IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: KOROSSO, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPEAL NO. 501 OF 2021

SHIJA MHEKELA .....APPELLANT

VERSUS

MVIGA GASPAR (Administrator of the estate of the late
Gaspar Mbabala Sigala Malyohe) .....RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Shinyanga]

(Kibela, J.)

Dated the 23rd day of September, 2016

in

Land Appeal No. 26 of 2016

.....

RULING OF THE COURT

8th & 13th December, 2023

GALEBA, J.A.:

The appellant and the respondent in this appeal, are neighbors. Their plots at Usanda Trading Center in Shinyanga District, share a common boundary. The contest between them giving rise to this appeal emanated from a misunderstanding on the location of the actual border line between their parcels of land. In that dispute the respondent owns plot No. 8 Block "G" Singita Usanda Trading Center, according to the letter of offer which was issued to him by the official land authorities on 16th July, 1974. The

other plot on the other side of the boundary, is the appellant's, having purchased it on 28th March, 2013 from one Mohamed Salehe Issa, a resident of the Sultanate of Oman.

The appellant's resentment and discontent which would later mature into a fully-fledged court litigation, was that in November, 2013 after he had purchased the land, the respondent offloaded marble on it, an act he repeated in February, 2015 by offloading more building materials on his land. According to the appellant, the respondent went further to cut down a particular tree "which was marking the accurate boundary" between the two plots. Pursuant to those allegations, the appellant approached the District Land and Housing Tribunal for Shinyanga (the Tribunal), and lodged Land Application No. 17 of 2015, alleging trespass on his land by the respondent. In response, the respondent denied to have committed any trespass on the appellant's parcel of land or even fell any tree. His position was that he offloaded a trip of marble on his own Plot No. 8 Block "G" Singita Usanda Trading Center, and not on any land outside his plot.

The Tribunal heard the dispute, and thereafter it was convinced that the applicant had proved his case. It therefore declared the boundary to be *"a mtangara tree"* which it ordered both parties to observe as a lawful

boundary between their respective plots. The respondent was also ordered to vacate the disputed part of the land.

The respondent was aggrieved by the above decision of the Tribunal. He thus approached the High Court (the first appellate court), and lodged Land Appeal No. 26 of 2016 to challenge it. The latter upheld the appeal, for reasons among others, that the Tribunal had no jurisdiction to entertain the dispute allegedly because the cause of action in the application was based on the tort of trespass to land. So, the proceedings and the judgment of the Tribunal were nullified. This time the aggrieved party was the appellant who lodged the present appeal to this Court, to challenge the findings of the first appellate court. The appeal is based on three grounds, which however for reasons that will become obvious in due course, we will not take heed to them in this ruling.

At the hearing of this appeal, the appellant was represented by Mr. Frank Samwel. On the part of the respondent, Mr. Mviga Gaspar, a son of the original respondent appeared and prayed under rule 105 (1) of the Tanzania Court of Appeal Rules 2009 (the Rules), to be joined as a party to the proceedings, following his appointment as an administrator of the estate of Gaspar Mbabala Sigala Malyohe, his late father, who had passed away

on 20th January, 2022. Mr. Samwel did not contest the prayer. Having considered the appointment of Mr. Mviga Gaspar by the Usanda Primary Court as the administrator of the estate of the original respondent in this appeal, we made an order under rule 105 (1) of the Rules that the said Mr. Mviga Gaspar, be joined as a party to this appeal, in the place of Gaspar Mbabala Sigala Malyohe, the original respondent, who is now the late.

After completion of the process of joining the administrator of the estate of the deceased to the proceedings, we *suo moto* required the parties to address us on the legality and appropriateness of the proceedings in the Tribunal, in view of the following two facts; **First**, the fact that the evidence of Shija Mhekela Kitina (PW1), Adam Msigallah (PW2), Maulid Seif (PW3), Medadi Ishengoma (PW4), Deogratias Saba Maduhu (PW5) and Kungila Kashinje (PW6), was taken on 26th May, 2015 when assessors present, were **Mr. Esha H. Stima** and **Mr. Benard M. Itendele**, while the evidence of Mohamed Salehe Issa (PW7), Gaspar Mbabala Sigala (DW1), Seleman Sosi (DW2) and Mviga Gaspar (DW3) was taken on 19th October, 2015 in the presence of a different pair of assessors, namely, **Mrs. A. Kipacha** and **Mr. I. Stephen. Second,** the fact that there is no record of the proceedings

of the session at which the assessors gave opinion to the Chairman, before he composed the judgment of the Tribunal.

