IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

LAND APPEAL NO. 5 OF 2021

(Originating from Land Application No. 74 of 2012,

Tabora District Land and Housing Tribunal)

ISSA RAMADHANI ..... APPELLANT

VERSUS

FRANCIS RAMADHANI NJAU .....1ST RESPONDENT

THE DIRECTOR, BUYUNI CO. LTD.....2ND RESPONDENT

Date of Last Order: 03.11.2022
Date of Judgment: 30.11.2022

JUDGMENT

KADILU, J.

The appellant was the first respondent in Land Application No. 74 of 2012 at Tabora District Land and Housing Tribunal. The first respondent was the applicant in that case. The dispute was over a piece of land situated in Igunga district. The said land was sold by the 1st respondent to the 2nd respondent at Tshs. 10,000,000/= for the purpose of constructing dairy industry. The appellant alleged that the 1st respondent had no title over the disputed land, so he could not sell it to the 2nd respondent. After full trial, the 1st respondent was declared a lawful owner of the disputed land. The appellant was ordered to refund the 2nd respondent the purchase price and pay costs of the case. Dissatisfied by that decision, the appellant has preferred this appeal basing on four grounds as reproduced hereunder:

1. *That, since the assessors' opinion was not read to the parties in the tribunal before judgment could be composed, the proceedings of the tribunal and judgment thereof are nullity.*
2. *That, the trial tribunal proceedings and decision thereon are a nullity for being conducted in violation of fundamental principles of trial with the aid of assessors upon the tribunal being constituted and presided over by different assessors during the trial of the said land application.*
3. *That, the learned Chairman allowed the assessors to cross-examine witnesses contrary to the law.*
4. *That, the learned Chairman erred in law by misdirection and non-direction in evaluating evidence on record which error led to a wrong decision in favour of the 1st respondent.*

The appellant prayed for the appeal to be allowed with costs. He urged the court to quash decision of Tabora DLHT and its resultant orders. He also prayed the court to order retrial of the case by the tribunal, but before another Chairman and a different set of assessors. In alternative, the appellant prayed for the court's reversal of the tribunal's decision and decide the case in favour of the appellant.

When the appeal was called for hearing, the appellant was represented by Ms. Flavia Francis, learned Advocate whereas both the respondents were absent despite the fact that the first respondent was duly served. The record indicates that Advocate for the first respondent filed a reply to the petition of appeal. Moreover, the said Advocate, one Mr. Ally Maganga had appeared only once on 7/6/2022 when the matter came for mention. Ms. Flavia informed the court that the second

respondent which was a company had closed its business in Tanzania and its whereabouts is unknown. She prayed the hearing of the appeal to proceed exparte, a prayer which the court granted unconditionally.

It is my considered opinion that the right to be heard is just an opportunity and cannot become an obligation upon a party to the case before the court. Any party is entitled to waive this right if he or she considers it to be in his interest. In the case of ***Pantaleo Lyakurwa v Leokadia Lyakurwa***, Civil Application No. 54 of 98, Court of Appeal of Tanzania at Dar es Salaam, it was stated that:

> *"The law of this country prohibits the condemnation of a person without his being given an opportunity to be heard. If, however, the person is given such an opportunity and does not make use of it, he cannot be heard to complain that he was condemned unheard. The audi alteram partem rule does not take away the power of the decision - maker to hear the matter ex-parte when a party duly notified of the hearing elects not to take part in it or without good cause absents himself, or where because of the urgency of the matter an interim order must immediately be made. A party who, having been duly notified of the hearing, absents himself at the hearing is deemed to have waived his right to be heard in the matter."*

Based on the above decision by the Court of Appeal, hearing of this appeal continued in absence of the respondents. When Advocate for the

appellant was given the floor, she prayed to abandon the third and fourth grounds of appeal. She opined that proof of the first and second grounds should be enough to dispose the entire appeal because they revolve around serious irregularities in the proceedings of the DLHT. She submitted that the Chairman of the DLHT did not read opinion of the assessors to the parties before judgment.

The learned Counsel told the court that after the closure of defence case, the Chairman pronounced the date of judgment. As such, the learned Advocate stated that she is not even sure if the assessors' opinion was given in writing as required by the law. She referred to the case of ***Edina Adam Kibona v. Absolom Swebe (Sheli),*** Civil appeal No. 286 of 2017 in which the Court of Appeal stated that the fact that opinion of the assessors was not read to the parties before judgment, renders the opinion to have no useful purpose. She urged the court to nullify proceedings of Tabora DLHT due to the irregularity she had stated.

On the second ground of appeal, the learned Advocate elaborated that the law requires the proceedings at the tribunal to be conducted with the aid of not less than two assessors. She submitted that when the case at hand was heard in the DLHT, different sets of assessors were engaged. She argued that such practice is not acceptable in law. She referred to the case of ***John Masweta v General Manager MIC (T) Ltd,*** Civil Appeal No. 113 of 2015 in which it was held that where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial becomes a nullity.

She also directed this court to the case of ***Ameir Mbarak & Another v Edgar Kahwili***, Civil Appeal No. 154 of 2015 whereby the Court of Appeal ordered retrial of the case due to among other reasons, that none of the two sets of assessors were involved throughout the entire trial. The Court of Appeal concluded that where assessors were changed in between the trial, the trial cannot be said to have been conducted by a duly constituted tribunal as required by section 23 (1) and (2) of the Land Disputes Courts Act, [Cap. 216 R.E.2019]. She thus, prayed this court to nullify proceedings of Tabora DLHT and allow the appeal with costs.

Having gone through submissions by Ms. Flavia and the records in the case file, the main issue for consideration is whether this appeal has merit. I will start with the second ground of appeal. It is on record that attendance of the assessors during the proceedings in the DLHT was in an alternating manner. For example, on 18/4/2013 when the hearing started, the record shows that Mr. B.S. Makalanga and Mrs. N.G. Ngwira were the assessor who attended the hearing. However, on 6/8/2013 when the hearing continued, Mr. E.K. Mkemwa and Mrs. N.G. Ngwira attended the proceedings.

On 12/6/2014 when the defence case opened, Mrs. A.W Nsimba and Mrs. N.G. Ngwira attended the hearing. At the closure of defence case on 12/6/2014, the Chairman ordered the date of judgment as 30/7/2014, without requiring the assessors to submit their opinion in writing. Therefore, there are no assessors' opinion in the case file. Moreover, there is nowhere in the proceedings that the assessors were required to give their opinion in writing, but on page 5 of the tribunal's judgment, Mrs.

A.W Nsimba and Mrs. N.G. Ngwira are mentioned by the Chairman as the assessors who had assisted him.

Further, the coram is silent as to whether assessors were present or not when the judgment was delivered. Regulation 19 (1) and (2) of Land Disputes Courts Regulations, 2003 provides:

> *"The tribunal may, after receiving evidence and submissions... pronounce judgment on the spot or reserve the Judgment to be pronounced later... The chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give opinion in Kiswahiii."*

Although the chairman is not bound with the assessors' opinion, he/she cannot opt-out the requirement of recording their opinion before composing the judgement. The departure from the assessors' opinion leads to another bounding requirement of giving sufficient reasons as stipulated under s. 24 of the Land Disputes Courts Act. It is not sufficient for the chairman to simply state that, the opinion of assessors was considered without writing them down in the proceedings. If such opinion does not feature in the proceedings, their acknowledgment in the judgment is not acceptable.

The Court of Appeal of Tanzania has decided so in different cases including the case of ***Sikuzani Saidi Magambo and Kirioni Richard***

v. Mohamed Roble Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported), in which the Court observed that:

> *"It is also on record that though, the opinions 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 therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed."*

For the reasons and authorities cited above, the second ground of appeal succeeds and is hereby allowed.

On the first ground of appeal, it is the contention of Ms. Flavia that assessors' opinions were not read to the parties in the tribunal before judgment could be composed. As shown earlier, no assessors' opinions were read over to the parties. In addition, copies of opinion of each assessor were not kept in the case file. In the case of ***Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble,*** Civil Appeal No. 197 of 2018, it was stated that:

> *"...since Regulation 19(2) of Land Disputes Courts Regulations, 2003 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."

The above extract shows the essence of reading opinion of the assessors to the parties before composition of judgment by the Chairman. In the present case, the judgment does not contain opinion of both assessors and, the record shows that the Chairman of the tribunal never required the assessors to give their opinions nor did he read the same to the parties. Therefore, I agree with the Counsel for the appellant that this was a serious irregularity. As such, the first ground of appeal is also meritorious.

Since the discussed grounds are both substantive and procedural, it infers that the whole decision of the DLHT was reached at, from irregular proceedings. In this regard, the appeal is allowed. The whole proceedings, judgment and decree of Tabora DLHT are hereby quashed and set aside. I order the file to be returned to Tabora District Land and Housing Tribunal for retrial before another Chairperson and a different set of assessors. I make no order for costs.

It is so ordered.

KADILU, M.J.,
JUDGE
30/11/2022

Judgement delivered on the 30th Day of November, 2022 in the presence of Ms. Flavia Francis, Advocate for the Appellant and in absence of the Respondents.

KADILU, M. J.

JUDGE

30/11/2022.