IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., FIKIRINI, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 124 OF 2020

WANKURU MAGABE.....APPELLANT

VERSUS

TERESIA MCHARYA..... RESPONDENT

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

(Matupa, J.)

dated 10th day of August, 2018

in

Misc. Land Case Appeal No. 50 of 2018

.....

JUDGMENT OF THE COURT

13th & 20th July, 2023

LILA, J.A:

The appellant, Wankuru Magabe, appeals against the decision of the High Court of Tanzania Mwanza Registry in Miscellaneous Land Case Appeal No. 50 of 2018 which overturned the decision of the District Land and Housing Tribunal of Tarime (the DLHT) in Land Case Appeal No. 86 of 2017 which declared the appellant the rightful owner of the disputed. The DLHT had earlier on varied the decision of the

Ward Tribunal of Pemba Ward which had initially pronounced the respondent to be the rightful owner of the suit land.

Before the Ward Tribunal, the respondent had claimed that the appellant had encroached into a family land measuring two and a half (2 ½) acres given to them by her father in-law. Four (4) witnesses testified to support her side of the case including her husband Charles Mcharya Nyaroche who, in his evidence, told the Ward Tribunal that he sold only ½ acre of the land at TZS. 80,000.00 to the appellant on which he built his house and was leasing the rest of the land to the appellant for temporary use only. Despite the attempts by the appellant to convince him to sell the rest of the land to him, Charles Mcharya Nyaroche maintained his stance not to do so. The appellant, on the other hand, claimed ownership of the suit land alleging that he bought one acre of land from the respondent's husband in 1996. He said, on 24/05/2017, he saw the respondent showing the Ward Tribunal the farms which were owned by other persons at various times.

At the conclusion of the hearing, the Ward Tribunal decided in favour of the respondent holding that, save for the land on which the

appellant built his house which measured 47 steps from south and 47 steps wide, the rest of the land belonged to the respondent. An appeal to the DLHT by the appellant was successful and the Ward Tribunal's decision was overturned. Satisfied that the appellant bought the suit land in 1996 and put it in use for 21 years up to 2017 when the dispute arose, the appellant was declared the rightful owner of the suit land. In arriving at that decision, the Chairman of the DLHT stated that: -

> *"Hence with the above reason* ***I differ with the opinion[s] of both of my assessors who have given their opinion[s]*** *to the effect that the respondent is the lawful owner of the suit land."* (Emphasis added)

Not ready to succumb, the respondent successfully appealed to the High Court and was declared the rightful owner of the suit land which decision aggrieved the appellant, hence the present appeal advancing five (5) grounds of complaints.

Our scrutiny and efforts to find out from the record so as to satisfy ourselves as to the nature and contents of the aforesaid assessors' opinions referred to and considered by the chairman of the

DLHT with which he differed, proved futile. We could not lay a hand on them as they were not part of the record. Given their significance, we invited the parties to address the Court on their absence and related legal consequences. Believing that, that concern is decisive of the appeal, we refrained from hearing the parties on the grounds of appeal and for that reason we see no need to recite them.

Wankuru Magabe appeared before us and was represented by Mr. Inhard Mushongi, learned counsel and the respondent appeared in person and unrepresented.

In addressing the Court on the issue raised *suo motu* by the Court, Mr. Mushongi straight away admitted that there was violation of the law relating to involvement of assessors in adjudication of land matters in the DLHT. He pointed out that, in terms of section 23 of the Land Disputes Court's Act, Cap. 216 R.E. 2019 (the LDCA), the Chairman is mandatorily required to sit with at least two assessors during the hearing of land matters. Submitting further, he argued that a valid decision, in terms of section 24 of the LDCA, is that arrived at after the assessors have given their opinions which the Chairman is required to consider them although he is not bound by them.

Although he could not tell the law or an ostensible authority to support his argument, may be due to the issue being raised by Court *in* Court, he stressed that such assessors' opinions should be in a written form the copies of which should be in the record. Absence of such opinions in the record, he submitted, raises doubt as to whether such opinions were given by assessors and were in a written form. In the circumstances, the violation was fatal and vitiated the judgment, he argued. As a way forward, he proposed that the record should be remitted for the law to be complied with in composing a proper judgment beginning with the Chairman asking the assessors' to present opinions in writing and a fresh judgment be composed according to law taking into consideration the assessors' opinions.

Definitely, the issue being legal with which the respondent was not conversant with, she being a lay person not learned in law, left it for the Court to decide. She did not find it problematic if the matter is to be heard afresh.

We indeed, entirely agree with Mr. Mushongi that there was violation of the law in involving assessors in the hearing and determination of the appeal before the DLHT. Sections 23 and 24 of

the LDCA clearly and imperatively provides that assessors form part of the Tribunal (the DLHT) and their respective opinions, although not binding, should be taken, considered and should be on record.

The record of proceedings of the DLHT is certainly silent on the compliance of the two provisions. We need not overemphasize that participation of assessors should be vivid on the record as the Court insisted in the case of **Edina Adam Kibona v. Absolom Swebe (Shell),** Civil Appeal No. 286 of 2017 (unreported) 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 judgement is composed." [Emphasis added].*

[See also **Alakara Nakudana v. Oningoi Orgumi,** Civil Appeal No. 177 of 2019 (unreported)].

Given the record being silent on the above respect, it cannot safely be said that, the assessors were involved in the decision making as required by the law. That means, therefore, that neither were the assessors asked by the Chairman to compose their respective opinions nor were the same read out to the parties before the judgment was composed as well as they were not filed in the record to prove that there was full compliance with the provisions of section 23 and 24 of the LDCA. The provisions sections 23 and 24 of the LDCA provide 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.***
>
> *24. In reaching decisions,* ***the Chairman shall take into account the opinion of the***

assessors but shall not be bound by it, *except that the Chairman shall in the judgment give reasons for differing with such opinion."* [Emphasis added].

In complementing the above, Regulation 19 (1) and (2) of the Land disputes Courts (the District Land and Housing Tribunals) Regulations, 2003 (the Regulations) was enacted enjoining the Chairperson to require every assessor to compose and present his or her opinion in writing before the judgment is composed. That 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.*

The Court, faced with an akin situation, had an occasion to consider the above provisions and the obtaining legal consequences in the case of **Ameir Mbarak and Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported), and it 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****." [Emphases added].*

(See also **Edina Adam Kibona v. Absolom Swebe (Shell)** (supra).

The Court extensively considered and emphasized on the need to ensure that the assessors' opinions form part of the record in the case of **Tubone Mwambeta v Mbeya City Council,** Civil Appeal No. 287of 2017 (unreported) and underscored 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 in composed...since Regulation 18 (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".

In the light of the afore quoted provisions and decisions of the Court which held that such irregularities are fatal rendering the trial an unfair hence a nullity, it is abundantly clear that it is imperative that at the close of the hearing of both sides to a land matter whether in exercise of its appellate or original jurisdiction, for the presiding Chairman of the DLHT to ask the assessors present to compose their respective opinions and cause them to be read out in court for the parties to be aware of the views taken by the assessors. Such written

opinions should then be made part of the record, that is they should be filed in the case file. Unfortunately, these requirements appear clearly to have been overlooked by the Chairperson of the DLHT in the instant case and, worse still, but with great respect to the learned judge, the procedural infraction did not come to his attention on second appeal.

Aligning with the earlier decisions of the Court, we hold that the explained oversights committed by the Chairman vitiated the whole conduct of the appeal proceedings and the decision of the DLHT as well as those of the High Court.

As was proposed by Mr. Mushongi, with whom we entirely agree, we are obligated to exercise the powers of revision bestowed upon the Court under section 4(2) of the AJA to quash and nullify the proceedings and judgments of both the DLHT and the High Court as they arose from the nullity proceedings and decision of the DLHT. We hereby order the record of the DLHT be remitted for it to comply with the law in hearing the appeal and composing the judgment by ensuring that assessors are fully involved in terms of sections 23 and 24 of the LDCA and Regulation 19 of the Regulations.

For the above reasons, we accordingly allow the appeal. Each party shall bear its own costs.

DATED at **MWANZA** this 19th day of July, 2023.

S. A. LILA

JUSTICE OF APPEAL

P. S. FIKIRINI

JUSTICE OF APPEAL

Z. G. MURUKE

JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2023 in the presence of Mr. Inhard Mushongi, learned counsel for the Appellant and respondent present in person, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. P. MWAISEJE

DEPUTY REGISTRAR

COURT OF APPEAL