

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT COURT OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 41 OF 2020

(C/F Land Application No. 65 of 2018, District Land and Housing Tribunal of Karatu)

BURA NADE.....APPELLANT

VERSUS

ELIKANA GADIYE.....RESPONDENT

JUDGMENT

5/10/2021 & 28/01/2022

GWAE, J

This appeal involves a dispute over a parcel of land situated at Ngaibara village, Kansay Ward, Karatu District over a piece of land measuring $\frac{3}{4}$ acre. On 20/11/2018 the respondent filed a suit, Application No. 65 of 2018 against the appellant claiming that on 14/07/2015 part of his land had been trespassed by the appellant. He went further to state that the trespassed land belonged to him as he was allocated 2 acres during Operation Vijiji in the year 1977. He therefore sought for relief to be declared as the lawful owner of the disputed land.

The respondent's case in the District Land and Housing Tribunal was built on his own evidence (AW1), and that of Mathayo Male (AW2) and Umbural Kondi (AW3) who supported the contention that the respondent was re allocated the disputed land during the operation vijiji in the year 1977.

On his part the appellant and his witnesses testified that the respondent and the appellant were neighbours and that on 14/07/2015 arouse a dispute between the appellant and the respondent and the same was refereed to the village council which visited the locus in quo and resolved that the disputed land $\frac{3}{4}$ acre belonged to the appellant and boundaries were set thereon.

After hearing, the trial chairman made a finding that the respondent is the lawful owner of the disputed land measuring $\frac{3}{4}$ acres on reason that he was allocated the said land during the operation vijiji in the year 1977.

The appellant was aggrieved by the decision of the trial tribunal. He lodged this appeal with a total of seven grounds of appeal which basically fault the evaluation of evidence by the trial tribunal and second is on the material irregularity on the requirement of the opinion of the assessors to be read in the presence of the parties.

When the appeal came up for hearing, the parties appeared in person unrepresented, and with leave of the court the appeal was disposed by way of written submission which I shall consider while disposing the appeal.

I shall begin with ground number seven which reads; that the proceedings of the District Land and Housing Tribunal is a nullity for the reasons of material irregularities apparent on the proceedings of the trial tribunal which go to the root of the case. In his submission the appellant argued that the proceedings of the trial tribunal are a nullity on the reason that the proceedings are such that opinion of the assessors were not read in the presence of the parties as required by the provisions of Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (the Regulations). To cement his arguments the appellant cited the case of **Edina Adam kibona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported). The appellant thus urged this court to nullify the proceedings and judgment of the trial tribunal.

In reply to this ground of appeal the respondent argued that in the matter at hand the records reveal that, assessors were asked to give their opinion before delivery of the judgment, and as to whether or not assessors opinion was read in the presence of the parties he was of the opinion that

even though the proceedings does not show that but the same were read to the parties.

In determining this ground of appeal, I find it apposite to reproduce the provision of regulation 19 (2) as follows;

"19 (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."

The above provision of the law has been interpreted by the Court of Appeal of Tanzania in a number of decisions to mention a few; **General Manager Kiwengwa Stand 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 and **Tubone Mwambeta v. Mbeya City Council**.

In the case of **Tubone Mwambeta (supra)** in emphasizing the need to require every assessor to give his opinion and the same recorded and be part of the trial proceedings, this 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." [emphasis is mine]

In the matter at hand, and as alluded to by appellant the records are such that on 31/03/2020 the trial chairman gave an order; "assessors opinion on 20/04/2020" again on 20/04/2020 the chairman gave another order; "assessors opinion on 4/05/2020". Indeed, the proceedings of the trial tribunal reveal that the assessors gave their opinion in writing however it is not reflected in the proceedings as to whether the said opinion were read in the presence of the parties before the composition of the judgment. In the case of **Sikuzani Saidi Magambo & another vs Mohamed Roble**, Civil Appeal No. 197 of 2018 (Unreported) the Court of Appeal of Tanzania was faced with similar situation and had the following to say;


"On the strength of our previous decisions cited above, we are satisfied that the pointed omissions and

irregularities amounted to a fundamental procedural error that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal, as well as those of the first appellate court. In our view, these points suffice to dispose of the matter and we find that it is not necessary to dwell on discussing the remaining irregularities found in the Tribunal's judgement."

From the above position of the law, it follows that the above irregularity amounts into a fundamental error which has occasioned miscarriage of justice to the parties which suffices to dispose the matter without discussing the remaining grounds of appeal.


That being said, this appeal is allowed. The file to be expeditiously remitted to the trial tribunal for the opinion of the remaining assessor (Mrs. Panga) to be read in the presence of the parties as one of the assessors is reported to be deceased (Mr. Mushi) and this is pursuant to section 23 (3) of the Land Disputes Courts Act Cap 216 R.E 2019. Thereafter reading the opinion of the assessor, the trial tribunal shall compose the judgment. Given the circumstances of this case each party to bear his costs of this appeal and that of the trial tribunal.

It is so ordered.


M. R. GWAE
JUDGE
28/01/2022

Order: Parties to appear before the trial Tribunal on 28th March 2022.




M. R. GWAE
JUDGE
28/01/2022