THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 02 OF 2020
(Arising from the decision of the District Land and Housing Tribunal for Mbeya in Land Appeal No. 19 of 2019 and original land case no 01 of 2019 of Kongolo Ward Tribunal)

BASHIRU ASHIRAFU.....APPELLANT

VERSUS

RAPHAEL MWANJIWA.....RESPONDENT

JUDGMENT

Date of last Order: *14/09/2020*
Date of Judgment: *03/11/2020*

NDUNGURU, J.

This is the second appeal, where in the Kongolo ward Tribunal the respondent Raphael Mwanjiwa sued the appellant one Bashiru Ashirafu claiming for the recovery of suit land measured two acres invaded by the appellant within Kongolo Ward. The ward tribunal decided in favour of the appellant, dissatisfied the respondent appealed to the District Land and Housing Tribunal for Mbeya (The Tribunal) which allowed the appeal, quashed the decision of the ward tribunal and declared the respondent as lawful owner of the suit land, the appellant was dissatisfied with the tribunal decision hence this appeal.

The appellant armed with three grounds of appeal namely;

1. That, the trial chairman erred in law and facts when held that the

appellant is not the owner of the land in dispute while there was no a (sic) cause of action against the appellant.

2. That, the Tribunal chairman erred in law and fact when entertained the matter while there was non joinder of necessary party.

3. That, the tribunal chairman erred in law when he failed to re-evaluate the evidence of the ward tribunal's records hence reached to unfounded and problematic judgment.

The respondent did not reply the petition of appeal. The appellant was represented by Amani Angolwisye learned Advocate while the respondent enjoyed the service of Anna Samwel learned Advocate. By the leave of the court it was agreed the appeal be disposed by way of written submission

In his written submission the appellant abandoned first ground of appeal thus remained with second and third ground.

It was the appellant submission regarding to the second ground of appeal that it is trite law that person who bring the case in courts of law should sue the proper and necessary parties, the respondent herein initiated the case against the appellant at Kongolo ward tribunal hence had a legal duty to join all necessary parties for the decree to be executable, failure to join the necessary parties the appeal/case becomes incompetent thus we

submit that the judgment and proceedings from appeal no 19/2019 between Raphael Mwanjiwa and Bashiri Ashirafu stems from incompetent land cause.

He proceed to submit that they are on that view because the respondent when was complainant at Kongolo Ward tribunal had been informed that the one who made to trespass into the land in dispute was the appellant's father who appointed the appellant as a supervisor on the disputed land, his father were supposed to be joined as necessary party but the respondent did not join him.

He further submitted that the same defects have been reflected at page 2 of the typed judgment of the District Land and Housing Tribunal but the chairman seems to ignore its legal effects. He cited the case of **Agnes Twangale Mkondya and Another vs. Daniel Nyongole**, Land Appeal No. 59 of 2016, High Court of Tanzania (unreported).

On the third ground the learned counsel argued by staring quoting part of page 3 of the judgment;

> "*respondent not being an owner of the suit farm had no locus stand to claim the land. Respondent ought to inform and call his father to defend the land.*
> *Respondent's father knew about this dispute. He did not turn up in court. failure to turn he suggested he had no interest in the land.*"

He submitted that that quotation of judgment pressed the respondent now the appellant into liability contrary to evidence on records, as nowhere

the appellant claimed ownership of the land instead he stated that he was the supervisor of the land in dispute owned by his father, the tribunal being the first appellate failed to re-evaluate the evidence. He further prayed that the appeal be allowed with cost.

In reply to the written submissions by the appellant, the learned counsel for the respondent submitted that they agree with the fact that the law require a person who sue in courts of law to do so by suing a necessary part , which was rightly done in the case at hand contrary to the claims of appellant's counsel that a necessary part was not joined to the case, she submitted that a necessary party is one without whom no order can be made effectively while a proper party is one on whose absence an effective order can be made, she invited this court to the case of **Abdi M. Kipoto vs. Chief Arthur Mtoi**, Civil Appeal No. 75 of 2017.

She argued that the alleged father do not qualify the definition given by Justices hence his absence does not nullify neither the proceedings nor the decision of the trial tribunal, further she argued that in the Appeal No. 19/2019 between Raphael Mwanjiwa vs. Bashiru Ashirafu, Bashiru therein respondent was a necessary party and not a proper party as his counsel tries to mislead the court, his father was a proper party in whose the order made by trial tribunal was effective even in his absence, Bashiru was the one

who trespassed into the land hence was enough to explain on the legality of him being in use of the land.

She continue to submit that in regard to the case referred to by the appellant's counsel is distinguishable from the case at hand, as the case referred to, the evidence laid by the appellants showed all circumstances of a necessary party not being joined contrary to the one at hand which the appellant just adduced mere words which lacked weight and evidence to show the needs to join his father to the case, she further argued that the ward tribunal records shows that there were several efforts to join the appellant's father to the case but he did not turn up. In the circumstances they prayed the second ground be dismissed with cost.

In regard to the third ground of appeal she argued that it's a total lie that the tribunal chairman failed to re-evaluate the evidence, the appellant was the one who trespassed into the respondent's farm and he was given a right to be heard to prove his defense by calling his father as a witness to prove that he was just a supervisor.

In the circumstances they submitted that this ground of appeal lacks merit and the whole appeal be dismissed with cost.

When I was going through the District Land and Housing Tribunal records, I noted that the trial chairman did not read the opinion of assessors to the parties. On 24/04/2019 in the tribunal typed proceedings, the

chairman proceed to issued an order for the judgment that it will be delivered on 03/06/2019 and the opinion to be filed within twenty days (20) but there were no specific order on the date when the parties to appear to be availed with the opinions of assessors as it looks hereunder:

24/04/2019.
Coram: *1.Vivian*
2. Musa
Cc. *Zamda*
Applicant: *present*
Respondent: *present*
Order;
- submissions ready
- Judgment 03/06/2019
- Opinion be filed in 20 days.

Surprisingly on 25/06/2019 the order shows that the judgment opinion was summed up to parties. I wonder how the Coram having the order named *"Judgment opinion summed up to parties"* finds its way in the proceedings as it appear below:

25/06/2019
Coram: *T. Munzerere-chairman*
Members: *1. Vivian*
2. Musa
Cc: *Zamda*
Applicant: *present*
Respondent: *present*
Orders:
- Judgment opinion summed up to parties.
- Judgment on 09/07/2019

- Parties to appear.

It be noted that even if the chairman was correct, but the opinions of the assessors must be availed and read to the parties and not to be summed up to parties.

In the circumstances, 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 come for judgment on 03/06/2019 as shown in the typed trial tribunal proceedings, He did not order the specific date opinion by assessors to be filed but he only orders to be filed in twenty days and did not order specifically as to when the parties should appear to be availed with the opinion of the assessors 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 during the entire pendency of the matter but the order for the parties to appear before the tribunal to be availed with opinions of assessors 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 prone 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 the 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.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
03/11/2020

Date: 03/11/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Appellant:

Respondent: Present

For the Respondent:

B/C: M. Mihayo

Court: Judgment delivered in the presence of the parties who have appeared in persons.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
03/11/2020

Right of Appeal explained.