IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 13 OF 2022

(Arising from District Land and Housing Tribunal of Babati at Babati Land Application No. 94/2016)

ALLAN ONESMO MROKI.....APPELLANT

VERSUS

EGBERT AKOMBOLWA.....RESPONDENT

JUDGMENT

23rd May & 19th June, 2023

Kahyoza, J.

Allan Onesmo Mroki (the administrator of the estate of the late Onesmo Nathan) (**Allan**) sued Egbert Akombolwa (Egbert) claiming for a declaration that 50 acres of land situated at Masakta village within Masakta ward was part and parcel of the estate of the late Onesmo Nathan. He also prayed for vacant possession to issue against Egbert. Allan lost the claim.

Aggrieved, **Allan** appealed to this Court raising three grounds of appeal which climaxed to the following issues-

(i) Are the proceedings vitiated by chairman's failure to indicate reason for the transfer?

(ii) Did the chairman analyze the evidence?

(iii) Was the tribunal justified to declare as the respondent owner of 30 acres of land?

A brief background will suffice to appreciate the long-fetched history of the dispute. In 1990 Allan's father sued Egbert claiming for a piece of land. Allan alleged that his father's claim was for 50 acres of land, while Egbert states that it was for 5 acres of land. Reading the primary court's judgment, it is clear that Allan's father claimed for 5 acres of land. The first line of the primary court's judgment in Civil Case No. 112/1990 between **Onesmo Nathan V. Ijibati Akombolwa** reads-

> *"Katika shauri hili **Onesmo Nathani** anamdai **Ijibati** Akombolwa shamba la ukubwa wa ekari 5. Mdaiwa alikana dai hilo"*

After Ijibati (Egbart) lost the claim before the primary court, he appealed unsuccessfully to the district court. The district court upheld the primary court's judgment.

To prove the size of the land which Allan's father claimed against Egbert before the primary court in 1990, Egbert tendered a copy of the summons issued by the primary in 1990 and an injunction order, both documents showed that Allan's father's claim was for 5 acres. I read Allan's

father's evidence before the primary court showing that he cleared land up to 40 acres. It reads-

> *"Shamba walilogawiwa lilikuwa pori wakang'oa hadi kufikia ekari 40 (arobaini)"*

As Allan's father's land was 40 acres as shown in his evidence, for that reason, there is no way an intruder would trespass to 50 acres alleged to belong to Allan.

Given the evidence, I find that the land in dispute before the primary court was 5 acres as stated in its judgment. I have discussed the size of land which was in dispute because parties tendered photocopies of the primary court judgments. The size of the land in the copies of judgment differs and are overwritten.

Allan alleged that before his father enforced the decree from the primary court's judgment, he fell sick and died. Thus, Allan's father's effort become futile as Egbert is still claiming ownership of the suit land. In 2009 a suit to claim the disputed land was instituted and struck out on 17.3.2006 on account of legal technicalities.

Egbert's position was that Allan's father sued him for five acres of land and not for fifty (50) acres of land as alleged by Allan. He added that he moved away from the five acres which he lost vide Civil Case No. 119/1990 before Endasaki primary court and that there were no attempts to evict him.

The tribunal found that the dispute between Allan's father and Egbert in 1990 before Endasak was for 5 acres and that Allan's claim for 50 acres was a new claim. Thus, it did not originate from the suit between Allan's father and Egbert. The tribunal denied Allan's claim that Egbert trespassed to the suit land after the judgment of the district court. The tribunal found in favour of Egbert.

The appeal was argued orally by the parties who appeared in person. The appellant reproduced the grounds of appeal without explanation and the respondent did the same. The appellant added that his father invited Egbert's father to the disputed land. In his reply, Egbert conceded that it was true that Allan's father invited his father and gave him land. Later, Allan's father claimed back the land by instituting a suit against Egbert. Allan's father obtained an injunction and he (Egbert) obeyed the injunction order. He added that after Allan's father won the suit, recovered and took possession

of his land. Done with a brief background of the matter, I now turn to the issues raised by the grounds of appeal.

Before I embark on answering the issued raised by the ground of appeal, I wish to answer the issue I raised to the parties, that is whether the chairman had justification to conduct the trial without assessors. It is self-evident that the chairman conducted this matter without aid of assessors.

The appellant submitted that the chairman conducted trial at times with assessors.

The respondent argued that trial was conducted with aid of assessors.

As the record bears testimony, the trial commenced on 31.10.2019 before Hon. Mahelele chairman and two assessors Ms. Rebeca and Mr. Hasan. It proceeded on 6.6.2022 without assessors. However, on 7.6. 2022 before Ngonyani chairman, the hearing proceeded in the attendance of Mr. Hyera and Ms. Hamida. It was adjourned to 23/6/2022 when the hearing went before Hon. Ngonyani chairman this time assisted by Mr. Barie and Ms. Sulle.

Surprisingly none of the assessors gave opinion. Hon. Ngonyani delivered the judgment without receiving opinion from assessors.

The record shows that on 6.6.2022, Hon. Ngonyani, the chairman addressed the parties that the assessors who aided the chairman when the suit commenced on 31.10.2019 were not reappointed so the matter will proceed without aid of assessors. However, the record shows the names of assessors who took part during the hearing of the case, after Hon. Ngonyani stated that the matter will proceed without assessors.

It is an established principle of practice that the record is presumed to accurately represent what happened. See **Halfani Sudi V. Abeiza Chichili** [1998] TLR 527. Thus, I find establishment from the record; **first**, that the chairman delivered the judgment without assessors' opinion; **two**, that assessors changed three times during trial; **three**, the chairman conducted the trial on 6.6.2022 without the aid of assessors. Further, chairman stated that he will conduct trial without aid of assessors as the assessors who took part on the first hearing date were not re-appointed. That notwithstanding he heard the evidence of some witness in the presence of assessors.

The law is settled that the trial before the tribunal shall be with aid of at least two assessors. The law provides for the procedure where the assessors who commenced trial could not be present to conclude the trial.

For the sake of clarity, I will reproduce sections 23(1) and (2) of the **Land Courts Disputes Act**, [Cap. 216 R. E. 2019] (the **LCDA**).

> *"**23**.-(1) The District Land and Housing Tribunal established under section 22* ***shall be composed of at least a Chairman and not less than 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 judgment".*

I am not traveling on a virgin land, this Court and the Court of Appeal have held in cases without number that change of assessors or trial without assessors vitiates the proceedings and the judgment. See **Erica Chrisostom V Chrisostom Fabian And Justinian John**, Civil Appeal No. 137 Of 2020 (Cat –Unreported) which confirmed its decision in **B. R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017 (unreported) where it held that-

> ***"... once trial commences with a certain set of assessors, no changes are allowed or even abandonment of those who were in the conduct of the trial****. ... Cases tried with the aid of assessors had to be concluded with the same set of assessors... unless the*

circumstances stated under Rule 5F
(2) above applied." (emphasis added)"

I find without hesitation that changing assessors during trial, trial without assessors or delivering the judgment without assessors' opinion vitiates not only the proceedings but also the judgment and decree of the tribunal. The proceedings and judgment in the case under consideration was nullity for changing assessors in the course of the trial and for failure to obtain opinion from assessors.

I would have stopped at this point but there is another point of law raised in the memorandum of appeal, that the application was transferred from one chairman to another without disclosing reasons. The appellant did not elaborate this ground of appeal and the respondent did not counter it.

I reviewed the record and found that it was true that the case was transferred without explaining reasons for the transfer. The hearing commenced before Hon. Mahelele. Mahelele recorded the evidence of Nicolos Onesmo. Later, the matter was put before Hon. Mdachi who did not receive any evidence. Finally, it landed to Hon. Ngonyani who heard the cross-examination of evidence of Nicolous Onesmo (PW1), the evidence of

the rest of the witness and composed the judgment. Hon. Ngonyani did not disclose why he took over the matter.

It is not clear whether it is compulsory for the chairman who commenced trial is bound to complete the trial. The Court of Appeal in **Hamza Byarushengo v. Fulgence Manya And Four Others,** Civil Appeal No. 33 of 2017, pronounced that the chairman of the district land and housing tribunal are bound by Order XVIII rule 10 (1) of the **Civil Procedure Code**, [Cap. 33 R.E. 2019] (the **CPC**). Rule 10 (1) of Order XVIII of the CPC, stipulates that-

> *"10.-(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it".*

The Court of Appeal in **Hamza Byarushengo v. Fulgence Manya And Four Others,** (supra) faced a case where the chairman who heard the evidence was not the one who composed the judgment and delivered it. The

chairman took over the matter without disclosing reason for taking over the matter and delivering judgment. The Court of Appeal observed as follows-

> *"With the above authority, we must state at this juncture that* ***performance of the obligation under Order XVIII rule 10 (1) of the CPC, by a successor judicial officer is mandatory****. It is not discretional or optional for the successor judicial officer to take over proceedings which have been presided over by a predecessor judicial officer, without assigning reasons accounting for his predecessor's inability to proceed with the judicial proceedings, he is now taking over. Thus, we do not agree with Mr. Joseph that, the requirement for a successor Chairman to give reasons when taking over the proceedings from another Chairman, is not a mandatory requirement of the law. It is a must, and it is not a matter that may be cured by the principle of overriding objective".*

The Court of Appeal gave explanation why it is vital to give reasons for transfer from one chairman to another in **Leticia Mwombeki v. Faraja Safarali and Two Others**, Civil Appeal No. 133 of 2019 (unreported), that-

> *"..... the silence of the record as to how the court file found its way from the predecessor Judge to the successor Judge puts* ***to test the integrity and transparency of the proceedings in question****. It was also observed that where the successor judicial officer takes over the proceedings without assigning reasons, whatever he does*

in the case he does it without jurisdiction and the omission goes to the root of the matter."

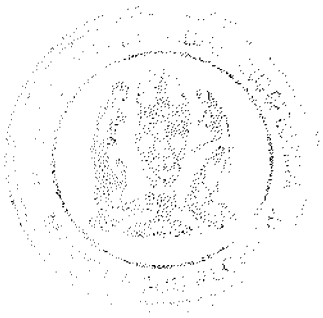
It is settled that failure to disclose reasons of transfer or taking over partly heard proceedings by the successor judicial officer vitiates proceedings, judgment, and decree, and that it is a fatal omission which cannot be glossed over as it goes to the root of the matter and occasioned failure of justice. See the case of **Leticia Mwombeki v. Faraja Safarali and Two Others** (supra). I find without hesitation that the proceedings from 06.06.2022 when Hon. Ngonyani took over without assigning reasons is nullity, I nullify the same.

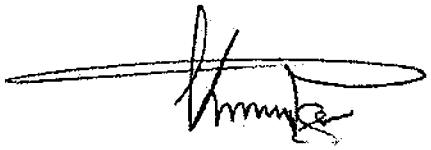
In end, I find no impetus to determine the remaining grounds of appeal as the proceedings are nullity for the following reasons; **one**, for assessors keeping changing on the course of trial; **two**, the chairman tried the case without aid of assessors and without assessors' opinion; and **three**, for failure of the chairman to assign reasons of taking over the partly heard proceedings. Consequently, I uphold the appeal, quash the proceedings from 06.06.2022 when Hon. Ngonyani took over and set aside the judgment. I further order the trial to commence from where it stopped on 06.06.2022.

I will not award costs to the appellant as the respondent is not to blame for ordering re-trial, hence, each party will bear its own costs.

It is ordered accordingly.

Dated at **Babati** this 19th day of June, 2023.

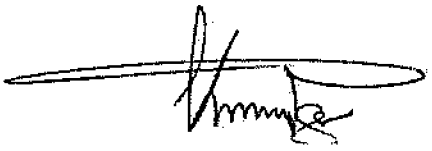




John R. Kahyoza,

Judge

Court: Judgment delivered in the presence of the parties. B/C Ms. Fatina (RMA) present.



John R. Kahyoza,

Judge

19.6.2023