THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. LAND APPEAL NO. 20 OF 2022

(Originating from District Land and Housing Tribunal for Rungwe at Tukuyu Land Appeal No. 51 of 2019, Originating from Mpombo Ward Tribunal Land Case No. 18 of 2019)

OSIA MWALILINO.....APPELLANT

VERSUS

JONAS MWALYOJO.....RESPONDENT

JUDGMENT

Dated: 20th December, 2022 & 14th February, 2023

KARAYEMAHA, J

This is a second appeal arising from a decision of the District Land and Housing Tribunal (the 1st appellate Tribunal) for Rungwe at Rungwe. The first appeal had originated from the judgment and orders of the Mpombo Ward Tribunal (WT). In the latter case, the respondent was declared a winner. The appellant was further condemned to pay the costs to a tune of Tshs. 88,000/=.

The appellant was aggrieved and preferred Land Appeal No. 51 of 2019 to the 1st appellate Tribunal. Unfortunately, he lost and the WT's decision was upheld.

To express his disagreement with the 1st appellate Tribunal's decision, the appellant preferred the present appeal to this Court raising four (4) grounds. They are:

1. *That the honourable chairman erred in law by not inviting assessors to give out their opinion.*
2. *That the honourable chairman failed to properly analyse and evaluate the records (sic) of the trial ward tribunal hence arriving into a wrong decision.*
3. *That, the quorum at the ward tribunal was not properly constituted.*
4. *That, the honourable chairman erred in law and in fact by failure (sic)to give reasons for a decision.*

The respondent on his side, saw nothing faulty both procedural and substantively in the 1st appellate tribunal's decision. He replied further that the 1st appellate tribunal critically evaluated and analyzed the evidence and considered the WT's record and as a result reached to a fair decision.

At the hearing of the appeal the appellant was represented by Mr. Kevin Kuboja Gamba, leaned advocate, while the respondent fended for himself. With the parties' consensual resolution, the appeal was argued by

way of written submissions which were filed consistent with schedule drawn by the Court.

I have carefully gone through the grounds of appeal, submissions by parties and the 1st appellate Tribunal's record, for reasons that shall be apparent in the course, I will deliberate on ground one as it appears in the petition of appeal. The complaint is that the assessors were not invited to avail their opinion in the presence of parties.

Mr. Gamba argued citing Regulation 19 (2) of the Land Disputes Courts (District Land and Housing Tribunal), Regulations, G.N. No. 174 of 2003 (henceforth the Regulations) that apart from the trial Chairman being assisted by two assessors, namely, Mr. Kaponela and Mrs. Mwasikili and giving orders that they had to file written opinion on 17/07/2020 and the same be availed to parties, the latter mandatory procedure was overlooked. The learned counsel argued further that the conduct of the 1st appellate Tribunal was an abrogation of the law and stance of the binding decisions. He supported his argument by citing the decision in the case of **Ruth Rugomola v Kitaluka Preservation and Conservation Association (KPCA)**, Misc. Land Appeal No. 3 of 2021 HC - Bukoba which quoted the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No. 287 of 2017 CAT- Mbeya and **Bernard Sembula v Tabia**

Mbeveta, Land Appeal No. 3 of 2020 (all unreported). He wound up by arguing that the infringement of the law renders the decision and orders of the 1st appellate tribunal null.

In contrast, the respondent contended that the assessors opinion was considered in the 1st appellate Tribunal's judgment. He submitted further that the contention that assessors were not invited to give out their opinion is just a mere allegation which lacks evidence hence baseless. In his view section 23 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 was duly complied with.

I have anxiously examined the 1st appellate tribunal's record in light with the argument of the appellant which is contested by the respondent. Obviously, the proceedings of the 1st appellate Tribunal justify the appellant's line of argument. The 1st appellate Tribunal's record indicates categorically that the trial Chairman begun the trial with two assessors, namely, Mr. Kaponela and Mrs. Mwasikili. After parties had closed their submissions on 12/06/2020, assessors were ordered to file their opinion on 17/07/2020 and avail the same to parties on the same date. When the tribunal convened on 17/07/2020 assessors' opinion was not rendered. That event prompted the trial Chairman to adjourn the matter till

14/08/2020. On that day both assessors were present as well as parties. The trial Chairman read the following order:

> *"Opinion by assessors not availed to parties as one of them did not write opinion. Mention on 09/10/2020."*

On 09/10/2020 the trial Chairman fixed a judgment date. However, for reasons best known to him, the judgment was delivered on 27/03/2021.

Undisputedly, the learned chairman invited assessors to give their opinion pursuant to section 23 (2) of the Land Disputes Courts Act and Regulation 19 (2) of the Regulations, 2003. I have taken liberty to go through the 1st appellate Tribunal's original record. It is obvious that the record has the opinion of assessors in writing. One was written by Odilina Mwakanyamale, who was not the sitting assessor, and Hebron M. Kaponela. Their written opinion was considered in the judgment. For easy of reference, I take liberty to reproduce it as follows:

> *"Nakubaliana na ushauri wa wazee wote wawili wa baraza walioshauri kuwa shamba lenye mgogoro ni mali ya mrufaniwa."*

As matters stand on the record, one assessor who was not present during the trial of the appeal wrote her opinion and the same was considered in the judgment. That was absolutely wrong in our

jurisprudence. This is because the law is settled that only assessors who heard the case are the ones to give their opinion. However, the record does not show how her opinion found its way in the court record. The record is also pretty clear that the opinion was not written and availed to parties.

The emerging crucial question is that if assessors did not avail their opinion in the presence of parties in court, where and when the chairman got 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, and was clearly not availed to parties for just light reasons, it was wrong for the trial Chairman to consider it in his judgment. I say so because given the reality of written opinion as stated above, the sameserves no useful purpose. It was equally of no useful purpose for the chairman to refer to it in his judgment.

In my understanding and appreciation of the law, it was incomprehensible on the side of the chairman to assume that assessors gave their opinion which is not on the record by merely reading the acknowledgment in the judgment and assuming that any assessor may intrude into the proceedings and write opinion. In the circumstances, I am

of a considered view that, both assessors were not fully involved in the trial of the appeal when they failed to avail their opinion to parties which would pave way for being considered 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 is mine]

The mandatory legal requirement of sitting with assessors at the hearing of the appeal is contained insection 34 (1) of the Act 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.

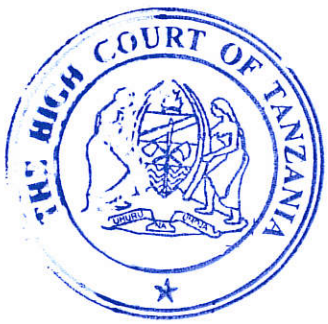
In the instant appeal, I am inclined to hold that the learned chairman failed to comply with mandatory provisions of Regulation 19 (2) of the Regulations as well as guiding precedents.

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 sitting with a new set of assessors.

Costs to be in the due course. It is so ordered.

DATED at **MBEYA** this **14th** day of **February, 2023**



J. M. Karayemaha
JUDGE