IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA
(MUSOMA DISTRICT REGISTY)

AT MUSOMA

LAND APPEAL NO. 48 OF 2019
(Originating from Land Application No. 87 of 2008 in the District Land and Housing Tribunal for Tarime at Tarime)

MARWA CHACHA ..... APPELLANT

VERSUS

1. SAMWEL SULEIMAN MWITA
(as legal personal representative of the deceased SELEMAN MWITA ..... 1ST RESPONDENT

2. NYAKUNGURU VILLAGE COUNCIL...2ND RESPONDENT

JUDGEMENT

25th and 30h March, 2020

KISANYA, J.:

In in the District Land and Housing Tribunal (hereinafter referred to as the Tribunal), the appellant herein, sued Selemani Mwita, claiming that he had encroached into his land. The second respondent was joined following a third party notice made under O. 1, R. 14(3) and (4) and 15 of the Civil Procedure Code [Cap. 33, R.E. 2002]. The case ended in favour of the respondents.

Dissatisfied with judgement and decree of the Tribunal, and with leave of the Court, the appellant has instituted this appeal against the

respondents named hereinabove. The grounds outlined in the petition of appeal are as follows:

1. That the learned trial Chairman erred in law and fact in holding for the first Respondent without considering the fact that the first Respondent was a mere invitee to the disputed land by PW2 Chacha Matinde hence limitation of time and adverse possession could not apply in his wife favour.
2. The learned trial Chairperson grossly erred in law and facts for his failure to accord no weight to the whole evidence by the Appellant and his witnesses and no reasons for its rejection given.
3. That, had the learned trial chairperson properly analyzed evidence adduced, he would have found that the Appellant was a lawful owner of the suit land.
4. That, the trial chairperson erred in law and fact in holding for the first Respondent in absence of evidence of inheritance of the suit land.

   ALTERNATIVELY,
5. The trial tribunal's judgement is illegal and nullity for failure to incorporate and contain the Tribunal Assessors.

At the hearing of this appeal, the appellant and respondent were represented respectively by Mr. Kassim Gilla, and Mr. Thomas Makowe, learned advocates. The second Respondent failed to appear.

When Mr. Gilla was called on to submit and elaborate on the grounds of appeal, he informed the Court that he had noted irregularities, which vitiated the proceedings before the Tribunal. He therefore requested to address the Court on the said irregularities.

The learned counsel argued that the case changed hands from Kitungulu E., Mayeye, S.M., L.E. Magwayenga and Mayeye, S.M., learned Chairpersons, without assigning reasons thereby contravening O. XVIII, R. 10 of the Civil Procedure Code, Cap 33, R.E 2002 (CPC).

Mr. Gilla submitted further that, there was illegal exercise of judicial powers as issues were amended or reframed without giving reasons to that effect. He pointed out that, there are issues farmed by Kitungulu E., on 2/12/2009 on, Mayeye, S.M, on 15/01/2015. The learned counsel stated further that evidence of PW1, PW2, PW3, PW3 and DW1 was recorded twice without assigning reason. Hence, the status of previous evidence given by the said witnesses is not known.

Another irregularity pointed out by Mr. Gilla is failure by the Chairman to address the assessors to give their opinion. He submitted that, although the judgement makes reference to opinion of assessors, the proceedings do not show whether and when the assessors were asked to give their opinion.

That said, Mr. Gilla was of the considered view that, the proceedings, before the Tribunal were vitiated. Therefore, he urged to revise and quash the proceedings under section 43 of the Land Disputes Courts Act, and order for retrial. He prayed each party to bear its own costs on the ground that the irregularities were not caused by either party.

In response, Mr. Makowe, supported the submission made by the learned counsel for the appellant. He also pointed out that, the 2nd Respondent was joined through the third party procedure. As the 2nd Respondent failed file the defence, Mr. Makowe argued that, he had no

locus to appear.

The learned counsel stated further that, the Tribunal entered the judgement for the applicant, on 24/03/2011. However, the said order was set aside in absence of the parties. In this regard, Mr. Makowe advised me to nullify the proceedings and order for retrial of this mater.

Upon considering the records and submissions by both parties, I nullified the proceedings before the Tribunal and reserved the reasons for such. For easy of reference, I hereby reproduce the order issued by this Court on 25/5/2020.

