IN THE COURT OF APPEAL OF TANZANIA
AT TABORA
(CORAM: MWARIJA, J.A., MWANDAMBO, J.A, And MASHAKA, J.A.)

CIVIL APPEAL NO. 104 OF 2018

SAKINA SADIKI MBANO.....APPELLANT

VERSUS

AMINA SAID BUTETE.....1ST RESPONDENT

SADA IBRAHIM.....2ND RESPONDENT

RADHIA IBRAHIM.....3RD RESPONDENT

NEEMA IBRAHIM.....4TH RESPONDENT

MAIDIA IBRAHIM.....5TH RESPONDENT

ASHA IBRAHIM.....6TH RESPONDENT

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

(Rumanyika, J.)

dated the 23rd day of August, 2016
in
Land Appeal No. 30 of 2015

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JUDGMENT OF THE COURT

21st & 28th March, 2022

MWANDAMBO, J.A.:

The appellant, Sakina Sadiki Mbano, was aggrieved by the judgment of the High Court at Tabora (Rumanyika, J.-as he then was) in its appellate jurisdiction from the District Land and Housing Tribunal (DLHT) for Tabora. The impugned judgment quashed the decision of the DLHT which had dismissed an application instituted by the first, second and third respondents

challenging sale of a house sold to the appellant allegedly without the first respondent's consent.

The facts from which the dispute before the DLHT arose are not in dispute. The first respondent was a widow of the late Ibrahim Kharidi who had died survived by several issues including the second, third, fourth, fifth and sixth respondents. She instituted Land Application No. 29 of 2014 before the DLHT jointly with the second and third respondents for two declaratory orders, to wit; that the sale transaction on the disputed house situate on plot No. 69, Salmini street, within Tabora Municipality to the appellant was illegal and that the first respondent was the owner of the said property.

The best we can discern from the scanty facts in the application before the DLHT reveals that the first respondent was in occupation of the disputed house allegedly acquired jointly with her late husband. After the death of her husband, she was appointed as the administratrix of the deceased's estate inclusive of the said house for the benefit of the second and third respondents as legal beneficiaries. It was contended that the respondent never sold the house to the appellant who claimed to have purchased it. In totality, the cause of action centred on the alleged lack of consent by the first respondent in the sale of the house.

In her written statement of defence, the appellant disputed the averments in the application praying for its dismissal. For their part, the fourth, fifth and sixth respondents who are among the children of the first respondent and her late husband did not deny having sold the disputed house to the appellant. They alleged that they sold the house of their mother out of utter necessity without her consent by reason of her unconscious state for a considerable period as they needed money for her own treatment. Other than the concession, they were agreeable to refund the money paid by the appellant as purchase price.

Thereafter, the application proceeded for trial before the DLHT constituted by the Chairman sitting with two assessors as required by section 23 (1) and (2) of the Land Disputes Courts Act [Cap. 216 R. E 2019] henceforth, the Act.

After the conclusion of the trial of the application, the DLHT dismissed it upon being satisfied that the first, second and third respondents had not proved their case against the appellant. It thus ordered vacant possession and payment of mesne profits in the amount of TZS 200,000.00 per month till delivery of vacant possession. Dissatisfied, the first, second and third respondents appealed to the High Court which found merit in their appeal. The first appellate court did so having been satisfied that the DLHT made an

error in holding that the first respondent had consented to the sale of the disputed house to the appellant. The learned first appellate Judge quashed the DLHT's decision and set aside the orders it had made in favour of the appellant, hence this appeal.

Initially, the appellant, acting through Mr. Musa Kassim, learned advocate, had preferred two grounds of appeal in the memorandum of appeal lodged on 10/01/2018. Essentially, the appellant's complaint in ground one is that the first appellate court erred in reversing the DLHT's decision relying on weak evidence. Ground two which was preferred in the alternative, faults the first appellate Judge for his failure to declare a nullity the DLHT proceedings on a number of alleged irregularities in the said proceedings.

In compliance with rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the learned advocate for the appellant filed his written submissions in support of the two grounds. Incidentally, none of the respondents filed any written submissions in reply per rule 106(7) of the Rules.

During the hearing of the appeal, Mr. Musa Kassim, learned advocate entered appearance representing the appellant whilst Mr. Mugaya Kaitila Mtaki, assisted by Ms. Flavia Francis, both learned advocates did so for the

first, second and third respondents. The fourth and sixth respondents who were duly served by publication in Mwananchi Newspaper ISSN 0856-7573 No. 7871 of 25/02/2022 pursuant to the Court's order made on 03/05/2021, defaulted appearance. The Court proceeded with the hearing in their absence in terms of rule 112 (2) of the Rules. Likewise, mindful of rule 105 (2) of the Rules, the Court proceeded in the absence of the fifth respondent who had been reported dead earlier on upon being satisfied that, notwithstanding its order made on 03/05/2021, the appointment of her legal representative to be joined in the appeal had not been done.

