IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)
AT ARUSHA

LAND APPEAL NO. 26 OF 2020

(Originating from the decision of the District Land and Housing Tribunal for Arusha, in Application No. 255 of 2017)

KAREN YOHANES ..... APPELLANT

Versus

EZEKIEL JOSEPH ..... 1ST RESPONDENT

PINIEL YARO ..... 2ND RESPONDENT

JUDGMENT

25th August & 15th October, 2021

Masara, J.

In the District Land and Housing Tribunal for Arusha (the trial tribunal), **Karen Yohanes,** the Appellant herein, sued the Respondents claiming for a piece of land measuring 42 metres length and 29 metres width, located at Olmringirinda Village, Kimunyik Ward, Arusha District (the suit land). In its ex-parte judgment delivered on 06/04/2020, the trial tribunal dismissed the application because the evidence of the Appellant was insufficient to prove her ownership over the suit land. The Appellant was dissatisfied by that decision. She has preferred this appeal on two grounds as reproduced hereunder:

a) *The tribunal erred in law and fact in holding that the Appellant's witness did not corroborate the Appellant's evidence; and*
b) *That the tribunal erred in law and fact by misconstruing exhibit P1 tendered in the tribunal by the Appellant's witness.*

Brief facts giving rise to this appeal goes as follows: The first Respondent sold the suit land to the second Respondent sometimes in 2013. Incidentally, the Appellant claimed the suit land to be her lawful property which was given to her by her deceased father before his death way back in 1965. The Appellant took the matter to various reconciliatory machineries, including the Ward Office,

as well as the boma meetings in a bid to seek resolution of the matter. Her efforts ended in vain. In 2014, the Appellant sued the second Respondent at Kimnyaki Ward Tribunal claiming back the suit land. The Ward Tribunal declared the first Respondent the lawful owner of the suit land and that he lawfully sold it to the second Respondent. The Appellant was dissatisfied by that decision, she appealed to the trial tribunal vide Land Appeal No. 95 of 2015. The trial tribunal quashed and set aside the decision and proceedings of the Ward Tribunal for declaring the first Respondent the lawful owner of the suit land while he was not a party to that case. It ordered a fresh trial before the Ward Tribunal that would enjoin the first Respondent as a necessary party. Instead of preferring a fresh suit in the Ward Tribunal as was decided, the Appellant filed her sui in the trial tribunal.

At the hearing of the appeal, the Appellant was represented by Mr. Godfrey Mushi, learned advocate, while the second Respondent appeared in Court unrepresented. The first Respondent's whereabouts could not be traced despite substituted summons published in Nipashe Newspaper of Friday, 6th August, 2021, therefore the appeal proceeded in his absence. The appeal was heard *viva voce*.

Before deducing what was argued by the advocate for the Appellant and the second Respondent, the competency of the Appeal was put into question. On 25/8/2021, when the parties came for final orders, the Court probed on the competency of the appeal, specifically whether the opinion of assessors in the trial tribunal was read to the parties before delivering the judgment. Mr. Mushi conceded that the same were not read, only that the tribunal chairman received them before delivering the judgment.

Reading assessors' opinion to the parties before judgment is a requirement of the law, that is what compelled me to determine the competency of the appeal before determining the merits of the appeal itself. It is the requirement of the law that before composing the judgment, the tribunal chairperson must make the assessors opinion to be read before the parties. That is as per Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N 174 of 2003. Its relevance was best expounded in the decision of the Court of Appeal in ***Sikuzani Said Magambo and Another Vs. Mohamed Roble***, Civil Appeal No. 197 of 2018. The Court of Appeal quoted with affirmation its earlier decision in ***Tubone Mwambeta Vs. Mbeya City Council***, Civil Appeal No. 287 of 2017 (both unreported), where it held:

> *"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.***"[Emphasis supplied]

I have perused the trial tribunal record; it depicts that hearing of the application was concluded on 18/12/2019. It was set for mention on 4/2/2020, and opinion of assessors was to be given on 2/1/2020. On 4/2/2020, when the matter came up for mention, the tribunal chairman recorded that assessors' opinion was received. He went ahead to fix the date of judgment.

From the above findings, there is no record that the assessors' opinion was read to the parties prior to composing the judgment. However, the said opinion was reflected in the trial tribunal's judgment. That was an error and was a violation of the mandatory requirements of the law. The Court of Appeal in the case of

Edina Adam Kibona Vs. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017 (both unreported), the Court observed as follows:

> *"... as a matter of law, assessors must fully participate and 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 Kiswahiii:* ***That opinion must be in the record and must be read to the parties before the judgment is composed.*** "[Emphasis added

In the spirit of the above cited decisions, omission by the trial tribunal to read the assessors' opinion before the parties is fatal. That said, it is the finding of this Court that the appeal is improperly before this Court because the decision of the trial tribunal was a nullity for failure to adhere to mandatory requirements of the law. I see no reasons to traverse on the merits of the appeal.

In all similar decisions, Courts have leaned towards ordering that the matter be retried. This was underscored in ***Dora Twisa Mwakikosa Vs. Anamary Twisa Mwakikosa***, Civil Appeal No. 129 of 2019 (unreported), where it was held:

> *"In all the three cases cited above, after having found that the omission was fatal, the Court ordered a retrial."*

Fortified by the above reasons and observations, by invoking revisional powers conferred to me under section 43(1)(b) of the Land Disputes Settlement Act, Cap. 216 [R.E 2019], I hereby quash and set aside the judgment and proceedings of the trial tribunal. I order the file to be remitted back to the trial tribunal for an expedited fresh hearing before another chairperson and a new set of assessors.

I have also noted that the application before the trial tribunal was heard ex-parte for what was said to be failure of the Respondents to file their Written Statement of Defence on time. For the interest of justice, it is preferred that

the matter be heard inter parties. The Respondents should be directed to file their written statements of defence. Considering that the ailment herein cannot be attributed to either of the parties, each party shall bear their own costs.

Order accordingly.

Y. B. Masara

JUDGE

15th October, 2021