IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 31 OF 2021

(C/f Misc. Application No. 81 of 2014 of the District Land and Housing Tribunal of Moshi)

JOACHIM MUNISHI ..... APPELLANT

VERSUS

TREASURY REGISTRAR..... RESPONDENT

JUDGMENT

20/4/2022 & 16/6/2022

SIMFUKWE, J.

The Respondent herein filed Application No. 81 of 2014 before the District Land and Housing Tribunal of Moshi (trial tribunal) claiming that the appellant herein had trespassed into their 23 acres being part of Farm No. 1252 locally known as Kinamodo Farm with Certificate of Title No.19013, L.O No.213307 located at Ngarenairobi, West Kilimanjaro Area, within Siha District in Kilimanjaro Region. The matter was heard inter parte and the applicant therein closed their case. It was then scheduled for defence hearing. However, the respondent's counsel did not appear for two consecutive dates but the respondent appeared. The trial chairman closed the case without hearing the defence side and prepared the judgment. Dissatisfied, the appellant filed the instant appeal on the following grounds:

1. *That, the Honourable trial Tribunal chairman erred in law and fact for failure to consider that the Appellant's advocate was attended (sic) burial ceremony and thus constitute good cause for adjournment.*
2. *That, the trial Tribunal erred in law and fact when neglected/refused to adjourn the case in order to allow the Appellant to prepare himself for defence taking into account that all documents relevant in the case are within the custody of his advocate, thus denied the Appellant's right to a fair trial. (sic)*
3. *That, the trial Tribunal erred in law and fact when neglected/refused to allow the Appellant to search for the service of other advocate without any reasons (sic) and entered judgment while defence was not heard thus the Appellant was condemned unheard.*
4. *That, the Honourable trial Tribunal chairman erred in law for delivering the judgment without addressing the issue regarding the variance in the composition of assessors.*
5. *That, the trial chairman of the Tribunal erred in law and fact when failed to require the assessors present at the conclusion of the trial to give their opinion in writing before making his final judgment as required under Regulation 19(2) of GN No.174/2003.*
6. *That, the trial chairman of the Tribunal erred in law for entertained (sic) the matter which it had no jurisdiction.*

The appeal was argued *viva voce*, the appellants were represented by Mr. Tumaini Materu learned advocate, whereas the respondent was represented by Ms. Glorian Isangya, the learned State Attorney.

Mr. Tumaini Materu prayed to abandon the 5th ground of appeal and opted to argue the 1st, 2nd and 3rd grounds of appeal jointly.

Under the 1st, 2nd and 3rd ground of appeal, Mr. Materu submitted that before the trial Tribunal, the appellant was represented by an advocate except on 3/2/2021 when the learned advocate did not appear as he had attended a funeral of Padre Massawe. That, the learned advocate directed his client to inform the Tribunal. However, the chairperson refused to adjourn the matter on the reason advanced by the appellant. Instead, he forced the appellant to proceed with the hearing of the defence case in the absence of his counsel which was difficult for the appellant having in mind the fact that all relevant documents were with his counsel. Thus, the appellant failed to proceed. That, the Chairperson closed the defence case while the defence side had not testified, which denied the appellant right to be heard.

The learned advocate for the appellant continued to submit that, being bereaved is not something which is planned by someone, thus the same was a good reason to adjourn the matter. In that regard, Mr. Materu was of the view that the 1st, 2nd and 3rd grounds of appeal have merit. That, the tribunal was obliged to adjourn the matter so that the appellant could be accorded right of representation or to get his relevant documents from his advocate.

It was Mr. Materu's prayer that the 1st, 2nd and 3rd ground of appeal be allowed and the decision of the trial Tribunal be nullified and the matter be ordered to be tried de novo.

Submitting in respect of the 4th and 6th grounds of appeal, Mr. Materu argued that the trial Tribunal had no jurisdiction to entertain the matter on the following reasons; First, pursuant to the law where the Treasury Registrar is sued, the Attorney General should be joined as a necessary party to the case. However, in Application No. 81 of 2014, the Attorney General was not joined as a party as required by the law. Thus, it vitiates all the proceedings of the trial Tribunal.

Mr. Materu submitted further that, as per page 22 of the typed proceedings of the trial tribunal, on 26/3/2020 the State Attorney one Rashid Mohamed prayed to amend the application for the sake of replacing Consolidated Holding Corporation by the Treasury Registrar. That, such prayer was granted and the Treasury Registrar replaced the Consolidated Holding Corporation. Also, Mr. Materu submitted that, **section 3 of The Treasury Registrar (Powers and Functions) Act, Cap 370 R.E 2002** was amended by **Written laws (Miscelleneous Amendment Act (No.3) 2016** where **section 40(3)(4) and (5)** were added. Subsection 3 provides that the Attorney General shall have the right to intervene in any suit or matter against the Treasury Registrar. Section 3(4) of the same Act provides that:

> *"Where the Attorney General intervene in any matter in pursuance of subsection (2) the provisions of the Government Proceedings Act shall apply- in relation to the proceedings of that suit or matter as if it had been instituted by or against the Government."*

Also, **section 3(5)** of the same Act provides that:

> *"For the purposes of subsection (3) and (4) the Treasury Registrar shall have a duty to notify the Attorney General of any in pending suit or intention to institute a suit or matter by or against the Treasury Registrar."*

Basing on the above provisions, Mr Materu argued that, the same has been couched in mandatory terms. Thus, since the Attorney General was not joined as a party and having in mind the fact that the Attorney General is a custodian of all public property, then the proceedings of the trial tribunal were a nullity.

Also, Mr. Materu referred at page 3 of the typed proceedings of the trial tribunal and argued that the applicant was Consolidate Holding Corporation. That, on 26/1/2015 the advocate who was representing the Applicant prayed to disqualify himself in order to allow the Attorney General to take over as representative of Treasury Registrar. Thereafter, the matter proceeded for mention till when the State Attorney one Rashid Mohamed prayed to amend the pleadings by substituting the Consolidate Holding Corporation with the Treasury Registrar. The learned advocate meant that when the pleadings were amended, the Treasury Registrar was supposed to notify the Attorney General to be party of the case. He was of the view that being represented by the State Attorney does not mean that the Attorney General has been joined. That is a mere representation.

The learned advocate referred to the **Black's Law Dictionary** which defines the word *'Intervention'* to mean:

"The proceedings of a third person, who not being originally a party to a suit, but claiming an interest in the subject matter in dispute in order the best to protect such interest."

Mr. Materu was of the view that the intervention under subsection 3 means that the Attorney General should be joined as party of the case. To substantiate these views, he referred to case of **Treasury Registrar vs A.C. Gomez (1997) Limited, Misc. Commercial Application No.71 of 2018** where the Honourable Judge at page 13 and 14 held that the Attorney General should be joined as a party of the case. That, the proceedings in which the Attorney General was not joined were nullified.

In respect of the ground of jurisdiction, the learned advocate for the appellant submitted that the trial tribunal had no jurisdiction to determine the matter which was before him for the reason that the Tribunal was not properly constituted. He argued that the composition of the trial tribunal according to **section 23(1) and (2) of the Land Disputes Court Act, Cap 216 R.E 2019** is the Chairman and at least two assessors. **Section 23(2)** of the same Act provides that the trial tribunal shall be duly constituted when held by a chairman and two assessors who shall be required to give out their opinions before the chairman compose the judgment. Mr. Materu insisted that the section is couched in mandatory terms.

That, in the instant matter as per the coram found at page 26 of the typed proceedings of the trial tribunal, the assessors were absent. In the circumstances, the learned counsel formed the opinion that the Chairperson had no powers to determine the matter alone. Thus, there was violation of the law, meaning the proceedings, judgment and decree were a nullity. He backed up his argument by referring to the case of

Edina Adam Kibona vs Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017, CAT at page 2,3,4 and 5 in which the Court quoted the case of **Tubone Mwambeta vs Mbeya City Council, Civil Appeal No.287 of 2017** (unreported) which held that:

> *"In view of the settled position of the law, where the trial has to be conducted with the aid of assessors.....they must actively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed."*

It was further submitted that at page 6 of the case of **Edina Adam Kibona** (supra) it was held 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."*

The learned advocate stated that in the said case of **Edina** (supra) the decision and proceedings of the District Land and Housing Tribunal were nullified and the matter was ordered to be tried de novo.

Moreover, the appellant's counsel also referred to the cases of **Sikuzani Said Magambo and Another vs Mohamed Roble, Civil Appeal No.197 of 2018,** CAT at Dodoma and **Mwita Swagi vs Mwita Geteba, Misc. Land Case Appeal No.36 of 2019** where the above position was supported.

In concluding his submission, it was Mr. Materu's argument that since the 4th and 6th grounds of appeal are points of law and there was violation of the law, it vitiates the proceedings, judgment and decree and the remedy is to order retrial of the matter by another Chairman with new set of assessors. He prayed their grounds of appeal to be allowed and the matter be ordered to be tried de novo.

In her reply Ms. Glorian Isangya for the respondent in respect of the 1st ground of appeal that the advocate of the appellant was attending a funeral, it was submitted that the said advocate was obliged to inform the court either by a letter or at least his client should have stated that his counsel was bereaved by whom one. That, at page 32 of the trial Tribunal proceedings, on 8/12/2020 the appellant just said that his advocate is a priest and he had gone to attend a funeral. However, prior to that at page 31 the appellant prayed for adjournment on allegation that his advocate was not reachable. Thus, it is obvious that the appellant had no good reasons for adjourning the matter. That's why the Tribunal required him to defend himself.

To support this point, the learned State Attorney referred to **Regulation 13 (2) of the Land Dispute Courts** which provides that:

> *"Where the party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the Tribunal may require the party to proceed himself and if he refuses without good cause, to give the evidence to establish his case the Tribunal may make an order that*

the application be dismissed or make such other order as may deed appropriate."

She submitted further that according to the above Regulation, page 33 at paragraph 5 of the trial Tribunal proceedings, the appellant said:

"I have said I am not ready to make my defence today, without being led by my counsel."

Basing on this argument the learned State Attorney was of the view that it is obvious that the appellant was accorded right to defend himself but he said that he was not ready. Thus, the Tribunal granted the prayer of the counsel of the adverse party. Therefore, the first ground has no merit.

On the second ground which is to the effect that the appellant was not given time to prepare for defence, it was submitted that the matter was adjourned more than once but the appellant refused to defend himself as seen at page 33 of the proceedings. Thus, it was the learned State Attorney's comment that the second ground lacks merit and the same cannot cause the matter to be ordered to be tried de novo.

Under the 3rd ground of appeal in respect of allegation that the appellant was not given time to find another advocate, Ms. Glorian argued that in the trial proceedings the appellant never prayed to be granted time to find another advocate. Therefore, the Tribunal could not assume something which was not prayed for.

Submitting on the fourth ground of appeal which concerns variance in the composition of assessors, the learned State Attorney stated that the same has no merit since the composition of the Tribunal was correct. She maintained that the tribunal was composed by one Chairman and two assessors. That, from page 22 of the trial proceedings when the matter

was set for defence hearing, the Chairperson was present together with assessors (T. Temu and J. Mmasi) who were present and they proceeded to appear throughout the proceedings.

Ms. Glorian vehemently opposed the issue of ordering the matter to be tried de novo because the assessors participated in the proceedings of this matter. That, at page 3, 1st paragraph of the tribunal's judgment the Chairperson noted that the assessors had given their opinion and that he agreed with the said opinions.

Regarding the 6th ground of appeal that the Tribunal had no jurisdiction to determine the matter and that the Attorney General should have been party of the case, where the appellant's counsel referred to the **Treasury Registrar (Power and function) Act,** (supra) and its amendments of 2016; Ms. Glorian opposed the same on the reason that **section 3** of the cited law had no part which concerned joining the Attorney General as party to the case. That, the same was added in the amendment of 2016, by then this matter had already been instituted in 2014 prior to the said amendments. Also, the office of the Solicitor General had not been established.

Regarding the issue that the State Attorney one Rashid representing the Treasury Registrar did not mean that the A.G. was joined as a party; Ms Glorian stated that since Rashid was a State Attorney, it was not mandatory to join the Attorney General as a party.

Concerning the advocate of Consolidate Holdings Corporation disqualifying himself, the learned State Attorney submitted that the same was normal thing since no private counsel defends the interests of the Government.

The learned State Attorney prayed this court to dismiss this appeal.

In rejoinder, Mr. Materu for the appellant reiterated his submission in chief under the 1st ground of appeal. He insisted that the appellant told the tribunal that his counsel was bereaved by his fellow counsel and was attending a funeral. He added that **Regulation 13 (2) of the Land Disputes courts (The District Land and Housing Tribunal Regulation,** (supra) requires the Chairperson to order the applicant to proceed with the matter if his advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal. It was his opinion that since there was a good cause of being bereaved, the trial Chairperson was supposed to adjourn the matter. Otherwise, the appellant was denied right to be heard having in mind the fact that the appellant had never missed / failed to appear before the tribunal.

He implored the court to find that the appellant had advanced sufficient ground before the trial tribunal and reverse the decision of the trial tribunal.

Concerning the issue of absence of assessors, Mr. Materu emphasized that as per page 26 of the trial tribunal proceedings on 23/11/2020 the Chairperson proceeded with the hearing of the case in the absence of assessors. This renders the proceedings a nullity which is a ground for this court to set aside the decision of the trial tribunal. On that basis, it was the learned counsel's prayer that the court should allow this appeal so that the appellant may be accorded right to be heard.

