IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 221 OF 2019

PAUL MUSHI (*as an Attorney of Salim Ally*) ..... APPELLANT

VERSUS

ZAHRA NURU ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, Land Division, at Dar es Salaam)

(Mziray, J.)

dated 12th day of August, 2015
in
Land Case No. 152 of 2007

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JUDGMENT OF THE COURT

7th June & 10th August, 2022

MWARIJA, J.A.:

The appellant instituted a suit in the High Court of Tanzania (Land Division) at Dar es Salaam, Land Case No. 310 of 2007 (the suit). He sued the respondent, Zahra Nuru who was the 1st defendant together with two other persons who are not parties to this appeal; the Commissioner for Lands and the Attorney General (who were 2nd and 3rd defendants respectively). He claimed for the following reliefs:

"(a) A declaration that the plaintiff is a lawful occupier of plot No. 800, now plot No. 1 Block 'D' Msasani village.

(b) *Permanent injunction restraining the first defendant, her agents, workmen, employees or any other person claiming under her from doing anything on plot No. 800 Msasani Beach.*

(c) *An order of permanent injunction restraining the second defendant from revoking the offer of the plaintiff on the plot.*

(d) *Costs of this suit be provide for.*

(e) *Any other order and/or relief(s) this honourable court my deem fit to grant."*

The appellant claimed that he was the lawful owner of a parcel of land, Plot No. 800 situated at Msasani Beach which was later changed to Plot No. 1 Block 'D' Msasani Village Dar es Salaam (the suit property). On her part, apart from denying the claim, the respondent filed a counterclaim contending that she was the lawful owner of the suit property. She also claimed for mesne profits of TZS 5,000,000.00 per month, interest and costs of the suit. Before the hearing had commenced the appellant withdrew the suit and as a result, the trial court proceeded to hear the respondent's counterclaim.

At the hearing of the counterclaim, the respondent (PW1) relied on her own evidence while on his part, apart from his evidence, the appellant who testified as DW3, called two witnesses; Denis Masami (DW1) and Paulo Kija (DW2) who were at the material time, a Land Officer and the Principal Surveyor respectively at the Ministry of Lands.

In her evidence, PW1 testified to the effect that, she was allocated the suit property in 1988. Giving its description, she said that the same is situated along Bagamoyo road, bordering Plots No. 801 and 779. She tendered the letter of offer and the title deed (exhibits P1 and P2 respectively) to substantiate her claim. She went on to testify that in 2004, one Salim Ally trespassed into the suit property and started to develop it on account that the same was allocated to him by the Kinondoni Municipal Council. She decided to file an application in the District Land and Housing Tribunal, Kinondoni where she obtained a restraint order against that person. She added that, as a result of the trespass, she suffered damages of TZS 5,000,000.00 per month.

In his defence to the counterclaim, the appellant, who brought the suit as the attorney of Salim Ally, alleged to have been residing in the United Arab Emirates at the material time, told the trial court that the suit property was allocated to the said person in 1989. DW3 tendered a letter of offer (exhibit D3) and other letters including the one from the City Council of Dar es Salaam indicating that the suit property was allocated to Salim Ally. DW3 added that, despite the correspondences from the City Council showing that the suit property was allocated to Salim Ally, he later received a letter from the Commissioner for Lands informing him that the rightful owner was the respondent. It was his evidence further that, the

letter of offer issued to the respondent was doubtful because both the payment receipts and the stamp duty show that the payments were made in 1985 while according to the respondent's claim, she was allocated the suit property in 1988.

The evidence of the appellant was supported by DW1 and DW2. DW2 testified that the suit property was created from the Survey Plan that was approved on 16/9/1997. He added that, Plot No. 800 was initially in a green belt area and was not earmarked for residential use. He went on to state that, after the change of land use, the area was designated as Block 'D', Msasani Village. On his part, DW1 said that Plot No. 800 was divided into three plots and the respondent was allocated the part that faces the Ocean while Salim Ally was allocated the portion that is along the old Bagamoyo road.

Having considered the evidence tendered by the parties, the High Court found that the respondent was the rightful owner of the suit property. Relying on the letter of offer, receipts in respect of payment of land charges and the title deed tendered by the respondent, the trial Judge was satisfied that the suit property was allocated to her. He was of the view that, the documents which were subsequently issued to Salim Ally were invalid. He found further that, it was improper for DW3 to give evidence on behalf of Salim Ally because, in the absence of his evidence,

the claim that he was allocated the suit property remained unproved. With regard to the claim for damages, the learned trial Judge was of the view that the respondent had failed to substantiate that she suffered such damages as a result of the appellant's act of trespassing into the suit property. That claim for damages was therefore, dismissed.

The appellant was aggrieved by the decision of the High Court and thus preferred this appeal. In his memorandum of appeal, he has raised a total of nine grounds, out of which grounds 7, 8 and 9 were raised in the alternative to the first six grounds of appeal. Having lodged the appeal, the appellant filed his written submission in compliance with Rule 106 (1) of Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and similarly, the respondent complied with Rule 106 (7) of the Rules by filing his reply submission.

