IN THE HIGH COURT OF TANZANIA

AT MWANZA

(LAND DIVISION)

CONSOLIDATED LAND APPEAL NO. 40 OF 2009 AND LAND APPEAL NO 63 OF 2009

(Appeal from the Judgment of the District Land and Housing Tribunal for Tarime in Land Application No. 161/2008 and No. 163/2008)

SAWENA MASINDOKI
HAMISI ALLY] .....**APPELANTS**

VERSUS

NYANGI OGIGO.....**RESPONDENT**

JUDGEMENT

Latifa Mansoor, J.

There were filed two separate appeals, one Land Appeal No. 63/2009 between Sawena Masindoki vs. Nyangi Ogigo, and another Land Appeal no. 40/2009 between Hamisi Ally and Nyangi Ogigo. Land appeal No. 63/2009 originated from Land Application No. 161/2008 and Land Appeal No. 40/2009 originated from Land Application no. 161/2008; both Applications were tried by the District Land and Housing Tribunal for Tarime, before Kitungulu, the Chairperson.

Since these two appeals involve the same Respondent and they are over the same subject matter, with the consent of the parties, these appeals were consolidated on 30/10/2012.

Advocate Bernard Kabonde appeared for the Appellants while Advocate Deya Outa appeared for the Respondent.

During hearing of the Appeal, the Counsel for the Appellants submitted that the Trial Tribunal was not properly constituted since it was not sitting with two assessors contrary to S. 23 (1) and (2) of the Courts (Land Disputes Settlements) Act, Cap 216, RE 2002 which requires that at the hearing the Chairman of the District Land and Housing Tribunal is required to sit with two assessors. He said on 20/7/2009, in the Land Application no.161/2008 between Sawena Masindoki vs. Nyangi Ogigo, the Chairman of the Trial Tribunal visited the locus in quo without the assessors. The Corum of the composition of the Trial Tribunal in that date does not show that the assessors were there. He said that the law does not allow the chairman to proceed with the hearing, even in one session without the aid of the two assessors. He said since the law was violated, the proceedings and the judgment of the Trial Tribunal were a nullity and should be quashed.

He further submitted that the judgment of the Trial Tribunal did not record the opinion of the assessors, and did not give reasons of whether and why he agreed or departed with the opinion of the assessors. He further submitted that the judgment did not contain facts, and reasons behind its decisions, and this violated s. 23 (1) (2), and s. 24 of the Courts (Land Disputes Settlements) Act, Cap 216, RE 2002. To support his case the Advocate for the Appellants cited the case of Hamisi Rajabu Dibagala vs. R 2004 TLR 181, where it was said:

"The necessity for the Courts to give reasons for their decisions exists for many reasons including the courts to demonstrate their recognition of the facts that litigants and the accused persons are rational beings and have the right to be aggrieved"

He submitted that the judgment did not have the facts and the reasons behind its decisions, and the parties could not understand how and why they have succeeded or failed.

Mr. Outa, the Counsel for the Respondent submitted that in the case of Hamisi Ally, Land Application No. 163/2008, the assessors visited the locus in quo, and it is on record that in both these two cases, the date of visiting the locus in quo was the same, and it is not logical to say that the assessors attended only to the case of Hamisi Ally and they did not attend to the case of Sawena Masindoki. The assessors in both these two cases were the same, the date of visiting the locus in quo were the same in both the cases, and the locus in quo is the same area for both the cases. He submitted that in the Masindoki case, it could be that the Chairman forgot to properly record the corum.

Advocate Outa agreed that the judgments of the Trial Tribunal in both cases was defective as it did not record the facts of the case, it did not record the opinion of the assessors, and it did not give reasons for the decisions it made. He said a defective judgment is no judgment at all, and suggested that since there was no judgment the proper remedy is to order the chairperson to write the proper judgments.

I agree that the judgment of the District Land and Housing Tribunal did not conform to the law especially Regulation 20(1) of GN 174 of 2003, and Order XX (4) of the Civil Procedure Code, and that the judgment of the District Land and Housing Tribunal violates these provisions of the law. It is clear that the judgment did not have the statement of facts; it only gave decisions without giving reasons for the decision. In the case cited by the Counsel for the Appellants as well as in the case of Tanga Cement Co. Limited vs. Christopherson & Co. Limited, Court of Appeal, Civil Appeal No. 77/2002 at page 9, unreported, in which the Judges strike out an appeal since the judgment of the lower court was defective. The judgments are defective, as there was no proper application of law and principles of justice, and the Chairman of the Trial Tribunal did not even state how he made his findings and he did not give reasons to his decisions. He also did not record the opinion of the assessors, and give his reasons why he departed or agreed with the opinions. The judgments were too short, as if he did not hear the cases. The function of the court was to resolve disputes judicially; this was not done by the Chairman of the District Land and Housing Tribunal. His judgment contained no statement of facts, and he gave no grounds for his decisions.

Again, the corum in the case of Masindoki does not show that when visiting the locus in quo, the assessors were present, and I agree with the Counsel of the Appellants that the Chairman of the Trial Tribunal is not permitted to sit without assessors even in one

session and especially when the hearing is on facts and presentation of evidence. This was the violation of the law.

On presentation of additional evidence I would say that the legal duty of a first Appellate Court is to re-evaluate the evidence on which the trial court has founded and makes its own finding based on the facts and the evidence presented before the Trial Court/Tribunal.

The High Court excercising its Appellate jurisdiction has powers to call for additional evidence; this power is conferred to it by S. 42, of the Courts (Land Dispute Settlements) Act, 2002. The question to be determined here is what mode is to be used when calling for additional evidence. The law provides that there must be an application made by a party to the proceedings requesting the First Appellate Court to exercise its discretion under S. 42 of the Courts (Land Dispute Settlements) Act, 2002 for calling additional evidence. It is usually the practice that such applications are made by one party or the other. The Applicant must indicate the nature of additional evidence which the Court / Tribunal exercising its Appellate Jurisdiction should have called and who was to give the additional evidence.

And that the application for calling additional evidence must show that the evidence which could have been called on appeal was not available during trial.

The principles to be applied by the Court exercising its appellate powers when considering whether to call for additional evidence are that; the evidence sought to be called was not available during the trial; it must be evidence relevant to the trial; it must be credible evidence. An application must usually be made by the interested party to move the court to call for additional evidence.

The principles applicable in calling for additional evidence is to ensure that the other party, is afforded a chance to cross examine the additional witnesses called by the Appellate Court or the Trial Tribunal, or a chance to challenge additional documentary evidence tendered by the party.

Since the whole proceedings and judgments of the Trial Tribunal are quashed, there shall be no need to make any order regarding the prayer made by the Advocate for the Appellants for adducing the additional evidence. He shall have the chance to present them before the Trial Tribunal as I shall order the matter to be tried de novo.

On the basis of the judgment being defective, and the defective proceedings, I quash the proceedings and decision of the Trial Tribunal, and I order trial de novo.

Appeal dismissed.

Latifa Mansoor
JUDGE
02 November 201