IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 197 OF 2019

SHARIFA A. NJENGE ..... APPELLANT

VERSUS

1. MOHAMED AMIR ISIHAKA
2. DEO HAULE ..... **RESPONDENT**

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

Dated the 11th day of April, 2018

in

Application No. 273 of 2014

JUDGMENT

S.M. KALUNDE, J.:

In this appeal the appellant is aggrieved by the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (**"the trial tribunal"**) in **Application No. 273 of 2014** delivered on 11th April, 2018. He is challenging that decision on account that:

1. The trial tribunal erred in law and in fact by failure to understand that the disputed land is a matrimonial home of the appellant and 1st respondent and that it was not disposed in

compliance with section 59(1) of the Law of Marriage Act, Cap. 29 R.E. 2002;

2. The trial tribunal erred in law and in fact by failure to conclude that the sale agreement (Exhibit D.1) was procured without the participation of the appellant, with all elements of fraud and misrepresentation;

3. The trial tribunal ignored the opinion of assessors without considering all the circumstances which surrounded the appellant at the alleged time of affixing her thumb print in Exhibit D.1; and

4. The trial tribunal erred in law and in fact by failure to analyze evidence to conclude that the appellant proved on the balance of probability that the matrimonial home was not disposed to the 2nd respondent in compliance with laws.

Before dealing with the current appeal, I find it apposite to briefly narrate the background of this appeal. It is on record that on 22nd July, 2014, the appellant contended that she was a lawful wife of the 1st respondent having contracted an Islamic marriage in 197 and that they have been blessed with one issue. The appellant alleged that during the pendency of their marriage they succeeded to acquire various properties including a house located on Plot No. 4, Block C, House No. 26 situated at Kawe, Mzimuni **("the suit property")**.

The appellant contended that, throughout the years, the family lived peacefully until around 2014 when she discovered that the 1st respondent, without her consent, and justification, sold the suit property which is matrimonial house, to the 2nd respondent. She added that the 2nd respondent was apparently occupying the suit property, hence she wanted interference of the tribunal in declaring that the suit property was a matrimonial property jointly owned by the appellant and the 1st respondent; that the agreement between the 1st and 2nd respondent to purchase the suit property was null and void; an order restraining the respondents from carrying out any activity on the suit property; costs of the suit and any other remedy.

The 2nd respondent filed their defence denying the respondents claims. In addition to that the 2nd respondent contended that the suit property was lawfully his having lawfully purchased it through a sale agreement dated 21st June, 2014 from both, the appellant and 1st respondent. He contended to have a good title having purchased the suit property through an agreement executed by the appellant and 1st respondent without any undue influence and having paid the full purchase price. The 2nd respondent prayed that the application be dismissed with costs.

Upon conclusion of filing pleadings and in a bid to resolve the controversy between the parties, the trial tribunal framed the following issues for determination: -

(i). Whether the sale contract is valid; and

(ii). To what reliefs the parties are entitled to.

During trial the appellant testified as **PW1**, and paraded one more witness, Yusuph Ally Njenge (**PW2**). The 1st respondent testified as **DW1**, with the 2nd respondent testifying as **DW2**. Together with the oral testimony of the two witnesses, the respondent tendered a copy of the sale agreement dated 21st June, 2014, which admitted and marked as **Exhibit D.1.**

Upon hearing the testimony and consideration of the evidence before the tribunal, the Chairman of the trial tribunal was satisfied that the sale agreement 21st June, 2014 was valid contract having been consented to by the appellant and executed by both the appellant and 1st respondent. Consequently, the application was dismissed with costs for lack of merit. It is this decision which aggrieved the appellant prompting her to file the present appeal.

Leave of the Court was granted for the appeal to be heard by way of written submissions. Being unrepresented, the applicant prepared and filed his own submissions. Similarly, the 1st respondent drew and filed his own submissions while submissions of the 2nd respondent were drawn and filed by learned counsel **Mr. Raphael Lefi David.** Submissions from both parties were duly filed hence this ruling.

As hinted above the appellant preferred four grounds of appeal. In determining the four (4) grounds of appeal on the same, I suggest

beginning with the 3rd ground of appeal. The appellant main complaint in this ground is that the trial tribunal ignored the opinion of the wise assessors.

In support of this ground the applicant complained that the trial tribunal did not consider the opinion of the assessor that the appellant was seduced by the 1st respondent in signing the sale agreement, Exhibit D.1. She alleged to have signed the agreement without being informed of what she was signing. She also contended that the tribunal did not consider the other circumstances, suggesting that the appellant was seduced to sign the document without he will.

In response the 1st respondent cited **section 24** of **the Land Disputes Courts Act, Cap. 216 R.E. 2019** and argued that the Chairman of the tribunal is not bound by the opinion of the assessors. The 1st respondent stated that the Chairman may depart form the opinion upon assigning reasons, which he did at page 11 of the typed judgment. He prayed the ground be disregarded for being baseless.

On their part the 2nd respondent contended that there was no provision in the Land Disputes Courts Act that compelled the Chairman not to depart from the opinion of assessors. in support of that view the counsel for the 2nd respondent quoted the provisions of section 24 of the Land Disputes Courts Act. The counsel argued that the trial tribunal rightly departed from the opinion of assessors during composition of the judgment.

In rejoining the appellant insisted that the assessor had it right that she was seduced in signing the sale agreement. She argued that, had the tribunal considered the opinion of the assessor it would have ruled that she did not consent to the sale of the suit property.

The above arguments prompted this Court to scrutinize the participation and involvement of assessors at the trial before the tribunal, and the eventual treatment of their opinion. I took that trouble being aware that the requirement to have assessors involved is provided for under section 23 of the **Land Disputes Courts Act** (supra) which provides:

> *"(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 supplied]

The prerequisite to have the assessor's opinion readout is also highlighted under regulation 19(2) of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003** which require every assessor present at the trial at the conclusion of the hearing to give his opinion in writing.

The record of the trial tribunal show that framing of issues and first hearing of the applicant case was conducted on 22nd September, 2016. On the day the assessors present were **Mr. Mwiru** and **Mrs. Mbakileki**. It is also on record that, on that day the tribunal heard the testimony of **PW1**, the appellant, the case was then adjourned. Hearing continued on 03rd May, 2017. The only present assessor was Mrs. Mbakileki, for some reasons Mr. Mwiru was not present. The tribunal went on to hear the testimony of **PW2**. The applicant's case was marked as closed. Admittedly, in terms of section 23 (3) of **Land Disputes Courts Act** (supra), the Chairman has a room to proceed to determine the application with the remaining assessor. However, no declaration or order was made to that effect. practice would require that the Chairman take note of the absent assessor and order the trial to proceed under the above cited section.

Hearing of the defence case commenced on 21st August, 2017 by hearing the testimonies of DW1 and DW2. Apparently, on the day there was no assessor present. Again, the Chairman had an opportunity to proceed and conclude the determination of the application without an assessor under section 23 (3) of **Land**

Disputes Courts Act (supra). However, he ought to have made a specific order to that effect. As observed above he did not do so. He went on to hear the whole defense case. Subsequently, the defence case was marked as closed, and the matter was fixed for judgment.

The delivery of judgment was subsequently adjourned several times on 03rd November, 201; 09th February, 2018; 23rd February, 2018 all on the ground that the case file was with the tribunal assessor for composition of their opinion. In all the adjournments none of the assessors was present. Judgment was finally delivered on 11th April, 2018 in the presence of the applicant and his advocate Mr. Mwakajinga; and counsel for the applicant. The 1st respondent was also present, and Mr. Mwakajinga was holding brief for counsel David for the 2nd respondent. No assessor was present at the date of delivery of judgment.

The records from the trial tribunal includes an opinion signed by Mrs. Aurelia B. Mbakileki on 05th April, 2018. In her judgment, at page 7 though to page, the Chairperson observed that:

> *"The Tribunal assessors who commenced the hearing of this matter are Mr. Mwiru and Mrs. Mbakileki but one who was able to write opinion was Mrs. Mbakileki, Mr. Mwiru was not around to give his opinion on reason of appointment as Tribunal Assessor.*
>
> *The opinion of Mr. Mbakileki was that the applicant was seduced* ***"laghaiwa"*** *by her husband the 1st respondent to sign the sale*

agreement, application be granted, the sale agreement be nullified."

The Chairman, then analyzed the evidence presented before the tribunal and reasoned that:

"I therefore differ with the opinion of the Tribunal assessor Mrs. Mbakileki as it was not proved that the applicant was forced to sign the said sale agreement."

On account of the above observation, the application was dismissed with costs for lack of merit.

Observing the above version of the records, I noticed several issues. **One**, on 03rd May, 2017 when the tribunal proceeded with one assessor it was advisable that an order be made to that effect in terms of section 23 (3) of **Land Disputes Courts Act** (supra). **Two**, similarly, on 21st August, 2017 when the tribunal heard the testimonies of DW1 and DW2 in absence of an assessor, the tribunal should have made an order that it was proceeding in absence of an assessor as allowed under section 23 (3) of Land Disputes Courts Act (supra). In my view, it is not sufficient to mention that fact in the judgment when the same is not reflected in the records. These were fatal irregularities in the proceedings as they had the effect of thinning the jurisdiction of the tribunal.

Three, Mrs. Mbakileki, who had not heard all the evidence was allowed to opine contrary to the requirements of section 23 (2) and regulation 19 (2) of the Regulations. The position of the law is that an

assessor who has excused from the proceedings should not be allowed to opine as he had not heard all the evidence sufficient to provide a useful opinion to the tribunal. It is also well settled that, allowing an assessor who had not heard all the evidence to opine is sufficient to render the proceedings a nullity. In this view, I associate myself with the decision in **Joseph Kabul vs. Reginam** [1954-55] EACA Vol. XXI-2 where it was held that:

> *"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 **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili,** Civil Appeal No. 154 of 2015, Court of Appeal at Iringa (unreported) the Court of Appeal underlined that where assessors are not involved throughout the entire trial, the trial was not conducted by a duly constituted Tribunal as required by section 23 (1) and (2) of **the Land Disputes Courts Act** (supra). On the consequence of failure to observe the requirements under section 23 (1) and (2), the Court stated that:

> *"With respect, we are not in agreement with Mr. Mushokorwa because the omission goes to the root of the matter and it occasioned a failure of justice and there was no fair trial. We say so because the law was contravened as the Tribunal was not properly constituted which cannot be validated by the Chairman as he alone does not constitute a Tribunal. Moreover, the lack of the opinion of assessors rendered the decision a nullity and it cannot be*

resuscitated by seeking fresh opinion of assessors as suggested by Mr. Mushokorwa."

Four, even assuming that the assessor was actively involved from the beginning to the end, the records of the trial tribunal do not show whether the assessor was given an opportunity to read her opinion is required by the mandatory requirements of **section 23 (2)** of **Land Disputes Courts Act** (supra) and regulation **19 (2)** of the Regulations. The two provisions are coached in mandatory terms requiring assessors to read their opinion before delivery of judgment in the presence of parties. This position was insisted by the Court of Appeal in **Edina Adam Kibona vs Absolom Swebe (Sheli)** (Civil Appeal No.286 of 2017) [2018] TZCA 310; (10 December 2018); **Ameir Mbaraka and Azania Bank Corp. Ltd v. Edgar Kahwili** (supra); **Tubone Mwambeta vs. Mbeya City Council,** Civil Appeal No.287 of 2017 (unreported); and **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal No.197 of 2018) [2019] TZCA 322; (01 October 2019 TANZLII.

Most recently, on 24th November, 2020, in (Civil Appeal No.129 of 2019) [2020] TZCA 1874; (25 November 2020 TANZLII), **Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa**, the Court of Appeal, (**Mwarija, J.A.**) stated thus:

"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."*

The record of the tribunal shows that since her absence on 21st August, 2017, Mrs. Mbakileki never attended before the tribunal. She was not present 03rd November, 201; 09th February, 2018; 23rd February, 2018 when the matter was being adjourned pending her opinion. She was also not present on 11th April, 2018 when the judgment was finally delivered. On the basis on the above account, one wonders when did she appear before the Court to present her opinion as required by law. It is obvious that besides not hearing all the evidence, she did not even read her opinion in front of the parties before delivery of judgment as required by law.

That said, I invoke the revisional powers vested to this Court under section 43 of **Land Disputes Courts Act** (supra) and revise all

the proceedings of the tribunal in Application No. 273 of 2014. Consequently, I quash all the proceedings and set aside judgment of the tribunal in Application No. 273 of 2014. Whoever interested may approach the appropriate forum subject to the rules of limitation. In the circumstances, I make no orders as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this **09th** day of **JULY, 2021**.

S.M. KALUNDE

JUDGE