THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 5 OF 2021

(Originating from the Decision of District Land and Housing Tribunal for Mbeya in Application No. 156 of 2016)

AAICO COMPANY LTD ..... APPELLANT

VERSUS

JANE JAILOS MAHALI (Suing as next friend of Joseph Gasper Malekela (Minor) ..... 1st RESPONDENT

FURAHA MLIGO ..... 2ND RESPONDENT

JUMA MWANKANDE ..... 3rd RESPONDENT

JULIUS LUPEMBE ..... 4TH RESPONDENT

MWANASHILU KINYWASI ..... 5TH RESPONDENT

ELISTINA KILATU ..... 6TH RESPONDENT

JUDGMENT

Date of last order: 28/11/2022

Date of judgment: 30/11/2022

NGUNYALE, J.

The first respondent JANE JAILOS MAHALI (Suing as next friend of Joseph Gasper Malekela (Minor) filed an Application No. 156 of 2016 against the

appellant AAICO COMPANY LTD and other respondents namely FURAHA MLIGO, JUMA MWANKANDE, JULIUS LUPEMBE, MWANASHILU KINYWASI and ELISTINA KILATU seeking to be declared the lawful owner of the suit land measured 50 acres located at Ihahi area at Ukomolinyi Village within Mbarali District Mbeya Region which she alleged that she bought from the 2nd respondent.

The factual background giving rise to this appeal may be extracted from the records as contended by the parties that; the first respondent who testified as PW1 at the trial said that the suit land was the property of the 2nd respondent, around January 2012 the 2nd respondent exposed them to the suit farm which she was selling. She told them that the said farm she was given by the Ihahi Village Counsel. They entered into a sale agreement buying the suit farm and the payment were made to the appellant and the 2nd respondent. The 1st respondent went on to state that the said farm was bought jointly with her husband in favour of their son one Joseph Gasper Malekela who was a minor by then. Her husband died before they completed payment, but they later completed payment per the sale agreement. The dispute arose when she wanted to start farming the suit farm, she went to the farm in 2016 where she found the farm has been trespassed by the 3rd, 4th and 5th respondents.

The 3rd respondent testified as DW5 Juma Mwankande. In his testimony he testified that the suit land was allocated to him by the Village Counsel in 1996 and since then he was in peaceful use of the same, farming without any interference. The 4th respondent testified as DW6. In his testimony he testified that the suit land he purchased from one Moshi Mswimi and the said Moshi Mswimi was allocated by the Village Council. In short, each party claimed ownership of a piece of land which is part of the suit land.

The trial tribunal after having heard the parties, it was satisfied that the 2nd respondent had no good title to pass to the 1st respondent because there was no evidence that the Village Council had handled the farm to her. The fact that she had no good title means she illegally obtained money from the 1st respondent purporting to sale the suit land. In short, the tribunal declared the 3rd, 4th and 5th respondents as lawful owners of the suit land meanwhile the appellant and the 2nd respondents were ordered to refund the money which they received illegally by selling the land which they had no right to transfer by sale and general damages.

The appellant was aggrieved with the decision of the trial tribunal hence this appeal. She preferred the present appeal predicating in the following grounds of appeal; -

1. *That the District Land and Housing Tribunal failed to evaluate the evidence adduced before the tribunal.*
2. *That the District Land and Housing Tribunal erred in law and facts to uphold the judgment delivered by trial tribunal without identifying the location and proper demarcation of the disputed land.*
3. *That the District Land and Housing Tribunal erred in law and facts in deciding the case against the weight of evidence.*
4. *That the District Land and Housing Tribunal erred in law and facts in deciding that the 3rd, 4th respondents were allocated the disputed land by the village committee the fact which was not proved.*
5. *That, the District Land and Housing Tribunal erred in law and fact when it disregarded the evidence of the appellant in respect of the said dispute.*
6. *That, the District Land and Housing Tribunal erred in law and fact by disregarding the opinion of the assessors.*

The court had time to read thorough the argument of the parties through their rival submission and noted that the 1st to 5th grounds of appeal which are about evidence have been argued but the 6th ground of appeal has been abandoned for the reasons known to the appellant or the parties. The careful perusal of the records reveal that the wise assessors presented their opinion and availed to the parties, but those opinions were not reflected in the tribunal judgment. Guided by prudence I find it wise to determine the competence of the judgment itself before embarking to determine rival issues about evidence and its analysis/evaluation.

I therefore reopened up the proceedings for the parties to address the court on the following issues; -

(a) Whether the assessors were properly consulted in accordance with the law.

(b) Whether the tribunal sufficiently considered the opinion of the assessors in the tribunal judgment.

(c)What are the necessary reliefs in case there was any anomaly as far as the role of the wise assessors is concerned.

On 28th day of November 2022 the parties appeared to address the court on the issues listed above, the appellant appeared under representation of Mr. Felix Kapinga learned State Attorney while the first respondent was represented by Jalia Hussein assisted by Lucia Richard both learned Advocates. The other respondents appeared in person fending by themselves.

Mr. Kapinga for the appellant started his submission by considering the applicable laws related to the role of assessors before the District Land and Housing Tribunal. He state that the relevant provisions are Section 23 (1) and (2) of the Land Disputes Act Cap 216 which is relevant about the composition of the tribunal in hearing of land applications. Those provisions provides that the tribunal is fully constituted when presided by a chairman and not less than two assessors. The assessors shall be required to give their opinion at the completion of the trial. The tribunal shall consider the opinion of the assessors per section 24 of the same law, the tribunal shall not be bound by the opinion provided the Chairman gives

reasons for differing with the opinion of the assessors. Rule 19 (2) of GN No. 174 of 2003 require the Chairman before making his/her decision to direct the assessors to provide those opinion in writing.

In the present case he submitted that; according to the proceedings of this case on 25/03/2020 the Chairman ordered the assessors to give their opinion. On 11th day of May 2020 records provide that the opinions were read to the parties. The proceedings do not state the content of the opinion and the copies of the opinion are not available in the court records. The law requires active participation of the assessors, in the case of **Edina Adam Kabona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 the Court of Appeal sitting at Mbeya observed that the opinion must be in record and the content to be read to the parties. The fact that the opinions were missing within the court records it was the stance of the appellants that the assessors were not properly consulted in accordance with the law.

On the issue whether the tribunal considered the opinion of the assessors it was the view of the appellant that the same is answered by section 24 of the Land Disputes Court Act. The provision require the Chairman to take into regard to the opinion of the assessors, unfortunately, the judgment of the tribunal did not stated the opinion of the assessors by

any means. The Chairman did not state as to whether he accepted the opinion of the assessors or not. It was the view of Mr. Kapinga that the judgment contravened section 24 of the Land Disputes Act because the opinions were not considered at all in the tribunal judgment.

On the reliefs, according to the appellant's counsel he suggested the court to buy the directives in the case of **Sikuzani Said Magambo & another vs. Mohamed Roble,** Civil Appeal No. 197 of 2018 Court of Appeal of Tanzania at Dodoma that, where the assessors were not actively involved in the proceedings, the omission is fatal which amounts to miscarriage of justice and vitiates the proceedings. The judgment and proceedings were a nullity. The fact that the proceedings were a nullity a proper remedy is trial de novo before another Chairman with a different set of assessors.

Ms. Jalia Hussein assisted by Lucia Richard submitted that the assessors were properly consulted. The tribunal was properly constituted per section 23 of the Land Disputes Courts Act because the tribunal was presided by a Chairman and two assessors, the Chairman was Mr. Munzerere and the two assessors were Musa and Vivian. They had no doubt about the tribunal composition. The appellant Counsel did not dispute that the opinion were read, his dispute is that the opinion are missing in the court records.

On the issue whether the opinions of the assessor were considered in the judgment of the tribunal, they were of the view that the tribunal considered the opinion of the assessors as seen in the proceedings on 11/05/2020. The Chairman considered the opinion in the proceedings per section 24 of Land Disputes Act Cap 216 R. E 2019. The Chairman did not differ with the opinion of the assessors. Regulation 19 of the District Land and Housing Tribunal Regulations of 2003 provide that the Chairman is supposed to deliver judgment after considering the opinion of the assessors. It was the view of the respondents that the Chairman considered the opinion of the assessors and he did not differ with them.

About a proper relief the first respondent Counsels suggested the Court to order the tribunal to compose a fresh judgment in case of any fatal anomaly. The other respondents who appeared in person had nothing useful to submit on these points of law, they left the court to proceed.

In a brief rejoinder the appellant Counsel prayed the court to quash the proceedings and judgment to allow retrial.

Having heard the parties I wish to answer the issues raised in seriatim as follows; - on the issue whether the assessors were properly consulted I opt to start by considering section 23 (2) of the Land Disputes Courts Act which provide;

"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."

In the case at hand there is no dispute that the Chairman did sit with two assessors namely Vivian L. Chang'ombe and Musa W. Mwasapili. Upon a careful perusal of the records, I realized that the assessor filed their respective written opinion before the date of judgment. The assessor Vivian L. Chang'ombe filed the opinion on 7th May 2020 and Musa W. Mwasapili filed his opinion on 5th day of May 2020. The opinions were accordingly filed before the tribunal. I therefore differ with the argument of the appellant Counsel that the respective opinions are not present in the court records. It is a rule of law and court practice that that the opinion of the assessors must be availed in the presence of the parties for them to be aware of the nature of the opinion.

