IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE APPEAL NO. 281 OF 2019

SOKOINE UNIVERSITY OF AGRICULTURE ..... APPELLANT

VERSUS

STEVEN KILASI & OTHERS ..... RESPONDENTS

(Appeal from the decision of the District Land and Housing Tribunal for Morogoro District at Morogoro)

Dated the 08th day of June, 2018
in
Application No. 75 of 2015

JUDGMENT

S.M. KALUNDE, J.:

This appeal arises from the decision of the District Land and Housing Tribunal for Ilala District at Mwalimu House (**"the Tribunal"**) delivered on 08th day of June, 2018. The brief facts leading to this appeal are that, in July 2015, the Appellants filed **Application No. 75 of 2015** before the tribunal against the Appellant for trespass into their piece of land located in Mikoroshini Area, Lukobe Juu in Morogoro (**"the suit property"**). In accordance with the application, the appellants prayed for *inter alia* the following reliefs;

(a) A declaration that they were lawful owners of the suit property;

(b) An order of vacant possession;

(c) General damages to the tune of Tshs. 12,000,000; and

(d) costs and any other reliefs.

Upon hearing the parties, the Tribunal dismissed the applicant's claims against the respondents and ordered a resurvey of the area and exclusion of the disputed area from the appellants land. Aggrieved by that decision the appellant filed the present appeal in which they challenged the decision of the tribunal. In their petition of appeal the appellant advance six (6) grounds of appeal. However, for convenience and brevity I will not reproduce all the grounds in this appeal.

On 3rd December, 2020, when the matter came for hearing the appellants were represented by Ms. **Lunyamadzo Gillah**, learned advocate and the respondents were represented by **Mr. Nyabinyiri Jahu**, learned advocate. During hearing I brought to the attention of the parties the defects in the proceedings before the tribunal. The defects related to the fact that:

(i). One assessor who had not heard all the evidence was allowed to opine; and

(ii). Assessors were not given an opportunity to readout their opinions.

In view of the above issues raised by the Court *suo motu*, I asked partied to address the Court on the consequences of the said defects. The defects were raised in view of the provisions of section

23 (1) and (2) of **the Land Disputes Courts [Cap. 216, R.E. 2019]** read together with regulation 19 (1) and (2) of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003**. In the first place, the section requires the tribunal to be constituted by at least two assessors and the Chairman. Further to that, the section requires assessors to readout their opinion before conclusion of the case.

Submitting for the appellant, Lunyamadzo argued that in accordance with s. 23 (1) of Cap. 216, the tribunal is constituted by the Chairman and two assessors. The counsel went on to argue that, on 13rd September, 2017 and 22nd March, 2018 the tribunal proceeded with hearing whilst being assisted by one assessor, **Mr. Leonard Njovu**. It was also submitted that in its judgment the Chairman made reference to the opinion of two assessors , that is **Mr. Njovu** and **Mr. Rashid Mpite**, whilst one of the assessor, Mr. Mpite, had not heard all the evidence.

Further to the above, the counsel argued that Mr. Mpite's opinion included facts which were presented on 13rd September, 2017 and 22nd March, 2018 when he did not attend the hearing. To support the argument the counsel cited the case of **Edina Adam Kibona vs. Absolom Swebe**, Civil Appeal No. 286 of 2017 CAT (Unreported) where it was *inter alia* held that when a trial is conducted with the aid of assessors, assessors should be actively and effectively involved in the proceedings so as to make a meaningful opinion.

As to whether assessors were given an opportunity to readout their opinions, Lunyamadzo submitted that the records of the tribunal show that after the visit to the *locus in quo* parties were invited to file their written submissions and the date of judgment was fixed. The counsel observed that there were no records to show that at any point in time the assessors were called to provide their opinion. According to Lunyamadzo, that contradicted the provisions of s. 23 (2) of Cap. 216 as read together with regulation 19 (2) of G.N. 174 of 2003. To bolster his argument he cited the case of **Edina Adam Kibona** (supra), **Tubone Mwambeta vs. Mbeya City Council,** Civil Appeal No.287 of 2017 (unreported) and **Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa** (Civil Appeal No.129 of 2019) [2020] TZCA 1874; (25 November 2020).

Based on the above position of the law, the counsel invited the Court to nullify the entire proceedings and judgment of the tribunal in Application No. 75 of 2015.

At the outset, Mr. Nyabinyiri, admitted that, in accordance with s. 23 (1) of Cap. 216, the composition of the tribunal is made of the Chairman and two assessors; and that the assessors shall be required to give out their opinion before the Chairman reaches the judgment. On whether it was appropriate for an assessor who had not heard all the evidence to opine Mr. Nyabinyiri argued that Mr. Mpite who did not hear all the evidence was present, in his own words, *"on such important dates"* during the testimony of PW1, PW2, PW3, and DW3. Further to that, the counsel reasoned that Mr. Mpite validly gave his opinion because *"he had all the evidential facts at his fingertips"* from

the final written submissions; and therefore his written opinion did not offend the mandatory provisions of section s. 23 (1) and (2) of Cap. 216.

Mr. Nyabinyiri added that the failure of the assessors to readout their opinion in the presence of the parties before delivery of judgment did not occasion any failure of justice on the parties. He implored that the proceedings before the tribunal were in compliance with the requirements of s. 23 (1) and (2) of Cap. 216.

Having considered the submissions made by the parties, I will embark on the determination of the issues by stating that in terms of the provisions of s. 23 (1) and (2) of Cap. 216, the district land and housing tribunal is composed of a Chairman and not less than two assessors. The section reads:

> *"23-(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.**" [Emphasis added]*

The takeaway from wording of .23 (1) of Cap. 216 is that, throughout the proceedings before the tribunal the two assessors must, at all times, be present, and they must be actively and effectively involved so that they can have a meaningful contribution

in advising the Court. If all or one assessor misses a hearing session, that assessors should not be allowed to rejoin the case in the next hearing. In such circumstances the law, 23 (3) of Cap. 216, allows the Chairman to proceed with one assessor or no assessor at all. Unfortunately that is not what happened in this case.

The tribunal records show that hearing commenced on 08th February, 2017, on that day the assessors present were **Mr. Mpite** and **Mr. Njovu**. On that day the applicants' case commenced and the Court heard the testimonies of **AW1** and **AW2**. The matter was adjourned to 21st June, 2017. Again on the 21st June, 2017, the assessors present were Mr. Mpite and Mr. Njovu. On the respective date the tribunal heard the evidence of one witness, **AW3** in the end the matter was adjourned. After that, the matter came for the next hearing on 21st July, 2017, on that day only Mr. Njovu attended, however, Mr. Mpite was not present. The coram for the day read:

"21/7/2017
Coram: Mr. P.J. Makwandi
Members: 1. Njovu
2. ------
Applicant: Present/ Mr. Sikalumba Adv.
Respondent: Present all 7
R/A: Joyce

Mr. Sikalumba, Adv: The matter is for further hearing. I have one witness today.

Tribunal: The matter is hereby heard as scheduled.

Sgd.
P.J. MAKWANDI

CHAIRMAN
21/7/2017

The Tribunal proceeded in absence of one assessor Mr. Mpite and in the end the applicants' case was marked as closed and the defence case was scheduled for 13th September, 2017. When parties appeared on 13th September, 2017, the tribunal noted that ***"There is no quorum today. Hg on 27/10/2017"***.

Hearing proceeded on 27th October, 2017, on the day the tribunal heard the evidence of **RW1** and subsequently hearing was adjourned to 08th and 09th January, 2018. As for the 27th October, 2017, part of the records of the tribunal read as follows:

"27/10/2017
Coram: Mr. P.J. Makwandi
Members: 1. Njovu
2. ------
Applicant: Present/ Mr. Sikalumba Adv.
Respondent: Present all
R/A: Joyce
DEFENCE CASE STARTS"

A look at the above records it is clear that Mr. Mpite was not present on 21st July, 2017 and 27th October, 2017, and hearing proceeded in his absence. Therefore, he never heard the testimonies of AW4 and RW1, neither did he participate in any form whatsoever. However, on 09th January, 2018, when the tribunal heard the testimony of RW2, Mr. Mpite appeared and was allowed to take part in the proceedings of the tribunal. The records, partly, read:

"9/1/2018

Coram: Mr. P.J. Makwandi

Members: 1. Njovu
2. Mpite

Applicant: Present/ Mr. Sikalumba Adv.

Respondent: Present except 5th representative.

R/A: Joyce

1st representative: We have one witness. We are ready to proceed.

Mr. Sikalumba, Adv: We are ready to proceed.

DEFENCE CONTINUES"

On top of that the records of the tribunal show that Mr. Mpite was also not present on 22nd March, 2018 when the tribunal made a site visit to the suit property.

Despite not being present on 21st July, 2017; 27th October, 2017 and 22nd March, 2018, Mr. Mpite was allowed to prepare his opinion and the tribunal. His opinion went on to be quoted by the Chairperson at page 8 of the typed proceeding. The quoted portion of Mr. Mpite opinion as reflected in the judgment of the tribunal read:

> ***"Ushahidi wa PW4 ulitambua uwepo wa Mikoroshini Village na Tanganyika Village lakini ameona Kijiji cha Tanganyika kiliondolewa katika mipaka ya SUA kwa sababu wakati wa upimaji wanatanganyika walishirikishwa....***
>
> ***Nashauri mipaka ya SUA na Kijiji cha Lukobe irekebishwe.***

Mipaka mipya izingatie uwepo wa Mitaa ya Kambi tano na Lukobe Juu....".

The question now is whether it was appropriate for the tribunal to proceed in the manner it did in the present case. The answer to that is in the negative. I say so because, in terms of section 23 (1), the law is clear that the tribunal shall be composed of the Chairperson and two assessors. Further to that the requirement of the law is that, the two assessors must participate from the beginning of the trial to the end; and they must be actively and effectively involved. This position was stated by the Court of Appeal in **Enosi v Republic** (Criminal Appeal No. 135 of 2915) [2016] TZCA 135; (21 October 2015 TANZLII) where the Court (**Mugasha, J.A**) stated:

> *"... **the assessors shall be required to attend at the adjourned sitting and at any subsequent sitting until the conclusion of the trial. The rationale of their continued presence** throughout the trial **is to enable them to hear the whole evidence** which will enable them to make informed or rational opinions." [Emphasis mine]*

As noted above, Mr. Mpite was present at the start of the trial and he heard the evidence of AW1, AW2 and AW3. However, he was not present when the case was subsequently called in for hearing of the testimonies of AW4 and RW1. He therefore did not hear the evidence of the said witnesses. He was also not present when the site visit was conducted. Having absented himself from subsequent hearing sessions, Mr. Mpite should not have been allowed to rejoin

the sessions on 09th January, 2018, when the tribunal heard the testimony of RW2. Having absented himself, he should not have been allowed to give his opinion at the conclusion of the trial. In the circumstances, the tribunal should have proceeded with one assessor as allowed under section 23 (3) of Cap. 216.

In terms of section 23 (1) of Cap. 216, allowing Mr. Mpite to resume participation and prepare his opinion was fundamental irregularity which was fatal to the proceedings of the tribunal. It went to the root of the case, as it affected the jurisdiction of the tribunal. The consequence of such irregularity was stated in **Joseph Kabul vs Reginam** [1954-55] EACA Vol. XXI-2, where the Court said:

> *"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity"*

In view of the aforesaid, I agree with Lunyamadzo that the tribunal proceedings were flawed with fatally incurable procedural irregularities occasioning a miscarriage of justice as that Assessor's opinion which was relied by the tribunal in its decision was based not on the full evidence and influenced the decision of the Chairman. The irregularity vitiated the trial at the tribunal and rendered it a nullity.

This above alone was sufficient to dispose of the matter, however, I should also add that, after going through the records of the tribunal, I am satisfied that, at no point did the tribunal require assessors to read out their opinion as required by s. 23 (1) of Cap. 216. The records show that, the defence case was closed on 08th January, 2018 and the tribunal ordered a site visit on 10th February,

2018 which was adjourned to 22nd March, 2018. After the site visit on to 22nd March, 2018 the matter was fixed for Judgement on 11th May, 2018. Subsequently, on 11th May, 2018 the tribunal observed that one of the assessors had not recorded their opinion, judgement was thus adjourned to, and delivered on 08th June, 2018.

From the above analysis it is clear that the assessors were not given an opportunity to readout their opinion in the presence of the parties and required under s. 23 (2) of Cap. 216 as read together with regulation 19 (2) of G.N. 174 of 2003. I am supported in this view by the Court of Appeal decision in **Edina Adam Kibona vs. Absolom Swebe**, Civil Appeal No. 286 of 2017 CAT and **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017 all unreported and **Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa** (Civil Appeal No.129 of 2019) [2020] TZCA 1874; (25 November 2020 TANZLII).

In **Dora Twisa Mwakikosa** (supra), the Court of Appeal, (Mwarija, J.A.) stated that:

> *"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 he 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.

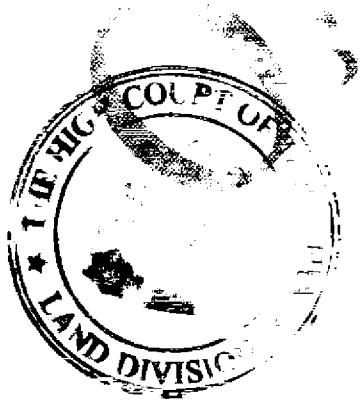
The failure by the Chairman to require the assessors to state the contents of their written opinions in the presence of the parties rendered the proceedings a nullity because it was tantamount to hearing the application without the aid of assessors. *" [Emphasis mine]*

In line with the above findings the Court of Appeal quashed the proceedings before the tribunal and High Court and set aside the judgments thereof.

That said, and in terms of section 43 of Cap. 216, I revise and quash the entire proceedings before the tribunal and the judgment is set aside. This being an old matter, I order on expedited rehearing of the appeal, before another Chairperson with a new set assessors. Having raised the issues, I make no orders as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this **08th** day of **APRIL, 2021.**



S. M. KALUNDE
JUDGE