IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 61 OF 2021

(Arising from the Decision of the Land and Housing Tribunal of Mwanza in Application No 132 of 2006)

HAMISI ATHUMAN RAMADHAN---------- APPELANT

VERSUS

CONSTANCE BANYANKAMBONA----------1ST RESPONDENT

JOSEPH WILLIAM BIDYANGUZE----------2ND RESPONDENT

CONSOLIDATED HOLDING CORPORATION------3RD RESPONDENT

JUDGEMENT

Last Order: 11.04.2022
Judgement Date: 19.4.2022

M. MNYUKWA, J.

The appellant, Hamisi Athuman Ramadhan was aggrieved by the decision of the District and Land Housing for Mwanza (herein to be referred as the trial tribunal) dated 24th September 2021 in Land Application No 132 of 2006, hence, the present appeal.

Before the trial tribunal, the first respondent sued the second respondent for mortgaging a house without her consent to the then National Bank of Commerce which now stand as the third respondent as

a security for loan. Later on the third respondent sold the house to the appellant after the second respondent failed to pay the loan. Consequently, the certificate of occupancy was transferred to the appellant. It is on record that, in the trial tribunal the first respondent claimed to have an interest in the suit house and she filed a caveat to protect her interest and at the same the appellant intended to evict the first respondent from the disputed house.

After hearing the application, the trial tribunal decided the matter in favour of the first respondent and ordered her to return the purchase price to the appellant and also ordered the third respondent to pay interest of the decretal sum from 24th February 2006 until when the payment is done.

Before this court the appellant was represented by Mr. Libent Rwazo assisted by Kyariga N. Kyariga and Haisa Rumanyika, the learned counsels, the first respondent was represented by Mr. Ditrick Raphael, learned counsel the second respondent enjoyed the legal service of Bahati Kessy, learned counsel while the third respondent had the service of Ms. Sabina Yongo, the learned state attorney.

It is worth to note that, when the matter was scheduled for hearing and when the counsels of both parties were supplied with the records from the trial tribunal, the court raised a concern *suo moto* and seek

clarification to the parties on the propriety or otherwise of the assessors not being fully involved in the trial tribunal. The court raised such a concern because it is apparent in the proceedings that assessors were not fully involved as per the requirement of section 23 of the Land Disputes Courts Act [Cap 216 R.E 2019] (the Act) and Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, GN No. 174 of 2003 (the Regulations).

Responding, Mr. Kyariga N. Kyariga conceded that there is a point assessors did not form part of the coram as reflected in the trial tribunal's proceedings dated 13th September 2010 and 7th February 2012 as it appear on page 38 and 48 respectively.

Mr. Kyariga added that there was also change of assessors throughout the hearing as reflected in the trial tribunal proceedings. He enlightens that, section 23(1)(2) and (3) requires the trial tribunal to be fully constituted by a chairman and two assessors. And that since there was no involvement of assessors in some hearing, it is fatal and that irregularity goes to the root of the matter. He therefore pray this court to nullify the entire proceeding. He refers this court to the case of **Dr. Clemance Kalugendo v Peter Andrew Athumani,** Civil Appeal No 92 of 2018, CAT at Dar es Salaam (unreported).

The counsel for the first respondent, Mr. Ditric Raphael contended that the assessors were involved as the Chairman acknowledged on his judgment that he did not consider their opinion. He further claimed that assessors formed part of the coram during the hearing of the application in the trial tribunal and therefore there was no miscarriage of justice in the trial tribunal since parties were afforded right to be heard. He went on that the case cited by the appellant counsel is distinguishable with our case at hand since in the cited case there was no involvement of assessors while in our case at hand the assessors were involved and their opinion is available in the court file. He finalized praying the court to invoke section 45 of the Act to find that there is no injustice to both parties and if this court form the view that there is irregularity, then it should not nullify the entire proceedings as the irregularity is only on the issue to address assessors to give their opinion and therefore nullification of proceedings should be from the point when assessors was required to give out their opinion. He insisted that he formed that view since the first and second respondent are now the deceased.

On his part, the counsel for second respondent, Mr. Bahati Kessy concurred with the submission of the first respondent. He insisted that since there was a written opinion of assessors, there was no procedural

irregularity which occasion failure of justice because each case is determined on its own facts.

The learned state attorney, Sabina Yongo agreed with the submission of the first and second respondent and opined that since the main issue based on the opinion of assessors, if the court formed the view that the matter is to be remitted to the trial tribunal it should be only remitted to include the opinion of the assessors.

In re-joining, the appellant's counsel reiterates his submission in chief that assessors were not fully involved as at some point the chairman sat with one assessor assesors' without giving reason, the chairperson stated that he did not consider opinion after giving reliefs. He went on to counter the respondents' submission by stating that the dispute centred on land and therefore if the person dies the course of action survive. He finalized by stating that the impugned judgement did not indicate if the first and second respondent are now the deceased though he is aware that the administrator of the first respondent is Nashon William Bidyanguze and for the second respondent is Wilfred Joseph Bidyanguze. He added that since the administrators of the deceased estate are present, they can stand on behalf of the deceased. He thus pray the court to nullify the proceedings.

Before I embark to decide the matter, I would like to point out that the trial of this case before the trial tribunal was not a smooth one as the same was handed by three different chairman and neither of them assigned reasons of taking over from his predecessor. The available record shows that the matter was presided over by Mr. A Kapinga, and Mr. Lung'wecha, M. The judgement was composed by Mr. Philip D and the decree was signed by Mr. A. Kapinga.

Turning back to the issue, parties were asked to address the court on the propriety or otherwise of the assessors not being fully involved at the trial tribunal. In other words, the parties were asked to address the court on as to whether the assessors were properly involved during the hearing and conclusion of the case before the trial tribunal and if the answer is in affirmative, what is the remedy.

Having heard the submissions of both parties, I would like to put it clear that assessors are part and parcel of the trial tribunal. The trial tribunal is said to be duly constituted when composed by a chairman and two assessors to form part of the coram and their involvement must be vividly reflected in the entire proceedings. The non-involvement of assessors is fatal and renders the entire trial tribunal proceedings a nullity.

The governing law that requires the involvement of assessors is Cap 216 R.E 2019 of which section 23 of the Act 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 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 judgement.*
>
> *(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 the proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.*

Having carefully scrutinize the available record, I have realized that assessors were not present throughout the hearing in the trial tribunal as it is required by the above cited provision of law. The records shows that when the matter was heard on the first hearing date, that is on 13th October 2009, two assessors were present namely; Mr. Juma and Mr. Lusato who duly constituted the trial tribunal together with the chairman.

On 13th September 2010 when the case proceeded with hearing the chairman sat without any assessor as well as on 7th February 2012 when the matter was for defence hearing, the chairman did not sit with assessors.

The records further indicates that on 30th May, 2012 the matter proceeded with two assessors, Mr Juma who was present at the commencement of hearing and Ms. Manyanda who is a new assessor as she was not present at the commencement of the hearing. Thus, from the records, it is clear that there was new assessor as Ms. Manyanda did not form part of the assessors in the previous hearing.

For the aforesaid shortcomings, I entirely agree with the appellant's counsel that the proceedings of the trial tribunal is tainted with grave procedural irregularity which was occasioned by the failure of the chairman of the trial tribunal to comply with the mandatory provisions of section 23(2) and (3) which requires him to sit with assessors and to continue with the remaining member if one of them is absent.

Furthermore, Regulation 19(2) of the Regulations provides that:

"Notwithstanding subsection (1) the Chairman shall before making his judgement, require every assessors present at the

conclusion of hearing to give his opinion in writing and the assessors may give his opinion in Kiswahili."

Upon thorough perusal of the record of the trial tribunal. I have found that when the chairman closed the case for the defence on 11th August 2014, he did but require the assessors to give their opinion. I say so because the records are silent if the chairman require the assessors to give their opinion in writing and he instead ordered the parties to file final submissions and scheduled the date of judgement.

As far as Regulation 19(2) of the Regulations is concerned, the assessors must give their opinion in writing and that opinion must be availed in the presence of the parties so as to know the opinion of assessors and whether the chairman considered that opinion or not.

In the case of **Tubone Mwambeta v Mbeya City Council,** Civil Appeal No 287 of 2007 (unreported) as quoted with approval in the case of **Dr. Clemance Kalugendo** (supra), the Court of Appeal specifically held that;

"In view of the settled position of the law, where the trial has been conducted with the aid of assessors... they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgement is composed. We are increasingly of the considered view that, since Regulation

19(2) of the Regulations requires every assessors present at the trial at the conclusion of hearing to give his opinion in writing, such opinion must be availed in the presence of 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."

It is without doubt that in our case at hand, the opinion of assessors was not read to the parties before the judgement as the court records are silent if the assessors' opinion were read out. In view of the above authority that was fatal irregularity and vitiated the proceedings.

Besides, despite the fact that the court record are silent if assessors were accorded an opportunity to give out their opinion in writing, but their opinion are found in the court file. When I scrutinize the opinion of assessors, I found the same were written by Methusela on 8th September 2014, though he was not a member at the commencement of the case and this is in contravention with section 23(3) of the Act. The other opinion was written by Juma on 10th September 2014.

In the case of **Edina Adam Kibona vs Absolum Swebe (Sheli),** Civil Appeal No 286 of 2017, CAT at Mbeya (unreported) the Court of Appeal of Tanzania faced with the situation like in our present case of finding the opinion of assessors in the court record and the said opinion were not availed to the parties, it stated that:

"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the chairman of the District Land and Housing Tribunal purports to refer them in his judgement. However, in view of the fact that the record does not show that the assessors were required to give them we fail to understand at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgement was composed the same have no useful purpose."

In the above decision, the Court of Appeal proceeded to nullify the entire proceedings and the judgement.

In our case at hand, the learned counsels for the respondents pray for the court to nullify the proceedings from the date when the assessors were required to give their opinion in writing for the reason that assessors were fully involved in the trial tribunal and some of the respondents are now the deceased.

With due respect to the learned counsels of the respondents, I find this prayer to be misplaced as the records are clear that assessors were not fully involved in the trial tribunal as highlighted above of which in some hearings the chairman proceeded without the presence of assessors. And as if that was not enough, the records are silent if the assessors were required to give their opinion and worse enough, their

opinion was not availed to the parties. All these vitiates the entire proceedings which deserved to be nullified.

The argument of the respondents' counsels that the first respondent and second respondent are now the deceased has no leg to stand as it was rightly submitted by the counsel of the appellant that since the dispute is on land and there are appointed administrators to administer the estate of the deceased, the same can be parties to the case on their behalf.

In conclusion, I am also mindful to the provision of section 45 of the Act as prayed by the counsels for the respondents that, this court should consider when forming its decision, that no decision of the trial tribunal will be reversed or altered on account of any error, omission or irregularity in the proceedings, unless such error, omission or irregularity has in fact occasioned a failure of justice. Nevertheless, in the circumstances of our case and for the aforesaid shortcomings, my mind is settled that the omission of the chairman to fully involved the assessors is grave and occasioned miscarriage of justice to both parties.

I therefore, proceed to exercise my revisional powers under section 43(2) of the Land Dispute Courts Act, Cap 216 R.E 2019, by nullifying and setting aside the entire proceedings and judgement of the trial tribunal.

As to the way forward for justice to be done I order a retrial of the case before a different chairperson and a new set of assessors. Since the omission was not caused by any parties, I make no order as to costs.

It is so ordered.

M.MNYUKWA
JUDGE
19/4/2022

Court: Judgement pronounced today on 19th April 2022 in presence of the appellant's counsel and the representative of the first and second respondents and in the absence of the third respondent.

M.MNYUKWA
JUDGE
19/4/2022