The appellant Counsel rightly referred to Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which provides; -

'Notwithstanding sub regulation (1) the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.'

The said position of the law was addressed and properly interpreted in the case of **TUBONE MWAMBETA VS. MBEYA CITY COUNCIL**, Civil Appeal No. 287 of 2017, CAT (unreported) at page 8 it was held;

> *'The role of assessors will be meaningful if they actively and effectively participate in the proceedings before giving their opinion at the conclusion of the trial and before judgment is delivered.'*

The Court at page 11 of the same judgment proceeded to state; -

> *'in view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, as earlier intimated, 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. Unfortunately, this did not happen in the instant case. We are increasing of the considered view that, 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****.'*

Guided by the above provision it is important to go to the proceedings to prove as to whether the guidance is reflected in the proceedings before the trial Tribunal. According to the proceedings dated 25th day of March 2020 the proceedings speak by themselves at page 126 and 127 as follows; -

> *"Gerald: I close my case*
>
> *Order:*
>
> - *Opinion be filled by assessors on 11/05/2020*
> - *The opinion to be availed to parties on 11/05/2020*

Sgd

T. Munzerere

Chairman

25/03/2020

11/05/2020

Coram: T. Munzerere – Chairman

Members:

1. *Vivian*
2. *Musa*

Applicant : present

Respondent: present

Order: -Opinion availed to parties. Judgment on 23/06/2020, parties to appear.

Sgd

T. Munzerere

Chairman

11/05/2020…"

The above proceedings are very clear that the wise assessors were availed an opportunity to prepare their opinion in writing and the same were availed to the parties on 11th May 2020. I am satisfied that the assessors were properly consulted and actively participated in the tribunal proceedings in accordance with the law.

The second issue to be answered is whether the tribunal sufficiently considered the opinion of the assessors in the tribunal judgment. The

Counsel for the appellants submitted that the same were not considered at all the fact which renders judgment and proceedings a nullity. In their party the respondents were of the view that the opinions of the assessors were properly considered because the trial Chairman did not differ with the opinion of the assessors.

I had time to read thorough the judgment of the tribunal and the opinion of the assessors file by the two assessors. In the judgment I agree with the appellant's Counsel that the learned Chairman did not consider by any means the opinion of the assessors. Both assessors opined that the suit land be given to the 1st respondent while the tribunal decided in favour of the 3rd, 4th and 5th respondents. Therefore, the argument of the Counsels for the first respondent that the learned Chairman did not differ with the wise assessors is not true.

The judgment of the tribunal stated nothing about the opinion of the assessors even the summary of what they opined is missing. Even a summary carrying the whole message of the opinion of the assessors sufficed to be stated in the judgment, but it is not there. To recall the law, I wish to consider section 24 of the Land Disputes Courts Act Cap 216 which provides; -

> *"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

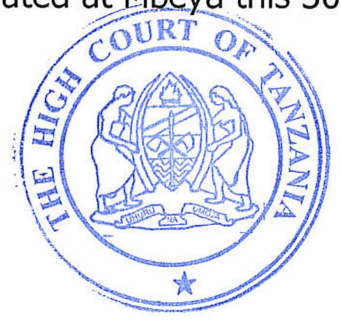
The above provision is very clear that the Chairman shall take into account of the opinion of the assessors and he shall not be bound by it except in the circumstance where he differs with such opinion, he is bound to give reasons. In the case at hand the chairman did not take into account of the opinion of the assessors. As it has been noted above, he did not even subscribe to the opinion of the assessors, he did differ with them. The fact that he did differ with the opinion of the assessors, he ought to give reasons. Section 24 of the Land Disputes Courts Act is coached in mandatory form; therefore, none compliance is fatal. The trial tribunal did not sufficiently consider the opinion of the assessors in the tribunal judgment.

The Counsel for the appellant prayed the court to quash the proceedings and judgment. The circumstance of this case I find no problem with the proceedings, there is no need to quash the proceedings because they are sound and competent as demonstrated above. The case of **Sikuzani Saidi Magambo** (supra) as relied by the appellant is distinguishable because it covers a circumstance where the opinions were missing or were not availed to the parties. Therefore, the only problem in this case is to

the judgment which did not consider the opinion of the assessors. The proper remedy is to quash the judgment and decree in order to give room for the trial tribunal to compose judgment in compliance to section 24 of the Land disputes Courts Act Cap 216 R. E 2022.

From the foregoing deliberation, I invoke revisional jurisdiction under section 43 (1) and (2) of the Land Disputes Courts Act Cap 216 R. E 2022 to nullify judgment and decree of the tribunal dated 27th August 2020. The records are remitted to the trial tribunal for the same Chairman to compose judgment according to law. Order accordingly.

Dated at Mbeya this 30th day of November 2022.



D. P. Ngunyale
Judge