THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 85 OF 2021

(***Originating from the District Land and Housing Tribunal for Mbeya at Mbeya Application No. 157 of 2020 – Munzerere Chairman***)

NEEMA OSIAH MBEMBELA ..... APPELLANT

VERSUS

FURAHISHA MAHENGE ..... 1ST RESPONDENT

ISUMAIL SADIKI BARUTI ..... 2ND RESPONDENT

HIGHLAND AUCTION MART ..... 3RD RESPONDENT

JUDGMENT

Date of last order: 15/06/2022

Date of judgment: 21/06/2022

NGUNYALE, J.

The appellant is the administrator of the estate of her husband Sadick Ismail Baruti, the suit house was among the properties in the deceased estate. She sued the respondents over the suit house located at Tunduma which she claimed to be the owner of the same.

Briefly the facts giving rise to this appeal may simply be stated as follows; the 2nd respondent is the son of the late Sadick Isamail Baruti and the step son of the appellant. Both the appellant and the 2nd respondent were joint administrators of the deceased estate. The 1st respondent filed a Civil Case No. 40 of 2019 against the 2nd respondent before Tunduma Primary Court seeking payment of the money passed to the 2nd respondent as a loan. The said case ended in his favour so he was in the course of executing the decree against the 2nd respondent. Under orders of the primary Court which issued the decree, the third respondent attached the suit house No. TDM/MJGM/0593 which is located at Majengo Mapya Tunduma Momba District for sale in order to recover the decretal sum. The appellant was aggrieved with the execution process, the District Court advised her to file objection proceedings against the intended execution but she could not honour the advice, instead she preferred an Application No. 157 of 2020 before the District Land and Housing Tribunal for Mbeya at Mbeya praying for several reliefs including the declaration that she is the lawful owner of the suit land.

The Tribunal after the trial, on 27th day of September 2021 it ruled in favour of the respondents with costs on ground that the Tribunal had no jurisdiction to overrule the order of the Primary Court, the appellant ought

to entertain objection proceedings against the orders of the Primary Court which attached the suit house in order to establish that the said house cannot be attached because it is not the property of the 2nd respondent (The Judgment Debtor).

Aggrieved bye the decision of the trial Tribunal, she preferred the present appeal premising it on three grounds of appeal; -

One, the trial Tribunal erred in law and facts to determine the matters while disregarding the amended applications which joined necessary parties to the suit.

Two, the trial Tribunal erred in law and facts to declare the judgment in favour of the respondent despite the fact that it failed to constitute the opinion of the assessors as required by the law.

Three, the Tribunal vigorously erred in law and facts for not considering evidence that the applicant has used the suit house for many years.

The appeal was heard by written submissions, both parties filed timely their respective submission according to the scheduling order. The appellant submitted that the loan which the second respondent took from the 1st respondent was taken on his own. There was no agreement among the members of the family to take the same. The trial Tribunal failed to

constitute the opinion of the assessors as required by law. The primary Court which dealt with the case at Tunduma had no authority to hear and determine it.

The 1st and 3rd respondents jointly enjoyed the service of Joyce M. Kasebwa learned advocate who submitted that the trial Tribunal was right to rule that it had no jurisdiction to hear the matter arising from Primary Court, the applicant ought to object the execution before the said Primary Court.

On the complaint that the Tribunal failed to indicate assessors' opinion in the judgment the Counsel for the 1st and 3rd respondent conceded to the anomaly but she was of the view that the mistake is curable. She submitted that the assessors prepared their opinion and they were read to the parties, the only problem is that they were not included in the judgment. The fact that they were not included in the judgment Ms. Kasebwa submitted that it is curable by what she called 'oxygen principle' or overriding objectives as per amendments done in the Civil Procedure Code, Cap 33 R. E 2019 by the Written Laws (Miscellaneous Amendments) (No. 3) (Act No. 8 of 2018) of which provisions of section 45 of the Land Dispute Courts Act embraces the same. The mistake does not go to the root of the matter.

The respondents referred the Court to the case of **Litelimbe Tembela vs. The Registered Trustee s of Chama Cha Mapinduzi**, Land Appeal No. 89 of 2021, High Court of Tanzania at Mbeya (unreported) where the Court observed that;

> *"... the case to be tried from the stage of availing opinion of assessors to the parties whereby the same set of assessors shall give their opinion. Thereafter a fresh judgment shall be composed by the same chairman or another in case the presiding Chairman is not available"*

Guided by the above decision Ms. Kasebwa submitted that it was their view that because assessors' opinion was heard at the Tribunal, it is only that the Chairman did not include them in the judgment, then the matter should be remitted back to the Tribunal for a fresh judgment to be composed by including the opinion of the assessors and nothing else as far as this appeal is concerned.

In rejoinder the applicant opposed the position of remitting the file for composing judgment afresh by including the opinion of the assessors. she was of the view that the effect of judgment which lack the opinion of the assessors vitiates the proceedings. She submitted that it would be erroneous to say that the same set of assessors and the same chairman to determine the case. She referred to section 24 which make it

compulsory for the Chairman to account for the opinion of the assessor in the decision and to state reasons for differing with them.

On the point she referred to the case of **Edina Adam Kibona vs Absolom Swebe (Sheli)** Civil Appeal No. 286 of 2017, Court of Appeal of Tanzania at Mbeya (Unreported), the Court, quoting the case of **Tubone Mwambeta vs Mbeya City Council**, Civil Appeal No. 287 of 2017, Court of Appeal Sitting at Mbeya (unreported), the Court had the following observation at page 5 of the judgment; -

> *"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"*

She went on to submit that on the matter at hand the appeal should be allowed because there are serious irregularities. She prayed the Court to nullify the whole of the proceedings, judgment and decree thereof and order the same be heard by another Chairman and different assessors.

The Court has heard the rival submission of the parties hence it proceeds to determine the appeal by considering the grounds of appeal guided by law and practice.

The first ground of appeal the appellant complained that the trial Tribunal could not consider the amended application which joined the necessary parties to the suit. The Court will not attempt to answer the first ground of appeal because neither the appellant nor the respondents submitted on the very ground of appeal. The fact that the parties could not bother to submit on the same, the ground of appeal is simply ignored.

The centre of complaint in the second ground of appeal is that the Tribunal failed to constitute the opinion of the assessors as required by the law. The appellant could not submit much about this ground of appeal to substantiate his argument but the respondent conceded that the opinions of the assessors were not involved in the Judgment of the trial Tribunal. In order to appreciate on the role of the wise assessors in this case it is prudent to consider the position of the law. In the present case the assessors were involved during trial as rightly submitted by the 1st and 2nd respondent but the only defect the assessor's opinion were not considered in the judgment of the Tribunal. Section 24 of the Land Dispute Courts Act Cap 216 R. E 2019 provides; -

> *"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

The above provision provides a clear guide that the Chairman shall take into account of the opinion of the assessors though he is not bound by it. in the present case the judgment is silent about the opinion of the assessors. It is not in dispute that the learned Chairman could not consider the opinion of the assessors in his judgment. The fact that it is obligatory for the Chairman to take into account of the opinion of the assessors, it is without doubt that the judgment is a nullity. I agree with the Counsel for the 1st and 3rd respondent that the proper remedy was to remit the records to the trial Tribunal for compliance with section 24 of the Land Disputes Courts Act, but for the reasons which will be apparent later I will depart from the relief suggested by the learned Counsel.

The trial Tribunal dismissed the application for the obvious reason that the Tribunal had no jurisdiction. The appellant in his submission avoided to invoke a discussion on the issue of jurisdiction of the District Land and Housing Tribunal for Mbeya at Mbeya, instead she submitted that the Primary Court had no jurisdiction to consider the dispute before it. Ms. Kasebwa for the 1st and 3rd respondents was of the firm view that the trial Tribunal had no jurisdiction, the appellant ought to entertain an application for objection proceedings before the Primary Court.

According to the records it is obvious that the suit house was among the properties within the estate of the late Sadick Ismail Baruti the husband of the appellant. The fact that the deceased property was attached in execution in Civil Case No. 40 of 2019 the appellant ought to entertain objection proceedings relying on the reason that the suit property was not the property of the 2nd respondent instead it was a property subject to Probate and Administration of the Estate of the late Sadick Ismail Baruti. So, the only avenue to challenge the attachment of the said property was to file objection proceedings against the decree and attachment order issued in Civil Case No. 40 of 2019 by the Primary Court of Tunduma. The District Land and Housing Tribunal had no jurisdiction to overrule the decision of the executing Court.

Be it as it may, I am settled in my mind that the appellant was to file an application in a way of objection proceedings and not an Application before the District Land and Housing Tribunal as he did to seek declaration that she is the lawful owner of the suit property. It is a settled law that the Court which has jurisdiction to determine ownership of the deceased property is the Probate and Administration Court see **Mgeni Seifu vs. Mohamed Yahaya Khalfan**, Civil Application No. 1 of 2009 Court of Appeal of Tanzania at Dar es Salaam. Suppose in the objection

proceedings it might appear that ownership is still a problem the proper channel will be to seek determination through a probate and administration court and not the District Land and Housing Tribunal as she did. The issue of jurisdiction is sacrosanct it cannot be left unnoticed, to be in use of the suit house for so long cannot guarantee ownership to the appellant.

In the end result, the trial Tribunal besides composing judgment without including the opinion of the wise Assessor of the Tribunal it had no jurisdiction as it ruled out. Lack of jurisdiction attracts the Court to avoid remitting the records to the trial Tribunal for compliance of section 24 of the Land Courts Disputes Act Cap 216 R. E 2019 by including the opinion of the wise assessors instead it invokes its revisional jurisdiction under section 43 (1)(b) and (2) of the Land Disputes Courts Act Cap 216 R. E 2019 to nullify proceedings and set aside consequential orders.

If the appellant wishes to further pursue her rights, she may institute a fresh cause in a court of competent jurisdiction subject to time limitation.

Dated at Mbeya this 21st day of June 2022.

D. P. Ngunyale
Judge
21/06/2022