provides under section 4 as follows: -

> *"Subject to any provision to the contrary contained in any written law, an oath shall be made by-*
> *(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court;*
> *(b) any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court: Provided that, where any person who is required to make an oath professes any faith other than the Christian faith or objects to being sworn, stating, as the ground of such objection, either that he has no religious belief or that the making of an oath is contrary to his religious belief, such person shall be permitted to make his solemn affirmation instead of making an oath and such affirmation shall be of the same effect as if he had made an oath."*

The above provision and the rules made thereunder require an oath to be administered in judicial proceedings otherwise, failure to do so renders the unsworn evidence without evidential value as it was decided

in **Nestory Simchimba v. Republic**, Criminal Appeal No. 454 of 2017 (unreported) when the Court was dealing with a similar matter, it held that: -

> *"Since, in the present case, PW1 and DW1 gave their evidence without being affirmed, on the authorities above, their words recorded when they gave testimonies was no evidence at all and, in that accord, we entirely agree with Mr. Mtenga that such evidence deserved not be considered by the court to determine the guilt or otherwise of the appellant. The evidence by PW1 and DW1 is hereby accordingly discarded."*

Being guided by the above decision, we as well, in the present matter, find that the evidence of all the witnesses at the trial tribunal deserves to be discarded as the same was recorded without oath as we accordingly do. Therefore, having discarded that evidence, nothing remains in the record of appeal to act upon.

We wish to remark briefly that, the first appellate court did not deal with issues of procedure. It concentrated on the substance which for the reasons we have endeavored to discuss could not legally stand. As submitted by Mr. Kassim, procedural flaws in this matter are many with almost the same effect. Therefore, for the purpose of this decision, we think we should end here.

As a result, we allow the appeal and nullify all the proceedings and the decisions of the trial tribunal together with those of the High Court and order this matter to be retried. We do not make order for costs; each party shall bear its own costs.

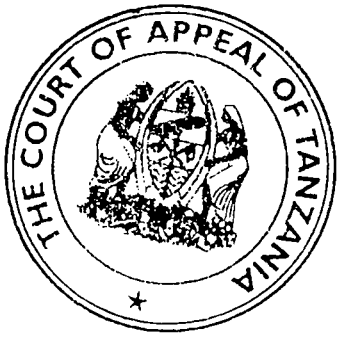
DATED at **TABORA** this 3rd day of November, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of November, 2021 in the presence of Mr. Musa Kassim, counsel for the Appellant and Mr. Mugaya Kaitila Mkati, counsel for the Respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL