IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB REGISTRY)

AT MOROGORO

LAND APPEAL NO. 37 OF 2021

MANENO JUMA .... APPELLANT

VERSUS

ZAINABU MSHAMA .... RESPONDENT

(Being appeal form the decision of the District Housing and Land Tribunal for Morogoro District at Morogoro)

(Hon. E. Mogasa, CM.)

dated the 18th day of October, 2021

in

Application No. 187 of 2017

JUDGMENT OF THE COURT

Date of Last Order: 25/02/2022 &
Date of Judgment: 04/03/2022

S.M. KALUNDE, J.:

In this the appellant, MANENO JUMA, is challenging the decision of the District Land and Housing Tribunal for Morogoro District at Morogoro ("the tribunal") in **Land Application No. 187 of 2017**. The brief facts leading to the present appeal are that; before the tribunal the respondent, ZAINABU MSHAMA, had sued the appellant for trespass into her piece of land located at Mgaza street, Kasanga - Mindu within Municipality of Morogoro ("the suit property") which she had lawfully bought from Rehema Nassoro and

Saidi Nassoro in the year 2010. The respondent claimed that the appellant had demolished her house built onto the suit property. Relying on the above set of facts the respondent prayed to be declared the lawful owner of the suit property, she also sought for specific damages for demolition of the suit property and costs of the case. On his part the appellant argued that he was the lawful owner of the suit property having purchased the same from the village government in 2009. He prayed for the dismissal of the suit.

Upon hearing testimony and considered evidence from both parties, the trial tribunal ruled in favour of the respondent. In the result, the trial tribunal ordered the appellant to vacate from the disputed property and pay the respondent specific damage to the tune of Tshs 2,000,000/=. The appellant was not happy with ruling of the tribunal, he filed the present appeal based on the following grounds:

1. *That, the trial chairman erred in law in deciding in favour of the respondent basing on the illegal and incompetent sale agreement tendered by the respondent which does not disclose the location of the disputed land and is full of contradictions;*

2. *That, the trial chairman erred in law and facts in holding that the appellant has failed to prove his ownership for failure to call the seller as witness without considering that the seller has pass away and human life is not permanent thing thus the written document tendered by the appellant as an exhibits sufficient proof;*
3. *That, the trial chairman erred in law and facts for failure to give opportunity to the appellant to call other witnesses other than the seller who were present during the sale of the disputed land to the appellant; and*
4. *That the trial chairman erred in law and facts in making improper judgement and orders which overrule the previous judgment issued by Mindu ward tribunal in land case No 80/B/MD/2014 and application for execution no 136 of 2015 of Morogoro District Land and Housing Tribunal outside the proper forum.*

After conclusion of pleadings, I fixed a date for hearing. However, as I was going through the records, I noted some irregularities in the proceedings before the trial tribunal. Thus, when parties appeared before me, I invited them to address the Court on the appropriateness or otherwise of the proceedings. I had raised the issue *suo motu* relying on the provisions of section 23 of **the Land Disputes Courts Act [Cap. 216, R.E. 2019]** ("the Act") read together with regulation 19 of **the Land Disputes Courts (The**

District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003 ("the Regulations").

The above cited sections read together provides that a properly constituted tribunal in terms of the Act is composed of the Chairperson and at least two assessors. The Act requires that the two assessor must be present throughout trial, and they must be actively and effectively involved in the trial so that they can have a meaningful contribution in advising the tribunal. Further to that, the Act allows for a flexibility that, wherefor any reasons, one or all the assessors misses a hearing session, the tribunal may proceed with the remaining assessor or without any assessor, as the case may be. (Also see **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015, Court of Appeal at Iringa (unreported)).

I was also aware of the position that an assessor who had missed a hearing session of the tribunal should not be allowed to rejoin the case in the next hearing or be allowed to opine. See **Enosi v Republic** (Criminal Appeal No. 135 of 2915) [2016] TZCA 135; (21 October 2015 TANZLII), and **Joseph Kabul Vs Reginam** (1954) 21

EACA 260. Similarly, I was up to date with the now settled legal position that the opinion of assessors must be delivered in writing in the presence of the parties. This is the impost of section 23 (2) of the Act and regulation 19 (2) of the Regulations. The above provisions have been considered and interpreted by the Court of Appeal on several occasions. See in the case of **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; **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017.

Responding to the call to address the Court on what transpired at the tribunal, the appellant recounted that trial tribunal was conducted with the aid of assessors. He recalled that at the conclusion of the trial only one assessor was present. He also did not hear the assessor read his opinion at the conclusion of the trial. On the part of the respondent, she said that there were two assessors at the beginning of the trial and that later during trial they were informed that one of the assessors had passed away. She also recalled not to hear the remaining assessor read his opinion before delivery of judgment.

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Reverting to the records, it is apparent that trial commenced on 11th January, 2018 where the trial tribunal, framed issues and partly heard the testimony of **AWI**. On the day the assessors present were **Mr. Mpitte** and **Mr. Njovu**. Further hearing of **AWI** and **AWII** proceeded on 13th November, 2018 in the presence of **Mr. Mpitte** and **Mr. Njovu** as assessors. The applicant's case was marked as closed and the case was adjourned.

Almost a year later on 29th day of January, 2019, defence hearing commenced. The trial records show that only one assessor, **Mr. Njovu** was present at the commencement of the defence hearing. On the respective day the tribunal partly heard the testimony of DW1 and the hearing was adjourned. No hearing was conducted for the remainder of 2019 and the whole of 2020. Further hearing of defence case proceeded two years later on the 17th day of May, 2021. The coram for the day read as follows:

17.05.2021
AKIDI: MWENYEKITI
WAJUMBE: (1) NSANA
(2) MNGAZIJA
MUOMBAJI – YUPO
MJIBU MAOMBI – YUPO

The above quoted records do not show who was the presiding tribunal officer for the day. However, on the day the tribunal (**Hon. Mogasa (CM)**) issued orders taking over the case from **Hon. Mbega (CM)** who had been transferred. In addition to that the tribunal took note that one of the assessors had passed away in thus it was proceeding with one assessor in terms of section 23 (3) Cap. 216. Specifically, the tribunal made the following order:

> *"Baraza: kesi hii ilikuwa ikisikilizwa na Mh Mbega Mwenyekiti ambaye amehamishwa Kituo. Kesi hii itaendelea mbele yangu B. Mogasa Mwenyekiti, na wazee wa Baraza walikuwa ni Mr. Mpitte na Mr. Njovu, Mpite yupo, **Mr Njovu** amefariki, kesi itaendelea chini ya kifungu cha 23 (3) CAP 216."*

The tribunal went on to hear to hear the remaining testimony of DW1. Despite the fact that Mr. Mpite was not recorded on the coram as indicated above, he participated in posing questions to the witness. On that account, I take it that the coram was mistakenly recorded. On the day, the mater proceeded with hearing of the defence case (DW2) on the 04th June, 2021 in the presence of Mr. Mpite as the sole assessor. Defence case was marked as closed. The

Court ordered that the opinion of assessors be delivered on 25th June, 2021. There are no records on what transpired on the 25th June, 2021. However, it is on record that delivery of judgment was adjourned several occasions including on 12th July, 2021; 21st July, 2021 and judgment was finally delivered on 18th October, 2021.

From the above records it is clear that Mr. Mpite was not present on 29th day of January, 2019 when defence hearing commenced. He, therefore, did not hear part of the evidence tendered by DWI. The trial records are also clear that the only assessor present was **Mr. Njovu**. It is also apparent from the records that on 17th day of May, 2021 the tribunal proceeded with Mr. Mpite as the sole assessor as allowed under section 23(3) of the Act. Mr. Mpite went on conclude hearing the matter. Despite the fact that he had not heard all the evidence, he prepared his opinion which forms part of the records.

In addition to that the Chairman referred to the opinion on page 10 through to 11 of the typed judgment. In my view, allowing an assessor who had not heard all the evidence to opine and failing to have the opinion delivered in the presence of the parties

presented some serious irregularities in the trial tribunal proceedings. I say so because the position of the law is that once trial commences with a certain set of assessors, no changes are allowed. I am also aware that once an assessor absents himself or herself from hearing, for any reason, he or she should not be allowed to rejoin at the future date. The rationale for this is simple, his or her opinion will be of no help to the tribunal as he or she had not heard all the evidence sufficient to enable him or her to make an informed or rational opinion to assist the trial tribunal. See **Enosi vs Republic** (supra) **Joseph Kabul vs. Reginam** (supra). Since Mr. Mpite had not heard all the evidence, it was therefore illegal for him to give his opinion on the case let alone the same be referred in the judgment.

From the above set of facts, it cannot be safely concluded that the trial before the tribunal was conducted with the aid of assessors as required under section 23(1) of the Act and regulation 19 of the Regulations. I have no flicker of doubts that failure by the trial tribunal to observe the mandatory requirement of section 23(1) of the Act and regulation 19 of the Regulations, did not only vitiate the proceedings and the resulting decision of the trial tribunal but it also rendered the trial tribunal lack jurisdiction to try the case.

Unfortunately, that was not the only irregularity in the trial tribunal records. As pointed out above, even assuming that the opinion on record was properly prepared, which as I have held it was not, the records are silent on whether the opinion of the remaining assessor was rendered in the presence of the parties. The position of the law is settled that at the conculsion of trial and before the delivery of judgment the presiding chairman must afford the wise assessors who have heard all the evidence and present at the conclusion of the trial an opportunity to readout their opinion in writing and such opinion must be availed in the presence of the parties. The rationale being to enable the parties to know the nature of the opinion and whether such opinion has been considered by the Chairman in the final verdict. See **Tubone Mwambeta v. Mbeya City Council** (supra); **Emmanuel Christopher Lukumai v. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013; **Y. S. Chawala & Co. Limited v. Dr. Abbas Tehonrali**, Civil Appeal No. 70 of 2017; and **B. R. Shindikat/a Stella Secondary School v. Kihonda Pista Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017 (all unreported).

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In the present case, the record show that when the defence case concluded on 04th June, 2021, the tribunal ordered delivery of the opinion to be on 25th June, 2021. There is no record of what transpired on 25th June, 2021. In addition to that the said opinion appear to be prepared and signed by the said assessor on 04th June, 2021. The question is, if the said opinion was ready by the 04th June, 2021 when defence case was closed why would the Chairman order the same be delivered on 25th June, 2021. Obviously, I am not ruling out the possibility that the opinion could have been prepared on the same day. But again, that may not have been possible because the 04th June, 2021 was the day when the defence case was closed. It would defy logic that the assessor could have compiled his opinion on the same day. If he, in fact, did it there was no reason for its delivery to be delayed, let alone failure for it to be read at a future date fixed for the occasion. The circumstances surrounding the way the opinion made it into the records raises doubts on fairness of the trial. In final, I hold that, the failure by the Chairman to afford an opportunity for the remaining assessors to give his opinion in writing in the presence of the parties, was a fatal irregularity as it was decided in the above cited cases.

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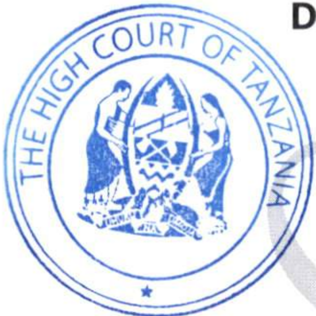
All said, I invoke the revisional power conferred on this Court under section 43 of the Act to nullify the entire proceedings and set aside the resultant judgment and decree of the tribunal in Application No. 187 of 2017. As a way forward, I remit the case file to the tribunal for rehearing of the application before another Chairman sitting with a new set of assessors. Should parties adopt this course of action, I order the application be disposed in no more than six (6) months from the obtaining of the records and receipt of this decision. Having resolved the matter on my own efforts, I make no order for costs.

It is so ordered.

DATED at **MOROGORO** this **04th** day of **MARCH, 2022**.



S.M. KALUNDE

JUDGE

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