IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CIVIL APPEAL NO. 67 OF 2022

ELIBARIKI MALLEY.....APPELLANT

VERSUS

SALIMU H. KARATA..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Tanga District Registry at Tanga)

(Mkasimongwa, J.)

dated the 6th day of December, 2019

in

Land Appeal No. 7 of 2019

.....

JUDGMENT OF THE COURT

25th April & 3rd May, 2023

FIKIRINI, J.A.:

The genesis of this third appeal involving the appellant, Elibariki Malley and the respondent Salimu Hamisi Karata is the Kilindi Ward Tribunal decision in Land Case No. 4 of 2018, in which the appellant lost. Aggrieved by the decision the appellant approached the District Land and Housing Tribunal in Land Appeal No. 39 of 2018, where he again lost. Undeterred he preferred an appeal to the High Court in Land

Appeal No. 7 of 2019. Distraught by the decision, the appellant approached this Court with a sole ground of appeal after securing a certification on point of law on 11th March, 2021.

In short, the facts of the case as garnered from the record of appeal are that the appellant claimed that he purchased a piece of land measuring forty eight (48) acres (suit land) on 15th October, 2012 from Kombo Bakari Suku for TZS. 2,800,000.00. The sale agreement was reduced in writing and duly signed by parties in the presence of the Kilindi Village Executive Officers. A few years later, particularly on 6th December, 2017 the appellant found six (6) people had trespassed and were clearing the land he purchased. Upon inquiry, he learnt the respondent was the one who trespassed onto his land. On his part, the respondent claimed to have been allocated the suit land measuring fifty (50) acres with three (3) other family members by the Kilindi Village Council on 20th August, 2010. The retired Chairman of the Village Council, Abdallah Kisenyule, testified before the Kilindi Ward Tribunal confirming the assertion.

As intimated earlier, upset by the High Court decision, the appellant sought and obtained certification on point of law which allowed him to lodge appeal with this Court. The sole ground of appeal is couched as follows:-

1. *That, the judge erred in law and fact by blessing a person not appointed as a representative (legally acknowledged to have locus standi on behalf of others) to represent the interests of others in a suit or claim ownership on behalf of others.*

At the hearing of the appeal, Mr. Philemon Raulencio, learned advocate appeared for the appellant, while the respondent appeared in person unrepresented. On raising to address us, Mr. Raulencio requested that he be allowed to raise a point of law to which he wished to draw our attention. The point is that the assessors' participation was marred with irregularities hence contravening Regulation 19 (2) of the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations of 2003 (the Regulations).

This is not the first time the Court has encountered such a scenario. In the case of **Adelina Koku Anifa & Joanitha Sikudhani Anifa v. Byarugaba Alex,** Civil Appeal No. 46 of 2019 (unreported),

in which the Court referred to two other cases, namely **B. 9532 Cpl. Edward Malima v. R,** Criminal Appeal No. 15 of 1989 (unreported), **Marwa Mahende v. R** [1998] T. L. R. 249 and in the case of **Felician Muhandiki v. The Managing Directors of Barclays Bank Tanzania Limited,** Civil Appeal No. 92 of 2016 (unreported), we had an opportunity to deal with the situation. For example, in the case of **B. 9532 Cpl. Edward Malima** (supra), when asserting its position that it has the power to deal with any issue even though not determined by the lower court so long as that issue involves a point of law, we reasoned as follows:-

> *"Firstly, we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case* ***even if such matters are not raised in the notice of appeal or in the memorandum of appeal.*** *This is so because such Court is a Court of law and not a Court of the parties."* [Emphasis added]

Similarly, our recent decision in **Felician Muhandiki** (supra) firmly specified that a point of law could be raised at any time, even on

appeal, regardless of whether the lower courts have dealt with the issue or not.

In the present appeal, Mr. Raulencio raised a point of law that we think needs our attention, believing we cannot sit by when an irregularity needs rectification. We thus allowed Mr. Raulencio to address us on that.

In his submission, directing us to pages 56 and 57, Mr. Raulencio contended that although assessors were present, the record is silent on whether they were asked to give their opinion in writing before a judgment date was pronounced. Neither was a date set aside for the assessors' opinions to be read over to parties nor was there proof that the assessors' opinions were read over to the parties as required by the law. Mr. Raulencio considered the omission fatal, which goes to the root of the case, consequently vitiating the whole proceedings. Buttressing his submission, Mr. Raulencio referred us to the case of **Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 (unreported), which quoted the case of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 and **Ameir**

Mbarak and Azania Bank Corporation Ltd. v. Edgar Kahwili, Civil Appeal No. 154 of 2015 (both unreported). In all the referred cases, the Court stressed that such omission went to the root of the case and vitiated the proceedings.

Thus, based on the strength of his submission, he urged us to invoke powers bestowed on us under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 and rule 4 (2) (b) of the Court of Appeal Rules and nullify the entire proceedings before the High Court in Land Appeal No. 7 of 2019, which emanated from the District Land and Housing Tribunal in Land Appeal No. 39 of 2018 and Ward Tribunal in Land Case No. 4 of 2018.

On the sole ground of appeal, Mr. Raulencio adopted his filed written submissions and implored us to rely on them. In summary, he contested the respondent's representation of his siblings without the court's leave or permission, contravening Order 1 Rule 8 of the Civil Procedure Code, Cap. 33 R. E. 2019 (the CPC). In support of his submission, he cited the cases of **Lujuna Shubi Balonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi** [1996] T. L. R 203

(H.C.), **Lekerengere Faru Parutu Kamunyu and 52 Others v. Minister for Tourism Natural Resources and Environment and Three Others** [2002] T. L. R 160, **Kiteria Menezes and 33 Others v. Area Engineering Work Ltd. & The Attorney General** [1998] T. L. R. 343. In all these cases, the emphasis was on fulfilling the precondition of seeking and obtaining leave before filing any representative suit. In the present appeal, permission was never sought and obtained. According to Mr. Raulencio, the respondent had no *locus standi* of representing the three (3) other family members.

Based on his submission, Mr. Raulencio prayed that the appeal be allowed with costs.

The respondent, being a lay person, had nothing much to say. He, however, briefly addressed us, maintaining that the assessors signed and gave their opinion and that was why the appellant could not raise this ground on appeal.

On the sole ground of appeal, the respondent refuted the assertion that he had no *locus standi* to represent the other three (3), submitting that when he was required to furnish a letter showing what

he alleged, he could provide that letter on 2nd April, 2018 as ordered by the Chairman of the Kilindi Ward Tribunal. Based on his submission, he prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Raulencio reiterated his earlier submission that the respondent had no *locus standi* to represent the three (3) other family members. Insisting on the presence of the three (3) other family members as parties, he insisted this was important as the decision and order for costs would have an impact on them. On the respondent's submission that the assessors' opinions were read to parties, Mr. Raulencio challenged that submission as not supported by the record.

Adjudication of land disputes at the District Land and Housing Tribunal (DL & HT) is governed by the Land Disputes Courts Act, Cap. 216 R. E 2019 (the LDCA). Section 23 (2) of the LDCA specifically illustrates a fully constituted DL & HT sitting to be:-

> *"(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 judgment.***"[Emphasis added]

From the provision, it is clear that a tribunal must be composed of at least a Chairman and not less than two assessors. Besides actively and effectively participating in the process, the assessors' are required at the end of the hearing to give their opinion before the judgment is composed and delivered. The manner those opinions should be given has been provided for in Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003 (the Regulations). For ease of reference, the provision is provided below:-

> *"Notwithstanding subsection (1), the Chairman shall, before making his judgment,* ***require every assessor present at the conclusion of the hearing to give his opinion in writing*** *and the assessor may give his opinion in Kiswahili."* [Emphasis added]

In giving effect and interpreting Regulation 19 (2), the Court, in the case of **Edina Adam Kibona** (supra), took the liberty to expound by broadly explaining the role of assessors when it stated that:

> *"We wish to recap at this stage that in the trials before the District Land and Housing Tribunal, as a matter of law,* ***assessors must fully participate and at the conclusion of the***

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 an 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]

It is noteworthy, to state that in dealing with disputes at the DL & HT the Chairman has to read in tandem the LDCA and the Regulations. Based on the provision of section 23 (2) of the LDCA and regulation 19 (2) of the Regulations, the Chairman who sits with assessors, is undoubtedly required to comply conjunctively with four conditions: (i) that the assessors actively participate, (ii) that at the end of the hearing, each of the assessors files a written opinion, (iii) that the written opinion filed must be read over to parties before the judgment is composed and (iv) that those written opinions must be part of the record.

Applying the above conditions to the appeal before us, we wish to start with what transpired as indicated on pages 56-57 of the record of

appeal. On 26th July, 2018, when the matter was called on for hearing, Ms. Rebecca, learned advocate representing the appellant at the time, requested the Chairman that the appeal be argued by way of written submissions as the respondent was not represented. The prayer was granted and the matter was fixed for mention on 23rd August, 2018. On that day, it seemed the Chairman was satisfied the submissions were duly filed. He proceeded to fix a judgment date. The record is silent on whether the assessors were asked to file their written opinions as required by section 23 (2) of the LDCA and regulation 19 (2) of the Regulations on either 26th July or 23rd August, 2018. Also, since the appeal was ordered to be argued by filing written submissions, there was no instruction on how the assessors could have gotten hold of the written submissions to be able to give their opinions. Similarly, no day was set aside for the assessors' written opinions to be read to the parties, as illustrated in the **Edina Adam Kibona** case (supra).

Upon inquiry about the existence of any assessors' written opinions, perusing the original record, it was revealed that there was the assessors' jointly signed opinion. This perplexed us. That was so because we have been asking ourselves if that was in line with the legal

requirement that each assessor files a written opinion. Conversely, it was unclear how the joint assessors' written opinion found its way into the tribunal proceedings. We have been wondering, because the record is silent on whether the assessors were availed with the submissions filed and out of the submissions, they filed the assessors' opinion. Moreover, there is no indication on the record that assessors' opinions were read to the parties as required in law.

Aside from the omission of getting written opinions from the assessors and reading them out to the parties, our examination of the record does not reflect the active participation of assessors. The Chairman's remark on page 60 of the record of appeal that he was concurring with the assessors' opinion is a false statement. We say so because nowhere in the record does it show that the assessors actively participated or were invited to deliver their opinion or that those opinions were read to the parties.

We agree with Mr. Raulencio that the irregularity is fatal and goes to the root. As a result, the proceedings are vitiated. We thus invoke our revisional power conferred under section 4 (2) of the Appellate

Jurisdiction Act, Cap. 141 and nullify the entire proceedings before the Tribunal and the following proceedings before the High Court in Land Appeal No. 7 of 2019. We order a retrial of the matter. Due to the nature of the appeal, we order each party to bear its own costs.

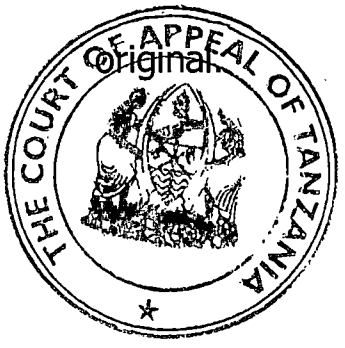
DATED at **TANGA** this 2nd day of May, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of May, 2023 in the presence of Ms. Ezerida Denis Mganga, learned counsel for the Appellant and Respondent present in person, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL