IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

LAND APPEAL NO. 76 OF 2022

(Originating from Land Case Application No. 77 of 2017 before the District Land and Housing Tribunal for Singida at Singida)

SAMSON NTUNDE .....APPELLANT

VERSUS

GRACE SAMSON NTUNDE..... RESPONDENT

JUDGMENT

Date of Last order 02/11/2023

Date of Judgment: 16/11/2023

LONGOPA, J.:-

The appellant and other two parties not subject to this appeal were the respondents in Land Application No. 77 of 2017 before the District Land and Housing Tribunal for Singida at Singida (the trial tribunal). The case was filed on 09th of August 2017 by the respondent herein. The respondent alleged that the suit land which Plot No. 116 LD, Nzega road, Unyakumi Singida is her property which she acquired by operation of the law.

The brief fact to the matter is that the appellant and the respondent's mother one Juliana Abel Mtinda were husband and wife and the respondent's parents. The couple divorced on 20th October 2006 vide Civil

Case No. 44 of 2006 filed at Utemini Primary Court. The case was heard *ex parte* against the appellant herein. The suit property which was alleged to be a matrimonial property was given to the respondent and his brother who is now a deceased under the guardianship of their mother one Juliana as said earlier. The respondent sued Juliana Ntinde his former wife vide Land Application No. 11 of 2007 before the trial tribunal praying the suit land to be transferred to his name, the application was dismissed for being res judicata. There were also other cases filed by the two former spouses in this court and the trial tribunal.

The record also shows that it happened the one Paulo Enock Izengo who was the first respondent during trial entered into agreement with the appellant to sell the plot with unexhausted development at TZS. 15,000,000/=. Only copy of the title deed was handed over to the appellant on agreement that transfer of ownership will be completed once full payment is made. Out of 15,000,000/= only TZS. 300,000/=was paid. On being fed up with empty promises to pay, Paulo Enock Izengo filed a case against the appellant via Land Application No. 34 of 2013 before the trial tribunal. In it, it was found that the suit was time barred.

Upon appeal to the High Court through Land Case Appeal No. 1 of 2014 this court found that the trial tribunal erred in holding that the suit was time barred and upon re-evaluation of evidence it found the suit land to belong to Paul Enock Izengo it ordered valuation of the same, sale of the suit property at the current price of that time and the outstanding

amount which was TZS. 14,700,000/= to be paid from the proceed of sale plus interest at court's rate of 75% from 1994 till the house would be sold. This was 18th April 2016.

It is this decision (High Court's decision) which prompted the respondent to sue the appellant and Paul Enock Izengo together with Majembe Auction Mart (court broker) in Land Application No. 77 of 2017. In it the trial tribunal decided in favour of the respondent. Hence this appeal on the following grounds:

1. *That, the proceedings and judgment of the trial tribunal was/is null and void ab initio.*
2. *That, the trial tribunal erred in law and facts by pronouncing judgment against appellant herein without taking into consideration the strong evidence adduced by the appellant herein.*
3. *That, the trial tribunal erred in law and facts for deciding this case basing on weak and contradicted evidence of the respondent.*

On 02nd November 2023 parties appeared before me, after the matter was reassigned to me following special programme of hearing cases. The appellant was represented by Mr. Godwin Ngongi and Ms. Faraja Shayo both learned Advocates whilst the respondent was represented by Mr. Peter Ndimbo, learned Counsel as well. Addressing the

court Mr. Ngongi submitted that the former presiding Judge ordered the parties to address the court on three matters, namely: First, the absence of signature of trial Chairman after completion of each witness testimony. Second, absence of opinion of assessors. Third, absence of reasons for the change of trial chairman. Mr. Ndimbo, advocate did not object on this suggestion. Therefore, the court heard those issues and not merits of the appeal.

Submitting on the first issue, Ms. Shayo submitted that, Order XVIII Rule 5 of the Civil Procedure Code, Cap. 33 R.E 2019 requires that evidence must be in language of the court and a judge or magistrate should append his/her signature upon completion of recording each witness's evidence. The word used in such provision being "shall" she said the same implies that the function must be performed. In fortification of the submission, she cited the case of **Baraka Imani vs. TANESCO and North Mara Gold Mine Limited**, Civil Appeal No. 28 of 2019 [2020] TZCA, in this case the consequence of non-appending signature was held to vitiate the proceeding. It was her submission that in the instant case the Chairman did not append his signature as the same can be traced vividly at pages 16-49 of the typed proceedings.

On the failure of a chairman to accommodate the opinion of assessors, Ms. Shayo submitted that section 24 of the Land Disputes Courts Act, Cap. 216 R.E. 2019 provides for the mandatory requirement of recording and reflection in the decision of the assessor's opinion. It was her argument

that there are decisions of the Court of Appeal to this effect one being the case of **Tubone Mwambeta vs. Mbeya City Council,** Civil Appeal No. 287 of 2017 [2018] TZCA. The effect of this omission is to render the proceedings and judgement a nullity.

In relation to the last issue on change of chairman, Mr. Ngongi submitted that on 22nd July 2020 the record show that Honourable B.J Shuma took over the matter which was formerly before Hon. E.F Sululu. It was submitted that no reasons were adduced towards the change of the trial Chairman thus the omission offended Order XX, Rule 3 of the Civil Procedure Code that it is the presiding judge who should sign and prepare judgement after finalisation of hearing. He argued that this also vitiate the proceedings. In conclusion he prayed that both proceedings and judgment of the trial tribunal be nullified and costs to follow the event.

In reply, Mr. Ndimbo subscribed the submissions made by the two counsel for the appellant and prayed that since the errors were caused by the trial tribunal not parties to the case, nullifications of the proceedings and judgment should be without costs. It was his submission that non appending of signature at the end of recording of each witness testimony is a fatal omission making the proceedings a nullity. Further, Mr. Ndimbo reiterated that failure to record the contents of the opinion of assessors went to the root of the matter. It was further stated that Hon E.F. Sululu heard the matter on 26/6/2020 and on 22/7/2020 Hon B.J. Shuma took over without assigning any reasons for so doing. He added that if the

matter will be ordered to be tried de-novo, the order should state the same to be done expeditiously.

I have carefully considered the submissions by the counsel for both parties. As intimated earlier, three grounds of appeal filed in this court were not argued by both counsel following the irregularities noticed and agreed by them on non-appending of signature of the trial tribunal in the proceeding, non-reading of the opinion of assessors and the reasons for the change of trial chairperson was not assigned.

Commencing with the issue of non-appending of signature, I have studied the proceedings of the impugned decision particularly at pages 15, 16, 23, 24, 28, 29, 30, 47, 48, 49 and found it to be correctly pointed out by counsel for the parties. Indeed, the trial Chairman (E.F. Sululu) did not append his signature after recording witnesses' evidence on both parties' case. The effect of failure to append signature in the proceedings was stated by the Court of Appeal in the case of **Uniliver Tea Tanzania Limited vs David John** (Civil Appeal 413 of 2020) [2021] TZCA 547 (30 September 2021). At pages 6-7, the Court stated that:

> Though there is no requirement under the Rules obliging the arbitrator to sign witnesses' evidence, we are of the considered view that the omission is fatal to the proceedings. This is because it jeopardizes the authenticity, correctness, and veracity of the evidence of the witnesses as it cannot be

said with certainty that what is contained in the record is the true account of the evidence of the witnesses since the recorder of the evidence is unknown.

Oftentimes, the Court has stated that, failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings.

In this case the Court of Appeal noted clearly that the Civil Procedure Code is relevant to draw inspiration of the requirement for appending signature by the trial Judge or Magistrate to authenticate the proceedings. As such, the rule in CPC was extended to apply to arbitrators when are determining the matters between parties.

Further, in the case of **John Fortunatus Makoko vs Gph Industries Limited** (Civil Appeal 108 of 2018) [2021] TZCA 723 (3 December 2021), the Court of Appeal observed that:

> We are mindful of the fact that, the requirement to append signature after the witnesses' testimony is not a requirement under the Mediation and Arbitration Rules. However, it is our considered view that, such requirement is vital for the assurance of authenticity, correctness and veracity of the witness's evidence. In the absence of such signature, it may be difficult to ascertain the truthness of the evidence of the

witnesses recorded by a person who did not want to commit himself on what he recorded.

In any case, as the requirement to append signature at the end of witnesses' evidence is not covered under the Mediation and Arbitration Rules, we wish to take inspiration from the Civil Procedure Code [Cap.33 R.E. 2019] (the CPC) and the Criminal Procedure Act [Cap 20 R.E.2019] which have similar provisions imposing a mandatory requirement for the presiding officer to sign the witnesses' evidence.

In the light of the above quoted decisions, since the trial chairman did not append his signature after recording of each witness for all witnesses' testimony. This failure to append signature at the end of each testimony on both sides brings the authenticity of the proceedings to become questionable. As a result, the evidence cannot be used in determination of the appeal. The irregularity is incurable the remedy being to nullify all the proceeding.

