THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 04 OF 2019
(Arising from the decision of the District Land and Housing Tribunal for Mbeya in Land Appeal No. 135 of 2018 and original Land Case No. 70 of 2018 of Ruanda Ward Tribunal)

ADAM A. LEMA.....APPELLANT
VERSUS
KENEDY MWAKATEKA.....RESPONDENT

JUDGMENT

Date of last Order: *12/08/2020*
Date of Judgment: *17/09/2020*

NDUNGURU, J.

This is the second appeal, where in the Ruanda ward Tribunal the respondent Kenedy Mwakateka sued the appellant one Adam A. Lema claiming for the rent recovery for twenty three months (23) to the tune of three millions and seven hundred thousands of his business room located at mtaa wa soko within Ruanda Ward. The ward tribunal decided in favour of the respondent, dissatisfied the appellant appealed to the District Land and Housing Tribunal for Mbeya (The Tribunal) which upheld the decision of the ward tribunal, still the appellant was uncomfortable hence this appeal.

The appellant armed with two grounds of appeal namely;

1. That, the trial Tribunal erred in law and facts by ignoring the question of jurisdiction of the ward tribunal.
2. That, the trial Tribunal grossed erred in law and fact for deliberately ignoring the issue of quorum of the trial ward tribunal.

Surprisingly the respondent opposed the petition of appeal by filling counter affidavit which also seems to be defective.

At the hearing of the appeal, the appellant was represented by Peter Kilango learned Advocate holding brief for Mr. Pomboma learned Advocate and the respondent appeared in person (unrepresented). By the leave of the court it was agreed the appeal be disposed by way of written submission.

In his written submission to support the petition of appeal, the appellant dropped the first ground of appeal and remained with the second ground.

It was the appellant submission regarding to the second ground of appeal that the District Land and Housing Tribunal for Mbeya was not just and correct to disregard the requirement of the law in respect of the quorum at ward tribunal of Ruanda, on the day of determining the matter at the ward tribunal only four members were recorded to attend each session at the ward tribunal and among of the four members one Pona Ngalunga who was the secretary was included as a member contrary to

Section 5 (3) of the Ward Tribunal Act, 1985 which provides that; secretary of the tribunal shall attend all sittings of the tribunal and record all of its proceedings but shall not participate in the decision making. He invited this court to cases of **Venance Tengeneza vs. Kawawa Mwapili**, Misc Land Case No. 123 of 2008 and **Hadija Ibrahim vs. Magdalena Dedi**, High Court Land Appeal No. 31 of 2010 (unreported).

The appellant further submitted that the case at hand the ward tribunal was constituted with secretary as a member but the District Land and Housing Tribunal did not take into consideration the defect in question.

Further it was his submission that Section 11 of the Land Dispute Courts Acts Cap 216 imposes mandatory requirements for every sitting members to be at least four, the matter at hand the members in exclusion of the secretary were only three contrary to the requirement of the law, he also cited the case of **Abdalamani Mohamedi vs. Halidi Mohamedi**, Misc Land Appeal No. 01 of 2019 Mruma ,J.

The appellant prayed the appeal be allowed with cost and the appellant be compensated with the loss suffered by unjust execution done by the respondent.

In response to the written submissions made by the appellant, the respondent filed a reply to the effect that the appellant made her

submissions to the case which does not involve the respondent and the appellant, the appellant filed Misc. Land Appeal No. 04 of 2019 which was served to him but unfortunately the counsel for the appellant made submissions on Land Case Appeal No. 18 of 2019 which does not exist.

He further submitted that if his explanation above is ignored then he reply to the submission that the argument that the composition of the ward tribunal was not properly composed is baseless as the composition was well constituted as required by law.

Further on the issue of gender of the members he submitted that it is not mandatory as it depends on the circumstances and all those cases cited by the appellant are irrelevant as does not have effect to the present case at hand.

The respondent prayed the appeal be dismissed with cost and the decision of lower court be maintained.

In the course of composing judgment the Court faced a legal issue on the involvement of the assessors during the conduct of the trial. The court required the learned counsels for the parties to address on the propriety of the trial pertaining the involvement of the assessors and their role in the conduct of the trial in question.

Addressing on the involvement and the role of the assessors, Mr. Hossea Adam submitted that, according to the law when the defence case

is closed the chairman is duty bound to invite the assessors to opine in the presence of the parties to the case, but in our case that was not done. According to the case law that is an irregularity which is fatal. It's effect is the nullification of the proceedings and judgment of the tribunal.

In other side, respondent submitted that the decision was right according to the way the case was conducted.

The trial tribunal proceedings reveals that the trial chairman did not accord the opinion of assessors. On 29/11/2018 in hand written proceedings the case was closed, the chairman proceeded to issue an order for judgment, there were no order for assessors to file their opinion before judgment. Surprisingly the opinions were filed on different dates but are not featured in the proceedings. When cross-checking on the opinion by assessor MUSA W. MWASAPILI it shows that his opinion was filed on 26/11/2018 that means it was filed even before concluding the hearing, and the opinion by assessor VIVIAN CHAN'GOMBE shows that was filed on 04/12/2018 that means was filed after the date the order of judgment was issued. Those circumstances creates the sense that it was an afterthought to the trial chairman. That means the assessors opinions were not read to the parties as required under Section 23 (1) and (2) of the Land Disputes Court Act Cap 216 and Regulation 19 (2) of Land

Disputes Court (The District Land and Housing Tribunal) Regulations, G.N No. 174 of 2003.

The grounds of appeal raised may be considered later if there are reasons to do so. At the outset, I wish to restate that, the role of the assessors is the creature of the law. It is on the record that the assessor's opinions are not featured in the proceedings. It is vividly observed that when the chairman of the District Land and Housing Tribunal (T. Munzerere) ordered the case to came for judgment on 10/12/2018 as shown in hand written trial tribunal proceedings, he did not order the date the assessors to file their opinion before judgment as required under Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (hereinafter referred to as Regulations) and Section 23 (2) of the Courts (Land Disputes) Settlement Act.

To make more clarity, I find it sensible to reproduce the two cited Sections. To start with Section 23 (1) (2) (supra) which reads as follows:

> *23. (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one 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.***

Whereas, Regulation 19 (2) of the G.N No. 174 imposes a duty to the chairman, to order every assessor present at the conclusion of hearing to give his opinion in writing before making his judgment:

The cited Regulation reads as follows:

> *"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.*

In the foregoing, the law is steady and well settled. It is the law which gives the assessors mandate to give their opinion on the verdict before the chairman composes the decisions. Their presence becomes valuable if they actively, effectively and fully involved in the proceedings before opining at the conclusion of the trial and before the chairman composes his decision. The trail tribunal record indicates that two assessors aided the trial during the entire pendency of the suit. These assessors are Mrs. Vivian and Mr. Musa. The records of the tribunal indicate that the assessors were present during the entire pendency of the matter but the order to file their opinions is not featured anywhere in the proceedings.

It is apparent under the eyes of the cited laws (supra), the assessors were not meant to be as watchdog but rather, to give out their observation on the pro and corns in the entire trial before the presiding

Chairman renders his final verdict. In that respect, it is inescapable for the Chairperson after winding up the defense case, to ensure that the assessors have filed their opinion, such opinion after been availed, should be read to the parties before delivering the judgment.

In my view, failure by the presiding chairman to ensure that the opinion of assessors have been filed and read to the parties before judgment, quantify into a fundamental defect that goes to the roots of the subject matter. Apparently, the spirit of Section **23 (1) (2)** of the **Land Dispute Court Act Cap 216 (R. E. 2002)** and the regulation made thereof, particularly **Regulation 19 (2)** of **G.N 174/ 2003**, if construed together and in its totality, what is to be ascertained is that, the true intent and purpose in the wisdom of the drafters of the respective piece of legislation was to commonly assimilate the assessors in the process of justice administration in land matters at District Land and Housing Tribunal.

It is apparent that what was at issue in this appeal was also an issue in **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017, Court of Appeal of Tanzanian, (Unreported) Mbeya, where the court has the following observation at page 11:

> *"In view of the settled position of the law, where the trial has to be conducted with the aid of assessors, they must actively and effectively participate in the proceedings so as to make*

meaningfully their role of giving their opinion before the judgment is composed...Since Regulation 19(2) ***requires every assessors present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the present of the parties so as to enable them to know the nature of the opinion has been considered by the Chairman in the final verdict."***

In this case, the court asserted the need to require every assessor to give his/her opinion and their opinions be on record. For more prominence, I find it prudent to underscore what has been stated in the case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286/2017, Court of Appeal of Tanzania, (Unreported) Mbeya, the Court had emphasized the legal implication for the failure to consider assessors opinion, it stated inter alia that:

"...when the chairman closed the case for the defense, he did not require the assessors to give their opinion as required by the law. ***On the authorities cited above, that was fatal irregularity and vitiated the proceedings."***

The court went on further to observe that:

"For the avoidance of doubt, we are aware that in the instant case the original records have the opinion of the assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the records does not show the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the

presence of the parties before the judgment was composed, the same have no usefully purpose."

To accord more weight, the Court of Appeal in its current decision of **Sikuzani Saidi Magambo and Another vs. Mohamedi Roble**, Civil Appeal No. 197/2018, Court of Appeal of Tanzania, (Unreported) Dodoma, the Court had addressed the legal impact for the failure by the Chairman to accord an opportunity for the assessors to give out their opinion in the following manner:

"...When the Chairperson of the Tribunal closed the defence case, he did not require the assessors to give their opinion as required by the law. ***It is also on record that, though, the opinion of the assessors was not solicited and reflected in the Tribunal's proceedings the chairperson purported to refer to them in his judgment.*** *It is thus our considered view that,* ***since the records of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal judgment****. It is also out further view that,* ***the said opinion was not availed and read in the presence of the parties before the judgment was composed"***
[Emphasis Mine]

Finally, the court had the following to say with regard to what was to befall owed to the anomalies occasioned therein:

"On the strength of our previous decision cited above, we are satisfied that the pointed omission and irregularities amounted into fundamental procedural errors that have occasioned a

miscarriage of justice to the parties and had vitiated the proceedings and the entire proceedings before the tribunal, as well as those of the first appellate Court."

There is overabundance of authorities to support the above stance this includes the case of: **General Manager Kiwengwa Stand Hotel vs. Abdallah Saidi Mussa**, Civil Appeal No. 13 of 2012, **Ameir Mbarak and Azania Bank Corp Ltd. Edgar Kahwili**, Civil Appeal No. 154/2015 and **Y. S Chawalla & Co. Ltd. vs. Dr Abbasi Teherali**, Civil Appeal No. 70/2017. In all cases, the record of proceedings did not show if the assessors were accorded an opportunity to air their opinion as required by the laws cited inter-alia, but the chairman merely made reference to them in their decisions.

Essentially, the issue of having assessors in the District land and Housing Tribunal was not meant to save for no useful purpose. Their designation for that position was intended to make them an integral part of land dispute settlement mechanism. Their presence therefore must be physical manifested in decision making process for the purpose of giving legal effect to what has been contemplated by virtue of Section 23 (1) (2) of Land Dispute Act Cap 216, and Regulation No. 19 (2) of G.N 174/2003.

In the premises, I hold that the irregularity is incurable as it goes to the root of the matter. I will not detain myself discussing other grounds of

appeal since the above discussed issue has sufficed to dispose of the appeal.

Consequently, I hereby nullify the entire proceedings and the judgment of the first appellate tribunal. The appeal deserves to be tried afresh expeditiously before another chairman and new set of assessors.

Since the anomaly has been prompted by the District land and Housing Tribunal, it would be highly unwarranted for the parties in this matter to bear responsibility, in the circumstance of this case therefore, the eyes of justice dictate this court to refrain from awarding costs, each part shall carry its own cost.

It is so ordered.

D. B. NDUNGURU
JUDGE
17/09/2020

Date: 18/09/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Appellant: Mr. Hosea Adam – Advocate

Respondent: Absent

B/C: M. Mihayo

Mr. Hosea Adam – Advocate:

The case is for judgment, we are ready.

Court: Judgment delivered in the presence of Mr. Hosea Adam advocate for the appellant and the appellant himself but in the absence of the respondent.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
18/09/2020

Right of Appeal explained.