IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 87 OF 2019

(Originating from Land Appeal No. 73 of 2013 in the District Land and Housing Tribunal for Kinondoni)

HAJI SHEMZIGWA ..... APPELLANT

VERSUS

SELEMANI RAJABU ..... RESPONDENT

RULING

Dated 22nd & 30th, June, 2021

J.M. KARAYEMAHA, J.

This matter traces its origin from the decision of the Wazo Ward Tribunal (the WT) in land case No. 9/2013. The suit land is located at Salasala A. The appellant in this appeal, namely, Haji Shemzigwa tabled his complaint that in the WT against the respondent in this appeal, namely, Semen Rajabu, stating that the respondent had invaded his land and built one roomed house. After hearing both parties, the WT was fully convinced that the suit land was rightfully possessed by the respondent. The appellant was not happy. He, therefore, appealed to the District Land and Housing Tribunal (the DLHT) for Kinondoni District demonstrating his lawful ownership over the suit land. Sadly, the appeal lacked requisite merits and was dismissed in its entirety with costs. Undaunted, he has appeared in this

court to challenge the DLHT's decision. His memorandum of appeal contains 4 grounds. They are:

1. *That the trial tribunal grossly erred both I law and in fact in upholding the respondent's claim of ownership of the disputed suit land which was acquired through trespass.*
2. *That the trial tribunal erred in law by coinciding with the decision of ward tribunal which was constituted against the law.*
3. *That the trial tribunal erred in law and in fact basing on weak evidence tendered by the respondents witness hence reached in erroneously decision.*
4. *That the trial tribunal erred in law and in fact for disregarding the evidence tendered by the appellant hence reached into erroneously decision.*

When the matter was called upon for hearing on 24/6/2021, the appellant appeared in person unrepresented and Mr. Frank Michael learned advocate represented the respondent. Parties argued the grounds of appeal. However, when I was composing the judgment I noted one anomaly which is to the effect that the learned Chairman conducted the appeal the hearing of the appeal without the aid of the assessors as required by section 34 (1) of the Land Disputes Courts Act [Cap. 216 R. E. 2019] (the Act hereinafter)

I asked parties to address me on this anomaly. On his part, Mr. Frank Michael submitted that on hearing appeals in the District Land and House Tribunal there is no need of assessors. It was his conviction that assessors are required when parties are adducing evidence. He addressed the court that in appeals conducted through written submissions, it is not mandatory for

assessors to be present. After submissions are complete, assessors are given the written submissions to prepare opinion which again are not compelled to read in the presence of parties. The learned advocate submitted further that since the assessor's opinion was considered in the judgment, there was no error committed on the side of the chairman.

In his brief address, the appellant commented that the chairman committed an error because the Coram was not complete.

I have dispassionately examined the record of the District Land and Housing Tribunal in the light of the learned parties oral argument. It is obvious that the proceedings of the first appellate court justify the appellant's line of argument. The appellate tribunal's record clearly indicates that when the appellate tribunal guided parties to canvas the hearing by way of written submissions on 12/7/2013 assessors were not in court. On 20/8/2013, the Chairman was satisfied that submissions in chief and a reply thereto were filed save for the rejoinder and proceeded to fix a judgment date to be 3/10/2013. Again, assessors were not in court. The judgment was not delivered on that date on the ground that one of the assessors had not given his opinion. So, the judgment was adjourned till 25/2/2014. I am 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. Thinking critically, if the chairman did not sit with assessors, when did he get them and direct them to write their opinion. Very astonishingly, assessors' opinion was considered in the judgment.

In my understanding and appreciation of the law, it was unsafe on the side of the chairman to assume the presence of the assessosr who are not appearing anywhere in the record and at a later stage assume their opinion which is not on the record by merely reading the acknowledgment of the chairman in the judgment. In the circumstances, I am of a considered view that, assessors were not actively and effectively involved in the trial of the appeal and assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity. In this accord, 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]

The mandatory legal requirement of sitting with assessors at the hearing of the appeal is contained in section 34 (1) of the Land Disputes Courts Act [Cap. 216 R. E. 2019] (the Act hereinafter) which provides that:

> *"34.-(I) The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors, and shall-*

(a) consider the records relevant to the decision;
(b) receive such additional evidence if any; and
(c) make such inquiries, as it may deem necessary."

After hearing the appeal the chairman must direct assessors to give out their opinion before the he reaches a judgment in terms of section 23 (2) of the Land Disputes Courts Act, which 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]

The opinion must be read to parties before the judgment is composed. This view finds support in the case of ***Edina Adam Kibona v Absolom***

***Swebe (Sheli)*, Civil Appeal No. 286 of 2017, CAT, Mbeya sub registry (unreported).** The Court observed that:

> *"...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."*

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]

I am fully guided by the above position.

In the instant appeal, I am inclined to hold that the learned chairman 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 as well as guiding precedents.

Consequently, the proceedings are quashed and the judgment and decree thereto are set aside. I accordingly order the record of the appellate

tribunal to be remitted back for expeditious re-trial before another chairman and must sit with assessors apart from those who wrote opinion.

Costs to be in the due course.

It is accordingly ordered.

Dated at Dar es Salaam this 30th day of June, 2021

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J. M. KARAYEMAHA

JUDGE