IN IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 505 OF 2021

ALEX MACHA .....APPELLANT

VERSUS

HOSEA JORAM.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Shinyanga)

(Mdemu, J.)

Dated the 3rd day of April, 2020
in
Consolidated Land Appeals Nos. 83 & 96 of 2016

JUDGMENT OF THE COURT

2nd & 7th November, 2022

KEREFU, J.A.:

In the District Land and Housing Tribunal for Shinyanga (the Tribunal), Hosea Joram, the respondent herein, sued Alex Macha, the appellant together with Kahama District Council, who is not a party to this appeal praying to be declared a lawful owner of a parcel of land described as Plot No. 206 Block 'O' located at Nyasubi area within Kahama Township (the suit land) and nullification of a letter of offer issued to the appellant by Kahama District Council dated 27th July, 2000. The respondent also prayed

for an order directing the appellant to demolish the structure he had erected on the suit land, to give vacant possession and costs of the case.

The essence of the respondent's claims as obtained from the record of appeal indicate that, the original owner of the suit land was Amos Kitula who was allocated the suit land by Kahama District Council on 15th December, 1994 and that, in 1996 he gave the suit land to the respondent. The respondent stated further that, at that time, the suit land was known as Plot No. 25 Block 'O' but later, after being surveyed, it was renamed as Plot No. 206 Block 'O'. Subsequently, on 10th September, 1999, vide a letter of offer, the suit land was formerly allocated to the respondent by Kahama District Council. Then, the respondent prepared a sketch map of a proposed building on the suit land which was approved and he was issued with a building permit.

It was the respondent claim that, before commencement of the construction on the suit land, he travelled to attend his father who was sick and admitted at Nkinga Hospital. In his absence, the appellant approached Kahama District Council where he was wrongly issued with another letter of offer on the same suit land dated 27th July, 2000 without revoking the earlier one given to him. The respondent stated further that, he became

aware of the said double allocation on 26th July, 2007 after being offered another plot. That, having inquired on the said offer, he was informed that there was a double allocation on the suit land. Thus, he instituted the suit as indicated above.

Upon being served with the respondent's application, both, the appellant and Kahama District Council filed their written statements of defence where they disputed the respondent's claim. Specifically, the appellant contended that he had been the lawful owner of the suit land since 1994. That, at that time, the suit land was known as Plot No. 5 Block 'O' (LD) Nyabusi Nyakato, Kahama Urban. The appellant stated further that, he developed the suit land in 1995 and in 1996 he was issued with a building permit. That, later, the suit land was renamed as Plot No. 206 Block 'O' (LD) and he was issued with a letter of offer, by Kahama District Council, dated 27th July, 2000. On that basis, the appellant and the Kahama District Council prayed for the dismissal of the respondent's application with costs.

After filing of the above pleadings, the suit proceeded on a trial before the Tribunal which was constituted by the Chairperson sitting with two assessors as required by section 23 (1) and (2) of the Land Disputes

Courts Act [Cap. 216 R.E 2019] (the Act). After the conclusion of the trial, the Tribunal decided the matter in the favour of the respondent.

Aggrieved by that decision, the appellant and Kahama District Council unsuccessfully filed their separate appeals before the High Court which were registered as Land Appeals No. 83 & 96 of 2016. Still dissatisfied, the appellant preferred the current appeal raising five grounds of appeal. However, for the reasons which will be apparent shortly, we do not deem it appropriate, for the purpose of this judgment, to recite them herein.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Alhaji Abubakar Majogoro, learned counsel, whereas the respondent was represented by Mr. Jacob Mayala Somi, learned counsel. It is noteworthy that, both learned counsel for the parties had earlier on filed their written submissions respectively, in support of and in opposition to the appeal as required by Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules (the Rules) which they sought to adopt at the hearing and thereafter, proceeded to highlight them.

However, at the outset, we prompted the counsel for the parties to address us on the propriety or otherwise of the proceedings before the

Tribunal on account of non-compliance with section 23 (2) of the Act and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunals) Regulations, 2003 (the Regulations), that is to say, the failure by the Tribunal's Chairperson to require each of the assessors who sat with him to the conclusion of the trial to prepare his/her opinion and read the same in the presence of the parties before delivery of the judgment.

In his response, Mr. Majogoro readily conceded to the pointed-out anomalies pertaining to the proceedings of the Tribunal. For clarity, the learned counsel referred us to page 39 of the record of appeal whereby, upon the closure of the defence case, the Tribunal's Chairperson set a date for judgment instead of fixing a date for receiving the opinions of the assessors and avail the same to the parties as required by the mandatory provisions of the law.

