IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 85 OF 2021

(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Morogoro District, at Morogoro in Land Application No. 238 of 2017)

1. **CUTHBERT ALFRED LYARO .....APPELLANT**
2. **LEP AUCTIONEERS LTD ..... APPELLANT**

VERSUS

LINA AHMED MPAKO ..... RESPONDENT

JUDGMENT

9th May & 31st August, 2022

CHABA, J.

This is an appeal from the judgment of the District Land and Housing Tribunal for Morogoro, at Morogoro ("the DLHT") in Land Application No. 238 of 2017 delivered on the 12th day of April, 2021 in favour of the respondent herein. Discontented by the findings and decision of the DLHT, the appellants have preferred this appeal armed with four (4) grounds of appeal.

At this juncture, I feel obliged to explain the undisputed facts of the background of the matter. The genesis of this matter can be traced back in 2014, before the Bigwa Ward Tribunal, where the applicant (now

respondent) successfully sued the 1st appellant over a claim for a right of a public road to be used by parties and members of the public. The suit at the ward tribunal was registered as Land Case No. 11 of 2014. As gleaned from the record, the Ward Tribunal ruled in favour the respondent herein

The 1st appellant was aggrieved by the decision of the ward tribunal, and successfully appealed to the DLHT for Morogoro, at Morogoro through Land Appeal No. 108 of 2015 whereby the respondent was ordered to demolish the erected wall in the disputed land so as to pave the way for a public road to be created for use of the parties themselves and the public as a whole.

Thereafter, the 1st appellant (Cuthbert Alfred Lyaro) filed an application for execution through Misc. Application No. 136 of 2016 before the DLHT where the respondent herein was ordered to yield vacant possession of the suit land by removing all structures to pave away for a public road and permanent boundary to be fixed to demarcate the public road.

On 30/9/2016 the DLHT for Morogoro, at Morogoro did appoint the 2nd appellant, one LEP Auctioneers Ltd as the Court Broker to execute the decree issued by the DLHT emanating from Land Appeal No. 108 of 2015. Such an execution process was effectively done or effected on 21/10/2016

pursuant to the tribunal's order. A year later, the respondent herein filed Land Application at the DLHT for Morogoro where it was registered as Land Application No. 238 of 2017 against the appellants. Among the orders sought by the respondent were;- **One;** the DLHT had to issue an order for permanent injunction restraining the appellants from trespassing the disputed land; **Two;** an order for the appellants to build a wall that the appellants (respondents at trial) allegedly destroyed within the disputed land, **Three;** a declaration and order to the effect that the appellant's acts to demolish the said wall was unlawful, and **Four;** an order to the effect, that the appellants (respondents at trial) to pay compensation to the watchman, engaged by the applicant to keep watch on his property at the tune of one hundred thousand Tanzanian Shillings from the day of demolition to the date or day the appellants will erect a new wall.

After a full trial, the DLHT ruled in favour of the respondent (the applicant at trial). Aggrieved, the appellants have come to this court intending to challenge the decision of the DLHT. The appellants fronted four grounds of appeal as hereunder: -

1. That, the learned trial Chairperson erred in law and in fact in awarding the respondent herein the sum of Three million (3,000,000/=) for

disturbance while the same was not pleaded/prayed for and no evidence was led on the same.

2. That, the trial Tribunal erred in law and in fact for failure to note that LEP AUCTIONEERS LTD, being the Tribunal Broker, had a separate legal mechanism for dealing with the complaints, if any, arising from execution process.
3. That, the trial Tribunal erred in law and in fact for upholding the respondent's application while the Tribunal Broker followed all procedures in executing the Decree passed by the Tribunal.
4. That, the trial Tribunal erred in law and fact for failure to read the Assessors' Opinion to the parties before proceeding to composing judgement.

At first, the matter was assigned before my sister in bench, her Ladyship Makani, J., and later on, the matter was re-assigned to me on 15/11/2021 due to the need of quick and expeditious disposal of this case which was cause listed in the backlog clearance sessions.

When this appeal was placed for hearing, the appellants enjoyed the services of Mr. Ignas Punge, the learned counsel whereas the respondent appeared in person, unrepresented. The parties opted to dispose of this appeal by way of written submissions. The respondent's written submission was drawn by Siraji Mussa Kwikima, learned advocate from LITCON CHAMBERS based in Tabora Region and it was filed by the

respondent herself. Indeed, the parties complied with the scheduling court's order.

The learned counsel for appellants in his written submission argued in three different clusters; He firstly argued the first ground and then proceeded to argue jointly on 2nd and 3th grounds of appeal and finally the fourth ground.

Submmiting in support of the first ground, the learned counsel argued that, the money awarded to the respondent by the DLHT was neither pleaded nor prayed for by the respondent, and the applicable rule is clear that relief(s) not founded on the pleadings should not be granted by the court or tribunal.

He added that, parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or which is at variance with the averments in the pleadings goes to no issue and must be disregarded.

To fortify his stance on this basic principle of civil litigation, Mr. Punge referred the court to a bundle of cases, including the cases of **JAMES FUNKE NGWAGILO V. ATTORNEY GENERAL** (2004) TLR 161, **VIDYRTHI V. RAM RAKHA** (1957) EA 527, **SARAH WANJIKU MUTISO V. GIDEON N. MUTISO** (1986) LLR 4879 (reported in

Odunga's Digest on Civil Case Law and Procedure, page 3012, and **MAKORI WASAGA VS. JOSHUA MWAIKAMBO AND ANOTHER** (1987) TLR 88. In the case of **VIDYRTHI VS.RAM RAKHA** (Supra), it was held that:

> *"Arguments and prayers by the parties must be confined in the pleadings filed in Court and not otherwise."*

Also, in case of **JAMES FUNKE NGWAGILO V. ATTORNEY GENERAL** (Supra) the Court held that:

> *i). The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute;*
>
> *ii). If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend his pleadings for that purpose;*
>
> *iii). In order for an issue to be decided it ought to be brought on record and appear from the conduct of the suit to have been left to the Court for decision.*

Moreover, on the same point, he cited the case of **SARAH WANJIKU MUTISO VS. GIDEON N. MUTISO** (Supra) where the Court held inter-alia: -

"Cases must be decided on the issues on record".

As regards to the second and third grounds of appeal, Mr. Punge contended that, the first appellant and the respondent had a case over the same land in dispute where the first appellant herein won the case. He pointed out that, after the conclusion of the case, the first appellant filed an Application for Execution and the second appellant herein was appointed by the DLHT to execute the lawfully order issued by the Tribunal. The Broker dutifully executed the Order as directed by the DLHT and prepared and filed a report to that effect.

He added that, after the execution process, the respondent herein did not lodge any complaint or objection to the trial Tribunal which suggests that the respondent she was satisfied with all that which was done by LEP Auctioneers Ltd.

The learned counsel reminded the court that, the appointment of Court Brokers in the DLHT is done according to the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, GN. No. 174/2003,

whereby, Regulation 32 which deals with disciplinary proceedings against Tribunal Brokers, provides that:

> *"(2) Where a complaint is against the performance of a Tribunal Broker is lodged to the Tribunal, the Chairman shall immediately refer the matter to the Appointment and Disciplinary Committee for disciplinary proceedings".*

According to him, Since the respondent's complaint at the trial Tribunal arose during execution exercise, she was required to follow the procedure stipulated by the above Regulations.

To bolster his argument, the learned counsel referred this court to the case of **ATTORNEY GENERAL V. LOHAY AKONAAY AND JOSEPH LOHAY** (1995) TLR 80, page 96, where the Court of Appeal stated that:

> *"Courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the Court that no appropriate remedy is available in the special forum".*

Arguing on the Fourth ground, it was Mr. Punge's averments that, the Judgment and proceedings of the trial Tribunal are tainted with procedural irregularities arising from the Chairman's failure to fully conform to the provisions of the law which require the assessors to give their opinions in

the presence of the parties. He averred further that, the opinions of the gentleman assessors were not read to the parties as required by Section 23 (1) and (2) of the Land Disputes Courts Act [Cap. 216, R. E, 2019] and Regulation 19 (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN. No. 174 of 2003.

He added that, the remaining assessor was obliged to give his opinion in the presence of the parties after the closure of defence case and before composition and pronouncement of the judgment. According to him, since this was not conducted, the whole judgment and proceedings become a nullity because it is as good as hearing the application without the aid of assessors. The omission goes to the root of the case and occasioned a failure of justice.

To cement the above point, Mr Punge cited the case of **DORA TWISA MWAKIKOSA V. ANAMARY TWISA MWAKIKOSA,** CIVIL APPEAL NO. 129 OF 2019 (Unreported), where the Court of Appeal of Tanzania observed that;

> *"The proceedings of the Tribunal were tainted with procedural irregularities arising from the Chairman's failure to comply with Regulation 19 (2) of the Regulations.*

The Court went on stating the:

... the failure by the Chairman to require the assessors to state the contents of their written opinions in the presence of the parties rendered the proceedings a nullity because it was tantamount to hearing the application without the aid of assessors".

Based on the above submission, Mr. Punge prayed the court to allow the appellant's appeal with costs.

In reply to the appellant's written submission in chief, the respondent argued that, upon noting all what has been submitted by the appellants, she averred that the Trial Chairman did not award anything contrary to what it was pleaded in her Amended Application before the DLHT.

For easy of reference, the respondent reproduced the statement of cause of action under paragraph 6 (a) as hereunder:

"That, the Applicant is the Lawful Owner of the Suit Premises. The Applicant was also an Applicant in respect of the adjacent land in which she successfuly sued the Respondent in Bigwa Ward Tribunal in which the Applicant won. However, the Respondent appealled to the District Land and housing Tribunal as per Appeal No. 108/2015 originating from Bigwa Ward Tribunal in Case No.11/2014) in which this Honorable Tribunal ordered that the Applicant herein demolishes the structures built

on the disputed road to pave a way for the road which the Applicant adhered to. Much to the Applicant's dismay, the 1st Respondent and the 2nd Respondent in 2019 without any justifiable cause, trespassed to the applicant's land, suit premises and abolished the brick wall that enclosed the Applicant's land".

According to the respondent, from the wording of paragraph 6 of the application as reproduced above, it is clearly that the respondent pleaded the disturbance caused by the appellant's actions of demolished the brick wall that enclosed he applicants's land. The respondent went on submitting that, the trial Chairperson rightly awarded the respondent herein the sum of Tsh. 3,000,000/= for disturbance as proved by the respondent.

As regards to the second ground of appeal, the respondent contended that, the Trial Chairman's decision is good in law because the fact that LEP AUCTIONEERS LTD having a separate legal mechanism for dealing with complaint does not oust the Jurisdiction of the DLHT.

She added further that, the Tribunal Broker was not representing the herein respondent as to entitle her to take actions against the Tribunal Broker through the established channels as suggested by the appellants' counsel. Based on the submission, the respondent asserted that the Trial Chairman's decision is good in law because the fact that LEP

AUCTIONEERS LTD having a separate legal mechanism for dealing with complaint does not oust the Jurisdiction of the DLHT.

Arguing in respect of the last ground, which touches the issue of assessor's opinion, the respondent contended that the same are clearly reflected on the trial tribunal's proceedings. Indeed, the proceedings speaks by itself that such opinions were read out before both parties before the judgment was delivered.

All that being said, the respondent contented that the appellants appeal is devoid of merit and the same should be dismissed with costs.

In rejoinder, the counsel for appellants echoed what he submitted in chief. He emphasized on the first ground that the sum of 3,000,000/= Tanzanian Shillings awarded by the DLHT was neither pleaded nor prayed for by the respondent during the hearing. He stressed that, since the relief granted by the trial Tribunal was never sought anywhere in the Application and since it is a common practice of the law that parties are bound by their own pleadings, ground number one is meritorious.

On the Second and Third grounds, Mr. Punge stressed that, the major concern is that the dispute arose immediately after the completion of execution which was sanctioned by the same trial Tribunal between the same parties. According to him, if at all the respondent was aggrieved by

the way the execution was conducted, then the proper forum was to invoke Regulation 32 of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations GN. No. 174/2003.

As to the Fourth Ground, the learned counsel for the appellants insisted that, the opinions of the gentleman assessors were not read to the parties (in the presence of the parties) as required by section 23 (1) and (2) of the Land Disputes Courts Act [Cap. 216, R. E, 2019] and Regulation 19 (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations GN. No. 174 of 2003. Based on the above submission and submission in chief, Mr. Punge once again prayed the court to allow the appellant's appeal with costs.

I have gone through the rival submissions advanced by both parties in line with the grounds of appeal together with the trial tribunal's record. In the circumstance of this case, I find it apt to start with the fourth ground of appeal because in isolation, it may suffice to dispose of the entire appeal. This ground is to the effect that: T**he trial Tribunal erred in law and fact for failure to read the Assessors' Opinion to the parties before proceeding to composing judgement.**

After a careful scrutiny of the trial tribunal's proceedings, this ground need not detain me much. As correctly submitted by the learned counsel for the appellants, the opinion of the assessor was not read out before

the parties as stipulated by the provisions of section 23 of the Land Disputes Courts Act (Supra) read together with Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003 ("the Regulations"). Section 23 provides that: -

> *"Section 23 (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".*

From the above excerpt of the provisions of the law, it provides that a properly constituted tribunal in terms of the Land Disputes Courts Act, is usually composed of the Chairperson and two assessors. The two

assessors must, at all times, be present throughout the trial, and they must be actively and effectively involved so that they can have a meaningful contribution in advising the tribunal. However, the section provides a flexibility where, for any reasons, one or all of the assessors misses a hearing session, the tribunal may proceed with the remaining assessor or without any assessor, as the case may be. (See: **AMEIR MBARAKA AND AZANIA BANK CORP. LTD V. EDGAR KAHWILI,** CIVIL APPEAL NO. 154 OF 2015, COURT OF APPEAL (T) AT IRINGA (Unreported).

In this appeal, the records show that the trial commenced on 6/4/2020 where the trial tribunal framed issues and the testimony of (AW1) **Lina Ahmed Mpako** was heard in the presence of wise assessors Mr. **Mukama** and **Mrs. Lenah Nsana. T**hen the Applicant's case was closed. Afterward, defense hearing commenced on 2/12/2020 proceeded in the presence of the above-mentioned assessors and the tribunal closed the defense case and issued an Order to the effect that visitation of *locus in quo* had to take place on 29/01/2021. On that particular date, both parties and one assessor namely, **Mr. Mukama** were present.

It is clear from the trial tribunal's record that, the trial tribunal proceeded to conduct her business with one assessor under the dictates of section 23 (3) of the Land Disputes Courts Act and only assessor

namely, Mr. Mukama during visitation of *locus in quo* on 29/01/2021. Looking at the record, the same is silent why the matter proceeded in the presence of one assessor. No reasons were assigned by the trial Chairperson. According to the record, the reasons were assigned and or recorded in the judgment of the tribunal. The Coram of the DLHT dated 29th day of January, 2021 shows as follows:

> ***29/1/2021***
>
> ***Coram:*** *M. Khasim, Chairman.*
>
> ***Members:***
> *1. Mr. Mukama*
> *2. .....*
>
> ***Applicant:*** *present*
> ***Respondent:*** *Present.*
> ***Tribunal:*** *On this date, the locus in quo is visited and both parties were able to shows their areas and the disputes position of land plus a demolished war.*
> *Here is the sketch showing the area ...."*

As shown above, the question whether the matter can proceed with the aid of all assessors or otherwise, this situation has been taken care of by the provision of the law under section 23 (3) of the Land Disputes Courts Act (Supra). The law says; 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. However, looking at page 7 of the typed judgment of the trial Tribunal, last paragraph it read: -

> *"Shauri hili lilianza kusikilizwa na wajumbe wawili lakini kufuatiwa ugonjwa wa muda mrefu wa mjumbe mmoja wa baraza shauri ilibidi liendelee na mjumbe mmoja kama inavyoruhusiwa katika kanuni ya 23 (3) cha Land Disputes Courts No. 2/2002 na mjumbe alitoa maoni kama ifuatavyo: -*
>
> *Nashauri kwamba ukuta mpya ujengwe kwa kunyooka kutoka mwisho wa ukuta wa banda la kuku hadi kwenye bikoni ya mwisho. Ikifanyika vilivyo njia itapatikana bila matatizo kazi hii aifanye na mdai kwa hiari yake".* ***Mr. Ndumey Mukama".***
>
> *[Bold is mine].*

As gleaned from the trial tribunal's record, the Hon. Chairman included the opinion of the assessor in the judgment. But the record is silent whether the said opinion was read out in the presence of the parties or not. As correctly submitted by Mr. Punge, the parties had the rights to know the opinion advanced by the said assessor before composition and pronouncement of the judgement. As the law requires, the opinion put forward by Mr. Mukama was supposed to be read out before the parties. Failure of which, the omission goes to the root of the case, a result of

which it occasioned failure of justice. In the eyes of the law, this is a serious irregularity. This kind of irregularity has been dealt by our Apex Court and this Court as well, in a number of cases, such as **SIKUZAN SAIDI MAGAMBO AND ANOTHER V. MOHAMED ROBLE,** (CIVIL APPEAL NO.197 OF 2018) [2019] TZCA 322; (01 OCTOBER 2019 TANZLII) and **DORA TWISA MWAKIKOSA VS ANAMARY TWISA MWAKIKOSA** (CIVIL APPEAL NO. 129 OF 2019) [2020] TZCA 1874; (25 NOVEMBER 2020 TANZLII) and **AMEIR MBARAK AND AZANIA BANK CORP. LTD V. EDGAR KAHWILI,** CIVIL APPEAL NO. 154 OF 2015. For instance, in **AMEIR MBARAKA** (Supra) when the Court noted that the trial Tribunal's proceedings did not indicate whether the assessors were accorded with an opportunity to air their opinions as required by the law, and the Chairperson only acknowledged in the judgment, similarly to what exactly happened in this appeal, the Court observed that: -

> *"Therefore, 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."[Emphasize is mine].*

Again, in the case of **TUBONE MWAMBETA V. MBEYA CITY COUNCIL,** CIVIL APPEAL NO. 287 OF 2017, the Court re-emphasized the need to require every assessor in the course of any proceedings before the Tribunal to give his or her opinion and ensure that the same are recorded and form part and parcel of the trial proceedings. The Court 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."*

As hinted above, the opinion of Mr. Ndumay Mukama was taken and recorded by the Hon. Chairman against the Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003. This irregularity is incurable in terms of section

45 of the Land Dispute Courts Act [Cap. 216 R. E, 2019] which provides that: -

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice".*

From the wording of the above provisions of the law, I am in agreement with Mr. Punge that, absence or deficiency of the opinion of the remaining assessor (Mr. Ndumey Mukama) rendered the decision of the Tribunal a nullity as the omission goes to the root of the case and occasioned a failure of justice. As I have demonstrated above, it is my considered view that, this anomaly herein couched as fourth ground of appeal, suffices to dispose of the matter in its entirely and I have no reasons to labour on the other grounds of appeal as by so doing that will be an academic exercise.

In the final event, I allow the appeal, and proceed to quash the trial Tribunal's proceedings and set aside the decision in Land Application No.

238 of 2017. If parties are still interested to pursue for their rights are at liberty to institute a fresh suit before a competent forum. The fresh suit (if any) shall be tried by another Chairperson with a new set of assessors. No order as to costs. **It is so ordered.**

DATED at MOROGORO this 31st day August, 2022.

M. J. CHABA

JUDGE

31/08/2022