IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CIVIL APPEAL NO. 84 OF 2021

AMRI SHABANI GUNDA.....APPELLANT

VERSUS

SALUM MOHAMED MASHAURI.....RESPONDENT

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

(Masaju, J.)

dated the 15th day of October, 2020
in
Land Appeal No. 487 of 2019

RULING OF THE COURT

2nd & 5th May, 2022

MUGASHA, J.A.:

This is an appeal originating from the District Land and Housing Tribunal of Iramba at Kiomboi (the DLHT) whereby the appellant lodged a suit claiming that the respondent had trespassed into land which he lawfully owned having inherited it from his parents. It was alleged by the appellant that, the suit land initially belonged to his family which utilised it between 1973/74 to 2009 and until the demise of the appellant's father and later his mother and as such, the suit land had remained in the hands of the

appellant. The respondent denied the appellant's assertions claiming that he was a lawful owner of the suit land which he had inherited it from his parents. He contended that, initially various people including his relatives had trespassed into the respective land but later, it was surrendered to him by those people save for the appellant and his mother. Then, upon being advised, the respondent successfully applied to be appointed as an administrator of estate of the late Mohamed Mashausi, his father, before the Iguguno Primary Court in Probate Cause No. 8 of 2013. Subsequently, the appellant unsuccessfully lodged in the DLHT a claim against the respondent seeking to be declared as lawful owner of the suit which was dismissed and so was the appeal before the High Court.

Undaunted, the appellant has lodged the present appeal. In the Memorandum of Appeal, the appellant has fronted six grounds. However, on account of what is to unfold in due course, we shall not reproduce the grounds of appeal.

At the hearing, the appellant was represented by Mr. Leonard Mwanamonga Haule, learned counsel whereas the respondent did not enter appearance though served with the notice of hearing on 11/4/2022 in terms of what is contained in the return of the service. Thus, Mr. Haule prayed and we accepted that the hearing of the appeal proceeds in the absence of

the respondent as per the dictates of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009.

Upon being invited, with leave of the Court Mr. Haule raised a point of law on the propriety of the trial whereby, on account of change of assessors in between the trial and that the opinion of assessors is lacking. Taking us through the record, it was submitted by Mr. Haule that the assessors present at the commencement of the trial were not in attendance throughout the trial. On this, he pointed out that, while Mrs. Elimamba Lula and Mr. Paul Sankey were the assessors present on 13/9/2016 when Amri Shabani Gunda (PW1) testified. This was not the case on 4/10/2016 and 30/11/2016 as Mwajuma Omary (PW2), PW3 and Jumanne Swalehe Nkumba (PW4) gave their testimonial in the presence of a different set of assessors constituted by Mr. Joram Massenga and Mr. Paul Sankey. It was Mr. Haule's argument that, on account of such change of assessors, since none of them was present throughout the trial to hear the evidence of the all witnesses, the assessors were not qualified to give any opinion after the conduct of the trial. He also intimated that, although the opinion of the assessors is in the record, there is no indication that such opinion was read out to the parties before the judgment was composed by the chairman. He

argued the omission to have vitiated the trial and proposed that we nullify the proceedings and the judgments of both the trial tribunal and the High Court. Consequently, he urged the Court to invoke its revisional jurisdiction as provided under the provisions of section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] to remedy the infraction.

The submission by the learned counsel for the appellant raises a pertinent issue to wit the propriety of the trial which was a subject of appeal before the High Court and the Court. We begin with the position of the law regulating the composition of the DLHT as stated under section 23 (1) and (2) of the Land Disputes Courts Act (supra) which stipulates as follows:

> *"(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."***
> *[Emphasis supplied].*

In the light of the cited provision, a duly constituted the DLHT is that which is composed by the Chairman and a minimum of two

assessors. In this regard, since the Chairman alone does not constitute the DLHT, the involvement of assessors as required under the law also gives them mandate to give opinion before the Chairman composes the decision of the DLHT. This has been underscored by Regulation 19 (2) of the Land Dispute Courts (the District Land and Housing Tribunal) Regulations, G.N 174 of 2003 (the Regulations) stipulates as follows:

> *"19 (2) Notwithstanding sub-regulation (1), the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing give his opinion in writing and the assessor may give his opinion in Kiswahili. "*

In case of absence of the assessors, the law gives following direction as specified under section 23(3) of the Land Disputes Courts Act [CAP 216 RE.2002] which states:

> *"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both members of the Tribunal* ***who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member (if any) may continue and conclude the proceedings notwithstanding such absence".***
> *[Emphasis supplied].*

The cited provision clearly indicates that, at least one of the assessors must be among the assessors in attendance throughout the trial so as to enable them to make an informed and rational opinion. Moreover, the opinions of the assessors must be in the record and that apart, it must be read out to the parties before the Chairman proceeds to compose the judgment. See: **TUBONE MWAMBETA VS MBEYA CITY COUNCIL,** Civil Appeal No. 287 of 2017, **SEBASTIAN KUDIKE VS MAMLAKA YA MAJI SAFI NA TAKA**, Civil Appeal No. 274 of 2018, **ALAKARA NAKUDANA VS ONINGOI ORGUMI**, Civil Appeal No. 177 OF 2019 and **AMEIR MBARAK AND ANOTHER VS EDGAR KAHWILI,** Civil Appeal No. 154 of 2015 (all unreported). In the latter case the Court emphasized as follows:

> *"...in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgement 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"*

The consequences of unclear involvement of assessors in the trial renders such trial a nullity. See: **AWINIEL MTUI AND 3 OTHERS VS STANLEY EPHATA KIMAMBO AND ANOTHER,** Civil Appeal No. 97 of 2015 and **SAMSON NJARAI AND ANOTHER VS JACOB MESOVIRO,** Civil Appeal No. 98 of 2015 (both unreported).

We shall be guided accordingly by the stated position of the law. In the case at hand, we agree with the appellant's counsel that, although at the trial there were three different sets of assessors, none of the assessors was present throughout the trial. We are fortified in that regard because Mrs. Elimamba Lula and Mr. Paul Sankey was a set of the assessors present at the commencement of the trial on 13/9/2016 when Amri Shabani Gunda (PW1) testified and on 26/9/2018, 27/11/2018 and 25/1/2019 when four witnesses testified for the defence case. However, Mr. Joram Massenga and Mr. Paul Sankey, were the assessors on 4/10/2016 and 30/11/2016 when Mwajuma Omary (PW2), PW3 and Jumanne Swalehe Nkumba (PW4) gave their testimony. However, it is Mrs. Elimamba Lula and Mr. Paul Sankey who opined as assessors regardless of not being present throughout the conduct of the trial. This was irregular because, Mrs. Elimamba Lula did not have the opportunity of hearing the evidence of PW2, PW3 and PW4 and Mr. Paul Sankey had no chance to hear the evidence of PW4.

It is apparent that the change of assessors offended the provisions of section 23 (3) of the Land Dispute Courts Act (supra) which does not envisage a complete change of all assessors who were in attendance at the commencement of the trial. The consequences of allowing the assessor to give an opinion while he has not heard the entire evidence were articulated in the case of **JOSEPH KABUL VS REGINAM** [1954 – 55] EACA VOL. XX-2 where the Court stated:

> *"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity."*

It is our considered view that, the above principle applies with equal force in the matter which is a subject of the appeal which is required to be adjudicated together with the assessors. In the premises, since neither of the three sets of assessors nor any assessor was involved throughout the entire trial, the omission vitiated the trial as it was not conducted by a duly constituted the DLHT as per the dictates of section 23 (1) and (2) of the Land Disputes Courts Act (supra) and Regulation 19 of the Land Disputes Courts Regulations.

We understand that the aforesaid discussion is sufficient to dispose of the appeal. However, we have also gathered that though the opinion appears to be in the record it is not clear if such opinion was read out to the parties as the record is silent. Therefore, although the Chairman in his judgment acknowledged to have considered the opinion as reflected at page 57, we found it unsafe to rely on the same in the absence of any indication that the opinion was in fact read out to the parties. See: **AMEIR MBARAK AND ANOTHER VS EDGAR KAHWILI (**supra). Without prejudice to the aforesaid, we are of a considered view that, the opinion not read out to the parties is as good as not being there. The omission correspondingly reduced the value of the opinion of the assessors and the trial was vitiated. **See: WASHINGTON S/O ODINDO VS REPUBLIC** [1954] 21 EACA CA 394.

In view of the foregoing, it is glaring that the omission is not curable under the provisions of section 45 of the Land Disputes Courts Act. We say so because the unclear involvement of the assessors cannot be validated by the Chairman as he alone does not constitute the DLHT. Thus, the omission goes to the root of the matter and it occasioned a failure of justice.

In view of the aforesaid incurable irregularities, the trial was vitiated. As to the way forward, we accordingly invoke our revision powers under section 4(2) of the AJA, nullify the proceedings and judgments of the DLHT and the High Court. We order the case file to be returned to the DLHT for a retrial as soon as possible before another Chairman and new set of assessors. Since the parties are not at fault, we make no order as to costs.

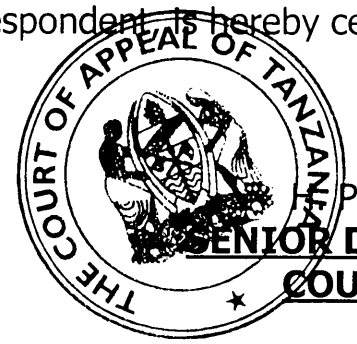
DATED at **DODOMA** this 4th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Ruling delivered this 5th day of May, 2022 in the presence of Mr. Ezekiel Amon Mwakapeje, learned counsel holding brief for Mr. Leonard Mwanamonga Haule, 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