In addition, Mr. Majogoro also referred us to pages 52 and 55 of the record of appeal and argued that, despite the fact that the opinions of the assessors were not indicated anywhere in the Tribunal's proceedings, the same were being referred and reflected in the Tribunal's judgment and

relied upon by the Chairperson to determine the case. It was his argument that, the pointed-out anomalies and irregularities had vitiated the trial thus rendered the entire proceedings of the Tribunal and the resultant judgment a nullity. Taking the argument further, Mr. Majogoro submitted that, consequently, the appeal to the High Court, the proceedings as well as the resultant judgment were also irregular having emanating from nullity proceedings. Based on his submission, Mr. Majogoro beseeched us to exercise the revisional powers vested in the Court under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) and nullify the aforesaid proceedings, quash the judgments of both courts and set aside the orders emanating therefrom. On the way forward, Mr. Majogoro invited the Court to order trial *de novo* before another Chairperson with a new set of assessors.

In response, Mr. Somi was candid enough to conceded to the submission and the prayers made by his learned friend. We are greatly indebted to the learned counsel for being sincere and honest to the Court.

On our part, having examined the record of the appeal, we respectfully endorse the learned counsel's concurrent submission as indeed there was a gross mishandling of the suit by the Tribunal. It is glaringly

clear on the record that, after conclusion of the trial, the Tribunal Chairperson strayed into an error in contravening the mandatory requirement of section 23 (2) of the Act read together with Regulation 19 (2) of the Regulations by his failure to require each of the assessors, who sat with him at the trial, to prepare and avail his/her opinion to be read to the parties before the composition and delivery of the judgment. For clarity, we find it apposite to reproduce the contents of section 23 (1) and (2) of the Act. The said section provides that:

> "23 (1) *The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors; and*
>
> (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 addition, Regulation 19 (1) and (2) of the Regulations impose a duty on a chairperson to require every assessor present at the conclusion of the trial of the suit to give his or her opinion in writing before making his final judgment on the matter. The said Regulation provides that:

"19 (1) The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;

(2) 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."* [Emphasis added].

The above provisions have been considered and interpreted by this Court in several occasions. See for instance the cases of **General Manager Kiwengwa Stand Hotel v. Abdallah Said Mussa,** Civil Appeal No. 13 of 2012; **Ameir Mbarak and Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015; **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017; **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 and **Sikuzani Said Magambo and Another v. Mohamed Roble,** Civil Appeal No. 197 of 2018 (all unreported). Specifically, in **Ameir Mbarak and Another** (supra) when the Court noted that the record of the trial proceedings did not show if the assessors were accorded the opportunity to give their

opinion as required by the law, but the Chairperson only made reference to them in his judgment as in the current case, we observed that:

> *"Therefore, in our own considered view,* ***it is unsafe to assume the opinion of the assessor 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."*** *[Emphasis added].*

Likewise, in **Tubone Mwambeta** (supra) in underscoring the need to require every assessor to give his opinion and the same recorded and be part of the trial proceedings, this Court observed that:

> *"In view of the settled position of the law, where the trial has been 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."

Again, in the case of **Edina Adam Kibona** (supra) we insisted that:

"... as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili: ***That opinion must be in the record and must be read to the parties before the judgment is composed.***" [Emphasis added].

[See also our recent decisions in **Sebastian Kudike v. Mamlaka ya Maji Safi na Maji Taka,** Civil Appeal No. 274 of 2018 and **Alakara Nakudana v. Oningoi Orgumi,** Civil Appeal No. 177 of 2019 (both unreported).]

In the matter at hand, as we have demonstrated above and also alluded to by both learned counsel for the parties, at page 39 of the record of appeal, when the chairperson of the Tribunal closed the defence case, he did not require the assessors to give their opinion as required by the law. It is also on record that, though, the opinions of the assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson, at

pages 52 and 55 of the same record, purported to refer to them in his judgment.

It is therefore our considered view that, since the record of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinions and the said opinion was not availed and read out in the presence of the parties before the said judgment was composed, it was not proper for the Tribunal's Chairperson to rely on them in his judgment. It is even not clear to us as to when, how and at what stage the said opinion found their way in the Tribunal's judgment.

In the circumstances, and being guided by our previous decisions cited above, we are satisfied that the pointed-out omissions and irregularities amounted to a fundamental procedural error that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal as well as those of the first appellate court. In our view, since this point suffices to dispose of the appeal, we find no compelling reasons to consider the grounds of appeal.

In the event, we are constrained to invoke our revisional jurisdiction under section 4(2) of the AJA and we hereby nullify the entire proceedings

and quash the judgments of both lower courts and the subsequent orders thereto. We remit the case file to the Tribunal for the matter to be heard de novo before another chairperson and a new set of assessors. Since the anomalies and irregularities giving rise to the nullification were raised by the Court *suo motu*, we make no order as to costs.

DATED at **SHINYANGA** this 7th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2022 in the presence of Mr. Jacob Somi holding brief for Mr. Alhaji Majogoro, learned Counsel for the Appellant and Mr. Jacob Mayala Somi, learned Counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL