IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

LAND APPEAL NO. 9 OF 2021

(Originating from Land Application No. 5 of 2009 of District Land and Housing Tribunal for Rukwa at Sumbawanga)

HUSSEIN ALLY YUSUF.....APPELLANT

VERSUS

RAPHAEL SALEZ WANGU

(*Administrator of the Estate of Salez Wangu).....*.....**RESPONDENT**

JUDGEMENT

Date of Last Order:11/04/2022

Date of Judgement:29/04/2022

NDUNGURU, J

The appellant instituted a suit before the District Land and Housing Tribunal for Rukwa at Sumbawanga (the trial tribunal) seeking declaration order for the vacant possession of the suit premise and recovery of the land rents from 1992 to the day of handing over the premise. The appellant lost the suit, thus he appealed to this court.

The appellant came to this court with four (4) grounds of appeal;

1. That the trial chairman erred in law and fact to hold that the appellant testimony contradicts itself without considering that the appellant testimony was fully

supported by PW2 and corroborated by the comments of DW3.

2. That the trial chairman erred in law and fact to hold that the respondent did not sell the house in dispute without considering undisputed factual proof by the appellant that he purchased the house in dispute and got a land offer from the land authority.
3. That the trial chairman erred in law and fact to discredit the evidence tendered by the appellant in proving ownership of the house in dispute without considering the weight of the exhibit P3.
4. That the trial tribunal erred in law and fact to give judgement in favour of the respondent without considering the strength of the appellant's evidence tendered before the trial tribunal.

When the appeal was called on for hearing, the appellant enjoyed the legal service of Mr. Bartazar Chambi, learned advocate while the respondent had legal service of Mr. Kampakasa, learned advocate. Mr Chambi, learned advocate prayed to argue the appeal by way of written submissions.

Submitting in support of the appeal, Mr Chambi as regards the first ground submitted that the appellant sued the respondent in the trial tribunal claiming for vacant possession of the house in plot No. 30 Block G HD from the respondent who had refused to vacate after selling. He

submitted further that the appellant had adduced enough evidence to prove that he purchased the suit premise from the respondent. That the sale agreement was witnessed by several persons. Mr Chambi further submitted that the respondent on his part he never said anything as to how the letter of offer and receipts for the suit premise went into possession of the appellant.

As regards ground three, Mr Chambi submitted that he was of the position that the appellant did prove the ownership of the property under dispute.

As to the ground four, Mr Chambi submitted that trial Chairman was very wrong to decide in favour of the respondent without considering the strength of the evidence given by the appellant in proving his case.

On his part, Mr Kampakasa, learned advocate in reply submitted that the appellant disputed to have requested the appellant to have accommodated him, respondent's children in the disputed house. Furthermore, Mr Kampakasa submitted that the appellant denied the claim of requesting him to hand over house to him and that he resisted to do so, and prompted the appellant to file a suit or about 2008.

Mr Kampakasa further submitted that the appellant refuted the allegation of fraudulent deal as concerns report of loss of his letter of offer, which lacked proof. Further, he submitted that the sale agreement was not used to acquire letter of offer of a right of occupancy from the land office.

He submitted that the appellant never denied to have presented the affidavit to the Land Office stating that he purchased the said premise in 1991 in 1991 for the price of Tshs. 80,000/=. He submitted further that the claim by the appellant that the evidence of DW4 corroborates that of the appellant concerning the validity of ownership by the appellant is refuted. He prayed for the appeal be dismissed.

However, before pronouncing of the judgement, I perused the record and found the Hon Chairman of the trial tribunal one T.J Wagine heard the application with aid of two assessors, Mr T. Mkwama and A. Masonda. However, the Chairman fixed, at the conclusion of the hearing on 19/09/2013, a date of judgement without inviting the assessors to give opinion. Furthermore, the Chairman did not fix a date for the assessors to read out their opinion in the presence of the parties.

Surprisingly, on 07/11/2013 the quorum of the material date showed that the matter was presided by Hon Chairperson one F.

Chinuku and preceded with the matter without assigning reasons for the absence of the former chairman and informing parties of her takeover of the matter.

Thus, I summoned learned counsels for the both parties to address me on the issue of involvement of the assessors at the trial tribunal and on the correctness of the proceedings as hinted above.

Starting with Mr Chambi, learned advocate for the appellant submitted that according to section 23 of the Land Dispute Court Act, Cap 216, RE 2019, the tribunal is to be constituted by the chairman and not with less than two assessors and according to Regulation 19 (2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations, 2002, GN 174/2003 the tribunal when adjudicating is bound to have opinion of the assessors. He argued that looking at the proceedings before the trial tribunal; the record reveals that the trial started with two assessors. T. Mkwama and A. Masonda. The trial proceeded by changing the assessors now and then. He further submitted that the case proceeded by interchanging assessors now and then. He said even on 08/12/2009 assessors were new ones not the ones who were during the first hearing. On 03/06/2010 when the case was for hearing the new set of assessors were involved.

Mr Chambi submitted that the case commenced hearing on 24/08/2010 after framing issues. On that date the assessors were T. Mkwama and A. Masonda. On 30/12/2010 the assessors changed, then proceeded with T. Mkwama and A. Masonda. From 20/12/2011 the case came for mention continuously before the same assessors till 2012 when the defence case started. The assessors were T. Mkwama and A. Masonda till when the defence was closed and fixed for judgement. All that time the case was presided by Mr Wagine Chairman. The Chairman never invited the assessors to give their opinion. Then the case was shifted to Ms Chinuku chairperson with another set of assessors. Ms Chinuku ordered for retrial. On 17/04/2014 the case ordered for retrial in the presence of T. Mkwama and A. Masonda. On 14/07/2014 assessors were new. On 20/01/2015 the case was mentioned before former assessors then next before Mzindakaya and Mikese. He submitted that though judgement was delivered by Chinuku to his view it was composed by Wagine but Chinuku just delivered it. Yet still when the defence case was closed, assessors were not invited to give their opinion, which is against Regulation 19 of GN 174 of 2003. Thus, the judgement was against the law as per the case of **Sikuzani Said Magambo vs Mohamed Roble**, Civil Appeal No. 197 of 2018, unreported.

Mr Chambi argued that the irregularity in the above cited case is the same as in this case at hand. The whole proceedings are a nullity. He cited also the case of **Daud Makolo and Maureen Kitange vs Shaban Lyanga Mshollo**, Land Appeal No. 70 of 2018, unreported. In the judgement at hand, the chairman referred the opinion of the others which are not in the record. Nowhere it is shown that the opinion of assessors was read to the parties. Thus, the whole proceedings are a nullity.

Further, Mr Chambi submitted that the records show that the assessors were changing, if during mention, it has no effect to the parties but sometimes they changed during drawing of issues. That was an error because the ones during trial cannot know contentious matters.

As far as hand over and takeover of the chairpersons. The change was possible when there is reason apparent in record. He referenced the case of **Inter. Consult Ltd vs Mr. Nora Kassanga and Mathew Ibrahim Kasanga**, Civil Appeal No. 79 of 2015, unreported. The reason being that there was a delay in delivering of judgement. Thus, he found that the change and order of retrial did not affect any parties' right. The defect is only that upon the order of retrial the matter was not retried to the full but it went back again to the successor's chairman

without reasons being assigned. He argued that he was not certain which proceedings led to the composition of judgement. The first trial had no opinion of assessors while in retrial only applicant was heard, thus he found all the tribunal's proceedings a nullity.

In reply, Mr Kampakasa submitted that the case commenced on 03/03/2009 before Wagine Chairperson and Masonda and Mkwama assessors. The case proceeded till on 19/09/2013 with the assessors. When the case proceeded hearing the assessors were the same. The judgement was composed by the same chairperson one Wagine. Chinuku just delivered it. In the judgement at pg 5 he said to have differed with the opinion of one assessor. He said during the trial the assessors were the same except during mention where there were new set of assessors, thus he said the proceedings conducted by Wagine was proper. Further, he submitted that when Chinuku took over, she started afresh with another set of assessors. What Chinuku did was to deliver judgement composed by his fellow chairperson. The proceedings conducted by Mr Chinuku is a nullity but that of Wagine is proper. Thus, to declare it a nullity is miscarriage of justice. That the fact that chairperson referred to the opinion of assessors means the same was furnished to the chairman not the parties. He argued that from 2009 to

2013 is almost five years, thus the order for retrial was for giving fair trial to the parties.

Mr Kampakasa submitted that the proceedings of the chairman who took over was not proper thus be nullified. He said what Chinuku did was just to deliver judgement, thus he prayed for the proceedings of Wagine be taken to be proper, judgement of Chinuku is not in record. He further submitted that if the court is to declare proceedings a nullity just the opinion was not read will be occasioning miscarriage of justice. He submitted that Regulation 19 (2) of the Regulation be seen to have been complied with. And this court proceed to write judgement.

In rejoinder, Mr Chambi submitted that the submission by learned counsel for the respondent has no legal basis. He said the fact that the opinion is written and filed eis the requirement of law, but in the file no opinion was found. Also, he submitted that the opinion must be read to the parties. In the record the chairperson never requested/invited the assessors to give their opinion which is the requirement of the law. He prayed for the court to declare the judgement and proceedings a nullity.

Having considered the arguments of both learned counsels for both the appellant and the respondent, the crucial question for me to determine is whether the appeal has merit.

With due respect to the oral submissions addressed by the counsels for the parties, it is settled that the District Land and Housing Tribunal is properly composed when it sat with the Chairman and less than two assessors as provided with **section 23 (1) of the Land Disputes Courts Act**, Cap 216 RE 2019.

It is evident that from the trial tribunal's record that the Hon Chairman sat with two assessors, who were T. Mkwama and A. Masonda. However, the two assessors did not compose their written opinion and nowhere the same was filed and read to the parties.

It is a position of the law that, once a chairman of the trial tribunal failed to invite the assessors to write and read their opinion to the parties that omission vitiates the trial as it renders it a trial without assessors, thus, a fundamental defect. The stance was taken by the Court of Appeal in a number of its decision. See **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017, **Edina Adam Kibona vs Absolom Swebe**, Civil Appeal No. 286 of 2017 and **Sikuzani Said Magambo and Kirioni Richard vs Mohamed Roble**, Civil Appeal No. 197 of 2018, all unreported a few to mention.

In **Tubone Mwambeta vs Mbeya City Council**, (supra), the Court of Appeal held that it is very important for the Chairman to call

upon the assessors to give their opinion in writing and read the same to the parties. The Court of Appeal stated as follows: -

> "In view of the settled position of the law where the trial has to be 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 judgement 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."

It is therefore, the findings of this court that Hon Chairman omitted to invite upon the assessors to give their opinion in writing, and nowhere the opinion was read to the parties.

Relating the position of the law and the findings of this court as stated above, the trial tribunal failed to accommodate assessors in the hearing of the application, which is the clear violation of the **section 23 of the Land Disputes Courts Act**, Cap 216, RE 2019 and **Regulation 19 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations GN**. 174 of 2003. The omission is fatal and vitiates the proceedings, rendering it a nullity.

As a result, I nullify the proceedings and the judgement of the trial tribunal. I direct the application to be heard afresh immediately, before another Chairman and with new set of assessors. Each party to bear its costs as the matter is yet concluded between them.

It is so ordered.

D. B. NDUNGURU

JUDGE

29/04/2022