IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 30 OF 2020

ELILUMBA ELIEZEL .....APPELLANT

VERSUS

JOHN JAJA.....RESPONDENT

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

(Mansoor, J.)

dated the 25th day of June, 2020
in
Misc. Land Case Appeal No.77 of 2019

JUDGMENT OF THE COURT

2nd & 5th May, 2022

LEVIRA, J.A.:

The appellant, Elilumba Eliezel, appealed unsuccessfully to the High Court of Tanzania at Dodoma against the decision of the District Land and Housing Tribunal for Iramba at Kiomboi (the Tribunal) in Land Case Appeal No. 27 of 2019. In the said decision the Tribunal dismissed the appellant's appeal which he had instituted against the decision of Mtoa Ward Tribunal in Land Case No. 16 of 2018 which was entered in favour of the respondent.

The dispute between the parties is over ownership of land situated at Mtoa Ibambasi. The appellant claimed ownership of the land in

dispute as an administratrix of the estate of her late father one Eliezery Kiula who initially owned the said land. On his part, the respondent claimed that the land in dispute is his property which he bought from one Shani Kiula in 1994. Each party called one witness to fortify its position during trial. Nalongwa Mpanda testified for the appellant while the respondent called one Juma Ramadhan Masanja. As intimated above, the appellant lost the case throughout, from the Ward Tribunal to the High Court.

Tirelessly, he has knocked the doors of this Court armed with six grounds of appeal against the decision of the High Court. Since this matter originated from the Ward Tribunal the appellant had to seek and obtain a certificate on points of law from the High Court, which he obtained. It is worth noting at the outset that in terms of section 47(3) of The Land Disputes Courts Act, Cap 216 RE 2019, no appeal originating from the Ward Tribunal, like the current one, shall lie to this Court unless the High Court certifies that there is a point of law involved. For ease reference, it reads: -

> *"47(3) Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High*

Court certifying that there is point of law involved in the appeal."

In the present appeal the High Court certified only two points of law as follows: -

"1. Whether there were procedural irregularities in the proceedings before the Ward Tribunal and before the District Land and Housing Tribunal, to wit whether the chairman of the District Land and Housing Tribunal did not take into consideration the opinion of the assessors.

2. whether it was necessary to order the joinder of Shani Kiula in the case."

The appellant has presented before us a Memorandum of Appeal comprising six grounds. However, having scrutinized them, we discovered that only two grounds fall under the above certified points of law.

At the hearing of the appeal, the appellant was represented by Mr. Paul B. S. M. Nyangarika, learned advocate, whereas the respondent did not enter appearance despite being duly served on 11/4/2022 and he

did not file written submissions. Following absence of the respondent, the Court engaged Mr. Nyangarika to suggest the way forward. Upon taking floor he submitted that, since the respondent was duly served with the summons to appear for the hearing and he has not filed any notice to explain out the reasons for his absence today, the hearing of the appeal should proceed in his absence. Therefore, he prayed and we granted the prayer under Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 that hearing of the appeal should proceed in the absence of the respondent. We as well engaged the learned counsel for the appellant to address the Court in relation to the grounds of appeal which are not compatible with the points of law certified by the High Court worth the Court's determination. Initially, he did not find any problem but after a short dialogue with the Court and having perused the record of appeal, he located the certified points of law which guided him in screening the grounds of appeal. Having done so, he realised that only two grounds fall squarely under the certified points of law. The only option he had was to abandon uncertified grounds of appeal, which he did. The importance of certification by the High Court of the points of law was well pronounced by the Court in **Yakobo Magoiga Gichere v.**

Peninah Yusuph, Civil Appeal No. 55 of 2017 (unreported) as follows:

*"In our opinion, the learned counsel for the appellant properly abandoned the two grounds of appeal for lack of certification by the High Court. Certificate from the High Court is mandatory for appeals originating from Ward Tribunals, and should not be taken perfunctorily or lightly by the certifying High Court and by the parties to the impending appeal. A certificate of the High Court predicates the jurisdiction of the Court in land matters, so much so, this Court has often times stated that a decision of the High Court refusing to grant a certificate on a point of law under section 47(2) of the Land Disputes Courts Act, is final and no appeal against it lies to this Court: (see-**TIMOTHY ALVIN KAHORO V. SALUM ADAM MFIKIRWA**, CIVIL APPLICATION NO. 215 OF 2013 (unreported). To underscore the significance of the certificate, we may add that where the High Court has certified points of law in appeals originating in Ward Tribunals, the grounds of appeal filed in the Court must*

substantially conform to the points of law which the High Court has certified."

