

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO 37 OF 2019

1. **CHACHA MWITA MWITA and PAULO WANCHOKO** (*Administrators of the
estate of the late MWITA DANIEL MWITA GESASE*) _____ **1st APPELLANT**
2. **KOHE DANIEL** _____ **2nd APPELLANT**
3. **WANGWE DANIEL** _____ **3rd APPELLANT**

VERSUS

ELIZABETH MATINDE MWITA _____ **RESPONDENT**

*(Arising from the Decision and Orders of the District Land and Housing Tribunal for Mara at
Musoma, Hon. Kaare, Chairman, in Land Application No. 27 of 2018 dated 24.09.2019)*

RULING

Date of last order; 23.04.2020

Date of ruling; 08.05.2020

GALEBA, J.

This appeal is arising from a decision of the District Land and Housing Tribunal (the Tribunal) for Mara, at Musoma. When I was preparing for its hearing, I noted that on 27.07.2019 after the defense case was closed the matter was immediately adjourned and reserved for judgment. Although the matter was adjourned for judgment, the date to which the matter was adjourned was not indicated. But that was not all. I noted yet another unusual encounter in the file and it is this; close to the end of the proceedings of 27.07.2019 as usual the text starts from the top of a fresh writing paper and it goes;

"Mr. Henga

That is the end of our defence. We close.

Order; Judgment."

After that text, the full page bellow is left blank. Then the reverse side of that page is left blank and another fresh paper is started. On that new page just like the other one it has only the following text;

**"Mr. Henga
That is the end of our defence.
Order; Assessors' opinions
*22/08/2019."***

Again there is nothing written bellow that text until the next page which has space both at the top and the bottom with the following text at the middle.

***"24/9/2019*
Coram
Chairman; Kaare J. T.
TASS;
Applicant; Represented by Veronica Daniel Mwita.
Respondent; 1. Deceased
2)
3) Mr. Chacha Daniel represents them
*T/K; Wini."***

According to the free handwritten record of the Tribunal, that is how the case ended.

The "interesting manner and gymnastics" of recording the proceedings as above by leaving spaces and making incomplete and unsigned orders is not particularly a matter deal with, but rather the suspicion that in this case, there is possibility that the assessors did not give their opinion to the chairperson before he could compose the judgment of the Tribunal as required by **Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2002 GN 174 of 2003** (the Regulations) **and section 23(1) and (2) of the Land Disputes Courts Act [Cap 216 RE 2002]** (the Land Disputes Act).

So when this appeal came up for hearing on 23.04.2020 I put the same query to counsel for the parties. Mr. Msafiri Aloys Henga learned advocate for the three appellants submitted that before composing the judgment, the chairman did not receive opinion of assessors as required by law. He moved the court not only to nullify the proceedings and judgment of the tribunal but also to strike out the pleadings that commenced the action in the Tribunal. In supporting his position he referred this Court to the decision of the Court of Appeal in **CIVIL APPEAL NO 197 OF 2018; SIKUZANI SAID MAGAMBO AND KIRIONI RICHARD VERSUS MOHAMED ROBLE, CA DODOMA (UNREPORTED)**.

In reply, Mr. Fabian Mayenga, learned advocate, acknowledged the anomaly of the assessors not giving the opinion and agreed that the proceedings and judgment of the tribunal ought to be quashed and a fresh trial ordered before a different chairman but he pleaded that the original complaint in the tribunal be spared so that it can be tried afresh.

I have considered the record of the Tribunal dated 23.05.2019 and also the confirmation of parties that indeed the tribunal did not legally receive opinion of assessors before it composed its judgment. It is the holding of this Court that, that is illegal for it is contrary to **Regulation 19(2) of the Regulations and section 23(1) and (2) of the Land Disputes Act**.

The law is that for any judgment of the Tribunal to be a lawful judgment, it must emanate from proceedings in which both components of the Tribunal, that is, a chairperson and the assessors fully participated. That is as per regulation 19(2) of the Regulations which provides that:

“(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.”

Subsection (1) of section 23 of the Land Disputes Act provides for the composition of the tribunal and subsection (2) provides for the roles of those who compose the tribunal. Those provisions are to the effect that;

"23-(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 a judgment."

That means the chairman can only reach a judgment after requiring and receiving opinion from assessors who participated in the case.

The above position is not a new position such that Courts have not decided on it. In **CIVIL APPEAL NO 286 of 2017 EDINA ADAM KIBONA VERSUS ABSOLOM SWEBE (SHELI) COURT OF APPEAL (UNREPORTED)** the Court of Appeal held at page 6 that;

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

The Court of appeal held that omission to receive opinion of assessors in the presence of parties was a fatal irregularity and it quashed the proceedings and ordered a rehearing of the matter before a different chairman and a different set of assessors.

The omission to require and receive opinion of assessors is a fundamental procedural error culminating into miscarriage of justice with consequences of vitiating proceedings and the entire trial before the Tribunal see **SIKUZANI SAID MAGAMBO AND KIRIONI RICHARD** cited above at page 11. There are many more cases on this subject including **CIVIL APPEAL NO 287 OF 2017; TUBONE**

MWAMBETA VERSUS MBEYA CITY COUNCIL CA (UNREPORTED), CIVIL APPEAL NO 70 OF 2017; Y. S. CHAWALA & CO. LTD VERSUS DR. ABBAS TEHERALI, CA (UNREPORTED) and many others.

Although Mr. Msafiri Aloys Henga, learned advocate, moved this court not only to nullify proceedings and judgment of the tribunal but also to dismiss the matter that was filed in the tribunal, but common sense serves that the omission by the Tribunal was involvement of assessors, which omission had nothing to do with the pleadings which initiated the legal action in the tribunal. That said therefore, this Court does not have any legal basis to dismiss or even to strike out land application no. 27 of 2018.

In the final analysis, this Court makes the following orders;

- i) The proceedings in land application no. 27 of 2018 are hereby quashed and nullified and the resultant judgment from which this appeal emanates is set aside.
- ii) This appeal is struck out for seeking to challenge a nullity.
- iii) The Deputy Registrar of this Court is directed to remit the record of the trial tribunal to the attention of the chairman in charge of the District Land and Housing Tribunal for Mara for the latter to appoint a chairman and assessors who shall try land application no. 27 of 2018 **de novo**.
- iv) For avoidance of doubt, the chairman and assessors who participated in the nullified proceedings shall not sit in trial in fulfillment of the ordered rehearing.
- v) Each party shall bear his own costs.

DATED at MUSOMA this 8th May 2020



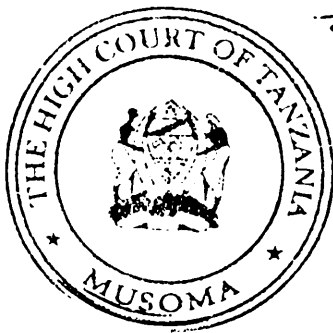
Z. N. Galeba

JUDGE

08.05.2020

Court; This ruling has been delivered today on 8th May 2020 in the absence of parties but with leave not to enter appearance in chambers following the corona virus outbreak globally and the medical advice to maintain social distance between individuals.

Order; Sufficient copies of this ruling be deposited at the Judgment Collection Desk for parties to collect their copies free of charge.



Z. N. Galeba
JUDGE
08.05.2020