Mr. Samwel observed that, in terms of the available record of the Tribunal, the trial was presided over by one Chairperson, but with two different sets of assessors. He submitted that, that was an error of law which offended the provisions of section 23 (3) of the Land Disputes Courts Act (the LDCA). He added that there was no opinion of assessors on record. As to the legality of all that the Tribunal accomplished, he submitted that all its proceedings and orders were irregular, and its judgment, unlawful. The learned advocate implored us to nullify all of the said proceedings and set aside the judgment of the Tribunal. As for the proceedings and judgment of the first appellate court, his position was the same; he prayed that the proceedings be nullified and the judgment be set aside because the same stemmed from a nullity. He lastly prayed that after nullifying all the proceedings of the two lower courts and set aside their corresponding judgments, we should proceed to make directions that the original record be remitted to the Tribunal for retrial of the land dispute before another Chairman and a new set of assessors.

The respondent being a layman, had no much to submit. He just left the matter in the hands of the Court for consideration according to law.

As indicated earlier on, the chairman sat with **Mr. Esha H. Stima** and **Mr. Benard M. Itendele**, when he was recording the evidence of the first six witnesses. The evidence of the first set of witnesses is contained between pages 24 and 31 of the record of appeal. As for the remaining witnesses, who were one from the applicant's side and three from the respondent's side, the assessors who sat with the Chairman were **Mrs. A. Kipacha** and **Mr. I. Stephen.** According to the record, these assessors presided over the proceedings of the Tribunal from page 33 to page 37 of the record of appeal. At page 48 of the record of appeal, it is recorded in the judgment of the Tribunal, that it was **Mrs. A. Kipacha** and **Mr. I. Stephen,** who gave the opinion to the Chairman, before he could compose his judgment.

It is also evident from the record of appeal, from page 37 when the respondent in the Tribunal closed his defense case, to page 39 when the matter was adjourned for judgment, that there is nowhere in between where it is indicated that the Tribunal convened and the assessors gave opinion to the Chairman, in the presence of parties.

Based on the foregoing deliberations, from this point on, we will examine the legal consequences of having two or more sets of assessors in the trial of one case in the Tribunal.

The District Land and Housing Tribunal is established under section 22 of the LDCA and its composition and constitution, respectively, are provided for under section 23 (1) and (2) of the same Act. The section provides that:-

> *"(1) The District Land and Housing Tribunal established under section 22* ***shall be composed of*** *at least a Chairman and not less than two assessors.*
>
> *(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 added]

In our view, the intended construction of section 23 (2) above, does not presuppose that a Chairman may, under normal circumstances, be assisted by different sets of assessors when trying one case. The import of

the section, is that, subject to section 23 (3) of the same Act, the assessors who start to hear the evidence with the Chairman in a given case, should not change; they should hear all witnesses for both the applicant and the respondent's side. The duty of such assessors comes to an end, upon giving their opinion to the Chairman in the presence of parties, as provided for under regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (the Regulations), read together with section 24 of the LDCA. Those provisions, respectively, stipulate as follows: -

> *"19 (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.*
>
> *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".*

The position of the law as it stands presently, is that the opinion of assessors, must only be given by assessors who heard all witnesses in a given case, and were physically present during the taking of evidence of all witnesses, except in cases where hearing could be over video link in which case, their presence may be virtual. Nonetheless, be it physical or virtual, the presence of the Chairman and the assessors he started the case with, must actually be the presence of the same persons throughout the entire course of the trial. In this case, **Mrs. A. Kipacha** and **Mr. I. Stephen** who allegedly gave opinion, did that without hearing all witnesses. They heard only four witnesses out of ten. They heard the evidence of one witness from the applicant's side and three from the respondent's side. These assessors did not hear the evidence of the first six witnesses who supported the applicant's case. In such a case, the opinion of assessors who participated only partly in the case, becomes an illegal opinion and vitiates a judgment of the Tribunal.

Luckily, in the past this Court has encountered a similar scenario. In the case of **Christopher Emmanuel Lukumai v. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013 (unreported), there were multiple assessors in

a single case, but only one of them managed to be present throughout the entire trial. In that case, this Court observed: -

> *"Apparently, it is only one assessor, Mandara who was present throughout the trial. Neither was assessor Mlole present at the start of the trial, nor when DW3 gave his testimony. Assessor Kinyondo was not in attendance when PW3 was testifying. In this regard,* ***since neither of the two sets of assessors was present throughout the entire trial, the trial was not conducted by a duly constituted Tribunal as required by section 23 (1) and (2) of the Land Disputes Courts Act (supra)...In view of the said irregularities, the trial was vitiated."***
>
> [Emphasis added]

Another case in which we had a similar encounter, was in **Ameir Mbarak and Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported). The following part of our judgment in that case summarizes what transpired and the decision we made: -

> *"When the trial commenced on 25/8/2005, from page 28 to 47, the present assessors were P. Tagalile and J. Vahaye. On 30/5/2006 the assessors*

present were M. Magahasenga and A. Mgulunde. On 15/8/2006, at the hearing of the defence case, none of the assessors was present. Subsequently, on 6/9/2009, the judgment was pronounced, and it was signed by Tagalile and Vahaye, the assessors who were present at the beginning of the trial. ***Since neither of the two sets of assessors were involved throughout the entire trial, the trial was not conducted by a duly constituted Tribunalas required by Section 23 (1) and (2) of the Land Disputes Courts Act (supra)...In view of the aforesaid incurable irregularities, the trial was vitiated".***

[Emphasis added]

In the above case of **Ameir Mbarak,** this Court observed that the irregularity cannot be cured by the provisions of section 45 of the LDCA and concluded that the irregularity vitiated the trial, rendering it a nullity. The other case, where we entertained a similar irregularity and maintained the same *ratio decidendi* was in the case of **Y. S. Chawalla and Co. Ltd v. Dr. Abbas Teherali,** Civil Appeal No. 70 of 2017 (unreported).

As we prepare to wind up this ruling in conclusion, we think it is appropriate to remark in passing, that the legal defect we have just discussed, is not the only serious anomaly apparent on the face of the record of the Tribunal. There was yet another procedural omission with a significant impact to the validity of the Tribunal proceedings. The fault is that, throughout the proceedings, there is nothing on record showing that the Chairman received the opinion of assessors in the presence of parties. Of course, we will not get into the discussion involving that illegality because, in view of what we have discussed above, there was no lawful opinion that the Chairman would have received in the presence of parties. In any event, we are satisfied that the Chairman's transgression of permitting two different sets of assessors to sit with him in one trial, is offensive enough to trigger our revisional jurisdiction to nullify all that he did.

Consequent to the above considerations, it is clear that the trial of the case at the Tribunal, was vitiated to the core, hence a nullity. We accordingly, invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, to nullify the proceedings and the judgment of the Tribunal in Land Application No. 17 of 2015. And since any outcome of

any appeal from a nullity is nothing but a nullity, we invoke the same powers to nullify the proceedings and the judgment of the High Court in Land Appeal No. 26 of 2016. We further direct that the original record in Land Application No. 17 of 2015, be remitted to the District Land and Housing Tribunal for Shinyanga, where a fresh trial of the Land Application shall be initiated. A new trial, according to law, shall be before another Chairman and a different set of assessors. Finally, we make no order as to costs because the issue upon which the appeal has been disposed of, was raised *suo moto* by the Court.

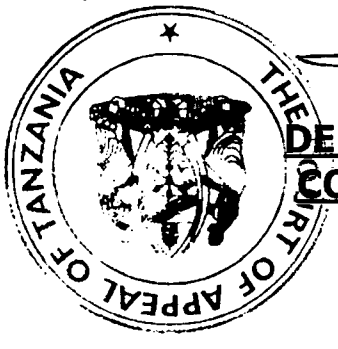
DATED at **SHINYANGA**, this 12th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 13th day of December, 2023 in the presence of Mr. Frank Samwel, learned counsel for the Appellant and Respondent appeared in person, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL