IN IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: SEHEL, J.A., KEREFU, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 231 OF 2020

JOYCE CHRISTOPHER MASAWE *(Legal Representative of the Late FRIDA WARASKAWA)*.....**APPELLANT**

VERSUS

AMPHARES GEOFREY NABURI (*Legal Representative of the Late ODILIA WARASKAWA KIMARO)* .....**RESPONDENT**

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

(Mwingwa, J.)

dated the 28th day of August, 2017

in

Land Case No. 16 of 2015

JUDGMENT OF THE COURT

8th & 12th December, 2023

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, at Moshi (Mwingwa, J.) dated 28th August, 2017 in Land Case No. 16 of 2015. In that case, the respondent herein sued the appellant on the ownership of a parcel of land measuring approximately three (3) acres (the suit land), situated at Dipu area, Kwasadala Village within Hai District in Kilimanjaro Region.

It was the respondent's claim that the appellant had trespassed into the suit land and continued to occupy it without her consent. Thus, the respondent prayed to be declared the lawful owner of the suit land and for a permanent injunction retraining the appellant from encroaching and trespassing into the suit land. The respondent also prayed for payment of general damages and the costs of the suit.

The essence of the respondent's claims as obtained from the record of appeal indicates that, the original owner of the suit land was the late Waraskawa Kimaro who was the husband of the respondent. That, the respondent being the fifth wife of the late Waraskawa, lived in the suit land with her late husband until his death. The respondent stated further that, sometimes in 1975, before his demise, the late Waraskawa Kimaro gave the suit land to her and she continued to live in the suit land and she buried her two children therein. The respondent stated further that, the appellant was invited into the suit land by one of her brothers (Josephat Waraskawa Kimaro) and was allocated only half an acre (½) after her divorce in 1973.

To prove her ownership over the suit land at the trial court, the respondent testified as PW1 and summoned three more witnesses namely; Thobias Isack (PW2), Adolf Josephat Kimaro (PW3) and Mariasa Selemani Kimaro (PW4). The said witnesses supported PW1's evidence that she is the lawful owner of the disputed land.

In her written statement of defence, the appellant, who is the daughter of the late Waraskawa Kimaro born to his second wife, disputed the respondent's claims and averred that the disputed land belongs to her and has been in continuous occupation of the same after it was allocated to her by her brothers upon the demise of her late father. That, having been allocated the suit land, she developed it by constructing a residential house in 1977 and a petrol station in 1982. At the trial, to prove that the suit land belongs to her, the appellant testified as DW1 and her testimony was supported by the evidence of Veronica Waraskawa (DW2), Wilson Stephano Kimaro (DW3) and Lasashii Joseph Kimaro (DW3). Thus, the appellant prayed for the dismissal of the respondent's suit with costs.

Having heard and considered the evidence adduced by the parties, the learned trial Judge decided the suit in favour of the respondent and declared her the lawful owner of the suit land.

The decision of the High Court prompted the appellant to lodge the current appeal to express her dissatisfaction. In the memorandum of appeal, the appellant has raised the following three (3) grounds:

(1) *The learned trial Judge erred in law and fact for failing to find that the suit filed by the respondent was time barred;*
(2) *The learned trial Judge erred in law and fact for failure to consider the evidence as a whole and as a result arrived at a wrong conclusion; and*
(3) *The learned trial Judge misdirected himself on the burden of proof.*

When the appeal was placed before us for hearing, the appellant was represented by Messrs. Theodore Primus and Robert Rutaihwa, both learned counsel, whereas the respondent was represented by Mr. Faraji Mangula, learned counsel. It is noteworthy that, both learned counsel for the parties had earlier on filed their written submissions, in support of and in opposition to the appeal as required by Rule 106 (1) and (7) of

the Tanzania Court of Appeal Rules, 2009 (the Rules) which they sought to adopt at the hearing to form part of their oral submission.

It is necessary, at the outset, to remark on a preliminary procedural matter we addressed ahead of the hearing of the appeal. That, Mr. Mangula informed us that the respondent had passed away and vide Probate and Administration Cause No. 68 of 2021, Ms. Amphares Geofrey Naburi was appointed by Bomang'ombe Primary Court to be the administratrix of the estate of the late Odilia Waraskawa Kimaro. A copy of the death certificate dated 10th August, 2023 with Registration No. 100000157405 together with the letter of administration of Ms. Amphares Geofrey Naburi were availed in Court to prove those facts. Then, Mr. Mangula moved us informally to join Ms. Amphares Geofrey Naburi in this appeal in the place of the deceased respondent. There being no objection from the counsel for the appellant, we acceded to the prayer and joined Ms. Amphares Geofrey Naburi, the administratrix of the estate of the late Odilia Waraskawa Kimaro in this appeal in the place of the deceased respondent. We thereafter invited the counsel for the parties to proceed with the hearing of the appeal.

Upon being given the floor to amplify on the grounds of appeal, Mr. Rutaihwa, in the first place, sought and obtained leave to add, yet another ground of appeal pertaining to the jurisdiction of the High Court to entertain the suit.

> *"That, the High Court was not properly constituted to entertain the suit.'*

Starting with that additional ground, Mr. Rutaihwa had brief, but focused submission. That the trial was irregular because it was conducted without the aid of assessors which is contrary to the dictates of Rule 5F of the High Court Registries Rules, 2005 as amended by the Government Notice No. 364 of 2005. He clarified that, under the said provisions, at the beginning of the trial, parties are entitled to opt as to whether the trial should be conducted with or without the aid of assessors. It was his argument that, in the instant appeal, throughout the trial court's proceedings, there is nowhere suggesting that the said requirement was complied with, as there is no indication of the parties agreeing on any options as to the involvement of the assessors or otherwise. He argued that, the pointed-out omission is fatal irregularity which had rendered the proceedings and the judgment of the trial court

a nullity. Fortifying his proposition, he cited to us the case of **Peter Olotai v. Rebecca Toan Laizer & 6 Others**, Civil Appeal No. 96 of 2022 [2023] TZCA 17791: (3rd November, 2023: TanzLII).

Upon being probed by the Court on the proceedings of the trial court related with the visit of the *locus in quo* indicated at page 49 of the amended record of appeal, Mr. Rutaihwa responded that the proceedings of the said visit are nowhere reflected in the trial court's proceedings, which, he said, is a fatal irregularity that had as well prejudiced the parties. Based on his submission, Mr. Rutaihwa beseeched us to exercise the revisional powers vested in the Court under section 4 (2) of the Appellate Jurisdiction Act. Cap. 141 (the AJA) and nullify the aforesaid proceedings, quash the judgment and set aside the orders emanating therefrom. On the way forward, Mr. Rutaihwa invited the Court to order retrial.

In his response, although, Mr. Mangula readily conceded that the trial was conducted without the aid of assessors and the learned trial Judge did not comply with the requirement of Rule 5F of the High Court Registries Rules, 2005 as amended by Government Notice No. 364 of

2005, he was quick to argue that the said omission was not fatal as parties were not prejudiced. He thus urged us to find that the pointed-out omission and irregularities was not fatal and proceed to hear and determine the appeal on its merit.

Our starting point on the issue of assessors, is the provisions of Rules 5F of the High Court Registries Rules, 2005 as amended by Government Notice No. 364 of 2005, which was the law applicable then prior to the recent amendment of the said Rule vide the High Court Registries (Amendment) Rules, 2023, Government Notice No. 665 published on 15th September, 2023. Rule 5F (1), as it stood then, read:

> *"5F (1). Except where both parties agree otherwise the trial of a suit in the Land Division of the High Court shall be with the aid of two assessors.*
>
> *(2) Where in the course of the trial one or more of the assessors is absent the Court may proceed and conclude the trial with the remaining assessor or assessors as the case may be."*

Pursuant to the above Rule, it is clear that sitting with the aid of assessors, though a mandatory obligation, but counsel and the parties had an option of choosing the hearing to be with the aid of assessors or

otherwise. If the choice is for the trial Judge to sit with the aid of assessors, then, the same set of assessors who were present at the commencement of the proceedings should sit in till the end. And the names of the selected assessors must be reflected on the record of proceedings. In case one or both assessors are absent, then, the learned trial Judge, either proceeds with the remaining assessor or without, if both are absent to the end of the proceedings.

The sanctity of the High Court proceedings sitting with the aid of assessors when hearing land cases was well illustrated by the Court in the cases of **B. R. Shindika t/a Stella Secondary School v Kihonda Pitsa Makaroni Industries Ltd,** Civil Appeal No. 128 of 2017 [2021] TZCA 258: (16th June, 2021: TanzLII); **Mohamed Ismail Murudker v. Fathia Boman & 2 Others**, Civil Appeal No. 38 of 2018 [2021] TZCA 441: (2nd September, 2021: TanzLII) and **Exaud Gabriel Mmari v. Yona Seti Akyo & 9 Others**, Civil Appeal No. 91 of 2019 [2021] TZCA 726: (3rd December, 2021: TanzLII). Specifically, in **Exaud Gabriel Mmari** (supra) when the Court was faced with an akin situation and having considered the applicability of above Rule, stated that:

"...Failure to comply with the requirements provided under Rules 5F and 5G resulted in a fatal irregularity that rendered the proceedings and judgment of the trial court a nullity."

