

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND APPEAL NO. 9 OF 2021

(Arising from the decision of Ilala District Land and Housing Tribunal in Application No. 69 of 2017)

ROBERT ARON MWANGALIKA APPELLANT

VERSUS

ELIEZA A. MWAKANG'ATA (Suing under
Power of Attorney of Anyosisi Mwakang'ata) **RESPONDENT**

JUDGMENT

4th November & 21st December, 2022

BANZI, J.:

Before the District Land and Housing Tribunal of Ilala, (trial Tribunal) Elieza A. Mwakang'ata (the Respondent) under the power of Attorney of his father, Anyosisi Mwakang'ata, sued Robert Aron Mwangalika (the Appellant) over a piece of land measuring 2 acres located at Mvuleni area previously known as Kitonga area, Msongola Ward in Ilala Municipal owned by his father who purchased the same from Fatuma Omary Mwinyimkuu in 2006. In 2007, the Appellant was invited by Anyosisi Mwakang'ata as caretaker of the suit land. However, in 2014, the Appellant decided to build a permanent house claiming that the said Anyosisi Mwakang'ata gave him part of the suit land measuring 25 paces width and 30 paces length because they are relatives. After receiving the evidence of both sides, the trial Tribunal decided in favour

of the Respondent declaring Anyosisi Mwakang'ata as the lawful owner of the suit land and ordered the Appellant to demolish the structure built therein.

Aggrieved by the decision of the trial Tribunal, the Appellant appealed to this Court on five grounds of thus:

- 1. That, the Honourable chairman erred in law and fact for reaching the decision in favour of the Respondent without quorum;*
- 2. That, the Honourable chairman erred in law and fact for reaching the decision in favour of the Respondent without considering the opinion of the assessor;*
- 3. That, the Honourable chairman erred in law and fact for reaching the decision without considering circumstantial evidence;*
- 4. That, the Honourable chairman erred in law and fact for reaching the decision in favour of the Respondent based on cooked evidence and without considering the potential witness;*
- 5. That, the Honourable chairman did not take into account that the Respondent failed to prove the case beyond balance of probability.*

When the appeal was called on for hearing, both parties appeared in person unrepresented. By consent, the appeal was argued by way of written submission.

For purpose of convenience, I will begin with the first ground which in the considered view of this Court it suffices to dispose the appeal. This ground touches the issue of propriety of the proceedings before the District Land and Housing Tribunal regarding the involvement of assessors. It was the submission of the Appellant that, the Chairman reached into the decision without involving assessors contrary to section 23 (2) of Land Disputes Courts' Act [Cap 216 R.E. 2019] ("the Land Disputes Act) which requires the coram of the District Land and Housing Tribunal to be composed of the chairman and two assessors. In this case, the chairman involved only one assessor, Mwakalasya which is contrary to the law. He supported his point with the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 CAT (unreported) which was referred in the case of **Mohamed Hamisi Madebe v. Annamecia Maeda**, Misc. Land Appeal No. 44 of 2017 HC Land Division at Dar es Salaam (unreported). Besides, the chairman departed from the opinion that was given by the said assessor namely, Mwakalasya without giving reasons of departing from that opinion as required by law.

On the other hand, it was the contention of the Respondent that there was no error for the Chairman to reach the decision with one assessor because section 23 (3) of the Land Disputes Act permits the Chairman to continue with the remaining assessor provided that they were present at the commencement of the proceedings. On the issue of opinion of assessors, he contended that the Chairman is not bound by opinion of assessors but he is required to give reason for departing from it which in our case, the Chairman explained his reasons for departing as he was convinced with the Appellant's assertion on how he got the land.

I have considered the rival arguments of both sides alongside with the record of the trial Tribunal. It is worthwhile to underscore that section 23 (1) (2) (3) of the Land Disputes Act provides that

"(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.

(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.

*(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or **both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.**"*

(Emphasis supplied).

What I gathered from the provisions of the law above is that, for District Land and Housing Tribunal to be properly constituted, it requires; **one**, the Chairman to sit with at least two assessors; **two**, the involvement of assessors which gives them the mandate to give opinion before the chairman composes the decision of the Tribunal and **three**, at least one of the assessors must be among the assessors who must be in attendance throughout the trial. This was reaffirmed by the Court of Appeal in the case of **Ameir Mbarak and Another v. Edgar Kahwili** (Civil Appeal No. 154 of 2015) [2016] TZCA 154 where it was emphasised that, consequences of unclear involvement of assessors in the trial renders such trial a nullity. In another case of **Cleoplace Kaiza v. Potence Mugumila** (Civil Appeal No. 378 of 2021) [2022] TZCA 760 it was stated that:

*"...it is a legal requirement under section 23 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019 (the Land Disputes Act) which has been fortified by our decisions that **the assessors who sat at the commencement of the proceedings should be the same throughout till the end.** The provision also requires mandatorily for the assessors to give their opinion, which should be read before the parties and reflected in the Tribunal decision regardless of whether their opinion has been considered positively or negatively."*(Emphasis is mine).

Reverting to the matter at hand, after a thorough perusal of the record of trial Tribunal, it is apparent that, the proceedings before the trial Tribunal were irregular to the extent of vitiating the entire proceedings. First and foremost, there was irregular change of assessors from commencement of trial to the end. The records show that on 19/06/2018 when the case was called on for framing issues and hearing of PW1, the assessors were Matimbwa and Mwakalasya who were also present on 20/06/2018 when PW2 testified. On 4/12/2019, although the hearing did not proceed but the Chairman sat with Matimbwa and Faiza, a new assessor who had never presided over the matter from the beginning. However, on 08/07/2019 when PW3 and PW4 testified, there was only one assessor, Mwakalasya. On

16/01/2020 when PW4 was recalled to give evidence, it was Matimbwa who was present as the assessor. During the defence, on 08/04/2020 when DW1 testified, the Chairman sat with Matimbwa and Faiza. Worse enough, on 07/09/2020 when DW2 was called to testify Faiza was dropped and in lieu Mwakalasya and Matimbwa who commenced from the hearing, continued with the hearing. This shows that there was no clear involvement of assessors because there was changing of assessors throughout the trial contrary to the law. In the case of **Cleophae Kaiza v. Potence Mugumila** (*supra*), when the Court of Appeal encountered with similar situation of changing of assessors had this to say:

"It is settled law that once trial commences with a certain set of assessors, no changes are allowed or even abandonment of those who were in the conduct of the trial. The noted irregularity is fatal and has rendered the proceedings before the Tribunal a nullity..."

Apart from that, Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, requires the assessors to give their opinions in writing after hearing the evidence of both sides. The opinions must be given in the presence of the parties as it was stated in the case of **Edina Kibona v. Absolom Swebe (Sheli)** (Civil Appeal No. 286 of 2017) [2018] TZCA 310. In the instant matter, although

there is a written opinion of one assessor namely Mwakalasya in the file and it is reflected in the judgment that the opinion was read to the parties on 16/03/2021, but in the proceedings, there is nothing showing that, such opinion was read before the parties as required by law. I hereby reproduce the proceeding on 16/03/2021 for ease of reference;

"16/3/2010

Akidi – L.R. Rugarabamu – M/Kiti

Wajumbe – Mwakalasya & Jokha

Mwombaji – Yupo

M/Maombi – Yupo

Karani – Beatrice

Baraza: Hukumu haijakamilika. Tarehe ya hukumu 3/5/21

Sgd: M/Kiti

16/3/21"

Looking closely at the extract above, there is nothing to support the assertion of the Hon, Chairman in his judgment that, on 16/03/2021, the opinion of the assessor was read over to the parties. Despite that legal flaw, the one who gave his opinion was not present throughout the trial as shown herein above. For instance, on 16/01/2020 when PW4 was recalled, Mwakalasya was not present. Likewise, on 07/09/2020 when DW2 was testifying, he was also not present. It is a settled law that, where an assessor

who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity. See the case of **Ameir Mbarak and Another v. Edgar Kahwili** (*supra*).

From the above findings and analysis, what transpired at the trial Tribunal from unclear involvement of assessors because there was changing of assessors throughout the trial to the moment of giving the opinion is a fatal irregularity which has rendered the proceedings before the trial Tribunal a nullity.

That being said, I invoke revisional powers under section 43 (1) (b) of the Land Disputes Act and nullify the entire proceedings of the District Land and Housing Tribunal for Ilala in Land Application No. 69 of 2017, quash and set aside judgment and the decree dated 19th May, 2021. I hereby remit the case file to the trial Tribunal for matter to heard afresh before another Chairman and a new set of assessors. In the circumstances, each party shall bear its own costs.

It is accordingly ordered.



A handwritten signature in black ink, appearing to be "I. K. Banzi", written over a horizontal line.

I. K. Banzi
JUDGE
21/12/2022