IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND APPEAL NO. 64 OF 2022

(Arising from Land Case No. 20/2016 District Land and Housing Tribunal for Karagwe)

THE REGISTERED TRUSTEES OF BAPTIST CHURCH OF TANZANIA..... APPELLANT

VERSUS

ALLI CHAMANI..... RESPONDENT

JUDGMENT

7th and 13th March, 2023

BANZI, J.:

On 24th May, 2016, the Respondent instituted a land application before the District Land and Housing Tribunal for Karagwe (trial tribunal) accusing the Appellant to encroach into his land located at Omurushaka area, Nyakahanga ward within Karagwe District. The matter proceeded *ex-parte* and after receiving the evidence of the Respondent, the trial tribunal allowed the application with costs. Discontented with the decision of the trial tribunal, the Appellant lodged the appeal before this Court.

At the hearing, the Appellant enjoyed the services of Mr. Raymond Laurent, learned counsel whereas, the Respondent who is also an Advocate of the High Court appeared in person unrepresented. Although the memorandum of appeal had four grounds, but learned counsel for the

Appellant abandoned the fourth ground and remained with three grounds thus:

1. *That, the trial Chairman reached an erroneous decision that was not based on the issues framed for determination.*
2. *That, the trial Chairman erred in law determining the matter without the aid of assessors as required by the law.*
3. *That, the entire proceedings were tainted with procedural illegality as there was several change of presiding chairmen contrary to the legal requirements.*

Submitting on the first ground, Mr. Laurent stated that, the decision of the trial tribunal varied with the framed issues in the sense that, the answer to the last concluding issue did not correspond with the answer in first two issues. This is an error which vitiates the entire decision. In respect of the second ground, he submitted that, there was violation of section 23 (2) of Land Disputes Courts Act [Cap 216 R.E. 2019] ("the Land Disputes Courts Act) and regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, GN No. 174 of 2003. In the matter at hand, hearing began with two assessors namely Akwiline and Mushashu. But in the course of testimony of AW2, one assessor was not present and the record does not show the involvement of the assessor who was present. He added that, although the Chairman reproduced the opinion of assessors in the judgment, but the proceeding does not show if the said assessor gave their opinion before judgment was delivered which is another irregularity

vitiating the entire proceedings. He supported his submission by citing the case of **Sebastian Kudike v. Mamlaka ya Maji Safi na Maji Taka**, Civil Appeal No. 274 of 2018 CAT at Arusha (unreported). Concluding with the last ground, Mr. Laurent submitted that, there was change of presiding Chairmen without assigning any reason. The matter began with Hon. J.K. Banturaki, but before AW2 testified, Hon. R.E. Assey took over without assigning any reason which is against Order XVIII, rule 10 (1) of the Civil Procedure Code [Cap. 33 R.E. 2019] ("the CPC") as it was held in the case of **Kinondoni Municipal Council v. Q Consult Limited**, Civil Appeal No. 70 of 2016 CAT at Dar es Salaam (unreported). He therefore prayed for appeal to be allowed by nullifying the proceedings, quashing the judgment and setting aside the decree. On the way forward, he prayed for the parties to be left liberty to file a fresh suit if so interested because circumstances of the case do not call for an order of retrial.

The Respondent was quick to concede on the illegalities with subsequent prayers as pointed out by learned counsel for the Appellant. However, on the way forward, he had a different opinion that, the court should order a retrial because learned counsel for the Appellant did not disclose those circumstances which do not call for retrial. He further submitted that, normally in similar situation, the court issues retrial order like it did in the case of **Thomas Rwagakinga v. Felician Zacharia and Six Others**, Land Appeal No. 60 of 2021 HC at Bukoba (unreported). He added

that, in the case of **Sebatian Kedike** (*supra*), the Court of Appeal refrained to order retrial after considering that, the matter has been in the court corridors for more than fifteen years and there was non-joinder of necessary party. He further contended that, if retrial order is not issued, parties will suffer economically and it will take long by starting before the ward tribunal for reconciliation due to changes of law. He therefore prayed for retrial order.

In his rejoinder, Mr. Laurent distinguished the circumstances in the cited case of **Thomas Rwagakinga** claiming that, unlike in that case where the pleadings were complete, in the matter at hand, there was no written statement of defence because the matter proceeded ex-parte. Thus, the retrial order will not be just for both parties. Moreover, economical suffering should not be used as shield to violate the law. In that view, he urged this court to take the position of the case of **Sebastian Kudike** for the interest of both parties.

Having considered the arguments of both sides as well as the record of the trial tribunal, the main issue for determination is whether the appeal has merit. In determining this issue, I will begin with the second ground which in the considered view of this Court it suffices to dispose of the appeal.

It is prudent to note that, for District Land and Housing Tribunal to be properly constituted in terms of section 23 (1) (2) of the Land Disputes Courts Act, the Chairman must sit with at least two assessors who are

mandatorily required to give out their opinions before the chairman composes the decision of the tribunal. Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 governs the manner upon which the assessors are required to give their opinion. The same provides as hereunder:

> *"Notwithstanding sub-regulation (1), the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."*

It is obvious from the provision of the law that, before the chairman makes his judgment, every assessor present at the conclusion of the trial, is required to give his opinion in writing. Such opinion must be given in the presence of the parties as it was stated in the case of **Edina Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 CAT at Mbeya (unreported). In the matter at hand, the record shows that, after conclusion of hearing on 11th August, 2017, the chairman set the date of judgment and recording of opinion of assessors. However, on the said date *i.e.,* 6th October, 2017, the assessors did not give their opinion. The same applied on the next date but on 10th November, 2017, the chairman delivered his judgment. Although there is written opinion in the file and the chairman reproduced the same at page 2 to 3 of his judgment, but the proceedings do not reveal if the assessors gave such opinion before the tribunal as required by the law.

Under the prevailing circumstances, it cannot be said that, the trial was conducted with the aid of assessors as required by law. In the case of **Ameir Mbarak and Another v. Edgar Kahwili** Civil Appeal No. 154 of 2015 CAT (unreported), the Court of Appeal was faced with alike situation and held as follows:

> *"Therefore, in our considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement 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."*

In **Sebastian Kudike v. Mamlaka ya Maji Safi na Maji Taka** (*supra*) The Court of Appeal held that:

> *"...it is highly unsafe to assume the opinions of the assessors which is not on the record regardless of the chairman's acknowledgement in the Judgment. Thus, it is our considered view that, in the event the assessors did not give opinions for consideration in composing the judgment of the DLHT, this is a fatal irregularity. In the circumstances, as correctly submitted by Mr. Mbura, the judgments of the two courts below are a nullity and cannot be spared. We are fortified in that account because the proceedings before the High Court and the resulting*

impugned judgment both stem on null proceedings and judgment of the DLHT."

From the foregoing, what transpired at the trial tribunal where the assessors did not give their opinions before the chairman composed his judgment is a fatal irregularity which renders the proceedings before the trial tribunal a nullity. This in itself suffices to dispose of the appeal.

Thus, I find the appeal with merit and I hereby allow it. Since the matter was heard *ex-parte* and in the proceedings there was no order for matter to be proceeded ex-parte, I hereby invoke revisional powers under section 43 (1) (b) of the Land Disputes Courts Act and nullify the entire proceedings of the trial tribunal starting from 24th May, 2016 onwards. Consequently, I quash the judgment and set aside the decree dated 10th November, 2017. Following the nullification, the only thing which remain intact is the Application/Plaint. Therefore, in order to minimise costs to parties, I am constrained to agree with the proposal of the Respondent by remitting the case file to the trial tribunal for expeditious retrial before another Chairman and a new set of assessors. In the circumstances, each party shall bear its own costs. It is accordingly ordered.

I. K. BANZI
JUDGE
13/03/2023

Delivered this 13th day of March, 2023 in the presence of the Appellant and the Respondent in person.

I. K. BANZI
JUDGE
13/03/2023