IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 53 OF 2020

(Arising from the District Land and Housing Tribunal for Mkuranga at Mkuranga Land appeal No 50/2019; originating from Mwandege Ward Tribunal Land Application No. 13/2019)

RASHID HARUNA MTEMBEZI.....APPLICANT

VERSUS

IBRAHIMU SHOMARI KISUMBWI.....RESPONDENT

RULING

Dated: 24th & 29th June, 2021

J.M. KARAYEMAHA, J.

Facts of this case are very interesting. In 2019 the appellant Rashid Haruna Mtembezi, complained before the Mkuranga Ward Tribunal that Amina Miraji Mkumbi and Ibrahimu Shomari Kisumbwe (the respondent in this appeal) grabbed his piece of land which he bought from Grace P. Timbe at a price of Tshs. 1,500,000/= in 2012. The suit land is located at Vicheji within Mwandege Ward. Sometimes later, the appellant found in his land a constructed house. The same was Ibrahimu Shomari Kisumbwe's property who told the trial tribunal that he bought the same suit land from Amina Miraji Mkumbi in 2012 in the presence of the local leaders of that area. On her part Amina Miraji Mkumbi told the trial tribunal that the suit land was originally Grace Timbe's property. Amina was her friend. At one

point in time they sealed a loan agreement whereby Amina advanced Tshs. 800,000/= to Grace and the collateral was the suit land. It appears that Grace disappeared from the locality when time to repay the loan was almost due. Her whereabouts were neither known to Amina nor Grace's relatives. In order to recover her money, Amina and Grace's family agreed to dispose of the suit land. The respondent bought it on 7/2/2012 and started to build a house. It appears that at the time Amina and Grace's family were selling the suit land had no knowledge that Amina had sold it to the appellant.

When the appellant noticed that the land he bought was trespassed in, he filed a suit in the Ward Tribunal. Apparently, the Ward Tribunal found in favour of the appellant. Distressed, Ibrahimu Shomari Kisumbwe appealed to the District Land and Housing Tribunal and emerged a successful party.

Aggrieved by the decision of the 1st appellate tribunal, the appellant has preferred this appeal advanced three grounds as follows:

1. *That, trial Tribunal erred in law and fact for declaring Respondent lawful owner of the disputed land without taking into consideration that Respondent purchased the disputed land from a seller who had no good title.*
2. *That, trial Tribunal erred in law and fact by failing to recognize that transfer of the land to the respondent included a forged signature of the owner.*

3. *That, both Tribunals erred in law and fact by entering judgment in favor or Respond without considering the evidences adduced by the Appellant.*

When the matter was called upon for hearing on 24/6/2021, the appellant appeared in person unrepresented and Mr. August Mramba learned advocate represented the respondent. Before parties could submit on the grounds of appealed, I asked them to address me on one anomaly I spotted which is whether it was proper for the appellate tribunal to compose and deliver a judgment without giving assessors a chance to give their opinion.

In his brief but focused submission Mr. Mramba stated that the Chairman did not give a chance to assessors to give their opinion. To him this meant that they did not actively and efficiently participate in the proceedings. He observed that this was a pure contravention of section 23 (2) of the Land Disputes Courts Act [Cap. 216 R. E. 2019]. To support his position he cited the case of ***Ameir Mbarak and Azania Bank Corp. Ltd v Edgar Kahwili***, Civil Appeal No. 154 of 2015 cited with approval in the case of ***Zainabu Rajabu v Musa Juma,*** Misc. Land Appeal N. 5 of 2019 (unreported). Wounding up, Mr. Mramba submitted that failure to give a chance to assessors to give opinion was fatal and renders the proceedings to be null.

On his party, the appellant didn't see any anomaly.

I have dispassionately examined the record of the District Land and Housing Tribunal in the light of Mr. Mramba's arguments. It is obvious that

the appellate tribunal's record clearly indicates that apart from the invitation to record their opinion on 6/11/2019, assessors were not invited to give their opinion they recorded in the presence of parties before delivery of the judgment.

In my understanding and appreciation of the law, it was unsafe on the side of the chairman 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, I share Mr. Mramba's view that assessors were not actively and effectively involved in the whole trial of the appeal and in my humble observation this was a serious irregularity. In this regard, I respectfully borrow the words of wisdom from the case of ***Ameir Mbarak and Azania Bank Corp. Ltd v Edgar Kahwili***, Civil Appeal No. 154 of 2015 that:

> ***"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]

Section 23 (2) of the Land Disputes Courts Act, requires mandatorily the assessors to give out their opinion before the chairman reaches a judgment. It provides thus;

"(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 imposed to the Chairman by the regulations made under the Land Disputes Courts Act (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]

It is gathered from the proceedings of the appellate Tribunal that after the conclusion of the hearing, the learned Chairperson recorded the following:

"Order: judgment on 10/12/2019 at 11:00 pm
Assessors to give opinion

Sgd
C/person
6/11/2019

"10/12/2019
Coram: R. Mwakibuja, Chairperson
Members: Katundu and Kilula
Appellant: present

Respondent: present

TC: Halima

Tribunal: judgment is not ready to be pronounced.

Order: judgment on 11/2/2020 at 11:00

Assessors to give opinion

Sgd

C/person

10/12/2019

On 20/2/2020 the judgment was delivered in the presence of both parties and assessors.

The above quoted extract of the proceedings demonstrates a correct remark that the chairperson did not require the assessors who were present at the conclusion of the hearing of the appeal to give their opinion in the presence of the parties. In her judgment the assessors opinion were referred albeit fleetingly. But the question is, when and where did the assessors give their opinion? The answer to this question is honestly not available as the record of the appellate tribunal is silent on this. This means there was noncompliance with the provisions of the law cited above. The above fully quoted 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, ***Ameir Mbarak and Azania Bank Corp. Ltd v Edgar Kahwili***, Civil Appeal No. 154 of 2015.

In ***Edina Adam Kibona v Absolom Swebe (Sheli),*** **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 of the appellate tribunal 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 the understanding that the procedure adopted is not the usual one known in law where opinion is given in the presence of parties. After that it is placed in the record. 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 rationale behind this view was well explained 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]

My mind is now clear that learned chairperson failed to comply with mandatory 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. Consequently, the proceedings are quashed and the judgment and decree thereto are set aside. I accordingly order the record of the appellate

tribunal should be remitted back for a fresh and expeditious trial before another chairman sitting with a new set of assessors.

Costs to be in the due course.

It is accordingly ordered.

Dated at Dar es Salaam this 29th day of June, 2021

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J. M. KARAYEMAHA
JUDGE