On the issue of opinion of assessors, the law directs in land matters the chairman is supposed to sit with not less than two assessors who are supposed to give their opinion as per section 23(1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E 2019. I find that section 23 of the Land Disputes Courts Act was not complied with. It states that:

> 23(1) The District Land and Housing Tribunal established under section 22 **shall be composed of one chairman and not less than two assessors**; and
> (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.

This duty is further elaborated in the regulations made under the above law, that is, the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 (GN No 174 of 27/6/2003). Regulation 19(2) provides thus:

> 19(2) Not withstanding 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.

The above provision have been restated by Court of Appeal in a number of its decisions including the cases of **Sikuzani Said Magambo &Another vs. Mohamed Roble,** Civil Appeal No. 197 of 2018 [2018] TZCA 310 TanzLII **Edina Adam Kibona vs. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 [2018] TZCA 310 and **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017 [2018] TZCA 392

TanzLII the Court held that assessors' opinion must be given in the presence of parties.

In the case of **Dora Twisa Mwakikosa vs. Anamary Twisa Mwakikosa,** Civil Appeal No. 129 of 2019 [2020] TZCA 1874 (25 November 2020), (TanzLII), the Court of Appeal stated, at pages 10-11, thus:

> In the case at hand, as shown above, the record does not reflect that the assessors were required to give their opinion in the presence of the parties after the closure of defence case. The written opinions of the assessors did however, find their way into the record in an unexplained way. Nevertheless, in his judgment, the Chairman stated that the considered those opinions. In our considered view, since the parties were not aware of existence of the assessors' opinions, we agree with the counsel for the parties that in essence, the provisions of regulation 19(2) of the Regulations were flouted.
>
> Failure by the chairman to require the assessors to state the contents of their written opinions in the presence of the parties rendered the proceedings a nullity because it was tantamount to hearing the application without the aid of assessors. We are supported in that view by our previous decision in the case of **Tubone Mwambeta** (supra) cited by the appellant's counsel.

On reviewing the record, I noted that the trial chairman sat with Mr. Kindulu and Mrs. Kisenge as assessors during hearing of application subject to this appeal. The record specifically at page 58 of the typed proceedings reveals that the matter was coming for reading of assessors' opinion. The trial Chairman stated, and I quote:

Date: 23/04/2021

Coram: Hon. B.J Shuma-Chairman

For Applicant-Present

For Respondents- Present

Tribunal Clerk-Linda

Tribunal Members-Present

Tribunal: The matter is coming for ready (sic) of assessor opinion. They are ready and read to the parties.

B. Shuma

Chairman

23/4/2021

The extract above shows what transpired on the scheduled date for opinion of assessors. The record is silent as to what was all about the opinion in other words what exactly the opinion of the assessors was. I find that there was omission on recording what assessors did opine in respect to the matter at hand. The opinion must appear on record.

This is because the Court of Appeal had instructively guided that opinion must be on record, and it must be read out in presence of the parties. The case of **Amri Shabani Gunda vs Salum Mohamed Mashauri** (Civil Appeal 84 of 2021) [2022] TZCA 233 (5 May 2022), at page 6, is illustrative:

> The cited provision clearly indicates that, at least one of the assessors must be among the assessors in attendance throughout the trial so as to enable them to make an informed and rational opinion. Moreover, the opinions of the assessors must be in the record and that apart, it must be read out to the parties before the Chairman proceeds to compose the judgment.

Since the Chairman in the case at hand did not comply with section 23(2) and section 24 of the Land Disputes Courts Act, Cap 216 R.E. 2019 in the impugned judgment by referring to the opinion and supporting their opinion was purposeless. It cannot thus, be said that the trial Chairman in fact complied with section 24 of the Land Disputes Courts Act. This is because the record does not reflect the contents of the opinion that is allegedly to have been read by assessors in presence of the parties. As pointed out above, such omission goes to the root of the trial for lack of active participation of the assessors which is a legal requirement under the law.

The reasons for so doing are simple and straightforward. The opinion of assessors intends to inform the parties to know nature of the opinion and whether or not the same was considered in the Chairman final verdict. See **Tubone Mwambeta vs Mbeya City Council** (Civil Appeal 287 of 2017) [2018] TZCA 392 (3 December 2018).

The last irregularity is the change of trial chairman without assigning reasons. This issue prompted my perusal of the trial proceedings, and I found the issue in affirmative. The whole case was heard by Honourable E.F Sululu-Chairman. The judgment was composed by Honourable B.J Shuma-Chairman, no reasons were assigned as to the change of the trial chairman. The law requires the successor Chairman to give reasons for change. The above requirement of the law is found under Order XVIII, Rule 10(1) of the Civil Procedure Code, Cap. 33 R.E 2019 which also applies in the District Land and Housing Tribunal by virtue of section 51(2) of the Land Disputes Courts Act, Cap. 216 R.E 2019.

