

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE ARUSHA SUB REGISTRY

AT ARUSHA

LAND CASE APPEAL NO. 170 OF 2022

(Arising out of Land Application No 3 of 2021 before the District Land & Housing Tribunal for Karatu at Karatu)

BETWEEN

REGINA BURA _____ **APPELLANT**

VERSUS

FORTUNATA VINCENT _____ **1st RESPONDENT**

VITALIS FABIANO _____ **2ND RESPONDENT**

JOSEPH JOHN _____ **3RD RESPONDENT**

13/07/2023 & 22/09/2023

JUDGMENT

BADE, J.

This matter emanates from the District Land and Housing Tribunal for Karatu at Karatu. The Appellant herein had sued the Respondents claiming recovery of a farm that is alleged to be a matrimonial asset, that was sold to the 1st and 2nd respondents by the 3rd respondent who is the husband of the Appellant herein. Upon the matter being heard by the tribunal, M.R. Makombe Chairman, a decision was delivered that the said landed property

was not a matrimonial asset, and thus the claim against the respondents failed. This outcome did not amuse the Appellants and therefore she preferred this appeal. She has raised 4 grounds of grievance:

1. That the Trial Tribunal Proceedings is a nullity for change of hands of the tribunal chairmen without reasons being put on record.
2. That the Trial Tribunal Proceedings is a nullity for assessors were neither read in the presence of both parties nor featured in the handwritten tribunal proceedings and decision of the tribunal.
3. That the trial tribunal failed to thorough (sic) analyze and evaluate evidence on record vis a vis pleadings filed in the tribunal thereby reached to (sic) unfair and wrong decision.
4. That the Judgment in Land Application No 3/2021 is bad in law as the Tribunal Chairman did not go through present appellant testimony while composing Tribunal (sic) judgment.

During the hearing of the appeal, the respondents did not bother to appear despite being served, and thus the court had to order the appeal to be heard one-sided. The Appellant was unrepresented and the appeal was heard orally.

Arguing the first ground of appeal, contending that the trial tribunal proceedings are a nullity for change of hands of the tribunal of the Chairmen without assigning reasons as required by the law.

She asserts that the chairpersons who heard the matter were Hon Vincent Ling'wentu, and later Hon Makombe, who took on the case and delivered judgment.

In the second ground of appeal, the Appellant prayed to adopt the ground of appeal as it is without further elaboration and urged the court to give it a thorough consideration.

Regarding the third ground of appeal, the appellant amplified the same in that the tribunal did not evaluate evidence on record against the pleadings and hence the tribunal got to deliver an unfair decision. Further, she explains that the respondents were not present as they refused to enter appearance despite summons being issued to them, except for the 3rd Respondent. However, she laments that the tribunal records do not feature this fact. And on the judgment, the respondents were given the land in dispute.

She explained further that The farm was their farm with the husband and it was a family property, insisting that she had given all the documents related to the farm to the tribunal, but the tribunal Chairman did not consider this evidence.

Lastly, she argues the tribunal chairman had not gone through the presented evidence to resolve the dispute because if he did, he would not have resolved the dispute by making the farm part of the debt, while the same was actually bought some years back, and the documents for proof were available.

She insists that it was erroneous for the tribunal to only consider her husband's testimony, who is the 3rd respondent herein, when he stated that the farm was part of the debt and his testimony was believed, with the decision of the tribunal based on this testimony. She laments that her own testimony was that the farm was bought and became part of the family assets and that he had tendered exhibits to that effect insisting that still this is her position.

So having considered the Appellant's submission and the record of appeal, the issue for determination is whether the appeal has any merits. To start

with, I shall tackle the grounds of appeal embodying technical legal position which are the first and second grounds of appeals. In my considered view, the determination of these grounds may dispose the appeal without the need to consider the remaining grounds of appeal embodying matters of evidence.

The issue of changing hands of the trial tribunal without assigning any reason has been a subject of many judicial considerations with the outcome that the same vitiates the proceedings.

Under Order XVIII, Rule 10(1) of the Civil Procedure Act, Cap. 33 RE 2019, the judge, magistrate, or chairperson must assign reasons for taking over a case from the predecessor chairperson. The case of **Yono Auction Mart and Court Broker and Dar es Salaam City Council vs Augusta John Ntiruka t/a Sanganiye and Food Supplies**, Civil Appeal No. 92 of 2017, as well as that of **M/S Georges Limited vs Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) where the Court observed:

"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer

*that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witnesses is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. **Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised.*** [emphasis mine]

The District Land and Housing Tribunal is strictly bound by the above provision of the law. See, sections 49 and 51(2) of the Land Disputes Courts Act, Cap. 216 RE 2019 and section 180 of the Land Act, Cap. 113 RE 2019.

I cannot help but ask myself how was the appellant affected by the failure to record the reasons for the transfer of the case from one chairman to the other. More importantly, is there any remedy to cure such a defect? Confronted with a similar scenario, the Court of Appeal of Tanzania in the case of **Mariam Samburo (Legal Representative of the Late Ramadhani Abbas vs Masoud Mohamed Josh and 2 Others**, Civil Appeal No. 109 of 2016 (unreported) observed:

"The above-quoted extract provides for a clear interpretation and the rationale behind the existence of Order XVIII Rule 10(1) of the CPC in the effect that, recording of reasons for taking over the trial of a suit by a judge is a mandatory requirement as it promotes accountability on the part of the successor judge. This means failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtanga/ cannot be cured by the overriding objective principle as suggested by Dr. Lamwai."

Guided by the holding of the Court of Appeal it is obvious that assigning reasons for taking over a case from the predecessor judge, magistrate or

chairman is a mandatory requirement, and failure to do so vitiates the proceedings. Under the circumstances of this case, and as gathered from the cited authorities above, this is important because one, the integrity of judicial proceedings hinges on transparency, and where there is no transparency justice may be compromised; and two, it promotes accountability on the part of the successor judge.

Since the file bounced from one Chairman to another (from Hon Ling'wentu to Hon Makombe) in the instant case without there being assigned reasons, there was a glaring contravention of the law. The handwritten proceedings testify to this omission as the coram is recorded from 19th January 2021 when the matter was filed and assigned to Chairman Ling'wentu, and was before him until 17th May 2021 when the coram abruptly records Chairman Makombe without any reasons for this change.

Addressing the second ground of appeal, the assessors' opinions were neither read in the presence of the parties nor featured in the handwritten proceedings or decision of the tribunal. The presence of the assessors have started to be recorded on the tribunal's proceedings from 29/07/2021, recording the presence of R. Panga and J. Akonaay. On 11 August 2022, the proceedings record that the assessor's opinion have been read without

disclosing what had been the said opinion. On the decision of the tribunal though, the Chairman is quoted as saying

"hivyo nakubaliana na maoni ya wajumbe wa baraza Mr. Akonaay na Mrs Panga ambao wote wamemwona mdaiwa hana kosa la kuuza shamba bali alirudisha shamba la dhamana baada ya kuona wanatishiwa uhai wao na familia yake"

The requirement of assessor's opinion is provided under section 23(2) of the Land Disputes Courts Act Cap. 216 RE. 2019 (LDCA) thus:

"The District Land and Housing Tribunal shall be dully constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the Judgment"

Further, Regulation 19 (2) of the Land Dispute Courts [The District Land & Housing Tribunal Regulations] G.N No 174 of 2003 requires the assessors to give their opinion in writing before the Chairman composes the decision, thus providing:

"Notwithstanding the provision of 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”

So it is discernible from these legal provisions that it is not only mandatory for the assessors to give an opinion before the Chairman reaches a decision, but also they must give their opinion in writing.

Now going by the proceedings of the trial tribunal, one can not be sure if the assessors did give their opinion and whether it was in writing as the same is not featured in the proceedings. Granted that the judgment makes mention of the assessor's opinion, but the same can not be picked from the tribunal's proceedings.

The Court of Appeal has guided in the matters on how the assessor's opinion should be treated and dealt with. In the case of Emmanuel **Oshoseni Munuo vs Ndemaeli Rumishaeli Massawe**, Civil Appeal No. 272 of 2018 (Tanzlii), it was observed that the opinion must be availed in the presence of the parties to enable them to know the nature of the opinion and whether or not the Chairman has considered such opinion in the final verdict. Also, the assessors' opinions must be read out to the parties, and the assessors' opinion has to be recorded regardless of

whether the Chairman agrees or disagrees with them. See Peter **Makuri vs Michael Magwega**, Civil Appeal No. 107 of 2019 (Tanzlil), and **Elilumba Eliezel vs John Jaja**, Civil Appeal No. 30 of 2020 (Tanzlil).

In the **Elilumba's** case (Supra) the Court was adamant that on a scenario as pointed out in the instant case where the assessors' opinion do not feature in the proceedings:

"Since assessors' opinion referred to by the Chairman cannot be located in the record of appeal, it is as good as not being there."

Flowing from the foregoing line of thinking, it is quite clear that the trial tribunal flouted the procedure in recording the assessor's opinion despite mentioning their opinion in the judgment that it had later composed.

All of the cases as decided by the Court of Appeal including the case of **Elilumba, Emmanuel Oshoseni Munuo** and **Peter Makuri** (Supra) are instructive that the flout of procedure by the trial tribunal is fatal as it vitiates the proceedings.

In the final analysis, I find that the proceedings of the Tribunal were vitiated and therefore, a nullity including the resultant Judgment of the trial tribunal. In the wake of the findings in the two grounds of appeal that have

been determined, I find no useful purpose in deliberating on the ground 3 and 4 which challenge the manner that the trial tribunal evaluated and or analyzed the evidence adduced.

Subsequently, I quash the proceedings and set aside the Judgment and Decree of the District Land & Housing Tribunal for Karatu in Land Application No. 3 of 2021. In lieu thereof, I order a re-trial before another Chairman and a new set of assessors. The appeal is allowed with costs.

I order accordingly.

DATED at ARUSHA this 22nd day of September 2023



**A. Z. BADE
JUDGE
22/09/2023**

Judgment delivered in the presence of parties / their representatives in chambers /virtually on the **22nd** day of **September 2023**



**A. Z. BADE
JUDGE
22/09/2023**