By consent, before the commencement of hearing, the Court granted leave to Mr. Kassim to argue an additional ground in pursuance of rule 113 (1) of the Rules which he formulated as under:

> "3. *The learned High Court Judge erred in law to proceed with the determination of the appeal emanating from the proceedings and judgment of the DLHT in which the opinions of the assessors were not read before the parties prior to the composition and delivery of judgment."*

Although he was confident that the additional ground was sufficient to dispose of the appeal, Mr. Kassim adopted his written submissions in support

of the two grounds as alluded to earlier in the unlikely event the Court will not find merit in it.

The gravamen of the learned advocate's submissions in the additional ground rested on the alleged non-compliance with Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunals) Regulations, 2003, henceforth the Regulations, that is to say; failure by the DLHT Chairman to require each of the assessors who sat with him to the conclusion of the trial to prepare his opinion and read it in the presence of the parties before delivery of judgment. Elaborating, Mr. Kassim drew our attention to page 46 of the record of appeal whereby, upon the closure of the defence case, the DLHT Chairman set a date of judgment instead of fixing a date for the reading of the opinions of the assessors contrary to Regulation 19 (2) of the Regulations. He argued further that since it is plain from the record that the Chairman delivered his judgment without having asked each of the assessors who sat with him up to the conclusion of the trial to prepare and read his opinion, the judgment and the entire proceedings were a nullity.

Taking the argument further, the learned advocate contended that consequently, the appeal to the High Court, the proceedings as well as the resultant judgment were equally irregular having been emanated from a nullity. Mr. Kassim cited to us several decisions of this Court pronouncing

itself in similar circumstances to bolster his argument notably; **Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 and **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 (both unreported) for the proposition that non-compliance with Regulation 19 (2) of the Regulations renders the proceedings before the DLHT a nullity so is the resultant judgment. In addition, the Court was referred to its decision in **Daudi Hagha v. Salum Ngezi & Another**, Civil Appeal No. 313 of 2017 (unreported) citing **Tubone Mwambeta** (supra) on similar circumstances.

Armed with the above authorities, Mr. Kassim invited the Court to hold as it did in similar cases that the proceedings and the judgment of the DLHT quashed by the High Court on appeal were a nullity affecting the sanctity of the appeal to the first appellate court, proceedings and judgment that followed. Concerning the way forward, Mr. Kassim invited the Court to order a retrial before another chairman and a new set of assessors in the interest of justice. Considering that none of the parties were responsible for the fateful proceedings, the appellant's learned advocate urged the Court not to make any order for costs.

Mr. Mtaki was candid enough to concede to the additional ground subscribing to the submissions and the prayers made by the appellant's

leaned advocate. We are greatly indebted to the learned advocate for being sincere and honest to the Court.

Having heard Mr. Kassim on the additional ground and upon our own examination of the record of appeal, we respectfully endorse the learned advocates' concurrent submissions resulting into sustaining the additional ground. It is glaringly clear that the DLHT Chairman strayed into an error in jettisoning the mandatory requirement of Regulation 19 (2) of the Regulations by his failure to require each of the assessors to prepare his opinion to be read to the parties before the composition and delivery of judgment. Consistent with our previous decisions reflected in the cases cited to us by Mr. Kassim in **Tubone Mwambeta**, **Edina Kibona** and **Daudi Hagha** (supra) supported by Mr. Mtaki, doing so was tantamount to the trial before the DLHT having been conducted without the participation of the assessors in clear violation of the provisions of section 23 (1) and (2) of the Act.

Curiously, a reading of page four of the judgment (appearing at page 57 of the record), the DLHT chairman makes reference to the opinions of the assessors but the so-called opinions are conspicuously missing from the record. A similar situation featured in the case of **Amour Mbarak and Azania Bancorp Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015

(unreported) referred in **Edina Adam Kibona** (supra), whereby the Court emphatically stated that the court cannot assume the existence of the assessors' opinions merely by refence to them in the judgment. The Court took the view that at any rate, even if the opinions had been found in the record, since it is plain that they were not read in the presence of the parties before the composition and delivery of judgment, they will not be of any use in remedying the irregularity. That is the position obtaining in the instant appeal attracting like treatment taken in the cases cited.

Under the circumstances, having endorsed the concurrent submissions by the learned advocates for the appellant and first, second and third respondents, we hold that the proceedings before the DLHT and the resultant judgment challenged on appeal before the High Court were a nullity. Guided by the decisions we have referred to in this judgment, the proceedings before the High Court in Land Appeal No. 30 of 2015 which emanated from an invalid judgment of the DLHT are held to be a nullity and are hereby quashed and set aside.

With regard to the way forward, having quashed the proceedings before the DLHT and the High Court and set aside the respective judgments, we cannot but accede to joint prayer, that is to say; ordering, as we hereby do, the retrial of Land Application No. 29 of 2014 before the DLHT for Tabora

by a different Chairman and new set of assessors according to law. In view of the order we have made, the determination of the appellant's grounds in the memorandum of appeal will be an academic exercise serving no useful purpose.

Finally, as the learned advocates are agreeable on costs, each party shall bear its own.

DATED at **TABORA** this 25th day of March, 2022.

A.G. MWARIJA
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 28th day of March, 2022 in the presence of the Mr. Musa Kassim, learned counsel for the appellant and Mr. Mgaya Kaitila Mtaki, learned counsel for the 1st, 2nd and 3rd respondents and absence of 4th, 5th and 6th respondents, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL