IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO 105 OF 2020

(Originating from the decision of District Land and Housing Tribunal forIlala Land Application No. 221/2015)

GINA REINFORD KAONJA.....APPELANT

VERSUS

ALVINA LIPINGU.....1ST RESPONDENT

JOHN SWAGALA.....2ND RESPONDENT

JUDGMENT

Dated 21st & 22nd June, 2021

J.M. Karayemaha, J.

The Appellant **Regina Reinford Kaonja** Sued the Respondents, namely, **Alvina Lipingu**and **John Swagala** herein before the District Land and Housing Tribunal for Ilalaat Ilala(hereinafter the District Land and Housing Tribunal) through application No. 221/2015. Reliefs prayed by the applicant thereat were:

1. *An order for vacant possession from the house in dispute by the respondents i.e, house located at Pugu, Ilala Municipality in Dar es salaam,*
2. *Payment of manse profits, costs of the application; and*
3. *Any other reliefs the Honourable Tribunal deemed fit and just to grant.*

After a full trial, the District Land and Housing Tribunal dismissed the application. The Appellant was aggrieved. She lodged the present appeal, and advanced four grounds of appeal, which are:

1. *That the Trial Tribunal erred in law and in fact in failing to examine the documentary evidence tendered by the Appellant which establish that the Appellant is rightful owner of the suit land.*

2. *That the Trial Tribunal erred in law and in fact in stating that the 1st Respondent herein has different names while the evidence adduced indicated clearly that it was 1st Respondent who illegally sold the suit land to the 2nd Respondent.*

3. *That the Trial Tribunal erred in law and in fact in failing to appreciate the discrepancies of the name of the 2nd Respondent which indicated in the exhibits which were tendered during the hearing by the 2nd Respondent.*

4. *That the Trial Tribunal erred in law and in fact in failing to appreciate fact that the Appellant being the Administratrix of the estate of the late Reinfred Justin Kaonja which established by the Ten cell reader of number 8 who was given the power to assist the Ten cell reader number 7 who recognized the existence of the Appellant and the power confers.*

In the course of preparing for the hearing I noted one serious problem. It is that the ***"trial tribunal erred when it heard and decided the case before it without the aid of assessors".*** On discovering this issue I called upon parties to address the Court on this aspect. Parties ably addressed the court on the same date.

Addressing the court Mr. Kusalika for the appellant submitted that the presence of assessors at the trial in the tribunal is a requirement of law as provided for under section 23 (2) of the Land Disputes Courts Act (Cap 216 R.E. 2019). He remarked that assessors should be present during the trial from the beginning to the end of the application and are obliged to give their opinion. Mr. Kusalika submitted adding that the Chairperson should require the assessors to give opinions before delivery of judgment and the same must be seen in the tribunal's judgment in terms of section 19 (1) and (2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations of 2003 G.N.174 of 2003.

The learned counsel observed further that proceedings show clearly that assessors were not given a chance to give their opinion. By so doing, the trial tribunal failed to comply with the law. Mr. Kusalika cited cases of **Mwita Swagi v Mwita Geteva**Misc. Land Appeal No. 36 of 2019, **Tubone Mwambeta v Mbeya City Council,** Civil Appeal No. 287 of 2017 and **Edina Adam Kibona v Absolom Swebe,** Civil Appeal No. 286 of 2017 CAT (all unreported) to underscore the trite position that the trial chairman had to invite assessors to give opinion in the presence of the parties. This, in his observation, was to be done to enable parties to know the nature of the opinion and whether or not the opinion was considered.

Mr. Kusalika submitted that failure to involve assessors was a serious shortcoming which calls for this matter to be heard afresh before another Trial Chairperson and new set of assessors.

On his part, Mr. Mmariconsented that the Trial Chairperson read the judgment without assessors' opinion as required by the law. He, however, quickly referred this court to Article 107A (c) of the Constitution of the United Republic of Tanzania, 1977 (hereinafter the Constitution) not to be bound by technicalities. In support of his assertion, Mr. Mmari reiterated that this matter started in 2016. Since the trial Chairperson considered the assessors' opinion he asked this court to determine this appeal on merits.

In his very laconic rejoinder, Mr. Kusalika submitted that the provisions of Article 107A (c) of the Constitution fall out the ambit of the matter on the

After carefully going through the record of the District Land and Housing Tribunal as well as the submissions by Mr. Kusalika and Mr. Mari, I wish to state the following. As pointed out by Mr. Kusalika and Mr. Mmari, the District Land and Housing Tribunal flouted the procedures as far as the issue of participation of assessors in the trial of the application is concerned. The record of the District Land and Housing Tribunal clearly shows that the assessors took part in the trial, that is, during hearing of the matter. However, the record does not show that these assessors recorded their opinion and read it in the presence of parties before the chairman composed a judgment as required by law. The proceedings of the District Land and Housing Tribunal, specifically, of 5/3/2020 show that

when the Respondents concluded their defencecase the chairman went ahead to fix a date for judgment. Indeed he pronounced it on 30/3/2020. He never invited the assessors to give their opinion as per the requirement of the law. This was indeed a glaring omission. As correctly pointed out by Mr. Kusalika and Mr. Mmari, section 23 (1) and (2) of the Land Disputes Courts Act,requires the assessors to give out their opinion before the chairman composes a judgment. It provides thus;

> *"S 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.***[Emphasis supplied]

This duty is further elaborated in the regulations made under the above law, that is, the District Land and Housing Tribunal, Regulations, 2003. Regulation 19 (2) provides thus:

> *19 (2) Notwithstanding 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.*[Emphasis provided]

In his judgment. the trial chairman is quoted referring to the assessors' opinion. But the question is, when and where did the assessors give their opinion? The answer to this question is certainly not available as the record of the trial tribunal is silent on this. This means there was noncompliance with the provisions of the law cited above. The above provisions have been restated in many High Court and Court of Appeal decisions including the cases of **Mwita Swagi v Mwita Geteva**(supra), **Tubone Mwambeta v Mbeya City Council,** (Supra) (both unreported)***General Manager Kiwengwa Stand Hotel v Abdallah Said Mussa,*** Civil Appeal No. 13 of 2012, ***AmeirMbarak and Azania Bank Corp. Ltd v Edgar Kahwiii,*** Civil Appeal No. 154 of 2015. In ***Edina Adam Kibona v AbsolomSwebe (Sheii),*** **Civil Appeal No. 286 of 2017, CAT, Mbeya sub registry (unreported)** the court held that assessors' opinion must be given in the presence of parties. The Court observed at page 6 of its judgment:

> *"....we are aware that the original record has the opinion of assessors in writing..... However, the record does not show how the opinion found its way in the court record".*

The court then concluded thus:

> *"...the chairman must require every assessor present to give his opinion. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed."*

In ***Ameir Mbarak's*** case (supra) when the Court of Appeal noted that the record of the trial proceedings did not show if the assessors were accorded

the opportunity to give their opinion as required by the law, but the chairperson only made reference to them in his judgment as in the current case, observed that:

> *"...in our considered view,* ***it is unsafe to assume the opinion of the assessor 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]

In the instant matter the original record contains written opinion of assessors. However, the record does not show when and how that opinion got into that record. This, in my humble view, suggests that the same was not given in the presence of parties. It was very crucial for the Chairman to call upon the assessors to give their opinion in writing and read the same to parties. The Court of Appeal emphasized in the case of **Tubone Mwambeta v Mbeya City Council,** (Supra) 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 in writing****such opinion must be availed 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 added]

In the case on board the chairman, did not, at the conclusion of the hearing of the application indicate that he availed time to assessors to give their opinion or did he give opportunity to parties to know the nature of the assessors'opinion.With that glaring omission, which in fact, is total failure to comply with the requirements of the law, it means the whole trial and the resulting judgment were a nullity. Entangled in these circumstances, it is difficulty in my considered opinion to invoke Article 107A (c) of the Constitution as Mr. Mmari suggested.

Now, having taken such a stance for the above obvious reasons, I do not think I am called upon to labour on the grounds of appeal. Findings on the raised irregularity suffice to dispose of the whole appeal.

On the strength of the above cited statutory and case laws I am behooved to hold that the District Land and Housing Tribunal failed to activelyinvolve the assessors in the application. This was a total disregard of the clear provisions of section 23 of the Land Disputes Courts Act Cap 216 (RE 2019) and Regulation 19 of the Regulations G.N. 174 of 2003. Conspicuously, the omission is fatal and vitiates the proceedings. Consequently, the proceedings are quashed and the judgment and decree thereto are set aside. The record should be remitted back to the trial tribunal for a fresh and expeditious trial before another chairman sitting with a new set of assessors.

This matter is not yet concluded between parties. Therefore each party shall bear its costs on the ground that the retrial was caused by the District Land and Housing Tribunal.

It is accordingly ordered.

Dated at Dar es Salaam this 22nd day of June, 2021

J.M. KARAYEMAHA
JUDGE
22/6/2021