IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB-REGISTRY
AT SHINYANGA

LAND APPEAL NO. 25 OF 2023

(Originating from Land Case No. 10 of 2023 of Maswa District Land and Housing Tribunal at Maswa)

DEDE KASIKA IBASA.....1st APPELANT

NKONI MASUNZU.....2nd APPELLANT

VERSUS

JOHN KASIKA IBASA.....RESPONDENT

JUDGMENT

30th November2023 & 16thFebruary, 2024

MASSAM J.:

The 1st appellant and the respondent are blood brothers fighting over a piece of land measured five (5) acres located at Gasuma village, Mwaubingi ward, in the District of Bariadi. It is narrated that the respondent acquired the disputed piece of land in the year 1976 by clearing the said land, and on the year 2000 he moved to another village leaving his land under the supervision of his brother (1st Appellate) with the direction that he will be renting the same and sending money to him.

It is said that from 2000 everything went smooth until 2020 when the 1st appellant failed to send him the money, that's when the respondent decided to use his farm without notifying his brother hence

this dispute where the 1st appellant claimed the land to be his and unknown to the respondent had sold two acres to the 2nd appellant.

The matter was taken to the District Land and Housing Tribunal at Maswa in Land Application No 10 of 2023 where the 1st appellant claimed that he was given that piece of land in 1986 by the village council and he has been using the same since then till 2020 when his brother invaded it in 2021.

Upon consideration of the evidence of both parties the trial tribunal reached its decision and the respondent was declared the rightful owner of disputed land.

Aggrieved by the decision of the trial tribunal, the appellants herein appealed to this court with three grounds of appeal namely;

1. *That, the chairman of the tribunal erred in law and facts for failure to require every assessor to give his opinion and the same be recorded and be part of the trial proceedings.*
2. *That, the chairman of the tribunal erred in law and facts for failure to sign the evidence of each witness adduced the evidence before the tribunal as required by law.*
3. *That, the chairman of the tribunal erred in law and facts for failure to analyse, evaluate and determined the evidence adduced by the parties hence miscarriage of justice.*

When the matter came for hearing, it was argued orally and the 1st appellant was presented by Mr. Daudi Masunga learned advocate and the respondent enjoyed the service of Mr. Martin Sabuni learned advocate, for the 2nd appellant the matter was heard ex-parte against him.

Arguing on the first ground the counsel for the 1st appellant submitted that the trial tribunal erred by failing to require every assessor to give opinion, record the same and be part of the trial proceedings, he explained that during the trial, there were two assessors and the court ordered that the matter was coming for assessors' opinion but in the copy of the proceedings it does not reflect the same as their opinions are not featured as required by law. He pined his observation with decided cases of **Andrea Mushongi (Administrator of estate of the late Hosea Mushongi) vs Charles Gabagambi, land appeal No 66 of 2021 Pg 6 and 7** which was supported by the decision of Court of Appeal, Dodoma **Elilumba Eliezer Vs John Saja, Civil Appeal No. 30 of 2020, Pg 11, he referred also this court to the case of Edina Adam Kibona V Obsolom Swebe (Shell), Civil Appeal No 286 of 2017 at page 6,** where the court said that the opinion must be in the record and must be read to the parties before the judgement is composed.

On the second ground he submitted that the trial tribunal failed to sign the evidence of each witness adduced to the court a per requirement of the law under Order XVIII Rule 5 of CPC, and that in the typed proceeding especially the corum dated 18/06/2022 the respondent testified but nowhere in the proceeding showing that the chairman did sign to show that the evidence was taken from the witness who testified.

He cited the case of **Mange Chuma Vs Ndosela Mbasa, land application No 87/2021,** where the court held that failure to sign in each page after taking the evidence is an incurable irregularity the consequence goes to the root of the case. On these two grounds he prayed this court to nullify the proceeding and judgement.

On the last ground that the trial tribunal failed to analyse, evaluate the evidence adduced, he submitted that the law require the court to declare the winner in the suit to a person whose evidence is heavy than the other, and in this case, the 1st appellant had witnesses whom their testimony were strong than that of the respondent's witnesses and that the trial tribunal failed to evaluate and analyse the same to reach its decision by declaring the 1st appellate the owner and the sale between the 1st and 2nd appellant legal.

Responding to these grounds, Mr Martin Sabini contended that, on the first ground assessors gave their opinions on 12.4.2023 and the same was read and put in the file as part of court proceeding, on the second ground he submitted that the trial chairman did sign after every witness has testified and that's why the appellant did not complain that the evidence given was not the same testified in court.

On the third ground he argued that the trial tribunal did analyse and evaluate the evidence brought before it and that the evidence of the respondent that he acquired the land by clearing the bushes in 1976 was heavy as it was testified by their blood brothers and that the 1st appellant did not have enough evidence as he had no minutes evidencing that he was given the land in 1986. He prayed this court not to disturb the decision of the trial tribunal.

On his rejoinder, he insisted that courts are guided by the law and the same must be followed the fact that opinions of the assessors were filed without recording them and failure for the chairman to sign after every witness's testimony is not in line with the law and hence its procedural irregularities which results to nullification of the proceedings and the judgement. He added that the evidence brought by the appellant was heavy as compared to that of the respondent.

I have meticulously crossed through the trial tribunal records on the evidence given, and the arguments by both parties at the appeal level, and the issue for considerate is whether **this appeal has been brought with sufficient cause.**

Regarding the first ground of appeal, it is a trite law that the chairman of the District Land and Housing Tribunal must record assessor's opinion before the compose of a judgment, at page 23 of the typed proceedings when the case was set for taking the opinion of assessors,the following was recorded:

BARAZA

Shauri linakuja kwa maoni ya wajumbe wa baraza na wote wametoa maoni yao.

AMRI

Hukumu 20.04.2023

Saini:

J.T.Kaare

Mwenyekiti

12.04.2023

As I have stated here in above the assessors' opinions must be part of the proceedings because they are part of the composition of the District Land and Housing Tribunal as stated under **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 which provides;**

"1. The District Land and Housing Tribunal established under S. 22 shall be composed of one chairman and not less than two assessors.

2. 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,"

In line of the above provision of the law, **Regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003 states that;**

"19(1) the tribunal may after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot reserve the judgment to be pronounced later;

(2) Not with standing 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 opinion in Kiswahili."

In this application the trial chairman mentioned that the matter was coming for the opinion of the assessors but the proceedings does not reflect if the opinions were given by the assessors as was guided in the cited case by the appellant's counsel of **Hosea Andrea Mushongi**

(Administrator of the Late Hosea Mushongi) vs Charles Gabagambi (Land Case Appeal 66 of 2021) [2021] TZHC 7325 (5 November 2021) at page 6 & 7

"Date:11th August 2021

Coram: S.J. Mashaka – Chairman

T/C: Magoma

Members: T.J. Kashasha and IN. Ndurna

Applicant: Present in person.

Respondent: Present in person.

Tribunal: The case is coming for assessors' opinion.

Applicant: I am ready for opinion.

Respondent: I am ready too.

Assessors' opinion

1st Assessor - T.J. Kashasha

Maoni yangu ni kwamba.....

2nd assessor -T.N, Ndoma

Katika kesi hii maoni yangu.....

Tribunal:

Assessors opinion read before the trial in the presence of the parties.

Order: Judgment on 20th August, 2021

Sgd: S.J. Mashaka

Chairman

10th August 2021.

Thereafter the chairman may compose the judgment."

Similarly, the Court of Appeal of Tanzania in the case of **Ameir Mb arak and Azania Bank Corp Ltd v Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** come up with the same position that, -

> *".....Therefore, in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment 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.*** *" [Emphasis added].*

Refer also the case of **Edina Adam Kibona v Absalom Swebe (Shell), Civil Appeal No. 286 of 2017**.

In the submission of the counsel for the respondent he urged that the said opinions were given by the assessors and the same were read by the trial chairman and later were filed. One question can be raised that is, does filling the opinion of assessors is enough to show that the same was tendered and read during the trial?

It is my considered view that the trial chairman ought to show in his proceeding that the assessors gave their written opinions on that same date by reading those opinions during trial and that the chairman recorded such opinion which later will be filed. The filling of the opinions comes after the same had been read and recorded and not otherwise. This is to ensure that assessors are part of the decision reached even when the chairman is not bound to their opinion.

Subsequently, in this application mere mentioning of in cooperating the opinion of assessors in the judgment by the chairman without the same being highlighted in the proceedings amount to fundamental error which, in my view occasioned miscarriage of justice to the parties as was decided in **Hosea Andrea Mushongi (Administrator of the Late Hosea Mushongi) vs Charles Gabagambi** (SUPRA) at page 4 that:

".....if such opinions do not feature in the proceedings, their acknowledgement in the judgement is not acceptable"

On the second ground, the 1st appellant counsel urged that the trial tribunal failed to sign the evidence of each witness adduced to the court a per requirement of the law under Order XVIII Rule 5 of CPC, on the other hand the respondent replied that, the same was signed after

every witness's testimony and that's why the 1st appellant did not complain that the evidence was not the one given in the court.

It is in my knowledge that the District Land and Housing tribunals are governed by the Land Dispute Courts Act, (supra) and (The District Land and Housing tribunal) Regulations 2003, and it is clear that, from the above laws, they are both silence on the recording of evidence by the tribunal on appending signature after recording witnesses' testimony. But in terms of section 51 of the LDCA, it provides that, -(1) N/A

> *(2) The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code.*

It is therefore from the above section that, even if the LDCA are silent, the Trial tribunal is not barred to apply **Civil Procedure Code, (Cap 33 R;E 2019)** in his proceedings since it is the mother of civil matters. The law requires magistrates or judges to sign after every testimony given by the witnesses See **Order XVIII, Rule 5 of the Civil ProcedureCode [Cap 33 RE 2019]** for easy reference the rule provides that;

> *"The evidence of each witness shall be taken down inwriting, in the language of the court, by or in the presenceand under the personal direction and superintendence ofthe judge or magistrate,*

not ordinarily in the form ofquestion and answer, ***but in that of a narrative and thejudge or magistrate shall sign thesame"***

(emphasisis mine)

I have revisited the trial tribunal proceeding at page 8, 9, 13, 15, 16, 19 and 20 the trial chairman having recorded the evidence of witnesses did not sign in the most of the recorded evidence and the only signatures in the record that the trial chairman recalled to appendix are found after the orders, he even ignored to sign after the closure of the respondents' evidence at page 22.

The above Order provides that it is mandatory requirement for the trial magistrate to ensure that he/she signs at the end of the witnesses' evidence.This position was also taken in the case of **Yohana Musa Makubi V. R,**Criminal Appeal No. 556 of 2015 (unreported) the Court of Appeal held;

In light of what the Court said in WALII ABDALLAKIBWITA'S and the meaning of what is authentic can it besafely vouched that the evidence recorded by the trial Judge without appending her signature made the proceedings legally valid? The answer is in the negative.We are fortified in that account because/ in the absence of signature of trial Judge at the end of testimony of every witness: firstly, it is impossible to authenticate who took down

such evidence. Secondly, if the maker is unknownthen the authenticity of such evidence is put to questionas raised by the appellantcounsel. Thirdly, if the authenticity is questionable/the genuineness of such proceedings is not established and thus: fourthly, such evidence does not constitute part of the record of trial andthe record before us... "

The Court went on stating that:

"We are thus satisfied that the failure by the judge to append his or her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationally for the rule is fairly apparent as it is geared toensure that the trial proceedings are authentic and not tainted"

This position was also taken in the case of **Amir Rashid v. Republic,**Criminal Appeal No. 187 of 2018 (unreported) where the Court discussed the importance of a presiding magistrate to ensure that he appends his signature after the end of each witness' testimony where the court was of the opinion that:

".....The rationale isnot hard to find. It tends assurance that suchevidence was recorded by an authorized person."

Thus, the above principles from court of appeal applies to both civil and criminal matters, therefore, I entirely agree with the counsel for the 1st appellant that, the trial chairman did not record the evidence of the witnesses appropriately as required by law, hence it is doubtful whether it was the testimony from witnesses or not, and I therefore find out that, this ground has merit.

For the foregoing reasons, I find no reasons to dwell into determining the 1st appellant's last ground, In the result I nullify the proceedings of the trial tribunal from 18.06.2022 where the chairman started to record the witnesses evidence.I also set aside the judgment and decree thereon. I hereby order a retrial of the case starting from the proceedings of 18.06.2022 before another chairman with another set of assessors. Thus, the appeal is allowed. Regarding the relationship of the parties to be brothers, No order as the costs

It so ordered.

DATED at **SHINYANGA** this 16th day of February, 2024.

THE HIGH COURT OF TANZANIA

R.B. Massam
JUDGE
16/02/2024