IN THE HIGH COURT OF TANZANIA

SHINYANGA DISTRICT REGISTRY

AT SHINYANGA

LAND APPEAL NO. 72 OF 2021

DILU DUMA.....APPELLANT

VERSUS

MAYUNGA SABUNI .....RESPONDENT

[Appeal from the decision of the District Land and Housing Tribunal of Maswa.]

(Hon. J.F. Kanyerinyeri, Chairman.)

dated the 18th day of November, 2021
in
Land Application No. 38 of 2020

JUDGMENT

15 & 24th August, 2022.

S.M. KULITA, J.

This is an appeal from the District Land and Housing Tribunal of Maswa. The story behind this appeal in a nut shell is that, the appellant herein, Dilu Duma sued the respondent one Mayunga Sabuni over the land sized 60 acres situated at Mwabalogi Village

within Maswa District in Simiyu Region claiming that it is belongs to him. On the other hand the respondent resisted the allegation. He also claimed to be the lawful owner of the suit land, asserting that the same had been purchased by his late father in 1974 and it is has been used by his family members since then.

Aggrieved with the decision of the Tribunal, the Appellant herein preferred this appeal relying on five grounds which can be summarized into the following four: **First**, there was no evidence on the descriptions of boundaries for the disputed land; **secondly,** the tribunal disregarded the testimony of the Appellant and wrongly considered the testimony of DW2 who was unreliable; **Thirdly**, there was no evidence from the local officials nor neighbors to justify the respondent's allegations over the suit land; **Fourthly**, the Tribunal's judgment did not base on the evidence available in the record that the respondent is a trespasser and the appellant is still occupying and cultivating the suit land.

The appellant is represented by Mr. Shaban Mvungi while the Respondent is unrepresented.

From the very outset, on 24th August, 2022 when the matter was placed before me for hearing, I prompted the parties to address the court as to whether the suit was appropriately handled and decided by the trial Tribunal. More particularly on the following

two issues: **first**, compliance of section 23(2) of the Land Disputes Courts Act [Cap. 216 RE 2002] and Regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which requires the Assessors to give their opinion after completion of trial, before judgment; **Secondly,** contradiction on the decision of the trial Tribunal's judgment.

Starting with the issue of assessors' opinion, it is on record that, from 4th June, 2020 to the completion of the trial on 18th November, 2021 the Chairperson sat with two assessors, namely, Ramadhani Chambulilo and Zuhura Mageuza, who assisted him throughout the trial, to give their opinion as required by section 23(2) of the Land Disputes Courts Act [Cap. 216 RE 2002] and Regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003.

However, the record transpire that the said Chairperson did not invite the said assessors to give their opinion. The said chairperson just proceeded to schedule a date on which the judgement would be pronounced. However, while composing his judgement the Chairperson made reference to the opinion of the said assessors.

Another thing that I had noted from the records and I asked the parties to address me is about the legality of the impugned

judgment. The same transpires that after full trial, the Tribunal made a contradictory decision. At page 7 of the typed judgment the Chairman decided the matter on favor of the appellant, that he is the lawful owner of the suit land. In the same judgment at page 8 the Chairman decided for the Respondent, that the suit land belongs to him and the Appellant ordered to vacate the premise. As such, I invited the parties to address us on the following issues:-

(i) Whether the opinion of assessors were sought and properly recorded in the Tribunal's proceedings in terms of Regulation 19(2) of the Regulations; and

(ii) Whether the judgment of the trial tribunal is lawful and whether the same is executable.

In his submission in respect of the second issue, Advocate for the Appellant Mr. Shaban Mvungi conceded with the fact that the Tribunal's judgement is confusing as so narrated by this court. He said that it is contradictory as to who is the winner.

On the issue of assessors' opinion, Mr. Mvungi submitted that the said opinion were not indicated anywhere in the Tribunal's proceedings, despite of being reflected in the Tribunal's judgement. He further argued that, it is not clear as to whether the said assessors gave the said opinion on the matter.

Due to those anomalies and irregularities, Mr. Mvungi urged the court to invoke the revisionary powers under **section 44(1)(b) of the Magistrate Court Act [Cap 11 RE 2019]** and nullify the entire proceedings of the Tribunal and quash its decision because, he said, it is nothing, but a nullity.

