IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 15 OF 2023

(C/F Land Application No. 230 of 2018 of the District Land and Housing Tribunal for Moshi at Moshi)

THABITHA R. MBARUKU ..... 1ST APPELLANT

NURU JOHN ROGGERS ..... 2ND APPELLANT

VERSUS

AZANIA BANK LIMITED .....1ST RESPONDENT

MABUNDA AUNCTIONERS MART CO.LTD ..... 2ND RESPONDENT

JOHN ROGGERS MBARUKU ..... 3RD RESPONDENT

ROGGERS JOHN MBARUKU ..... 4TH RESPONDENT

HUSSEIN MURO ..... 5TH RESPONDENT

JUDGMENT

09/08/2023 & 11/09/2023

SIMFUKWE, J.

The appellants herein preferred this appeal challenging the entire judgment and decree of Land Application No. 230 of 2018 of Moshi District Land and

Housing Tribunal (the trial Tribunal). The Appellants have advanced six grounds of appeal as reproduced hereunder:

1. *That the trial chairman of the Tribunal erred in law and fact when failed to require assessor present (sic) at the conclusion of the hearing and before judgment to give their opinion in writing before making his final Judgment as required under Regulation 19(2) of GN 174/2003 and section 23(2) of the Land Disputes Courts Act, Cap 216 R.E 2019 hence Judgment and Decree was nullity.*
2. *That the Trial Chairman of the Tribunal erred in law and facts when held in favour of the 5th Respondent without take note that failed (sic) to assign reasons for taking over the case from predecessor Chairman consequently the Proceedings, Judgment and Decree was nullity.*
3. *That Hon. Chairman of the District Land and Housing Tribunal erred in law and facts when failing to properly evaluate the Evidence. (sic)*
4. *That the Honourable Tribunal Chairman erred in law and facts for failure to declare that the sale of Suitland between the respondents was illegal and against the law as result (sic) he pronounced shoddy decision.*
5. *That, the Trial Honourable Tribunal Chairman erred in law and fact for failure to consider the fact that spouse consent was not obtained by 4th Respondent from the Appellants as result a bad decision was pronounced. (sic)*

6. *That the Honourable Chairman of the Tribunal erred in law and facts when granted reliefs of 400,000 as rent could have been gained to the 5th Respondent while the same was neither pleaded nor was counter claim filed.*

The gist of this appeal as captured from the record is to the effect that, the 3rd respondent secured a loan of Tsh 30,000,000/= from the 1st respondent and mortgaged the house at Plot No 884, Block DDD' Section III at Karanga Moshi (disputed property). Following the default to pay the said loan, the 1st respondent conducted the auction through the 2nd respondent and the 5th respondent appeared as a successful bidder. Before completion of the transfer of the mortgaged property to the 5Th respondent, the 1st and 2nd appellants; mother and wife of the 3rd respondent respectively, unsuccessfully filed the suit before the DLHT of Moshi praying for the following reliefs:

1. *A declaration that the suit property is lawfully owned by the 1st Applicant and the 4th respondent.*

   In alternative, if the tribunal finds that the suit house was lawfully transmitted to the 3rd respondent in 2018, a declaration that it is the matrimonial property of the 3rd respondent and the 2nd Applicant.
2. *A declaration that the application for transmission of the suit property was both wrong and unlawful and as such no title or interest acquired from the 4th to the third respondent through that process.*
3. *A declaration that the mortgage over the suit land was unlawful and no interest passed from the 3rd respondent to the 1st respondent.*

4. *A declaration that the sale of the suit land by the 1st respondent to the 5th respondent was null and void ab initio.*
5. *Nullification of the sale of the suit land by the 2nd respondent to the 5th respondent.*
6. *An order restraining the respondents and/or their agents from interfering with the suit land.*
7. *Costs of the suit*
8. *Any other relief this tribunal may deem fit and just to grant.*

At the conclusion of the trial, the tribunal decided against the appellants hence, this appeal.

During the hearing of this appeal which was conducted through filing written submissions, the appellants were represented by Mr. Charles J. Mwanganyi, learned advocate, the 1st respondent was represented by Mr. Martin Wanyancha, learned advocate, the 2nd, 3rd and 4th respondents were unrepresented while the 5th respondent was represented by Mr. Patrick Paul learned advocate.

Submitting on the first ground of appeal, Mr. Mwanganyi faulted the trial Chairman for contravening **section 23(1) and (2) of the Land Disputes Courts Act** (supra) and **Regulation 19(1) and (2) of GN No. 174/2003** for failure to accord the assessors an opportunity to give their opinions in writing and read their opinions before pronouncing judgment. To cement the above legal requirement, the learned advocate referred to the case of **Sikuzani Said Magambo and Another vs Mohamed Roble,** Civil Appeal

No. 197 of 2018, CAT. He explained that such omission renders the entire proceedings, judgment and decree a nullity.

Expanding the ground, Mr. Mwanganyi made reference to the typed proceedings of the trial tribunal particularly at page 50 where the defence case was closed and after filing final submissions the matter was scheduled for judgment on 19th May 2021. He argued that nowhere it is shown that the opinions of assessors were read or reflected in the judgment of the tribunal. Insisting the noted requirement, reference was made to the case of **Ameir Mbarak and Azania Bank Corp Ltd vs Edgar Kahwil**, Civil Appeal No. 154 of 2015 which was quoted with approval in the case of **Sikuzani** (supra).

Supporting the 2nd ground of appeal, Mr. Mwanganyi faulted the successor Chairman for failure to assign reason for taking over the case from the predecessor Chairman. He referred to page 26 of the typed proceedings where the presiding Chairman gave the ruling of retiring from hearing the matter without even adducing the reasons thereon. Thereafter, at page 27 of the typed proceedings, the successor Chairman proceeded with the matter without adducing reasons. According to Mr. Mwanganyi, such error vitiates the whole proceedings, judgment and decree. To cement the argument, Mr. Mwanganyi made reference to **Order XVIII Rule 10(1) of the Civil Procedures Code, Cap 33 R.E 2019** and the case of **Mariam Samburo (As Legal Representative of the late Ramadhan Abas) vs Masoud Mohamed Joshi and 2 Others,** Civil Appeal No. 109 of 2016. (CAT)

On the 3rd ground of appeal, the appellants complained that the trial Chairman did not evaluate evidence properly. Mr. Mwanganyi stated that the trial Tribunal arrived at its decision by merely concentrating on the evidence that the suit land was already handed over to the 3rd respondent after he attained the age of majority. He was of the opinion that if evidence was properly evaluated, then the trial Tribunal could have noted that the consent of the 2nd appellant should have been obtained by the third respondent. The learned advocate cited the case of **Rashid Abiki Nguwa vs Ramadhan Hassan Kuteya and Another**, Civil Appeal No. 421 of 2020, (CAT) which requires the first appellate court to re-evaluate the entire evidence to arrive into a fair decision.

On the fourth ground of appeal, the appellants' advocate faulted the trial Tribunal for failure to declare the sale of the suit land between the respondents illegal and against the law. That, at page 7 of the Tribunal's judgment the Chairman held that all the procedures for sale by way of auction were followed. Mr. Mwanganyi believed that the procedures were not followed since the consent of the 2nd appellant was not obtained before the said sale.

Moreover, on the 5th ground of appeal, it was reiterated that spouse consent was not obtained by the 4th respondent from the appellants. Thus, the sale was illegal and the Tribunal should have noted that and decide in favour of the appellants.

Lastly, on the 6th ground of appeal, the trial Chairman was blamed for granting Tshs 400,000/= as rent which could have been gained by the 5th

respondent while the same was neither pleaded nor counter claimed. It was maintained that such findings by the trial tribunal are frivolous, misconceived and unfounded. The learned counsel submitted that parties are bound by their pleadings. That, the trial tribunal cannot rely on submission of the counsel as it is not evidence or pleading. Mr. Mwanganyi was of the view that if the 5th respondent had claims against the appellants, he was required to raise a counter claim and prove the same before the tribunal and not to pray it in the final submission. Reference was made to the case of **Hadija Ally vs George Masunga Msingi,** Civil Appeal No. 384 of 2019, CAT, at page 11 where it was held that:

> *"…In nutshell, written submission cannot be used as a forum for raising new complaints…".*

He also referred to the case of **Athuman Amiri vs Hamza Amiri and Another**, Civil Appeal No. 8 of 2020 (CAT)

To sum up his submission, the learned counsel for the appellants prayed the court to allow the appeal with costs and set aside the judgment and decree of the trial Tribunal and grant the appellants' prayers which were prayed before the trial Tribunal. He also prayed to be granted costs which the appellants incurred in the Ward Tribunal, trial Tribunal and this appeal.

The 1st respondent contested the above submission through Mr. Wanyancha, the learned Advocate. Replying the first ground on failure to require assessors to give their opinions in writing, Mr. Wanyancha averred that initially, the application was heard before Hon. J. Sillas together with the assessors Mrs. T. Temu and J. Mmasi. However, Hon. Sillas issued the order

of retiring presiding over the case on 03/08/2020. It was observed that, following the former chairperson recusal to proceed with the hearing of the case he transfered the case to another Chairperson which automatically removed the assessors who initially were involved in the matter. That, it was impracticable for the assessors who sat with Hon. Sillas to proceed with the hearing of the case. He made reference to **section 23(3) of the Land Disputes Courts Act** (supra) which save as exception to the general rule that if the assessors who were initially in the proceedings are absent in one way or another the Chairperson shall proceed to hear the matter and deliver judgment to that effect. He was of the view that, that is what transpired in this matter. That, since the assessors who were initially involved in the proceedings were not sitting with the preceding Chairperson in the continuation of the proceeding after the trial chairperson retired himself from determination of the case, their opinions were no longer required.

Mr. Wanyancha distinguished the cited cases of **Sikuzani Said Magambo and Another** and **Ameir Mbarak and Azania Bank Corp Ltd** (supra) because in those cases the assessors were involved throughout the proceedings and their opinions were considered but were not read to the parties before delivery of judgment.

Countering the 2nd ground of appeal on failure to assign reasons of taking over the case, Mr. Wanyancha elaborated that it is on record at page 26 of the typed proceedings that on 3/08/2020 when Hon. J. Sillas retired from hearing the case and since Hon J. Sillas was the Chairman in charge, he re-assigned the case to Hon. P. Makwandi for continuation of hearing though he did not record any reason for taking over the case from Hon. J. Sillas.

However, Mr. Wanyancha said the issue is what should be the remedy for the same. He averred that the rationale behind taking over the case from another judge, magistrate or Chairman was stated in the case of **Ms. George Center Ltd vs The Attorney General and Another, Civil Appeal No. 29 of 2016,** which held that:

> *"…the general premises 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 so. The provision cited above impose 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 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 see and hear the witness 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 ..."*

The learned advocate invited the court to consider the available remedy where the successor Chairperson has failed to give reasons for taking over a case since the law is settled where the successor Chairman fails to give reasons for taking over the matter whatever she records is a nullity. He referred to the case of **Abdi Masoud @ Iboma and another vs. Republic, Criminal Appeal No. 116 of 2015** (unreported), which was

quoted in the case of **Kinondoni Municipal Council vs. Q Consult Limited** Civil Appeal No. 70 of 2016 in which it was emphasized that:

> *" ... the absence of any reason on record for succession by a judicial officer in partly heard case, the succeeding judicial officer lack jurisdiction to proceed with the trial and consequently all proceedings pertaining to takeover of the partly heard case become a nullity ... "*

Based on the above decision, Mr. Wanyancha submitted that failure to state reasons for such transfer suggests that the case file has never re-assigned to any other Chairperson and that other Chairperson has no jurisdiction to adjudicate the case for want of proper assignment something which make all proceedings that continued without proper reassignment to be a nullity. The learned advocate invited this court to nullify the proceedings of the successor Chairperson only from 09th September, 2020 to 10th June, 2021 and the Judgment and Decree dated 10th June 2021 and order the defence hearing to commence before another Chairperson with the same Assessors who were initially involved in the case before Hon. J. Sillas if at all they are still around. Also, he stated that since the alleged illegality was occasioned by the trial tribunal, this court should not order costs to either party.

Mr. Wanyancha replied the 3rd 4th and 5th grounds of appeal together. Responding to the argument that the mortgage was illegal as spouse consent was never obtained from the 2nd Appellant, it was argued that the Appellants' Counsel intends to mislead this court by providing arguments which are very different to the case at hand. Based on the framed issues and evidence

adduced by the parties, Mr. Wanyancha stated that the trial tribunal reached to a correct and fair decision.

It was further submitted that the first issue which was framed was who is the lawful owner of the property in dispute between the 1st appellant and the 3rd Respondent? He asserted that the suit land held under Certificate of Tittle No. 18392, Plot No. 884, Block "DDD" Section III, at Karanga in Moshi Municipality, was initially registered in the name of Roggers John Mbaruku (as the guardian of John Roggers Mbaruku a minor) who were the 4th and 3rd Respondents respectively. Also, it is on record that, the said land was later registered and the guardian of the 3rd Respondent (Roggers John Mbaruku) consented to the change of name by operation of law to the 3rd Respondent after he attained the age of majority. Thus, based on the evidence tendered and admission made by the 3rd Respondent and Roggers John Mbaruku, the trial Tribunal correctly held the 1st issue in the affirmative.

Responding to the argument that consent of the appellants was not obtained on transfer, Mr. Wanyancha proposed that whether the consent of the 1st Appellant was required during transfer and/or change of name under operation of law? He clarified that the evidence on record reveals that DW4, Roggers John Mbaruku, initially, his name was registered in the Certificate of Tittle No. 18392 as the guardian of the 3rd Respondent his son, who was a minor at the time when the Tittle was processed and obtained. That, DW4 admitted to have consented change of name under operation of law from his name to the name of the 3rd Respondent. In analyzing the above evidence at page 7 of the judgment, the Hon. Chairperson quoted the contents of Exhibit "D 10" which is to the effect that:

"3 ... that in 2004 I bought the land described in paragraph 1 above for my son John Rogerth Mbaruku but I couldn't transfer to him at the time because he was young and not attained the majority age of owning the plot... "

"7. That I have made these (sic) decision before the witnesses including my wife TABITHA ROGGRS (sic) MBARUKU who is the mother of JOHN ROGGERS MBARUKU ... "

From the above evidence, Mr. Wanyancha formed an opinion that the trial Chairperson was correct to stand on the position that indeed the consent for change of name under operation of law from Roggers John Mbaruku to that of the 3rd Respondent was obtained. Thus, it was correct for the 1st Respondent to accept the pledged collateral as security for the loan advanced to Moshi Aluminium Glassworks.

Furthermore, Mr. Wanyancha highlighted that the law is settled that land held by the guardian on behalf of the minor shall be transferred to the beneficial owner, upon application formally made by the holder of the title. That, the beneficial owner shall make the said application after attaining the age of majority. For the transfer of the Tittle to be effective, consent from the guardian is required, which in this case, consent from the guardian, one Roggers John Mbaruku as per Exhibit D10 was obtained and the Registrar of Tittles acted upon it. Thus, the name of the 3rd Respondent was inserted and registered as the lawful owner of the disputed land and the 1st appellant's consent during the process of transfer of tittle to the 3rd Respondent was never required, since the 1st Appellant in law was never

guardian of the 3rd Respondent let alone being registered owner of the said Certificate of Tittle.

Responding to the argument that the 2nd appellant's consent was mandatory during creation of mortgage, Mr. Wanyancha submitted that the 3rd Respondent acquired the suit property when he was a minor, and the certificate of Title was registered in the name of his father as guardian. However, during the hearing at the trial tribunal, there was no any documentary evidence tendered by the 2nd Appellant to prove that, she is the lawful wife of the 3rd Respondent and that the Landed Property is a matrimonial property. That, according to the 3rd respondent's sworn statement (Affidavit) in respect of his marital status (Exhibit- D3), the 3rd Respondent clearly indicated that, he is the lawful owner of the suit land and that he was single and no one was claiming interest of the said property.

Thus, as per the evidence on record, the 2nd Appellant had no interest at all over the Suit Property. Reference was made to the case of **Hadija Issa Arerary versus Postal Bank Limited, Civil Appeal No. 135 of 2017**, which held that:

> *"…the mortgagee was correct to disburse the loan believing that there was no any other third party with interest on the mortgaged property hence the mortgage was valid … "*

In light of the above cited case, Mr. Wanyancha insisted that evidence adduced by the parties was properly evaluated and considered by the trial tribunal. He implored this court to consider and hold that, since there is no proof of marriage between the 2nd Appellant and the 3rd Respondent and

there is Affidavit of being single deposed by the 3rd Respondent, the same made the 1st Respondent to believe that, indeed the 3rd Respondent was single and disbursed the loan facility to Moshi Aluminum Glassworks. That, the Suit Property was legally mortgaged to the 1st Respondent to secure loan facility granted to Moshi Aluminum Glassworks, hence, the public auction conducted by the 1st and 2nd Respondents was justifiable and legal since the borrower, Moshi Aluminum Glassworks had defaulted.

On the 6th ground of appeal, which concerns the relief of Tshs 400,000/- granted as rent, it was submitted that, by way of Counter Claim the 5th Respondent claimed to be paid Tshs. 400,000 as rent for failure to be handed over the house from the date the Suit Property was purchased at the public auction. That, on 06th March, 2019 the Appellants here filed their Written Statement of Defence to the Counter Claim. Also, the 5th Respondent testified to that effect, as seen at page 22 and 23 of the typed proceedings of the trial tribunal. Therefore, the contention that the granted claim was never pleaded or counter claimed was not true. That, all cases and submission by the counsel for the Appellants are irrelevant and distinguishable to the case at hand.

Responding to the prayer of allowing this appeal with costs and Judgment and Decree in Land Application No. 230/2018 be set aside and that the same be substituted with a judgment granting the prayers of the Appellants before trial Tribunal; Mr. Wanyancha replied that this court as the first Appellate Court, should first evaluate and consider all evidence adduced before the trial tribunal and see if the Appellants herein deserve to be granted the said prayers as sought, of which they are not. That, this court should align itself

from the framed issued and evidence given by the parties and their witnesses in order to arrive to a fair and just decision.

It was argued further and prayed that if this Court will uphold the 1st and 2nd grounds as submitted above based on the cited cases, to ONLY nullify the proceedings of the successor Chairperson from 09/09/2020 to 10/06/2021 and the judgment and decree dated 10/06/2021 and order the defence hearing to commerce before another Chairperson with the same set of assessors who were initially involved in the case before Hon. J. Sillas if at all they are still around.

Advocate Patrick Paul for the fifth respondent responded to the first ground of appeal by blaming the Appellants for failure to supply the 5th Respondent with the alleged proceedings to wit their submissions so as to verify that what is submitted is what is actually in the trial records. He stated that even if the opinions of assessors were not read to the parties, the remedy is to nullify and quash the trial tribunal proceedings from immediately after the final submissions (on the 19th May, 2019) and set aside the judgment and order the said assessors to give their opinions and the same be read to the parties and another chairman to compose the judgment. He referred to page 21 and 22 of the judgment of the Court of Appeal in the case of **Rukia Khamis Mohamed vs the Republic, Criminal Appeal No. 130 of 2018**.

On the 2nd ground of appeal, Mr. Patrick complained that the Appellants' submission is based on the typed proceedings which were not availed to the 5th Respondent; that, the 5th Respondent cannot respond to those arguments which are only within the knowledge of the Appellants.

Replying to the 3rd and 5th grounds of appeal, it was submitted that the first appellate court has powers to re-evaluate the evidence. It was asserted that the issue of requirement of consent is not a matter of evidence but law and there is no such requirement in law where the guardian hands back the land to the registered owner who has reached the age of majority. Mr. Patrick stated that, the Appellants have not shown any reason as to why this court should vary the decision of the trial tribunal.

On the 4th ground of appeal, Mr. Patrick stated that during the trial the Appellants failed to prove the alleged relationship between the 2nd Appellant and the 3rd respondent. Also, there was an affidavit tendered to the effect that the 3rd Respondent was not married at the time of mortgaging the suit property to the 1st Respondent. Thus, the appellants are trying to do window shopping.

Mr. Patrick elaborated further that under **section 102 of the Land Registration Act, Cap. 334 R.E. 2019** if the Appellants were aggrieved with the decision or act of the Registrar of Titles to register the change of registered owner from the guardian to the registered owner who has reached the age of majority; or the registration of the mortgage in favour of the first Respondent, the remedy was to appeal to the High court and not institution of an application at the District Land and Housing Tribunal.

Mr. Patrick implored the court to dismiss the appeal so that the decree holder (Fifth Respondent) should enjoy the benefits of the decree that has been awarded in his favour since 2021. That, the Appellants herein were not

holders or registered owners of the suit land, they had no legal interest over the same and they are illegally denying the Fifth Respondent of his rights.

Moreover, the learned advocate invited this Court to hold that the trial tribunal had no jurisdiction to entertain and determine Application number 37 of 2022 pursuant to **section 102 of the Land Registration Act**, and nullify all the proceedings and judgment emanated from the trial Tribunal and direct the interested party to comply with the provisions of the said law. He was of the view that since the provisions of **section 102 of the Land Registration Act** have not been exhausted, the court should dismiss the appeal with costs, and set aside the proceedings of the trial tribunal for lack of jurisdiction.

In rejoinder, Mr. Mwanganyi notified the court that the 1st respondent has conceded to the 2nd ground of appeal.

In respect of **section 23(3) of the Land Disputes Courts Act**, Mr. Mwanganyi submitted that despite the fact that the said provision allows continuation of hearing in absence of assessors, still the reason must be recorded. That, in the present case, no reason was given in continuing with the hearing in absence of assessors.

Responding to the prayer of quashing the proceedings from where the new chairman took over and the judgment and decree, it was submitted that the remedy is to vitiate the whole proceedings, judgment and decree as per **Order XVIII Rule 10(1) of the CPC**. He referred to the case of **Maria Samburo (As Legal Representative of the late Ramadhan Abas) vs Masoud Mohamed Joshi and 2 Others**, (supra).

Having given a careful thought of the parties' submissions, grounds of appeal and the trial tribunal's records this being the first appellate court; the court is obliged to re- evaluate evidence on the record and come up with its own conclusions in case the trial court failed to evaluate the same. In **Standard Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another,** Civil Appeal No. 98 of 2008 (unreported) the Court held that:

> *"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand* ***(Peters v. Sunday Post,*** *1958 EA 424;* ***William Diamonds Limited and Another v. Rf*** *1970 EA 1;* ***Okeno v. R,*** *1972 EA 32".*

Turning to the first ground of appeal, on failure to require the assessors to give their opinions in writing and read their opinions before pronouncing the judgment; I wish to state that the involvement of assessors is purely the matter of the law. This requirement is provided for under **section 23 (1) (2) and (3) of The Land Disputes Courts Act** (supra) together with **Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal)** (supra). As a matter of reference, **Regulation 19(2)** provides that:

> *"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."*

Section **23(1)(2)(3) of the Land Disputes Courts Act** (supra) provides that:

> *(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.*
>
> *(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 proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.*

In the instant matter, I have gone through the records; the records speak loudly as rightly submitted by the learned counsels that the assessors (namely T. Temu and J. Mmasi) were involved in the trial of the case up to the time when the trial Chairman Hon J. Sillas made a ruling of retiring from presiding over the matter on 03/08/2020. However, the successor chairman Hon. P. Makwandi took over the matter without the aid of assessors and without assigning reasons for failure to proceed with the aid of both of the assessors. I strongly believe that the irregularity is fatal to the extent which this court cannot ignore it.

The mandatory requirement is for the Chairman to sit with assessors during the hearing and to accord the assessors opportunity to give their opinions in writing, the opinions which should be read out in court before judgment.

With due respect to Mr. Wanyancha, the intention of the legislature was for the DLHT to sit with assessors throughout the trial. The exception found under **section 23(3)** (supra) was only meant as a relief in exceptional circumstances where for some reasons the tribunal Chairman could not sit with assessors. In absence of genuine reasons, then the requirement under **section 23(1)(2)** and **regulation 19(2)** must be adhered to. Section 23(3) was not enacted to give the Chairman exclusive powers to opt to proceed or not to proceed with the assessors. I am of settled opinion that even in the circumstances which calls for the absence of assessors as provided for under **section 23(3),** at least the reasons for failure to proceed with one or all assessors should be given to the parties as it is mandatory to proceed with assessors. In this case, since the successor Chairman proceeded in absence of assessors without assigning any reason to the parties, it is fatal to the extent of vitiating the proceedings, judgment and decree of the trial tribunal.

This goes hand in hand with the second ground of appeal; as submitted by Mr. Mwanganyi, the proceedings were conducted by two Chairmen without giving reasons. Initially, Hon. Chairman Sillas simply gave the ruling that he retired from presiding the case without stating the reasons for such retirement. Also, the predecessor Chairman, Hon. P. Makwandi proceeded with the hearing without stating the reasons for taking over the matter. It is the duty of any Officer or adjudicator to assign reasons for any decision or

order given. I also find this irregularity fatal because the successor Chairman lacked jurisdiction to try the case as rightly submitted and conceded by Mr. Wanyancha for the 1st respondent.

Concerning the way forward, Mr. Wanyancha urged the court to nullify only the proceedings of the Successor Chairman from 09/09/2020 and the judgment and decree of the trial Tribunal. However, he did not cite any authority to support his suggestion. In the case of **Maria Samburo** (supra) at page 10-11, which was also cited by Mr. Mwanganyi, the Court of Appeal held that:

> *"Therefore, in the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reasons for the succession advanced on record of appeal. We think that in the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity. Thus, since the appeal before us is incompetent as it emanated from nullity proceedings and judgment, in exercise of our powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141, RE 2002, we hereby quash the entire proceedings conducted at the trial High Court and set aside*

the judgment and decree dated 18/12/2015. We remit the file in respect of Land Case No. 36 of 2009 to the High Court, Land Division for a fresh trial before another judge in accordance with the law. In the circumstances of this appeal, we make no order as to costs."

On the strength of the above authority and findings, I do not see any reason for discussing the rest of the grounds of appeal since the two grounds of appeal suffice to dispose of the appeal. In the premises, I hereby quash the entire proceedings conducted at the trial Tribunal and set aside the judgment and decree dated 10/06/2021. I remit the case file back to the trial Tribunal for trial de novo before another Chairman in accordance with the law.

Based on the grounds which disposed of this appeal, no order as to costs is given. Appeal partly allowed.

It is so ordered.

Dated and delivered at Moshi this 11th day of September, 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

11/09/2023