IN THE HIGH COURT OF TANZANIA

[DODOMA DISTRICT REGISTRY]

AT DODOMA

LAND APPEAL NO. 70 OF 2018

[Arising from District Land and Housing Tribunal for Singida at a Singida in Land Application No. 35 of 2017]

DAUDI MAKOLO AND MAUREEN KITANGE
[Administrator and Administrix of the Estate of late **HAMISI M. MAMBO]** ..... **APPELLANTS**

VERSUS

SHABANI LYANGA MSHOLLO
[Administrator of the Estate of late Mohamed Mambo] ..... **RESPONDENT**

JUDGMENT

22nd June, 2020 & 10th August, 2020

M.M SIYANI, J

Acting under his powers as the administrator of the estate of the estate of the late Mohamed Mambo, Shabani Lyanga Mshollo who is the respondent herein, sued Daudi Makolo and Maureen Kitange, the administrators of the estate of the late Hamis Mohamed Mambo for ownership of a piece of land

located at plot No.27 Block 'J' at Ipembe Street alongside Arusha road within Singida Municipality. While the appellants who were the respondents at the trial tribunal claimed that the plot above belonged to their late father who died in 1990, Shabani Lyanga Msholo, also led evidence which indicated that the disputed land was merely left under the care of the late Hamis Mohamed Mambo after the death of his father one Mohamed Mambo in 1975.

Having heard the parties, the District Land and Housing Tribunal Singida, decided in favour of the respondent herein and declared the said land to be the property of the late Mohamed Mambo because the late Hamisi Mohamed Mambo was a care taker of the said property and therefore no ownership passed to him. Dissatisfied, the instant appeal which contains the following two (2) grounds of complaints was preferred.

1. *That the trial tribunal erred in law and in fact for failure to evaluate properly evidence before it.*
2. *That the trial tribunal erred in law and in fact for failure to observe the law in determining the matter before it.*

Hearing of the appeal was done by way of filling of written submissions and while those of the appellants were prepared and filed by counsel Tadei Rista, the respondent had no legal representation and so he prepared his own reply submissions. Arguing in support of the first ground of appeal it was contended that the trial tribunal erred in law by not sitting with assessors during the hearing of the case contrary to section 23 (1) of the Land Disputes Courts Act, Cap 216 RE 2002 and Rule 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003.

The learned counsel pointed out that when the suit was heard on 27th April 2017, 19th May 2017, 19th June 2017, 4th August 2017, 7th August 2017, 19th September 2017, 17th October 2017, 15th January 2018, 18th January 2018, 16th July 2018, 7th August 2018 and even 14th September, 2018 when the impugned judgment was delivered, the tribunal was convened without assessors neither were their opinion recorded as required by the law. Such failure according to counsel Rista was fatal and vitiated both the proceedings and the subsequent decision. In support of his stance, the learned counsel cited the Court of Appeal decisions in **Edina Adam Kibona Vs Absolum Sheni,** Civil Appeal No. 286 of 2017 and **Hamisa S. Mohsan & Two Others Vs Taningra Contractors** (Civil Appeal No.51 of 2013)

In the response, Mr. Shaban Lyanga Mshollo raised what ought to have been a preliminary point of objection that the instant appeal was filed out of the prescribed time. He contended that while judgment in Application No. 35 of 2017 was delivered on 14th September, 2018 the instant appeal was filed on 12th December, 2018 which is beyond the prescribed 45 days. As to failure of the tribunal to sit with assessors, the respondent submitted that assessors were present throughout the proceedings and they were accorded a chance to give their opinion which were accordingly considered by the tribunal in the judgment. He contended therefore that there was no violation of the law under section 23 (1) of the Land Disputes Courts Act Cap 216 RE 2002 as alleged by the appellant's counsel.

In view of the respondent, the submission by Mr. Rista, rested only on technicalities and so failed to deal with merit of the case which on who between the late Mohamed Mambo and the late Hamis Mohamed Mambo, owned the disputed piece of land prior to their death. He believed that nothing that was done by the trial tribunal can be faulted as the same, properly evaluated evidence produced during the hearing of the suit before reaching a conclusion that the land in dispute, was the property of the late Mohamed Mambo.

Having revisited the records and submissions by parties, I will start with the question of time limitation raised by the respondent in his reply submissions. Admittedly, the District Land and Housing Tribunal, delivered its judgment on 14th September, 2018. In terms of section 41 (2) of the Land Disputes Courts Act (supra) an appeal against that decision ought to have been filed within 45 days of its delivery. The record shows despite being delivered on 14th September, 2018, a copy of decree and judgment were certified on 16th November, 2018. It is the law that time spent in waiting for copies of proceedings, must be excluded when counting limitation period. For that reason, counting from 16th November, 2018 when copies of judgment and decree were ready for collection to 12th December 2018 when this appeal was presented, the appellant was within the prescribed 45 days.

The above said, I will now turn to the merits of the appeal. As it was for counsel Rista, I will start with the second ground where the concern was on failure by the tribunal to observe the requirement of the law under section 23 (2) of the Land Disputes Courts Act. As noted earlier, the appellant raised two limbs of concerns here. In the first limb the argument was that the trial District Land and Housing Tribunal was not composed by at least two assessors during the trial of the case. I shall address this issue first before

turning to the second one and I wish to be straight in my reasoning. I agree with counsel Rista that the record of the tribunal shows no names of assessors in its coram. By looking on the corams throughout the proceedings one may justifiably say that since the same reveals no names of the assessors then, the trial tribunal was improperly constituted. I also agree with the learned counsel that failure to sit with at least two assessors in the hearing of any matter before the District Land and Housing Tribunal, is indeed, a fatal irregularity which goes to the root of the matter.

I would have allowed the appeal for that reason, but despite not indicating the names of the assessors who constituted the coram during the hearing of the matter which took place between 9th August 2017 to 10th April, 2018, the proceedings of the trial District Land and Housing Tribunal, show that there were two assessors who were actively involved in the trial. Their names can be clearly seen in the proceedings which indicate that they were accorded chances to participate by asking questions. It is therefore my opinion that failure to indicate the names of the assessors in the coram was not fatal in the circumstances of this case as the records clearly shows they were involved in the trial. As such and as correctly argued by the respondent that per se means that the tribunal was properly constituted.

The second limb of the second ground of appeal is that there was failure by the trial tribunal to accord the assessors a chance to give their opinion before the Chairman reaches a final decision. This is a requirement of the law under section 23 (2) of the Land Disputes Courts Act and Rule 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which impose a mandatory duty to the Chairman to require every assessor present at the conclusion of the hearing to give his/her opinion in writing before composing his judgment. For easy of reference, I have reproduced the contents of Rule 19 (2) of the regulations as hereunder:

> *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.*

The law above is clear that according chance to assessors to air their opinion after hearing of the case, is not an option. Such opinion must be given in writing. In the instant appeal, the proceedings of the District Land and Housing Tribunal indicates that when the matter come for further hearing of

the defence case on 10th April, 2018; and upon closure of the said defence case, the Chairman went on to pronounce the date of judgment. There is nowhere in the proceedings which shows that assessors were given a chance to give their opinion and if the same was given, the records are silent as to whether the given opinion were read over to the parties before judgment.

In the case of **Tubone Mwambeta Vs Mbeya City Council,** Civil Appeal No. 287 of 2017**,** the Court of Appeal of Tanzania had the following to say in relation to involvement of the assessors in land matters before the tribunal:

> *In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, ... they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed ..... since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict.*

Borrowing a leaf from the above decision, the trial tribunal was supposed to avail a chance to the assessors to provide their opinion as required by the law and that such opinion must be in record and must be read to the parties before the judgment is pronounced.

In the present appeal, the record contains opinion of the assessors in writing which the chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. As prior noted, there is however, no record in the proceedings which shows when and at what stage such opinion found their way in the tribunal's record. Therefore since there is no any record which show that the opinion of the assessors were read over to the parties before judgment, the same become uselessly despite being available in the record and referred in tribunal's judgment. This is because, by not reading the opinion of the assessors, parties were not afforded an opportunity to know its contents and so to enable them to know whether or not the same has been referred in the final decision.

Having adumbrated as above, the decision of the trial District Land and Housing Tribunal was a nullity for failure to cause assessor's opinion be read to the parties. As such I find no need to dwell on the first ground of appeal.

I allow the appeal basing on the second ground by quashing and set aside both the judgment and decree of the District Land and Housing Tribunal Singida in Land Application No. 35 of 2017 and dated 14th September, 2018. I further direct that the said tribunal to compose a fresh judgment after reading the opinion of the assessors to the parties in compliance with the law. Considering, the nature and circumstances of this case, I order each party to bear its own costs. Order accordingly.

DATED at **DODOMA** this 10th day of August, 2020

M.M. SIYANI

JUDGE