Since the matter at hand originated from Mtoa Ward Tribunal as intimated earlier, in the light of the settled position of the law above, we un-hesitantly state that the counsel for the appellant in the current appeal made a proper decision to abandon uncertified grounds of appeal and we so mark them. He thus argued the following grounds of appeal: -

1. *That, the Honourable High Court Judge erred in law and facts in not holding that the trial Mtoa Ward tribunal ought to have ordered a re-trial after having found that the purported vendor of the suit land ought to have been legally joined as a party.*
2. *That, the Honourable High Court Judge erred in law and in facts in not holding that the Iramba at Kiomboi District Land and Housing Tribunal erred in law and facts in not properly recording and considering the opinions of the Assessors."*

Mr. Nyangarika commenced his submission in support of the appeal by adopting the appellant's written submissions filed in Court on 1st March, 2021 save for the explanations relating to the abandoned grounds of appeal. He preferred to start arguing the second ground of

appeal which he said, is capable of disposing of this appeal. He referred us to page 53 of the record of appeal where the Chairman of the Tribunal had stated in his judgment that he considered assessors' opinion; while the proceedings before the said Tribunal found at page 49 of the record of appeal do not suggest that the assessors gave their opinion despite their presence. The record shows that Mrs. Elimamba M. Lula and Mr. Paul M. Sankey sat as members of the Tribunal with the Chairman, but their opinion was not recorded, if at all they gave their opinion. The learned counsel submitted further that, it can be gathered from page 54 of the record of appeal that the Chairman of the Tribunal acknowledged the assessors' opinion, that they made a finding that the appeal was unmerited but the same was not supported by the record of appeal. In the circumstances, he was firm that there was no full involvement of assessors at the Tribunal as mere presence without giving opinion is as good as they were not present; hence, the Tribunal was not properly constituted. Therefore, he prayed the Court to nullify the proceedings of the Tribunal and the High Court, quash the respective decisions and order for a retrial before another chairman with a different set of assessors. He did not press for costs.

Regarding the first ground of appeal, he submitted briefly that there was non joinder of a party in this matter which the Tribunal ought to have acted accordingly. According to him, Shani Kiula was a necessary party in this matter because being the seller of the land in question, if left out, she will be condemned without being heard and this is what transpired in the Tribunal.

We have carefully gone through the submission by the counsel for the appellant, grounds and the record of appeal. Just as stated by the learned counsel for the appellant, the main issue calling for our determination falls under the second ground of appeal which the learned counsel preferred to argue first in his submission. We shall thus determine whether the Tribunal involved the assessors while determining appeal between the parties herein. In determining this issue, we shall also consider whether assessors' opinion was recorded and considered by the Tribunal.

The law is settled regarding composition of the Tribunal, it requires the Chairman of the Tribunal to sit with not less than two assessors who shall be required to give their opinion before the judgment. This position is provided under section 23 (1) & (2) of the Land Disputes Courts Act, Cap 216 RE 2019 in the following terms: -

"(1) The District Land and Housing Tribunal establishes under section 22 shall be composed of one chairman and not less than two assessors.

(2) The District Lan and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out there opinion before the chairman reaches the judgment."

Furthermore, Regulation 19(2) of the Land Disputes Courts (the District Land and Housing Tribunal Regulations, G. N. No. 174 f 2003 requires assessors to give their opinion before the composition of the judgment by the chairman. It reads: -

"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."

For the composition of the Tribunal see for instance, **Emmanuel Christopher Lukumai v. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013 (unreported).

In the current case, it is apparent from the record of appeal that the Honourable Chairman who presided over the matter between the parties sat with two assessors whose names appear in the proceedings, to wit, Mr. Paul Stankey and Mrs. Elimamba Lula as per the coram of 24th June, 2019 when the hearing of the case was conducted. However, after giving the *'respondent'* an opportunity to make his rejoinder and before inviting assessor to give out their opinion, the Chairman of the Tribunal fixed a judgment date, which judgment was eventually delivered on the fixed date. For easy reference, we shall let the relevant part of the proceedings speak for itself hereunder: -

> ***"REJOINDER BY THE 'RESPONDENT' "***
>
> *Your Honour, I insist that the land in dispute is the property of my late father....*
>
> ***Tribunal:*** *upon hearing the submissions from both sides, let judgment date be fixed.*
>
> ***Order:*** *1. Judgment on 30/07/2019."*

As it can vividly be seen from the above except, the Chairman of the Tribunal did not invite the assessors to give their opinions as required by the law. Besides, no opinion could be traced in the record. It can only be gleaned from the record that the assessors who sat with

the Chairman made participation by listening to the witnesses, asking questions but in the end, they were denied their statutory right of giving heir opinion in writing. Had it been that they were given such right, their opinion could be reflected in the record of appeal, particularly, the proceedings before the Tribunal.

It has to be noted that the opinion given by assessors sitting in the Tribunal has to be recorded regardless of whether the chairman agrees or disagrees with it. Nevertheless, if the chairman disagrees with the opinion of one of the assessors or both of them, the law requires him to record the reasons for such disagreement in his decision and not to neglect them completely. Failure to do so is tantamount to sitting without the aid of assessor. In real sense, if the assessors' opinion is not recorded at all it is difficult for the appellate court to gauge whether they gave their opinion or not; especially, when the decision of the tribunal purports that they gave the opinion. In our settled opinion, it is not enough for the chairman of the tribunal to refer, concur or agree with the assessors' opinion in the judgment whilst the said opinion is nowhere to be found in the proceedings of the tribunal as in the case at hand. Consideration of assessors' opinion in the judgment go hand in hand with recording their opinion during proceedings.

The effect of failure to record and read out assessors' opinion was stated in the case of **Peter Makuri v. Michael Magwega**, Civil Appeal No. 107 of 2019 (unreported) in the following terms: -

> *"Failing to request, receive, read out to parties, and consider the assessors' opinion in the Tribunal decision as is the case in the instant case,* ***regardless whether the chairman agreed or not with the opinion,*** *is a fatal omission that goes to the root of the matter, consequently vitiating the proceeding."*
>
> [Emphasis added]

Page 54 of the record of appeal at hand, reflect exactly what is stated in the bolded part of the above quoted decision. Having composed his judgment, without recording assessors' opinion first, the Chairman of the Tribunal purported to agree with non-existing assessors' opinion when he stated: -

> *"I find the appeal filed by the appellant* ***as found by assessors of the Tribunal to have no merit*** *and the same I hereby dismissed with costs to the respondent and the judgment and decree of the Ward Tribunal Mtoa is hereby upheld."* [Emphasis added]

As state earlier, since the assessors' opinion referred to by the Chairman of the Tribunal as reflected above cannot be located in the record of appeal, it is as good as not being there. It might be that the Chairman forgot completely to require the assessors to give out their opinion before fixing the judgment date and thus, upon recalling them, in the course of composing the judgment, he remedied the situation by purporting to refer what they had opined. In any case, the fact that the assessors gave no opinion for consideration by the Chairman of the Tribunal before composing the judgment is a fatal omission that goes to root of the matter at hand to the extent of vitiating the proceedings, as we hereby hold. The omission missed the eye of the High Court or else it could have been remedied way back when the appeal was before it. The said infraction rendered the judgments and proceedings of the courts below a nullity on account of the non-involvement of assessors because the chairman alone had no jurisdiction to adjudicate and determine the appeal before him. This ground alone is capable of disposing of the appeal and thus we do not see the need of determining the other ground raised by the appellant.

Consequently, we allow the appeal, quash the judgments and proceedings of both the High Court and the Tribunal. In lieu thereof, we

order a retrial before another chairman and a different set of assessors. Since the appellant did not press for costs, we make no order as to costs.

DATED at **DODOMA** this 4th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 5th day of May, 2022 in the presence of Mr. Paul B. S. M. Nyangarika, learned counsel for the Appellant and in the absence of the Respondent, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL