IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA DISTRICT REGISTRY)

AT MBEYA

LAND APPEAL NO. 43 OF 2019

(Arising from Application No. 113 of 2018 of the District Land and Housing Tribunal for Mbeya at Mbeya)

PATRICK JOHN MWAIPAJA .....APPELLANT

VERSUS

ISAYA ABEID MWAIPAJA

as an administrator of the late AMBATAMISYE MWAIPAJA .....RESPONDENT

JUDGEMENT

Date of Last order: 22.09.2021

Date of Judgement: 06.10.2021

Ebrahim, J.:

When the appellant preferred the instant appeal, the respondent was initially one Ambatanisye Mwaipaja. However, before the matter could proceed on the hearing of the appeal, he passed on as per the court records of 30.09.2020. The matter was halted to allow the administrator of the estate of the late Ambatanisye Mwaipaja. On 19.08.2021, Isaya Obed Mwaipaja presented before the court Form No. 4 of 30.07.2021 exhibiting his appointment as an administrator of the estate of the late Ambatanisye Mwaipaja and tendered death

certificate no. 2939520A. The court took cognizance of the same and accordingly adopted the documents to form part of the records and rectified the court records to refer to Isaya Obed Mwaipaja as an administrator of the late Ambatanisye Lutino Mwaipaja, the respondent.

The appellant in this appeal has lodged four grounds of appeal as follows:

1. That the trial Tribunal erred both in law and fact for not taking into account that the main issue for determination between parties was to establish the rightful owner of the suit house.
2. That the trial Tribunal erred in law and fact for not determining who between the parties had right to sell the suit house.
3. That the trial Tribunal erred both in law and fact for not taking into account that the appellant is the administrator of the suit house.
4. That the trial Tribunal erred both in law and fact for relying on the statement of the second Respondent regarding ownership of the suit house.

In this case the appellant and the late Ambatamisye Mwaipaja are related. The appellant is the son of the late John Anyisile Mwaipaja. The late John Anyisile Mwaipaja and the late Ambatamisye Mwaipaja were blood sister and brother and their father was the late Anyisile Mwaipaja.

The Applicant filed an Application at the District Land and Housing Tribunal suing Ambatamisye Mwaipaja. The Applicant was appointed as an administrator of the estate of the late John Anyisile Mwaipaja. His claim against the Respondent was therefore that the disputed house located at Nkyuyu Street, Isanga Ward, Mbeya City is the property of the late Anyisile Mwaipaja who passed on 15th May, 1993. He claimed that the Respondent has obtained possession of the suit house illegally hence his claim for vacant possession of the disputed house and costs.

At the trial Tribunal, main issues were whether the Applicant is the lawful owner of the suitland and whether the suitland belonged to Anyisile Mwaipaja or John Anyisile Mwaipaja. In proving his case, the Appellant called two witnesses and there were four witnesses on Respondents side. After hearing the evidence from both sides, the trial Chairman made a finding that dismissed the application and held that the disputed house was properly sold and declared the 2nd Respondent as the rightful owner of the disputed property. The Appellant was aggrieved, hence the instant appeal.

When the appeal came for hearing, the Appellant was represented by advocate Mathayo Mbilinyi and the Respondents preferred the service of advocate Peter Kiranja.

Advocate Mbilinyi prayed to abandon the 2nd, 3rd and 4th grounds of appeal on the basis that the main issue is to establish the rightful owner of the disputed house. Prayer was granted by the court.

Submitting in support of the appeal, Mr. Mbilinyi told the court that the disputed land belonged to their father and the Appellant had letters of administration which the 1st Respondent did not have. He submitted further that one cannot claim the land of the deceased unless he is an administrator. He argued that the trial Chairman considered the history by DW1 that the house was built in 1945 but when responding to cross examination questions, he said in that year he was not yet born making his testimony a hearsay.

Counsel for the Appellant prayed for the leave of the court to argue additional ground in terms of **Order 39 Rule 2 of the Civil Procedure Code, Cap 33 RE 2019.** Counsel for the Respondent having no objection to the prayer, the court granted the leave.

Counsel for the Appellant argued a point of law in terms of **Regulation 19(2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulation, 2003** that assessors were not correctly involved because their opinions were not invited to form part of the proceedings. He expounded that assessors' opinion was not written but

there is only an acknowledgement of the chairman which is not enough.

Responding to the point of law raised by the counsel for the Appellant, counsel for the Respondent conceded that assessors opinion is not reflected in the judgement or proceedings. He argued that the remedy is to revert the file to DLHT for the matter to be heard afresh.

Certainly, **Section 23(2) of the Land Dispute Courts Act, Cap 216 RE 2019** provides as follows:

> " *(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***"

From the above provision of the law, it follows that the assessors are required to give out/state their opinion before the Chairman pronounces his/her judgement. More so **Regulation 19 (2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulation, 2003** requires every assessor who has been present at the conclusion of the hearing of the case to give his opinion in writing. The requirement of receiving of assessors' opinion as provided by the law has been extensively expounded by the Court of Appeal in the case of **Edina Adam Kibona Vs Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017

(CAT – Mbeya) which quoted with approval the principle enunciated by the Court in the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) where it was held thus:

> *"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, as earlier intimated, 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. Unfortunately, this did not happen in this case.* ***We are increasingly of the considered view that, 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 is mine]

In recapitulating the principle exemplified by the Court in the case of **Tubone Mwambeta (supra)**, the Court in the cited case of **Edina Adam Kibona Vs Absolom Swebe (Sheli) (supra)** stated that:

> *"We wish to recap at this stage that in trials before the District Land and Housing Tribunal,* ***as a matter of law, assessors must fully participate and at the conclusion of***

***evidence**, it 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 Kiswahili. **That opinion must be in the record and must be read to the parties before the judgment is composed**. For the 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 judgment. **However, in view of the fact that the record does not show that 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 useful purpose".*

Tailoring the above jurisprudential position with the proceedings on the instant case, it is conspicuous that when DW4 finished to give her testimony, the trial Chairman scheduled for a judgement date. There was no record indicating that he called for the assessors to read their opinion to the parties in court as stressed by the case law. Of course, the written opinions are in the court records, but still since there is no record

as to how they got into the records of the proceedings, therefore, the same have no purpose.

In all instances, the Court of Appeal nullified the proceedings and ordered a retrial. In the same spirit, I agree with both counsels and nullify the proceedings, judgement and the resultant orders in respect of Land Application No. 113/2018. I further order that an expedited trial be commenced before another Chairman with a new set of assessors. I give no order to cost as the flouting of procedure was caused by the Tribunal.

Accordingly ordered.

R.A. Ebrahim

Judge

Mbeya

06.10.2021