For reasons which will be apparent herein, we do not intend to consider all grounds of appeal but only ground 8 which was raised in the alternative. The complaint in that ground is that:

> *"The proceedings were a nullity as the assessors cross- examined the witnesses."*

In his written submission and during the hearing of the appeal, while arguing that the assessors had wrongly cross-examined the witnesses, the counsel for the appellant, Mr. Samson Mbamba raised other two

crucial points concerning involvement of the assessors at the trial. He argued that, the procedure which was adopted was improper. It was his submission **first**, that while at the commencement of hearing of the counterclaim on 10/9/2013 when PW1 started to give his evidence, the learned trial Judge sat with two assessors, Messrs Kimaro and Morris. However, at the subsequent hearing dates from 21/2/2014, new set of assessors comprising of Mr. Kimatare and Ms. Hellen Joseph took over from the previous assessors and continued to hear the evidence of PW1 and that of the defence witnesses. It was the argument by the learned counsel that, the irregularity is fatal because the second set of assessors who did not hear the whole evidence of PW1 could not give informed opinion. To bolster his argument, he cited the cases of **Aminiel Mtui and Others v. Stanley Kimambo** (*as an attorney for Ephata Mathayo Kimambo*), Civil Appeal No. 97 of 2015 (unreported) and **Joseph Kabui v. R**, [1954 -55] E.A.C.A Vol. 2, 260.

Secondly, he contended that there was another irregularity; that the opinion of the assessors was neither recorded nor availed in the record of appeal. According to the learned counsel, the omission is fatal because the evidence that they gave their opinion is lacking. On the basis of the irregularities complained of by the appellant, the learned counsel urged us to nullity the proceedings and order a retrial.

In reply to the arguments made by the appellant's counsel, Mr. Magafu disputed the contention that the assessors cross–examined the witnesses. It was his submission that, if that had happened, the learned counsel for the appellant should have raised an objection. He added that, the mere fact that the abbreviation "XXD" was used did not necessarily mean that the assessors cross-examined the witnesses. As to the absence of the assessors' opinion, the learned counsel argued that, since at page 462 of the record of appeal, it is shown that the learned trial Judge considered their opinion, which was to the effect that the appellant was the lawful owner of the suit property, it means that they gave their opinion. He thus urged us to find that the omission is not fatal.

We have duly considered the submissions made by the counsel for the parties on the involvement of the assessors at the trial. It was the requirement of the law at the material time, that when hearing a land case, the High Court was properly constituted when a Judge sits with two assessors unless the parties agreed otherwise. This was in accordance with the provisions of Rule 5 F (1) of the High Court Registries Rules, 1984 as amended by GN No. 364 of 2005. That rule states as follows:

> *"5F-(1) Except where both parties agree otherwise the trial of a suit in the Land Division of the High Court shall be with aid of two assessors."*

In the case at hand, the trial was conducted with the aid of assessors, as there is nothing in the record showing that the parties had agreed to dispense with that requirement. It has not been disputed that there was a change of assessors after the first set had partly heard the evidence of PW1. It is also not disputed that the learned trial Judge did not record the opinion of the assessors who heard the suit to its conclusion. He only stated in his judgment that he considered their opinions.

It is trite of law, as argued by the appellant's counsel, that where in a suit, the assessors who commenced the hearing fail to participate to the conclusion of the trial different assessors cannot take over and conclude the hearing. With due respect to the learned trial Judge, therefore, that was an error. The effect thereof is to render the trial a nullity. – See for instance, the case of **Aminiel Mtui and Others** (supra) cited by counsel for the appellant and **B. R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Ltd,** Civil Appeal No. 128 of 2017 (unreported). In the latter case in which the High Court committed a similar error, the Court had this to say:

> *"Since the trial began with Kimolo and Mtumba as assessors when PW1 testified, then in terms of the law applicable at the time, the trial court was bound to proceed with them till finalization of the*

case and in the event either of them was unable to attend court, the trial court was obliged to proceed with the remaining assessors ... Mrs. Martha Bukuku and Hellen Joseph, who were a new set of assessors, wrongly took over the place of the former set of assessors."

With regard to the absence of the assessors' opinion in the record, the omission is equally fatal. In the case of **Hamis S. Mohsin and 2 Others v. Taningra Contractors**, Civil Appeal No. 51 of 2013 (unreported), also cited by the counsel for the appellant, the opinion of the assessors was missing in the record of the District Land and Housing Tribunal. Considering the effect of the omission, the Court observed that:

"...Since the law requires assessors to give their opinion, such opinion must be on record in order to ascertain if truly, the Chairman in preparing the Tribunal Judgement did consider the opinion assessors ... In the absence on record of opinion of assessors, it is impossible to vouch if they gave any opinion for consideration in composing the judgement of the Tribunal .... Since the opinion is missing, this is a fatal omission which occasioned a failure of justice and there was no fair trial."

Although in the above cited case, the omission was made by the District Land and Housing Tribunal, in our considered view, the effect is

the same when the irregularity occurs in the proceedings of the High Court. It render the trial a nullity.

On the basis of our findings on the two additional points raised in the 8th ground of appeal, we are of the settled view that the same suffice to dispose of the appeal. We do not therefore, find it necessary to consider the issue whether or not the assessors cross-examined the witnesses and also for the other grounds of appeal. As a result, we hereby allow the appeal and nullify the proceedings, quash the judgment and set aside the orders arising therefrom. We consequently order a retrial before another Judge in accordance with the law.

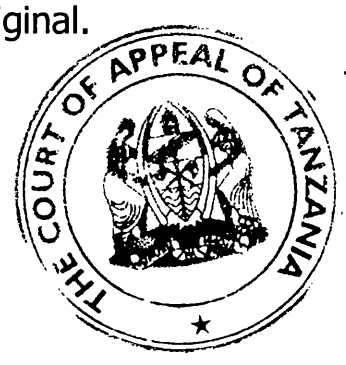
DATED at **DAR ES SALAAM** this 2nd day of August, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 10th day of August, 2022 in the presence of Ms. Jackline Kulwa, learned counsel for the appellant who also holding brief for Mr. Samson Mbamba and Mr. Ashiru Lugwisa, counsel for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL