

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

LAND APPEAL 18 OF 2019

(Appeal from Judgment and Decree of the District Land and Housing Tribunal for Katavi at Mpanda by Hon P.I. Chinyele given on 3rd day of May, 2019 in Land Application No. 38 of 2017)

DONATH MREMA 1ST APPELLANT

MPANDA MUNICIPAL DIRECTOR 2ND APPELLANT

Versus

MBOGORA WILBERT NYAMBARYA RESPONDENT

JUDGMENT

13/08/2020 & 08/09/2020

W.R. MASHAURI, J.

In the District Land and Housing Tribunal for Mpanda at Katavi (the Tribunal) Respondent sued Applicant for wilfully trespassed on plot No. 560 Block DD Kasimba Mpanda by erecting a structure therein. After full trial, the Tribunal decided the matter in favour of Respondent. Aggrieved, the applicant now challenges the decision of the Tribunal before this Court by petition of appeal in which he filed four grounds of appeal as follows:-

- 1 That the trial tribunal erred in law and in facts for failure to accommodate properly and legally the opinion of assessors in

reaching to its decision hence its proceeding is vitiated and its judgment is bad in law.

- 2 That the trial tribunal's proceedings are vitiated hence null and void for lack of necessary party.
- 3 That, the trial tribunal erred in law and fact by determining the matter against the person without legal capacity to be sued (lack of locus stand) hence its proceeding and judgment are vitiated and bad in law.
- 4 That the trial tribunal erred in law and fact for condemning the appellant who is bonafide allocatee to pay damages and costs of the suit.

He prays; the appeal to be allowed with costs, judgment and decree of trial tribunal to be quashed and set aside, proceeding of trial tribunal be nullified and any other order deem fit by the court to grant.

Upon service of summons, both parties enter appearance in court. On the 28/5/2020 when appellant represented by Mr. Sanga and respondent represented by Mr. Patrick Kyakusa (advocate), appellant prayed to amend his petition of appeal, in which, the court granted it prayer to dispose appeal by way of written submission granted. All parties filed their submissions accordingly.

In submissions appellant was represented by learned counsel Mr Sanga (advocate) and respondent represented by Mr. Patrick Mwakyusa (advocate). In his submission in support of ground one, counsel for appellant submit that the tribunal failed to accommodate properly the opinion of assessors. that when trial tribunal has been conducted with the aid of the assessors they must be actively and effectively participated in the proceeding by being afforded with chances to give their opinion and such opinion be availed and read in presence of parties before being taken and used by chairman in composition of judgment. This failure renders the proceeding vitiated and judgment a nullity. He cited **S. 23(1) and (2) of the Land Disputes Court Act and Rule 19(1&2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulation, 2003.** And the case of **Sikuzani Saidi Magambo & another Vs Mohamed Roble** Civil Appeal No. 197 of 2018 CAT at Dodoma (unreported).

In the 2nd ground of lack of necessary party, appellants counsel submitted that, it is a trite principle of the law that, non-joinder of necessary parties to the proceeding is fatal and renders proceeding vitiated. In the suit for recovery of property sold to the third party both the seller, buyer and any other person interested be joined and afforded with chances to defend their interest before the court so as to reach to a just decision. He cited the case of **Juma B. Kadala Vs Laurent Mnkande**

1983 TLR 10 and the case of **National Housing Corporation Vs Tanzania Shoe Company & Others** 1995 TLR 252.

As to the 3rd ground of determining the matter against a person without legal capacity to be sued (lack locus standi) appellant submitted that, whenever there is a claim for or against the District or Municipal council in its corporate name and not its executive director. The municipal executive director cannot sue or be sued in claim against Council, subject to this appeal the appellant sued the respondent together with Mpanda Municipal Director for the claim against Mpanda Municipal Council which is obvious contrary to the law. He cited S. 14 (1)(b) of the **Local Government (Urban Authorities) Act**, Act No. 8 of 1982.

In 4th ground that the trial tribunal erred for condemning the appellant who is bonafide allocatee to pay damages and costs of the suit, he submitted that; appellant have been in occupation and use of the disputed land without the knowledge that the same was prior allocated to any other person, in the circumstances it is the 2nd respondent who was supposed to bear all liabilities including damages suffered by respondent since he is the one who allocated the appellant to disputed land. It is rule of thumb that, no one should be condemned by pay damages caused by another person unless under circumstances of vicarious liability. Appellant never contributed in any ways damages suffered by 1st respondent. Appellant

ending his submission by praying his appeal to be allowed and nullifying the proceeding and quash the judgment and it is orders.

In the side of Respondent, he submitted that, the amended petition of appeal is not maintainable for want of proper parties, appellant appealed against the second respondent who was his fellow defendant in Land Application No. 38 of 2017. The procedure is contrary to the Law, he cited Order XXXIX Rule 4 of the Civil Procedure Code R.E 2019. After that, he submits on the grounds of appeal raised by the appellant as follows:-

On the 1st ground of failure to accommodate properly and legally the opinion of assessors he submit that, trial tribunal observed and comply with the law and procedure governing assessors with regard to judgement making. Trial Chairman complied with the provision which require the assessors to give their opinion in writing and submit to the chairman, and go on to make and pronounce judgment, the judgment was incorporating the opinion of assessors. He cited Rule 19(2) of the Rules (Supra). No any irregularity hence this ground is dismissed.

As to 2nd & 3rd grounds on lack of necessary party and lack of locus stand, respondent submitted that, original case was brought against the Mpanda Municipal Director instead of the Mpanda Municipal Council but this is not bad in law as the same are synonymous, Mpanda Municipal

Director is the executive officer of the Mpanda Municipal council who is vested with executive powers over the council. In his name all the claim are addressed and all functions of the council are **evolved**. He cited authorities as follows: - **Director Moshi Municipal Vs Stanlenard Mnes & another** Civil Appeal No. 246 of 2017 CAT at Arusha (unreported), **Usangu Sugar Processing Estate Ltd Vs Mbarali District Executive Director** Civil Case No. 26/2000 HC at Mbeya.

With respect to 4th ground that the trial tribunal erred in law for condemning the appellant who is a bonafide allocatee he submitted that, the trial tribunal did rightly to condemned the appellant to pay damages and costs of the suit as the whole transaction is tainted with fraud. He acquired the land without applying for it as the law. It is no wonder trial tribunal condemned the 1st respondent all the relief claimed. That was it and prayed the appeal to be dismissed with costs.

In rejoinder, appellants submitted that, as to assessors, opinion of assessors must be on record, nowhere in the trial tribunal proceedings where the assessor's opinion were recorded.

After all submissions, the question of this court is whether the appeal has the merit?

Back to the petition of appeal, I began with ground one on assessor's opinion; the appellant claimed that proceeding has no anything concerning the opinion of assessors while respondent said there was opinion of assessors. For me, the only truth comes from the record and not otherwise, in the record of trial tribunal after case closed, no any date shows the assessors were given chance to give their opinion latter than the matter to be scheduled for judgment, record doesn't indicate when the said opinions were read over to parties. This leave questions before the court.

The Land Disputes courts, Act, Cap 216 R.E 2019 in S 24 provides that:

*"In reaching decisions, **the Chairman shall take into account the opinion of the assessors** but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion"*

As well as, the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 in Regulation 19(2):-

*". . . require every assessors present at the conclusion of hearing to **give his opinion** in writing and assessors may give his opinion in Kiswahili"*

The law require chairman to take the opinion of the assessor, it is belief of this court that anything happen in trial affecting rights of parties for one way or another shall be, and must be, appeared apparently in the

proceedings of the said trial, and otherwise court will take adverse inference that nothing done in trial. Therefore absence of order of the chairman requiring the assessors to submit their opinion before the parties is connotes that assessors were accorded opportunity to give their opinion as required by the law.

Our practise also strengthen the opinion to be in record and read to parties, the case of **Edna Adam Kibona Vs Absolom Swebe (Sheli)** Civil Appeal 286/2017 CAT at Mbeya December, 2018 (unreported) hold that:-

"the Chairman of the District Land and Housing Tribunal must require everyone of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed."

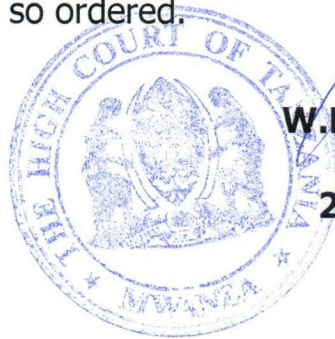
It is therefore my considered view that, since the record of the trial tribunal does not show that the assessors were accorded with opportunity to give their opinions, it is not clear as to how and at what stage the said opinion found their way in trial tribunal judgment. It is my further view that, the said opinion was not availed and read in the presence of the parties, this was a serious irregularity. (See – the case of Edna Adam Kibona) **Supra.**

On the strength of the laws and decisions cited above, I am satisfied that, the pointed omission of assessors' opinion in proceedings is an irregularity amounted to a fundamental irregularity that have occasioned

a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the tribunal. In my view this point is suffice to dispose of the matter.

In the event, appeal has merit, I hereby nullify the entire proceedings and quash the judgement of the trial tribunal and subsequent orders thereto. If parties are still interested are at liberty to institute a fresh suit before the tribunal, subject to the law of limitation. I order that, the said suit should be instituted before another chairperson with jurisdiction together with competent a new set of assessors.

It's so ordered.




W.R. MASHAURI
JUDGE
20/08/2020

Date: 08/09/2020

Coram: Hon. W. R. Mashauri, J

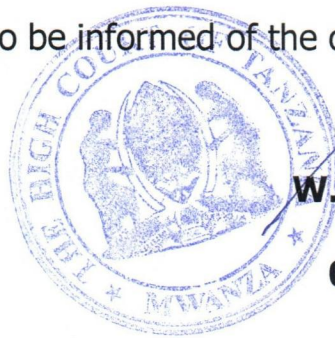
Applicant: 1st and 2nd

Respondent:

B/c: Felister Mlolwa, RMA

Court: Judgment delivered in court in absence of all parties through video conference this 08/09/2020.

Parties to be informed of the outcome.



W.R. Mashauri
W.R. MASHAURI
JUDGE
08/09/2020