> *"I have gone through the record and I am in agreement with the submission by the counsels for the Appellant and the 1st Respondent that the proceedings before the District Land and Housing Tribunal were vitiated due to irregularities apparent on records. Therefore I hereby invoke the revisional powers entrusted in this Court by section 43 of the Land Disputes Courts [Cap. 216, R.E. 2002] to revise, nullify and quash the proceedings of the District Land and Housing Tribunal. Consequently, the jdugement and decree arising from the said proceedings are also quashed and set aside. Parties may if still interested to pursue this matter, institute a fresh application. In the event new application is filed, it should be determined expeditiously by another Chairperson and new set of assessors. Each party shall bear its own costs because the irregularities were not caused by the parties. Reasons for this order will be assigned in the jugdement to be availed to the parties before 20/4/2020."*

Therefore, I am inclined to give reasons for the above order. In so doing, I will address on the following irregularities pointed out by the learned counsels for both parties.

The first issue is on failure to show the reasons for change of case from one Chairperson to another. The law recognizes circumstances where a case change hands from one magistrates or judge to another. The reasons for such change depend on the circumstance of each case. This may include death, transfer, disqualification, resignation, retirement etc. In civil cases, this matter is governed by O. XVIII, R. 10(1) of the CPC, which provides:

> *"Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.*

It is now settled that, the magistrate or judge who takes over a partly heard case, is required to state the reasons for taking over the case from his predecessor. The rationale of this procedure is to ensure that the credibility of witnesses is assessed by the magistrate or judge who records the evidence; and to protect the integrity of the judiciary. This position was stated in **Ms. Georges Centre Limited v. The Honourable Attorney General and Ms. Tanzania National Road Agency,** Civil Appeal No. 29 of 2016 (unreported), when the Court of Appeal held that:

The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same Judicial Officer unless it is not practicable to do so. For one thing,... the one who sees and hears the witness is in the best position to access the witness credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

Therefore, the magistrate who fails to give reasons after taking over the case lacks mandate to proceed with trial and the proceedings before him are null and void. This was stated by the Court of Appeal in **Abdi Masoud Iboma and 3 others vs. Republic**, Criminal Appeal No.116 of 2015, (unreported) where it was held:

The provision requires that reasons be laid bare to show why the predecessor magistrate could not complete the trial. In the absence of any such reasons, the successor magistrate lacked authority and jurisdiction to proceed with the trial and consequently all such proceedings before him were nullity.

It is on record that, this case was handled by three Chairpersons. It started with Kitungulu E. He recorded evidence of PW1 and PW2 on 2/12/2009 and PW3 on 5/2/2010. Thereafter, the case moved to Mayeye, S.M. on 20/10/2010 and 18/11/2010. It was then transferred to L.E. Magwayega, on 3/12/2010. He recorded evidence of PW4 on 17/12/2011. However, the case was again returned to Mayeye, S.M on

17/05/2012 who decided to record evidence afresh. No reason was given as to why the case was transferred from one Chairperson to another. Guided by the above cited cases, I hold that the successor Chairperson after Kitungulu, E., had to jurisdiction to proceed with trial. Therefore, I am in agreement with Mr. Gilla that, the proceedings before the Tribunal were vitiated by the irregularity on failure to assign reasons for transfer of case from one Chairperson to another.

I now move to second issue on failure to take opinion of assessors. According to section 23 (1) and (2) of the Land Disputes Courts [Cap. 216, R.E. 2002], the District Land and Housing Tribunal is composed by the Chairman and not less than two assessors. Assessors present at the conclusion of hearing are required to give opinion before the Chairman composes the judgement. Further, regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides as follows:

> *"(1) The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgement on the spot or reserve the judgement to be pronounced later;*
>
> *(2) Notwithstanding sub-regulation (1) the Chairman shall, before making his judgement, 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 light of the above, opinion of assessors is required to be given in the presence of the parties. Further, the proceedings should indicate that, opinion is taken in the presence of the parties as held in **Tubone**

Mwambeta vs Mbeya City Council, Civil Appeal No. 287 of 2017, CAT at Mbeya, (unreported), when the Court of Appeal held that:

> *"In view of the settled position of the law, where the trial has been 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."*

The proceedings in the case at hand do not show whether the assessors were addressed to give their opinion. Upon closing the defence case, the trial Chairperson ordered that, judgement would be delivered on 19/5/2016. It is not known as to how and when the written opinion purported to have been written by assessors found its way in the file. As the proceedings do no show that the opinion was read or given in the presence of the parties, the Court cannot presume that it was given. Therefore, the purported opinion has no useful purpose. In **Edna Adam Kibona vs Absalom Swebe (Sheli),** Civil Appeal No. 286 of 2017, CAT at Mbeya (unreported) the Court of Appeal had similar position when it stated:

> *"For avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgement. However, in view of the fact that the record does not show that*

the assessors were required 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 judgement was composed, the same has no useful purpose."

Since the opinion was not taken or read in the presence of the parties, the proceedings before the Tribunal were vitiated. The said irregularity goes to the root of the case on composition of the Tribunal. Further, it denied the parties, right to know the opinion of assessors who heard the evidence.

The third issue is on amendment of the issues during trial. Generally, the trial court is mandated to amend the issue or frame additional issues at any time. These powers are provided for Order XIV, Rule 5 (1) and (2) of the CPC which reads as follows:

"(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made and framed.

(2) The court may also, at any time before passing a decree, strike out any issues that may appear to it to be wrongly framed or introduced."

It is my considered opinion that, the trial court's power of amending the issues or framing additional issues is discretionary. Therefore, such powers should be exercised judiciously to avoid abuse of legal and judicial process. In this regard, the trial court or tribunal should assign reasons for amending the issues or framing additional issues.

In the case at hand, the issues framed on 1/12/2009 were, (i) whether the first respondent occupies the suit land lawfully; and (ii) relief(s). However, on 15/1/2014, the Tribunal framed new issues namely, who is the lawful owner of the disputed land between the applicant and 1st respondent; and relief. The trial Chairperson did not state the reasons for framing new issues. Although, the issues are not different from the issues framed on 1/12/2009, the trial court was required to state the reason to that effect.

The fourth irregularity is on how the evidence was recorded. I have shown herein that, PW1, PW2 and PW3 gave evidence before Kitungulu while PW4 gave evidence before E.L. Magwayega. However, upon framing new issues, Mayeye, S.M recorded new evidence of PW1, PW2, PW3 and PW4. Further, Selemani Mwita (DW1) gave evidence twice, on 7/5/2014 and 30/3/2016 before Mayeye, S.M. It was not shown as to why Mayeye, S.M decided to rerecord the evidence. If a trial court or tribunal is permitted to re-record evidence of the same witness for personal reasons as in the case at hand, it may lead to confusion and chaos in the administration of justice. The confusion in the case at hand is on the status of previous evidence given by PW1, PW2, PW3, PW4 and DW1. Further, what was done by the trial Chairperson may cause chaos because, for reasons known to himself, a judicial officer presiding over the case could just decide to re-summon witnesses and take evidence thereby causing failure of justice.

The fifth irregularity is the manner in which the Tribunal set aside the judgement entered for the plaintiff. It is on record that when the matter came for hearing on 24/3/2011, the respondents were absent. Therefore,

the Tribunal ordered as follows:

> *"Both of the two parties had relevant information that this matter is coming up for hearing, since the respondent was duly served in sufficient time and that is absent on this fix date/day for hearing of the case, I proceed to enter judgement for the plaintiff under ORDER IX, r. 69(i) of the Civil Procedure Act, Cap 33, R.E. 2002 accordingly.*

The said order did not last for so long. It was set aside two months later, on 18th May, 2011 by the Chairperson, *suo motu*, and in absence of the parties. The New order was issued as shown hereunder:

> *"Since the respondent have failed to file counter affidavit within time, it follow therefore that they have not object (sic) the applicants prayer. I therefore set aside this Court' order made 24/3/2011.....hearing interparties on 2/6/2011."*

With respect, if the Tribunal had already issued an exparte judgement due non-appearance of the respondent, the said exparte judgement could only be set aside upon application by the respondent/defendants. This is in accordance with section Order IX, R. 13(1) of the CPC which reads:

> *"In any case in which a decree is passed exparte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit..."*

It is my considered opinion that, the learned Chairperson had no power to set aside the exparte judgement, on his own motion. In absence of an application made by the respondent to justify what prevented him from appearing on the hearing date, the Court was not mandated to set aside the exparte judgement..

Lastly, the second respondent was issued with the third party notice. It is trite law that, upon being served with the third party notice, the third party is required to file his written statement of defence within twenty one days or within the period ordered by the Court. This is provided for under O. I, R. 17 of the CPC. Where there is default to file defence, judgment may be entered against the third party under O.I, R.19 of the CPC. Therefore, as rightly argued by Mr. Makowe, a third party who fails to file his defence, has no right to appear and defend the case. However, the third party in the case at hand was allowed to appear. He also cross examined all witnesses while he had no locus to appear during trial.

It is for the aforesaid reasons that, I invoked the revisional powers entrusted in this Court by section 43 of the Land Disputes Courts [Cap. 216, R.E. 2002] and issued the order to the following effect:

1. The proceedings of the District Land and Housing Tribunal are revised, nullified and quashed.
2. Judgement and decree arising from the said proceedings are also quashed and set aside.
3. Parties may, if still interested to pursue this matter, institute a fresh application.

4. In the event new application is filed, it should be determined expeditiously by another Chairperson and new set of assessors.
5. Each party to bear its own costs because the irregularities were not caused by the parties.

DATED at MUSOMA this 30th day of March, 2020.

E.S. Kisanya
JUDGE
30/3/2020