THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. LAND APPEAL NO. 10 OF 2021
(Arising from Land Appeal No. 169 of 2018 of the District Land and Housing Tribunal for Mbeya, original Land Dispute No. 120 of 2018 of the Ruiwa Ward Tribunal)

WASIA MAHERABI.....APPELLANT

VERSUS

HAMAD MUSA.....RESPONDENT

JUDGMENT

Dated: 13th December, 2021 & 9th February, 2022

KARAYEMAHA, J

This is a second appeal arising from a decision of the District Land and Housing Tribunal (the 1st appellate Tribunal) for Mbeya at Mbeya. The first appeal had originated from the judgment and orders of the Ruiwa Ward Tribunal (WT). In the latter case, while the WT declared that the late Nassoro Ibrahim was a lawful owner of the disputed land measuring one and half acres ($1^{1/2}$), the appellant's late father, Maherabi Nassoro (Nassoro's son Ibrahim), was adjudged an administrator of his father's estate and was merely using the disputed land but not the

owner. It was, therefore, the decision of the WT that the appellant could not claim ownership over the disputed land. The WT concluded that:

> *"Eneo bishaniwa alikuwa analilima marehemu Maherabi akiwa msimamizi wa mirathi ya marehemu Nassoro Ibrahim na baada ya misimamizi wa mirathi kufariki, familia ilimteua msimamizi wa mirathi mwingine na hatua za kisheria zilifuatwa na hakuna pingamizi lolote lilitolewa, ndipo msimamizi wa mirathi akaapishwa na kuanza kulihakiki eneo la familia ya marehemu Nassoro Ibrahim, hivyo msimamizi wa mirathi yupo kisheria anatakiwa kuendelea kugawa eneo la familia kwa kutumia busara na hekima, hivyo kuanzia leo eneo bishaniwa litakuwa chini ya msimamizi wa mirathi ya marehemu Nassoro Ibrahim kwa hatua ya ugawaji..."*

This excerpt means that before his demise Maherabi was appointed the administrator of the late Nassoro Ibrahim's estate. During that period, he used the disputed land for cultivation. After his demise, the respondent was legally appointed to step into his shoes and was tasked to verify the disputed land and thereafter divide it to Nassoro Ibrahim's beneficiaries. It was this background which forced the WT to declare the respondent a legal administrator of Nassoro Ibrahim's estate and ordered him (respondent) to proceed with the division of his estate including the disputed land to his beneficiaries wisely. The appellant was aggrieved and preferred Land Appeal No. 169 of 2018 to the 1st

appellate Tribunal.Sadly, her appeal was dismissed in its entirety with costs at the conclusion of the trial.

To express her disagreement with the 1st appellate Tribunal's decision, the appellant preferred the present appeal to this Court raising seven grounds (7). The grounds are:

1. *That, both lower tribunals erred in law and fact when entering (sic) the judgment in favour of the respondent without considering that the function of the administrator is only to administer the estate of the deceased and not to own the same.*
2. *That, both lower tribunals erred in law and fact when failed (sic) to consider the law of limitation in possession of land for more that of twelve years (12).*
3. *That, both lower tribunals erred in law and fact when failed (sic) to analyzing (sic) the status of the respondent in the family of Nassoro Ibrahim.*
4. *That, both lower tribunals erred in law and fact when entering (sic) the judgment in favour of the respondent without considering that the appellant was given the said disputed property by one Rahibu Nassoro and not by Hamad Musa.*
5. *That, the lower tribunals erred in law and fact when failed (sic) to consider the relationship which exist between the appellant and one Hamad Musa.*
6. *That, the appellate tribunal erred in law and fact when failed (sic) to invite the opinion of the wise assessors before fixed (sic) the date of the judgment.*

7. *That, the appellate tribunal erred in law and fact when entering (sic) the judgment in favour of the respondent without expressing the opinion of the wise assessors to the parties of the case.*

Before me, parties appeared in person, unrepresented. The matter was disposed of by way of written submissions as per the court's order. On 03/11/2021 when the scheduling order passed, both parties were present. The Court proceeded to schedule the submissions dates as follows:

1. Appellant's written submission to be filed by 17/11/2021.
2. Respondent's reply to be filed by 1/12/2021.
3. Rejoinder on 08/12/2021.
4. Mention on 13/12/2021.

The respondent has defaulted the court's order which was made at the advantages of both parties who were unrepresented and not objected. As per the court's order, the reply submissions were to be filed by 01/12/2021. On 13/12/2021 when the matter was called on for fixing a judgment date, the respondent had not filed his reply submissions. Reasons staged by him that his brother died on 07/12/2021 was dismissed by this Court on the ground that by that date he was already out of time ordered by the Court. The appellant was timeous in filing her

written submissions. She filed her submissions in chief on 17/11/2021 quite in line with the court's order dated 03/11/2021.

It is now part of our law that failure to file written submissions as ordered by the Court is akin failure to appear when the case is called on for hearing. The consequent orders for such no appearance are inevitable. There is an unbroken chain of decisions that hold so. These include ***Hidaya Zubei vs Bongwe Mbwana***, PC Civil Appeal No. 98 of 2003 (DSM) (unreported), ***Perpetua H. Kirigini & another v Dr. Msemo Diwani Bakari***, Land Appeal No. 3 of 2005 (unreported), ***Tanzania Electric Supply Co. Ltd v Abubakar Adam***, Civil Appeal No. 46 of 2008 (unreported), ***Twaha Songoro & 2 others v Anold Kato***, PC Civil Appeal No. 18 of 2003 (unreported) and ***Mohamed Manji v The Registered Trustees of Chama Cha Mapinduzi***, Land Appeal No. 5 of 2012.

Inspired by the above few mentioned cases, I am of a settled view that the respondent has failed to defend his case. Therefore, as already alluded to above, I shall decide this appeal on the evidence available and as argued by the appellant.

I have carefully gone through the grounds of appeal, submissions by the appellant and the 1st appellate Tribunal's record, for reasons that

shall be apparent in the course, I will deliberate on grounds 6 and 7 as they appear in the memorandum of appeal. I think, nevertheless, that the two grounds can be compressed into one ground which is that ***the 1st appellate Tribunal failed to invite assessors to give opinion before delivery of judgment***. The appellant argued that the 1st appellate Tribunal contravened section 34 (1) of the Land Dispute Court (Cap 216 RE 2019) (henceforth the Land Disputes Act).

I have disappointedly examined the 1st appellate tribunal's record in light with the argument of the appellant. Obviously, the proceedings of the first appellate Tribunal justify the appellant's line of argument. The 1st appellate tribunal's record (especially the handwritten proceedings) clearly indicates that on 20/02/2019 when the 1st appellate Tribunal ordered the hearing to be in the form of written submissions Vivian and Mussa, assessors, were present. On 11/03/2019 they were present and the 1stappellate tribunal on application by the respondent, extended time for him to file his submission in two days. The 1st appellate Tribunal scheduled the appeal for judgment on 16/04/2019. It further ordered the assessors to file their opinion. Although the typed proceedings show that assessors' opinion was availed to parties on 11/03/2019, the hand written proceedings showno suchorder stated above. The record does

not show that these assessors recorded their opinion and read it in the presence of parties before the Chairman had composed a judgment as required by law. The hand written proceedings demonstrate that after parties had filed their submissions, the chairman went ahead to fix a judgment date. He neverinvited assessors to give their opinion pursuant to section 23 (2) of the Land Disputes Courts Act and Regulation 19 (2) of the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003 (henceforth the Regulations).

I have taken libertyto go through the 1st appellate Tribunal's original record. It is conspicuous that the record has the opinion of assessors in writing. However, the record does not show how the opinion found its way in the court record. The emerging crucial question is that if assessors did not avail their opinion in the presence of parties in court, where and when did the chairman get their opinion. The corrupting fact is that assessors' opinion was considered in the judgment. It is my settled view that since the record does not show when and how assessors' opinion paved their way into the record, this suggests that the same was not given in the presence of parties. As such it serves no useful purpose. It is equally of no useful purpose for the chairman to refer to them in his judgment.

In my understanding and appreciation of the law, it was unsafe on the side of the chairman to assume that assessors gave their opinion which is not on the record by merely reading the acknowledgment of the chairman in the judgment. In the circumstances, I am of a considered view that, assessors were not fully involved in the trial of the appeal when they failed to give any opinion for consideration in the preparation of the 1st appellate Tribunal's judgment and this was a serious irregularity. In this accord, I respectfully borrow the words of wisdom from the case of ***Ameir Mbarak and Azania Bank Corp. Ltd v Edgar Kahwili***, Civil Appeal No. 154 of 2015 that:

> *"**It is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgment of the chairman in the judgment**. 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."*** [Emphasis added]

The mandatory legal requirement of sitting with assessors at the hearing of the appeal is contained insection 34 (1) of the Land Disputes Courts Act [Cap. 216 R. E. 2019] (the Act hereinafter) which provides that:

"34.-(I) The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors, and shall-

(a) consider the records relevant to the decision;

(b) receive such additional evidence if any; and

(c) make such inquiries, as it may deem necessary."

After hearing the appeal, the chairman must direct assessors to give out their opinion before he reaches a judgment in terms of section 23 (2) of the Land Disputes Courts Act, which provides thus;

(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.*** [Emphasis supplied]

This duty is further imposed to the Chairman by the regulations made under the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003. Regulation 19 (2) provides thus:

19 (2) 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.* [Emphasis provided]

The opinion must be read to parties before the judgment is composed. This view finds support in the case of ***Edina Adam Kibona***

***v Absolom Swebe (Sheli),* Civil Appeal No. 286 of 2017, CAT, Mbeya sub registry (unreported)**. The Court observed that:

> *"...the chairman must require every assessor present to give his opinion. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed."*

The rationale behind this view was well articulated in the case of ***Tubone Mwambeta v Mbeya City Council,*** (Supra) 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."*** [Emphasis added]

I am fully guided by the above position.

In the instant appeal, I am inclined to hold that the learned chairman failed to comply with mandatory provisions of section 23 of the Land Disputes Courts Act Cap 216 (RE 2019) and Regulation 19 of the Regulations G.N. 174 of 2003 as well as guiding precedents.

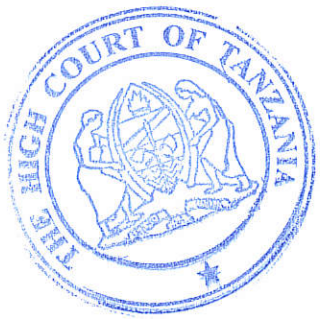
Consequently, the glaring omission by elimination means that the trial in the 1st appellate Tribunal was a nullity. For these reasons thereof, I declare both the proceedings and judgment of the 1st appellate

Tribunal a nullity and are accordingly nullified. I accordingly order the record of the 1st appellate tribunal to be remitted back for expeditious re-trial, of course if parties will be interested, before another chairman and sitting with a new set of assessors.

Costs to be in the due course.

It is so ordered.

Dated at **MBEYA** this **9th** day of **February, 2022**



J. M. Karayemaha
JUDGE