IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 274 OF 2018

SEBASTIAN KUDIKE.....APPELLANT

VERSUS

MAMLAKA YA MAJI SAFI NA MAJI TAKA.....RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania at Moshi)

(Mussa, J.)

dated the 13th day of May, 2011
in
Land Appeal No. 10 of 2010

RULING OF THE COURT

14th & 17th February, 2022

MUGASHA, J.A.:

In the District Land and Housing Tribunal at Moshi (DLHT), the appellant instituted a case against the respondent claiming to be declared a lawful owner of land held under customary leasehold in Shiri/Njoro village, Maili Sita within Hai District in Kilimanjaro Region. He claimed to be paid compensation by the respondent who had acquired such land after identifying the same as a catchment area for the source of water supply in

Moshi town. After a full trial, judgment was entered against the appellant and in favour of the respondent.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed. Still undaunted, the appellant has preferred an appeal to the Court challenging the decision of the High Court. On account of reasons to be apparent in due course, we shall not give a factual account of what transpired at the trial and neither shall we reproduce the grounds of complaint to the Court.

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent was represented by Mr. Mussa Mbura, learned Principal State Attorney and Messrs. Daniel Nyakiha, Yohana Marco and Ms. Zamaradi Joannes, all learned State Attorneys.

We initially wanted to satisfy ourselves on the propriety or otherwise of the role of assessors in the conduct of trial before the DLHT. This being a point of law and since the appellant was a layperson, he opted to initially hear the submissions of the learned Principal State Attorney, reserving a right of reply.

On taking the floor, in his brief focused submission, Mr. Mbura pointed out that, the opinions of the assessors is missing in the record of appeal

which as well, does not show if the assessors were required to read out their opinions before the Chairman composed the Judgment. He argued this to be an omission because following the completion of the trial and before composing the Judgment, the Chairman ought to have required the present assessors to give their opinions. In the event the aforesaid did not happen and considering that the opinions of the assessors are not in the record, it was thus Mr. Mbura's argument that the involvement of assessors was not in accordance with mandatory requirements of the provisions of sections 22, 23 and 24 of the Land Disputes Courts Act CAP 216 R.E.2002 (the Land Disputes Courts Act). On the way forward, Mr. Mbura urged the Court to nullify the judgments of the courts below and the proceedings of the DLHT and order a retrial before another chairman with a new set of assessors.

On the other hand, the appellant had nothing useful to add except pleading with the Court to be allowed to commence the trial afresh without being subjected to the prescribed time limits in which his case has to be filed in court.

Having heard the submissions of the parties, the issue for our consideration is whether or not the assessors were fully involved in the conduct of the trial before the DLHT.

We begin with the position of the law which governs the adjudication of land disputes before the DLHT. In terms of section 23 (1) of the Land Disputes Courts Act, the DLHT shall be constituted by the Chairman and assessors and their role is articulated under subsection (2) whereby after the trial is concluded, they are mandatorily required to give out their opinions before the Chairman reaches the judgment. The manner in which the assessors shall give their opinions is governed by Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal (Regulations) 2003 which 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 to give his opinions in writing and the assessors may give his opinions in Kiswahili."*

It is glaring that the cited Regulation enjoins the Chairman, before making a judgment, to require every assessor present at the conclusion of the trial to give his opinions in writing which may be in Kiswahili language. However, what transpired in the case at hand is that, while the hearing was concluded on 30/9/2009 when the chairman pronounced that judgment

would be delivered on 11/11/2009 which was later handed down on 21/1/2010, there is no indication if the Chairman did require the assessors to give their opinions in writing as per the dictates of regulation 19 (2). That apart, there is no clue if the assessors were invited to read their opinions so that the parties could hear them. Instead, as reflected at page 46 of the record, on 30/9/2009, the matter was fixed for the hearing of the respondents which never materialized and the Chairman ordered that judgment would be delivered on 11/11/2009. This is reflected at page 52 of the record of appeal as hereunder:

> *"Tribunal members who sat with me are of the same views that DW1 was supposed to be joined as either co - respondent or necessary party..."*

Apart from the record not indicating that the assessors were not invited to read out their opinions, in the entire record we could not land our eyes on the opinions of the assessors. In this regard, the question for our consideration is whether the trial was conducted with the aid of assessors as acknowledged by the Chairman. Faced with akin situation in the case of **AMEIR MBARAK AND AZANIA BANK CORP LTD VS EDGAR KAHWILI,** Civil Appeal No. 154 of 2015 (unreported), the Court held:

"....it is unsafe to assume the opinions of the 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 opinions for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity"

[See also: **TUBONE MWAMBETA VS MBEYA CITY COUNCIL**, Civil Appeal No. 287 of 2017 and **EDNA ADAM KIBONA VS ABSALOM SWEBE** (Sheli) Civil Appeal No. 286 of 2017 (both unreported).]

In the premises, as we said in the case of **AMEIR MBARAK AND AZANIA BANK CORP LTD VS EDGAR KAHWILI** (supra), it is highly unsafe to assume the opinions of the assessors which is not on the record regardless of the chairman's acknowledgement in the Judgment. Thus, it is our considered view that, in the event the assessors did not give opinions for consideration in composing the judgment of the DLHT, this is a fatal irregularity. In the circumstances, as correctly submitted by Mr. Mbura, the

judgments of the two courts below are a nullity and cannot be spared. We are fortified in that account because the proceedings before the High Court and the resulting impugned judgment both stem on null proceedings and judgment of the DLHT.

On the way forward, we invoke the powers vested on us under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019], and hereby quash and set aside the proceedings and judgment and subsequent orders of both the DLHT and the High Court.

Consequently, in this particular case, we refrain to order a retrial having considered that: **one,** this matter has been in the court corridors for more than fifteen years from 2007 to date; **two,** the record of appeal shows that, appellant's case was confronted with a preliminary point of objection on the predicament of non-joinder which entails lodging proper pleadings. In the circumstances, if the appellant so desires, may not later than six (6) months from the date of this Ruling, institute a fresh suit joining the necessary party in accordance with the law and without being subjected to computation of time limitation during which the matter was pending in courts.

Since the issue under consideration was raised by the Court *suo motu*, we make no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 16th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Ruling delivered this 17th day of February, 2022 in the absence of Appellant, who was dully notified, and Mr. Mkama Musalama, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL