

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL CASE NO. 231 OF 2019

BETTY KAMPOTA APPELLANT

VERSUS

THUREIYA MOHAMED RESPONDENT

(Appeal from the decision of the District Land and Housing Tribunal for Ilala
District in Land Application No. 315 of 2015)

Dated the 14th day of June, 2019

in

Land Application No. 315 of 2015

JUDGMENT

S.M. KALUNDE, J.:

In this appeal the appellant, BETTY KAMPOTA, is aggrieved by the decision of the District Land and Housing Tribunal for Ilala District at Mwalimu House ("**the tribunal**") in **Application No. 315 of 2015** ("**the application**"). The story goes that, in 2015 the respondent, THUREIYA MOHAMED, filed an Application against the appellant claiming for *inter alia* a declaration that she was the lawful owner of Plot No. T125 Block B Kinyerezi, within Ilala District ("**the suit property**"). In addition to the above, the respondent sought for a demolition order against the appellants huts constructed on the suit property. He also sought for an order for payment general damages, costs and any other relief as the Court would deem appropriate.

Upon hearing of the testimony and evidence from both parties, the tribunal declared the respondent to be a lawful owner of the suit property having being allocated by the Ilala Municipal Council. The appellant was ordered to demolish her structures built unto the respondent's land. The appellant was aggrieved by the decision of the tribunal and hence the present appeal. Before this Court the appellant has preferred three (3) grounds of appeal which may generally be summed up into two namely:

- (1) That, the Tribunal erred in law and in fact for failing to properly evaluate the evidence before it hence arriving at an erroneous conclusion; and
- (2) That, the proceedings before the tribunal are tainted with irregularity for the failure to records the names and opinion of assessors.

Leave of the Court was granted for hearing of the appeal to be conducted through written submissions. Submissions were accordingly filed in accordance with the Courts orders. At the hearing the appellant enjoyed the legal services of learned counsel **Mr. Erick Simon**. On the other hand, the respondent was being represented by **Ms. Veronica Luis**, learned advocate.

In disposing this appeal I propose to start with the third issues wherein the appellant is complaining about the treatment of assessors during trial. I propose to start with this ground as its effect is to nullify the proceedings before the tribunal hence saving the time of this Court to proceed to determine the

remaining ground which may have emanated from illegal proceedings.

In the third ground, which is second above, the applicant is *inter alia* complaining that the opinion of assessors was not properly recorded. In support of that ground Mr. Erick complained that the role of assessors during trial at the tribunal was made negligible, in that their opinion was not stated in the judgment of the tribunal. He cited the case of **Kasanfa Shabani vs Kasanga Hassan Kasanga and Ernest Joseph Tarimo**, Land Appeal No. 2 of 2018 (unreported). Mr. Erick added that, the record of the tribunal does not show whether assessors were afforded an opportunity to readout their opinion as required by law. The counsel insisted that the failure to allow assessors to provide their opinion before judgment contravened the provisions of regulation 19 (2) of the **Land Dispute Courts (District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003** ("the Regulations").

To further bolster his position he cited the cases of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015, Court of Appeal at Iringa (unreported); **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal No.197 of 2018) [2019] TZCA 322; (01 October 2019 TANZLII); and **Edina Adam Kibona vs Absolom Swebe (Sheli)** (Civil Appeal No.286 of 2017) [2018] TZCA 310; (10 December 2018 TANZLII). In view of the position in the above cited cases, Mr. Erick invited this Court to allow this appeal with

costs, by nullifying the whole trial tribunal proceedings and quashing the judgment of the tribunal in Application No. 315 of 2015

In response, Ms. Veronica admitted that, ***"it is clear that the opinion of the wise assessors in the instant case was lightly considered"***. However, she went on submitting that, it was not a requirement of regulation 19 (2) of the Regulations to have the names of assessors included in the judgment of the tribunal. Ms. Veronica went on to argue that the tribunal considered the opinion of assessors which was given as required by 19 (2). The counsel stated that the case of **Kasanfa Shabani vs Kasanga Hassan Kasanga and Ernest Joseph Tarimo** (supra) was merely persuasive to this Court but not binding.

By way of distinguishing, Ms. Veronica stated that the cases of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili** (supra); **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (supra); and **Edina Adam Kibona vs Absolom Swebe** (supra) were not applicable in the present case where the appellant complaint is that the name of assessors were not included in the judgment. I have to pose here state that, with respect, I think the counsel misconceived the reason why the above cases were cited. In his submissions, Mr. Erick was categorical that the authorities were cited for a complaint that assessors were not afforded an opportunity to read out their opinion before composition of the decision as required by law.

In conclusion, Ms. Veronica argued that, the decision of the tribunal should not be faulted, imploring that the appeal ought to be dismissed with costs for lack of merits. The appellant did not rejoin on this ground.

Having considered the records and submissions of the parties, it is apparent that the question for my determination is whether this appeal is merited. I propose to start by examining the applicable law.

The requirement and role of assessors in the proceedings before the District Land and Housing Tribunal is regulated by **section 23 of the Land Disputes Courts Act, Cap. 216 R.E. 2019** and regulation **19** of the Regulations. Section 23 of Cap. 216 provided that:

"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.***

*(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal **who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.***"[Emphasis mine]

The position under section 23 (2) of Cap. 216 is further amplified under regulation 19 (2) of the Regulations which provides that:

"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 writing and the assessor may give his opinion in Kiswahili."

[Emphasis mine]

In the instant case the record of the tribunal show that, hearing of evidence commenced on 05th September, 2016. The coram on the day indicate that the only available member of the tribunal was **Mr. Matunda**. The record read:

"5/9/2016

Coram: M. Mgulambwa C/P

Members: Madimbwa

For Applicant: Present, Mr. Manyangu & Maurin

For Respondent: Present, Mr. Brush

Tribunal: The matter is here for hearing.

Sgnd

5/09/2016"

On the day the tribunal framed issues and went on to hear the testimony of **PW1**, Thureiya Mohamed, who is the respondent herein. Other witnesses heard on the day were **PW2** and **PW3**. Further to that, it is on record that, the matter was adjourned on several dates and hearing proceeded on 08th March,

2017. On the day a new set of assessors was present, these were **Mwakilasya** and **Farisa**. The coram for the day read:

"8/3/2017

Coram: M. Mgulambwa

Members: Mwakilasya + Farisa

For Applicant: Present, Mr. Manyangu for

For Respondent: Present, Mr. Brush for

T/c: Mbihi

Tribunal: The matter is here for hearing.

Sgnd.

8/3/017"

On 08th March, 2017, the tribunal heard the testimony of **PW4** and the matter was adjourned to a subsequent date. Hearing of the applicant's case proceeded on 09th August, 2017, on the day there was no assessor present. The tribunal proceeded to hear the matter under section 23 (3) of Cap. 216. The record of the trial tribunal show the coram read as follows:

"9/8/2017

Coram: M. Mgulambwa

For Applicant: Present, Mr. Manyangu for

For Respondent: Present, Mr. Brush for

T/c: Alice

Tribunal: The matter is here for hearing, I don't have any assessor to proceed without the law allows us to do. Section 23 (3) of Act No. 2/02

Sgnd
9/8/017"

The tribunal, and correctly so, proceeded under section 23 (3) of Cap. 216 and went on to take the testimony of **PW5**. However, after proceeding under section 23 (3) of Cap. 216, the record show that on 05th December, 2017, the assessors were allowed to rejoin hearing of the applicant's case. The record show that on the respective day, the tribunal was constituted by the Chairman and two assessors, **Mr. Mwakilasya** and **Ms. Farisa**. On the day the tribunal hear the testimony of PW6 and the applicant's case was marked as closed.

At the commencement of the defence case, on 13th February, 2019 another set of assessors was introduced, this time it was composed of **Mr. Madimbwa** and **Ms. Farisa**. The new composition of the tribunal hear the testimony of **DW1** and the defence case was marked as closed. The tribunal went on to pronounce that judgment will be delivered on the 08th April, 2019. After several adjournments the judgment was finally delivered on 14th June, 2019. On the day the record show as follows:

"14/6/2019
Coram: M. Mgulambwa
Members: Madimbwa + Farisa
For Applicant: Present
For Respondent: Present
T/c: Alice
Tribunal: The matter is here for
Judgment.
Sgnd
14/6/19

***Applicant: I'm ready.
Respondent: I'm ready.***

***Tribunal: Judgment is pronounced
at the open court before
both parties.***

***Sgnd
14/6/19"***

The question, now, is whether it was appropriate for the tribunal to proceed in the manner it did above. As hinted earlier the requirement to have assessors participate in tribunal proceedings is a creature of section 23 of Cap. 216 and regulation 19 of the Regulations cited above. The requirement under the respective provisions has been amplified in several decision included those cited by the appellant, that is **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili** (supra); **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (supra); and **Edina Adam Kibona vs Absolom Swebe** (supra).

In summarizing the position of the law, there is no better authority than the case of **Ameir Mbarak** (supra). In that case, the Court of Appeal (**Mugasha, J.A**) after citing sections 23 (1) and (2) of Cap. 216, made the following observations:

"The underlined expression significantly shows that, a duly constituted Tribunal is that which is composed by the Chairman and a minimum of two assessors. The Chairman alone does not constitute the Tribunal."

On the consequences on non- involvement of assessors the Court made the following observation:

"The involvement of assessors as required under the law also gives them mandate to give opinion before the Chairman composes the decision of the Tribunal. In case of absence of the assessors, the law gives following direction as specified under section 23 (3) of the Land Disputes Courts Act [CAP 216 RE.2002] which states:

"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member (if any) may continue and conclude the proceedings notwithstanding such absence". [Emphasis supplied].

*The cited provision clearly indicates that, at least one of the assessors must be among the assessors who must be in attendance throughout the trial so as to enable the assessors to make an informed and rational opinion. The consequences of unclear involvement of assessors in the trial renders such trial a nullity. (SEE **AWINIEL MTUI AND 3 OTHERS VS STANLEY EPHATA KIMAMBO AND ANOTHER, CIVIL APPEAL NO. 97 OF 2015 AND SAMSON NJARAI AND ANOTHER VS. JACOB MESOVIRO AND CIVIL APPEAL NO. 98 OF 2015** (all unreported)).*

Further to that, the Court of Appeal considered the consequences of allowing the assessors to avail opinion while he has not heard all the evidence. The Court said:

*"Moreover, the consequences of allowing the assessors to avail opinion while he has not heard all the evidence were articulated 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 **Edina Adam Kibona vs Absolom Swebe** (supra), after citing its decision in **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili** (supra) and **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No.287 of 2017 (unreported) the Court of Appeal (**MWAMBEGEIE, J.A.**) recapitulated the position that failure to call upon the assessors to give opinion and to let the parties know the contents of the opinion was a serious defect. The Court of Appeal stated: -

"We wish to recap at this stage that the trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, it terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed.

For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand

how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose."

I will now apply the above position of the law to the facts of the present case. From the records it is clear that on 05th September, 2016 when hearing commenced the tribunal was composed by the Chairman and one assessor, **Mr. Madimbwa**. That was contrary to the requirements of section 23 (2) of Cap. 216 which provides that the tribunal shall be "**duly constituted when held by a Chairman and two assessors**". On top of that the record of the tribunal are clear that, on 08th March, 2017, when the tribunal heard **PW4**, Mr. Madimbwa, who was present at the commencement of trial, was not present, instead a new set of assessors, composed of **Mwakilasya** and **Ms. Farisa** was present. This was also an anomaly in the proceedings of the tribunal as the tribunal was not properly constituted.

Further to that, the law requires that the assessors present at the commencement to proceed with the trial to the conclusion. However, in acknowledgement that assessors may be absent for one or more reasons section 23 (3) of Cap. 216 allows the Chairperson to proceed with one or no assessor. The record of the tribunal show that on 09th August, 2017, there was no assessor present at the tribunal, the Chairman proceeded to make a declaration to proceed with hearing without an assessor under section 23 (3) of Cap. 216 and heard the testimony of **PW5**. In the circumstances, one would have expected that, the tribunal

would proceed without any assessor to the conclusion of the trial. However, on 13th February, 2019 another set of assessors was allowed to rejoin the trial and went on to hear the testimony of DW1. These were **Mr. Madimbwa** and **Ms. Farisa**. In accordance with the decision in **Ameir Mbarak** (supra) the consequences of allowing the assessors to avail opinion while he has not heard all the evidence is to render the entire trial a nullity.

From the records, it is therefore clear that, three assessors participated in the hearing of the trial at separate occasions. These were **Mr. Madimbwa, Mr. Mwakilasya** and **Ms. Farisa**. This was a contravention of the provisions of section 23 (2) of Cap. 216.

As hinted above, there is also no record demonstrating that the assessors were required to read their opinion in the presence of the parties before delivery of the judgment as required by section 23 (2) of Cap. 216 and regulation 19 (2) of G.N. 174 of 2003. Even assuming that the tribunal was properly constituted, the failure to comply with the requirements of section 23 (2) and regulation 19 (2) is sufficient to nullify the proceedings before the tribunal.

By a further glance into the records of the tribunal, I noted that, it is also apparent on the face of record that none of the three assessors had the opportunity to hear all the evidence during the trial. As such none of them was ably qualified to issue their opinion before the tribunal. Surprisingly, however, the record of the tribunal include the opinions signed by **Mr. Madimbwa**

and **Mr. Mwakilasya**. The contents of their opinion appear to be considered by the Hon. Chairperson at page 7 of the typed judgment when the Chairperson stated:

"That, having replied the 1st issue in positive the respondent prayer on dismissal of the application is not granted, hence I go through the reliefs claimed by the applicant, as opined by my wise assessors the applicant through Exh. P1 and P2 is declared a lawful owner of the Plot No. T125 Block B Kinyerezi, within Ilala Municipal with square meters 380..."

Having noted that the tribunal records do not show that assessors were not invited to read out their opinion in the presence of the parties before delivery of the judgment, it is inconceivable to have the same referred to or considered in the composition of the decision of the tribunal. In principle the failure to allow assessors to read their opinion meant that the trial was not conducted with the aid of assessors and as such the proceeding are a nullity. I say so in light of the decision in **Sikuzan Saidi Magambo** (supra). In the cited case the Court of Appeal noted that the opinion of the assessors were not solicited and reflected in the Tribunal's proceedings. It also observed that the chairperson purported to refer the opinion in his judgment. The Court noted that since the record of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal's judgment. The Court then observed that:

On the strength of our previous decisions cited above, we are satisfied that the pointed omissions and irregularities amounted to a fundamental procedural errors that

have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal, as well as those of the first appellate court. In our view, these points suffice to dispose of the matter and we find that it is not necessary to dwell on discussing the remaining irregularities found in the Tribunal's judgment. Suffice, to point out that even the decree emanated from the said judgment is non-executable for being contradictory." [Emphasis mine]

Like their justices in the above cases, having considered that above procedural omissions and irregularities, I am satisfied that, the same were fundamental as they occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal. The appeal must therefore succeed.

That said, I quash the entire proceedings before the tribunal, and consequently set aside the judgment thereon. This being a partly blame of the tribunal, the appellant shall have half of the costs. **It is so ordered.**

DATED at DAR ES SALAAM this 18th day of June, 2021.




S. M. KALUNDE

JUDGE