Furthermore, in our recent decision, in the case of **Peter Olotai v Rebeca Toan Laizer** (supra) cited to us by Mr. Rutaihwa, having been confronted with a similar situation and being guided by our previous decisions we held that:

"On account of the stated position of the law, what transpired at the trial under scrutiny is against the dictates of the law. We are fortified in that regard, having considered that, when the trial was conducted between 16/5/2019 and 28/2/2020 as reflected from pages 342 to page 389 of the record of appeal and evidence of both sides was taken, the record is completely silent if the trial was conducted with the aid of assessors as none was present and if parties had opted as such. ***This was a serious omission and we agree with the learned counsel for either side that, the trial court was not properly constituted to adjudicate the land dispute*** *and in addition it was not clothed with jurisdiction*

to preside over and determine the respective land dispute."
[Emphasis added].

In the instant appeal, it is glaring that, the case which is a subject of this appeal was a land dispute which was instituted before the High Court, Land Division on 17th November, 2015. It is also on record that, the trial commenced on 22nd February, 2017 to 3rd July, 2017 prior to the recent amendment of Rule 5F indicated above.

As correctly argued by the learned counsel for the parties, in the trial court's proceedings reflected at pages 35 to 51 of the amended record of appeal, there is nowhere suggesting that the learned trial Judge had complied with the requirements of Rule 5F of the High Court Registries Rules as amended by Government Notice No. 364 of 2005. There is no indication that the learned trial Judge intended to sit with the aid of assessors as parties were not addressed on the option as to whether the trial proceedings should be conducted with or without the aid of assessors.

Being guided by our previous decision, we agree with the submission advanced to us by Mr. Rutaihwa that, the pointed-out

omission is fatal irregularity which had prejudiced the parties and thus rendered the proceedings and the judgment of the trial court a nullity.

As for the visit of the *locus in quo* reflected at page 49 of the amended record of appeal, we should start by stating that, we are mindful of the fact that there is no law which forcefully and mandatorily requires the court or the tribunal to conduct a visit at the *locus in quo,* as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the court or the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial. Some of the said guidelines and procedures were clearly articulated by this Court in the case of **Nizar M.H. v. Gulamali Fazal Janmohamed** [1980] T.L.R. 29, where the Court, inter alia, stated that:

> "***When a visit to a locus in quo is necessary*** *or appropriate, and as we have said, this should only be necessary in exceptional cases,* ***the court should attend with the parties and their advocates,*** *if any, and with much each witness as may have to testify in that particular*

> *matter...**When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts,** if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future."* [Emphasis added].

See also the cases of **Avit Thadeus Massawe v. Isidory Assenga,** Civil Appeal No. 6 of 2017 [2020] TZCA 365: (24th July, 2020: TanzLII) and **Jovent Clavery Rushaka & Another v. Bibiana Chacha**, Civil Appeal No. 236 of 2020 [2021] TZCA 3527: (20th December, 2021: TanzLII), where the above guidelines and procedures were reinstated.

Now, in the case at hand, as intimated earlier, at best the trial court's proceedings at page 49 of the amended record of appeal only indicated that "Court to visit *locus in quo* on 21st April, 2017," without

more. It is therefore not clear as who participated in the said visit and whether witnesses were re-called to testify, examined and/or cross examined. We are therefore in agreement with Mr. Rutaihwa that the said visit, if at all conducted, was done contrary to the procedures and guidelines issued by this Court in the above cited cases. The said omission is another procedural irregularity on the face of record which had vitiated the trial court's proceedings.

In the circumstances, and being guided by our previous decisions cited above, we are satisfied that the pointed-out omissions and irregularities amounted to fundamental procedural errors which have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the High Court.

Since our findings on the additional ground suffice to dispose of the appeal, the need for considering the other remaining grounds of appeal does not arise.

In the event, we hereby nullify the entire proceedings and quash the judgment and the subsequent orders thereto. We remit the case file

to the High Court for it to conduct an expedited trial before another Judge in accordance with the law. Considering the circumstances of this appeal, we order each party to shoulder own costs.

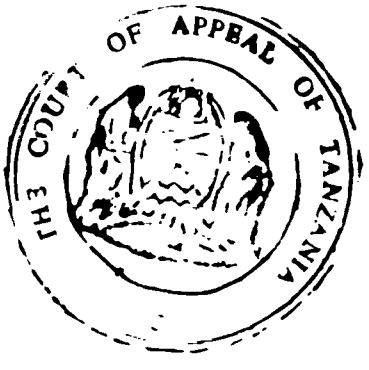
DATED at **MOSHI** this 12th day of December, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2023 via video conference facility linked from High Court Moshi to Dar es Salaam, in the presence of Ms. Jacqueline Rweyongeza, learned counsel for the appellant and Mr. Faraji Mangula, learned counsel for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL