IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 7 OF 2021

ATHUMANI HAMIS BENTA .....APPELLANT

VERSUS

ISSA MOHAMED BENTA ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Twalb, J.)

dated 24th day of July, 2019

in

Land Appeal No. 04 of 2019

.....

JUDGMENT OF THE COURT

26th & 29th Sept, 2023

MWANDAMBO, J.A.:

The appellant, Athumani Hamis Benta, lost to the respondent Issa Mohamed Benta before the District Land and Housing Tribunal (DLHT) for Moshi in a dispute over ownership of a house on Plot No. 168 – DDD -111 situate at Soweto in Moshi Municipality (the suit house). On appeal, the High Court at Moshi dismissed his appeal but vacated some of the reliefs granted by the DLHT in favour of the respondent. Still aggrieved, the appellant is now before the Court in a second appeal faulting the High Court for dismissing his appeal.

The facts giving rise to the application before the DLHT are fairly simple. The respondent is a son of the late Mohamed Hamisi who was a blood brother of the appellant. After the demise of the deceased, the respondent was appointed as administrator of his estate which included the suit house. It turned out that the suit house was occupied by the appellant who claimed ownership despite it being registered in the name of the deceased. The dispute culminated into an application before the DLHT at the instance of the respondent who claimed several reliefs amongst others, a declaration that the suit house was his property and that the appellant was occupying it illegally for which he sought vacant possession. The DLHT chairman who sat with assessors as required by section 23(1) and (2) of the Land Disputes Courts Act (the Act), read together with Regulation 19(1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2002 (the Regulations) determined the application in favour of the respondent and granted him the reliefs claimed. Having declared the respondent as the owner of the suit house, the DLHT ordered the appellant to deliver vacant possession.

The appellant's first appeal before the High Court sitting at Moshi was dismissed which has resulted into the instant appeal before the

Court predicated upon four grounds of appeal. However, as it will become apparent shortly, the determination of the appeal turns on ground four. That ground which was nonetheless not one of the grounds before the High Court faults that court for failing to consider the omission by the DLHT chairman to require assessors to present their written opinions before making his decision as required by the law.

Ahead of the hearing of the appeal, the parties had filed their respective written submissions for and against the appeal which they both stood by at the hearing of the appeal without more. Apparently, both parties are at one on what transpired before the DLHT that is, after the closure of the trial, the DLHT chairman set a date of judgment which was delivered on 18 December, 2018. It has been submitted by the appellant that, fixing a date of judgment without requiring the assessors who sat with the chairman during to give their opinions, the trial violated section 23(1) and (2) of the Act read together with Regulation 19(1) of the Regulations. Placing reliance upon the Court's decisions in **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported), the appellant argues that the omission was fatal to the trial and the judgment warranting an order nullifying the

proceedings before the DLHT and the first appellate court with a direction for a retrial.

For his part, the respondent who was represented by Mr. Martin Kilasara, learned advocate argues that, the omission to require the assessors to read their written opinions was innocuous in so far as the record shows that the assessors presented their opinion to which the DLHT chairman made reference in the judgment. It was argued further that in any event, the omission did not occasion any miscarriage of justice and so it should be disregarded.

After examining the record and the authorities referred in the appellant's written submissions, we are constrained to agree with him in ground four. Apparently, as reflected in the authorities cited to us including, **Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 and **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 (both unreported), this is not the first time the issue features before the Court. Like here, in both cases, the record did not reflect that assessors were invited to present their written opinions to the parties before delivery of judgment as required by Regulation 19(2) of the Regulations but the opinions surfaced in the record to which the respective chairmen made reference. Despite the

argument that the irregularity in the failure to invite the assessors to read their written opinions to the parties before that delivery of judgment was not fatal, the Court rejected that argument as baseless. In particular, in **Edina Adam Kibona**, the Court lucidly stated:-

> *"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose."* (At Page 6)

Earlier on, in **Tubone Mwambeta** whose facts are more or less similar to the instant appeal, the Court had the following to say:

> *"....We are increasingly of the considered view that, 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..." [at page 11]

Similarly, in **Ameir Mbarak & Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported), the Court stressed that, it is not enough for the chairman to acknowledge the assessors' opinion in the judgment in the absence of an indication that the assessors were invited to express their opinions before delivery of judgment.

Guided by the foregoing authorities predicated on similar circumstances to this appeal, we sustain ground four of the appeal and hold that the DLHT chairman made a fatal error in failing to invite the assessors to read their written opinions in the presence of the parties to the application before the delivery of the judgment. As we held in the above referred cases, it is immaterial that pages 74- 77 of the record reflect the opinions of two assessors; Sarah Mchau and Sara J. Lukindo acknowledged by the DLHT chairman in the judgment. The omission had the effect of excluding the participation of the assessors against the dictates of section 23 of the Act thereby rendering the trial a nullity from which no appeal could have been preferred to the High Court.

In fine, we allow the appeal on the basis of ground four which shall result in quashing the proceedings before the High Court in Land

Appeal No. 4 of 2019 and the proceedings and judgment in Land Application No. 150 of 2014 for being a nullity. Going forward, we remit the matter for retrial of Land Application No. 150 of 2014 before the DLHT for Moshi by a different Chairman and new set of assessors according to law. Since the dispute involves relatives, we make no order as to costs.

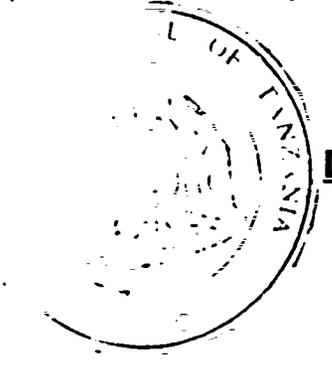
DATED at **MOSHI** this 28th day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of September, 2023 in the absence of the Appellant and Mr. Martin Kilasara, learned Counsel for the Respondent is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL