

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CIVIL APPEAL NO. 177 OF 2019

ALAKARA NAKUDANA.....APPELLANT

VERSUS

ONINGOI ORGUMI.....RESPONDENT

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

(Mwaimu, J.)

dated the 11th day of July, 2016

in

Land Appeal No. 25 of 2015

RULING OF THE COURT

18th & 22nd February, 2022

SEHEL, J.A.:

This is a second appeal. It emanates from decision of the District Land and Housing Tribunal of Simanjiro at Orkesumet (DLHT) where the appellant instituted a land dispute against the respondent. He sought to be declared as a lawful owner of land measuring forty (40) acres located at Loiborsoit "A" village within Simanjiro District (the suit land) on account of sale agreement dated 19th January, 2007 (Exh. P2) as he claimed that the respondent sold it at a consideration of TZS. 2,800,000.00. The respondent disputed the claim by filing a written statement of defence and raised a

counter claim seeking for a vacant possession of the suit land. The case was heard *ex-parte* and at the end, the appellant was declared lawful owner of the suit land whereas the respondent's counter claim was dismissed for want of prosecution.

Aggrieved by the decision of the DLHT, the respondent successfully appealed to the High Court where the sale agreement was declared *void ab initio*. Undaunted with the outcome of the appeal, the appellant filed an appeal to this Court. In the memorandum of appeal, he raised five grounds which we shall not reproduce for a reason shortly to be apparent. Neither, shall we reproduce the evidential facts of the case. However, we find it pertinent to point out that after being served with the record of appeal, on 25th November, 2021, the respondent filed a notice of preliminary objection which was withdrawn during hearing of the appeal.

The appeal was called on for hearing on 18th February, 2022. Ms. Edna Mndeme, learned counsel appeared for the appellant, whereas the respondent was represented by Mr. Andrew Moses Maganga, also learned counsel.

At the very outset, the Court invited counsel for parties to address it on the propriety or otherwise of the proceedings of the DLHT regard being that the opinion of the two assessors who sat with the Chairman is lacking

in the record of appeal and it is not reflected in the proceedings of the DLHT as to whether the assessors read out their opinions to the parties.

In her brief submission, Ms. Mndeme conceded to the anomalies pertaining to the proceedings of the DLHT. She argued that although the Chairman indicated in his judgment that he considered the opinions of the assessors, the same cannot be found in the record of appeal. She added that even the record is silent as to whether the assessors read out the opinion to the parties before the Chairman composed the judgment. On the basis of the pointed-out anomalies, the learned counsel argued that the assessors were not fully involved thus, the entire trial was conducted without involving the assessors which is contrary to the provisions of sections 22 and 23 of the Land Disputes Courts Act, Cap. 216 R.E. 2019 (henceforth "the LDCA"). She added that those irregularities vitiated both the proceedings of the DLHT and the High Court since the proceeding in the High Court arose from a null proceeding. She thus, urged the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (henceforth "the AJA") and nullify the proceedings of the DLHT and the High Court, set aside the judgments and decrees and make an order of retrial before another Chairman with a new set of assessors.

Mr. Maganga supported the submissions made by the appellant's counsel. He added that the proceedings of the DLHT were a nullity as the Chairman did not comply with the provisions of Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal (Regulations) G.N No. 174 of 2003 (henceforth "the Regulations").

We have dispassionately considered the submissions by both counsel. The issue for our determination is whether the assessors were properly involved during the hearing and at the conclusion of the trial before the DLHT.

Section 23 (1) and (2) of the LDCA provides for the composition of the DLHT that:

*"(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].*

The above provision of the law provides in clear terms that the DLHT is constituted by the Chairman and not less than two assessors and that

the role of the assessors, as provided under subsection (2), is to give out the opinions before the Chairman reaches the judgment.

Regulation 19 (2) of the Regulations specifies the form and language of such opinion. It provides:

"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 opinion in writing and the assessors may give his opinion in Kiswahili."

It follows that at the conclusion of the trial, the Chairman is obliged to require every assessor present to give his opinion in writing before composing his judgment and such opinion may be in Kiswahili language.

In the present appeal, we gathered from the record of appeal, in particular at page 73, when the defence case was closed by the Chairman of the DLHT, the Chairman did not require the two assessors, namely L. Matuga and S. Losioki, to give their opinion and instead he fixed the date of judgment to be on 18th December, 2014. Unfortunately, the record is silent as to what transpired on 18th December, 2014. What is on the record is that, on 11th December, the case was before the Chairman in the absence of the assessors and parties, thus, it was fixed to come for

mention on 23rd December, 2014. Part of the record on that mentioned date reads:

"Tribunal: Judgment is not ready. Ladies' assessor one was absent, the other is bereaved. They had not been able to write their opinion.

Order: Judgment on 30th December, 2014. Hearing on the P.O on 08/01/2015."

From the above extract, it is obvious that by 23rd December, 2014 the assessors' opinions were not ready. However, on 30th December, 2014 the judgment was delivered to the parties. This is reflected at pages 77 and 78 of the record of appeal. In that Judgment, the Chairman acknowledged the opinion of the two assessors when he said:

"Assessors of this Tribunal who presided with me Ms. L. Matunga and S. Losioki were of the opinion that this application be allowed since the applicant had all exhibits to show that he is the lawful purchaser..."

However, on our part, we failed to find in the record of appeal the said assessors' opinion in writing. Further, there is no record to show that the assessors were required to give their opinion to the parties before the Chairman delivered the judgment.

Recently, we were confronted with an akin situation in the case of **Sebastian Kudike v. Mamlaka ya Maji Safi na Maji Taka**, Civil Appeal No. 274 of 2018 (unreported) that the record was silent as to whether the Chairman required the assessors to give their opinions in writing as per the dictates of regulation 19 (2) of the Regulations. Applying the principle, we stated in the case of **Ameir Mbarak and Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) the Court held:

"... 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."

Yet, in the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 the Court emphasized the need to require every assessor to give his opinion and the opinion be put on record that:

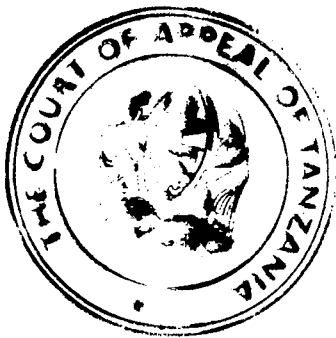
"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, ... they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed ... since Regulation 19 (2) 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."

On the strength of the cited authorities, we are constrained to hold that it would be unsafe to assume that the assessors gave their opinion to the parties before the Chairman reached the judgment. In that respect, we are satisfied that the failure by the Chairman of the DLHT to actively involve the assessors before delivery of judgment vitiated the proceedings of the DLHT and that of the High Court.

Consequently, we do hereby invoke our revisional powers conferred upon us under section 4 (2) of the AJA and hereby nullify the proceedings of the DLHT and of the High Court as it emanated from a null proceeding, set aside the judgments and decrees arising therefrom.

In the end, given the circumstances of the appeal, we order for an expedited retrial of the case before a different chairperson with a new set of assessors. Since the issue was raised by the Court, we make no order as to costs.

DATED at **ARUSHA** this 22nd 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 22nd day of February, 2022 in the presence of Mr. Andrew Moses Maganga holding brief for Ms. Edna Mndeme, learn counsel for the Appellant and Mr. Andrew Moses Maganga, learned counsel for Respondent, is hereby certified as a true copy of the original.

A handwritten signature in black ink, appearing to be "J. E. Fovo", written over a horizontal line.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL