IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND CASE APPEAL NO. 23 OF 2019

RAPHAEL SIMTOE ..... APPELLANT

VERSUS

MKAMBARANI VILLAGE COUNCIL ..... RESPONDENT

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

Dated the 12th day of February, 2019

in

Land Appeal No. 66 of 2018

JUDGMENT

S.M. KALUNDE, J.:

In 2017, the Mkambarani Village Council, (herein **"the Respondent"**) filed Case No. 020/MK/2017 against the appellant at **Mkambarani Ward Tribunal** (herein **"the Tribunal"**) claiming trespass by the appellant into an open space, a property of the village. In its decision delivered on 10th November, 2017 the Ward Tribunal declared that the respondent was the lawful owner of the suit property. Aggrieved by the decision of the Tribunal the appellant filed **Land Appeal No. 66 of 2018** before **the District Land and Housing Tribunal for Morogoro District at Morogoro** (herein **"the DLHT"**).

In its judgment delivered on 12th February, 2019, the DLHT dismissed the appellants appeal and hence the present appeal. In the

present appeal the appellant preferred eight (8) grounds of appeal. On the 04th June, 2020, I ordered the appeal to be disposed by way of written submissions. Parties filed their respective submissions in compliance with Court orders.

However, as I was composing the judgment I noted some defects in the DLHT proceedings. The defects related to the fact that the assessors were not invited to read out their opinion in the presence of the parties as required by law.

In view of the above observation, I invited parties to address the Court on what transpired and the effect thereof. The appellant, who appeared in person and unrepresented recounted that he did not hear assessors asking questions or reading their opinion. He only remembered hearing the Chairperson reading the judgment in English, which he did not understand, before being told he had lost the appeal.

Submitting on the issue, **Mr. Maganya Nickson**, learned advocate for the respondent, admitted that there is nowhere in the records of DLHT where assessors were invited to ask questions or required to read their opinions. His view was that, assessors were not sufficiently involved and hence the proceedings were a nullity.

I raised the issue *suo moto* since it was apparent on the records of the DLHT tribunal that, on 27th August, 2018, after making an order that the appeal be argued by way of written submissions, the Chairman fixed mention date on 08th October, 2018. See page 3 of typed proceedings. When the matter came on 08th October, 2018,

it was fixed for judgment on 13th November, 2018 and no where did the Chairperson require the assessors to give their opinion as required by section 23 (2) of **the Land Disputes Courts [Cap. 216, R.E. 2019]** read together with regulation 19 (2) of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003.**

The pertinent point for determination now is whether it was appropriate for the DLHT to proceed in the manner it did. To respond to that question, I think, it would be prudent to recite the relevant provisions of the law. In accordance with section 23 (2) of Cap. 216 the DLHT is composed of a Chairperson and at least two (2) assessors who are required to provide their opinion before delivery of judgment. 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 Mine]*

Further to that, regulation 19 (2) of G.N. 174 of 2003 directs the Chairman of the DLHT to require every assessor who had participated to the end of the hearing to read their opinion before making his decision. The regulation reads:

> *"Notwithstanding 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 his opinion in Kiswahiii."*** *[Emphasis Mine]*

The provisions of s. 23 (2) of Cap. 216 and regulation 19 (2) G.N. 174 of 2003 imposes a duty on the Chairperson to require every assessor present at the conclusion of the hearing to provide his or her opinion in writing before making a judgment. Confronted with a similar situation in **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015, the Court of Appeal observed that:

> *"Therefore, in our own considered view,* ***it is unsafe to assume the opinion of the assessor which is not on the record by mereiy reading the acknowledgement of the Chairman in the judgement.*** *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 Mine]*

In its subsequent decisions in **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No.287 of 2017 (unreported) and **Edina Adam Kibona vs. Absolom Swebe**, Civil Appeal No. 286 of 2017 CAT (Unreported), the Court of Appeal underscored the need to require every assessor to give his opinion and their opinion be on record. The position was re-affirmed by the Court of Appeal as recent as 24th November, 2020 in **Dora Twisa Mwakikosa vs Anamary**

Twisa Mwakikosa (Civil Appeal No.129 of 2019) [2020] TZCA 1874; (25 November 2020 TANZLII) where the Court of Appeal, (**Mwarija, J.A.**) stated:

> *"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. We are supported in that view by our previous decision in the case of* ***Tubone Mwambeta*** *(supra) cited by the appellant's counsel. When confronted with a similar situation as in this case, we held as follows:*
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> > *"We are increasingly of the considered view that, since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion inwriting,* ***such opinion must be avaiied in the presence of the parties***

so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict,"

[Emphasis supplied]"

In all the cases cited above, the Court of Appeal made a finding that the failure to require assessors to provide their opinion in front of the parties rendered the proceedings a nullity and ordered a retrial.

In the present case, having made a finding that, the Chairman of the DLHT did not require assessors to provide their opinion in the presence of the parties, I invoke the revisional power conferred on this Court under section 43 of Cap. 216 and quash the entire proceedings and set aside the judgment and decree of the DLHT in Appeal No. 66 of 2017. Consequently, I remit the case file to the Tribunal for rehearing of the appeal before another Chairman and new set of assessors.

Having raised the matter *suo motu* and this being the fault of the tribunal, I make no order as to costs. It is so ordered.

DATED at **DAR ES SALAAM** this **16th** day of **APRIL, 2021**.

S. M. KALUNDE
JUDGE