Order XVIII, Rule 10(1) of the Civil Procedure Code, Cap 33 R.E. 2019 provides that:

> 10(1) where a Judge or Magistrate is prevented by death, transfer or other cause from concluding the trial of the suit, his successor may deal with any evidence or memorandum take, done 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 stage at which predecessor left it.

It is the duty of a successor trial magistrate or judge or chairman to explain to the parties the reasons for the change. This duty has been expounded in the **Chantal Tito Mziray & Another vs Ritha John Makala & Another** (Civil Appeal 59 of 2018) [2020] TZCA 1930 (31 December 2020). The Court of Appeal, at pages 11-12, stated that:

> We are settled that the successor judge fully complied with the provisions of Order XVIII Rule 10 (1) of the CPC. Undoubtedly, the record of appeal bears out that the trial started before Feleshi, J (as he then was) and after his transfer from Dar es Salaam to another station, Sameji, J (as she then was) took over the conduct of the trial in which she recorded the evidence of one witness (DW2) for the caveators (appellants), considered the parties' written submissions and composed the judgment.
>
> More importantly, the record of appeal clearly indicates from pages 267 - 269 that the successor judge took considerable effort to inform the parties concerning her taking over the trial of the case after the predecessor judge was unable to conclude it due to his being transferred to another station.
>
> Admittedly, the successor judge even adjourned the hearing for the purpose of consulting the judge in charge to ascertain

whether it was not possible for the predecessor judge to finalize the trial of the case. It is in the record that she was informed by the judge in charge that it was not practicable for the predecessor judge to conclude the trial of the case. Thus, she was assured that the reassignment of the case to her was justified in the circumstances.

The rationale for giving reasons for taking over a case from another Judge, Magistrate or Chairman has been stated in the case of **MS Georges Centre Ltd vs. The Attorney General an Another,** Civil Appeal No. 29 of 2016 [2016] TZCA 629 TanzLII where the Court of Appeal stated that:

> 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 reasons, he or 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 or she has to take a case that is partly heard by another. There are a number of reasons why it is important to state 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 hear

> witness is in the best position to assess the witness's credibility. Credibility of witness which has to be assessed is very crucial in the determination of any case be a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised.

Likewise, in the case of **Omary Fundi Kondo Humbwaga vs. Said Mwinjuma Humbwaga and Noel Paulo Ndikumigwa** (Land Appeal 27 of 2019) [2021] TZHCLandD 6687 (11 June 2021), the High Court of Tanzania held that:

> Failure to state reasons for such transfer suggest that the case file has never been reassigned to any other chairman and that other chairman has no jurisdiction to adjudicate the case for want of proper assignment. This makes all proceedings thus continued without proper assignment to be nullity.

All these authorities as expounded by the Court of Appeal and the High Court of Tanzania put emphasis on the need for a successor trial magistrate or judge to categorically assign reasons for such taking over of the proceedings. It is a mandatory procedure that will cloth a successor magistrate or judge with jurisdiction to entertain that matter.

It is therefore that non-adherence to this procedure entails consequences on the proceedings that follow upon the successor trial magistrate, judge or chairman taking over the proceedings. The respective successor judicial officer (Judge or Magistrate) or chairman failing to give reasons for taking over a case lacks jurisdiction to try the case. Therefore, in absence of jurisdiction, whatever he records is a nullity. That being the case, therefore, Honourable B.J Shuma who took over the case which was before Honourable E.F Sululu by not assigning reasons he had no jurisdiction to compose judgment. For that reason, the decision thereof is a nullity.

Having demonstrated that trial tribunal proceedings and judgement were marred with irregularities that touch the root of the tribunal's jurisdiction, I find that this appeal can be disposed off on this point of irregularities based on the non-appending of the signature of trial chairman at the end of every witness's testimony, failure to read and record the opinion of assessors before the judgment is composed, and failure to assign reasons for change of trial chairman. I shall hasten to so conclude at this juncture.

That said and done, by powers vested on this court under sections 42 and 43(1) (b) and (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019, I nullify the proceedings of the District Land and Housing Tribunal for Singida in Land Appeal No. 77 of 2017 for being nullity on account of non-compliance with mandatory provisions of the law. I also set aside the

judgment and decree dated 19th September 2022. Each party shall bear its own costs. Parties are to liberty to institute fresh case if they wish.

It is so ordered.

DATED and **DELIVERED** at Dodoma this 16th day of November 2023

E. E. Longopa

JUDGE

16/11/2023.