In response, the Respondent, Mr. Mayunga Sabuni went along and supported the submission made by Mr. Mvungi. He also urged this court to nullify the entire proceedings of the Tribunal.

Having examined the record of the Tribunal and considered the submissions made by both parties, I am satisfied that there was a gross mishandling of the suit by the trial Tribunal.

As for the first issue, that is the failure by the chairperson of the Tribunal to accord the opportunity to the assessors to make their opinion, I find it appropriate to reproduce the contents of provisions of **section 23(1) and (2) of the Land Disputes Courts Act [Cap. 216 RE 2002] Act.** The said section provides;

> ***"(1) The District Land and Housing Tribunal*** *established under section 22* ***shall be composed of one Chairman and not less than two assessors;*** *and*

(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". [Emphasis supplied].***

In addition, **Regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** impose a duty on a chairperson to require every assessor, at the conclusion of the trial of the suit, to give his or her opinion in writing before making his final judgement on the matter. The said **Regulation 19(1) and (2)** provides;

"(1) The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgement on the spot or reserve the judgement to be pronounced later;

(2) Notwithstanding sub-regulation (1) ***the chairman shall, before making his judgement, require every assessor present at the conclusion of hearing to give his opinion in writing*** *and the assessor may give his opinion in Kiswahili"* ***[Emphasis added].***

The above provisions have been considered and interpreted by the Court of Appeal in several occasions. See for instance cases of **General Manager Kiwengwa Strand Hotel v. Abdallah Said Mussa, Civil Appeal No. 13 of 2012**; **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015**; **Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 of 2017**; **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017** and **Y.S. Chawalla & Co. Ltd v. Dr. Abbas Teherali, Civil Appeal No. 70 of 2017**.

In **Ameir Mbarak and Azania Bank Corp (supra)** the Court of Appeal noted that the record of the trial proceedings did not show if the assessors were accorded the opportunity to give their opinion as required by the law, but the chairperson only made reference to them in his judgment, as observed in the current case. In the said case the court stated that;

> *" in our own considered view,* ***it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the Chairman in the judgement****. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the Tribunal's*

judgment and ***this was a serious irregularity".*** ***[Emphasis added].***

Likewise, in **Tubone Mwambeta (supra)** in underscoring the need to require every assessor to give his opinion and the same be recorded and be part of the trial proceedings, the Court of Appeal observed that:-

> *"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]***

In the matter at hand, as I have vividly demonstrated above and also alluded the parties, when the Chairperson of the Tribunal

closed the defense case, he did not require the assessors to give their opinion as required by the law. It is also on record that, though, the opinion of the assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is my considered view that, since the record of the Tribunal does not show that the assessors were accorded the opportunity to give their opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal's judgement. It is also my view that, the said opinion was not availed and read out in the presence of the parties before the said judgement was composed.

In my view, the above pointed omissions and irregularities amounted to a fundamental procedural errors that occasioned to a miscarriage of justice to the parties. They also vitiated the proceedings and the entire trial before the Tribunal.

These points suffice to dispose of the matter and I find it unnecessary to dwell on discussing the remaining irregularities found in the Tribunal's record, particularly the judgement. Suffice, to point out that even the decree emanated from the said judgement is non-executable for being construed from the defective judgment. In the event, I am constrained to invoke my revisionary jurisdiction under **Section 44(1)(b) of the**

Magistrate Court Act [Cap 11 RE 2019]. In so doing, I hereby nullify the entire proceedings and quash the judgement of the trial Tribunal and the subsequent orders thereto. If any of the parties is interested, he is at liberty to institute a fresh suit before the Tribunal, subject to the law of limitation. I further order that if the suit is re-filed, it should be entertained by another Chairperson with a new set of assessors. As the anomalies and irregularities giving rise to the nullification were raised *suo motto* by the Court, I make no order as to costs.

S.M. KULITA
JUDGE
24/08/2022

DATED at **SHINYANGA** this 24th day of August, 2022.

S.M. KULITA
JUDGE
24/08/2022