After going through the parties' rival submissions and the trial tribunal's records, the only issue for determination is whether this appeal has merit. This issue will resolve all the grounds of appeal.

Under the 1st, 2nd and 3rd grounds of appeal, the appellant condemned the trial chairperson for entering judgment without hearing the defence case thus curtailed his right to be heard.

As per the trial tribunal's records the case was adjourned for defence hearing on 8/12/2020. However, on that date, the respondent's advocate did not appear and the respondent prayed for adjournment on the reason that he did not know the whereabout of his advocate. The chairman adjourned till 3/2/2021. On that date, the respondent was present but his advocate was again absent on the reason that his advocate was a priest and he had gone to attend a funeral. He thus prayed for adjournment and that he was not ready to proceed without his advocate. His prayer was objected by the State Attorney for the applicant. The appellant in his rejoinder insisted that he was not ready to proceed without being led by his counsel. The learned Chairman ordered the case to be closed and subsequently read the opinions of assessors and thereafter continued to deliver the judgment.

Under **Regulation 13(2) of GN 174 of 2003** it is the discretion of the tribunal to dismiss the application or to make any order where it appears that the party's advocate is absent for two consecutive dates without good cause. For ease reference the provisions reads:

> *"Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal,* ***the Tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case,*** *the tribunal may make*

an order that the application be dismissed or make such other orders as may be appropriate." Emphasis added.

According to the records, it is true that the learned advocate for the respondent did not appear for two consecutive dates. However, on the second time it was reported that the learned advocate was attending the burial ceremony since he was a priest.

Considering the fact that the respondent in all dates entered appearance with his advocate, it suggests that he eagerly wished to pursue his rights. His reason for refusal to make his defence was genuine. As rightly submitted by the appellant's counsel that there was a good cause of being bereaved then the trial Chairperson was supposed to adjourn the matter considering that the applicant and his advocate had never missed previously.

As per the above provision, this was a good reason which ought to have been considered by the trial Chairman in adjourning the case instead of ordering the case to be closed and entered judgment.

Justice requires that unless there are special reasons to the contrary, the case should be determined on merits to its finality. In the case of **Cropper V Smith (1884) 26 Ch D 700** it was held that:

> *"It is well established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their rights. I know of one kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct if it can be done without injustice to the other part. Court does not exist for the sake of disciplines but for the sake of deciding matter in controversy."*

Also, in **Mwanza Director M/S New Refrigeration Co. Ltd v Regional Manager of TANESCO Ltd & Another [2006] TLR 329** it was held that:

> *"What amounts to non-appearance depends on the particular circumstances of each case."*

Onder the 6th ground of appeal, the learned counsel for the appellant faulted the respondent for failure to join the Attorney General. He cited different authorities to that effect. To the contrary, the learned State attorney argued that such requirement of adding the Attorney General was made in the amendment of 2016 after the institution of this case. It is undisputed fact that the case was prosecuted by the learned State Attorney. It also undisputed fact that the requirement to join the Attorney General was made in the amendment of 2016. Thus, I agree with the learned State Attorney that there was no requirement of adding the Attorney General as the party. Moreover, considering that the Attorney General intervened the matter as required under **section 3 of The Treasury Registrar (Powers and Functions) Act, Cap 370 R.E 2002** and the Attorney General prosecuted the case; I am of considered view that the aim of the amendment of 2016 of making it mandatory to join the Attorney General in any case is to safeguard the substantive rights of the government in any case instituted before the court of law. Whenever the law affects substantive rights, then the same cannot act retrospective. See the case of **Director of Public Prosecutions vs Jackson Sifael Mtares and 3 Others, Criminal Appeal No 2 of 2018** which stated that:

> *"Normally, it may not be made to apply retrospectively where the said legislation affects the substantive rights of*

the potential victims of that new law. On the other hand, however, if it affects procedure only prima facie it operates retrospectively unless there is good reason to the contrary."

Basing on the above argument, it goes without saying that the 6th ground of appeal has no merit. However, considering the fact that the 1st, 2nd and 3rd grounds of appeal has been answered in affirmative, then I am of considered view that the trial Chairman erred by closing the defence case without hearing the appellant and curtailed the appellant right to be heard. This suffices to allow the appeal.

In the circumstances, I allow the appeal. I quash the order and the proceedings which denied the appellant right to be heard. I hereby order the file to be remitted to the trial tribunal for the same to proceed with defence hearing.

Considering the circumstances of this case, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 16th day of June, 2022.

S. H. SIMFUKWE

JUDGE

16/6/2022