IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPEAL 65 OF 2021

AFRA LIGAZIO ..... APPELLANT

VERSUS

REVOCATUS LIGAZIO ..... RESPONDENT

(Appeal form the decision of the District Housing and Land Tribunal for Kilombero district at Ulanga/Ifakara (Hon. Rugarabamu, CM.))

dated the 30th day of October, 2018
in
Land Appeal No. 114 of 2017

JUDGMENT OF THE COURT

Date of Last Order: 01/10/2021
Date of Ruling: 06/10/2021

S.M. KALUNDE, J.:

This is an appeal arises from the decision of the District Housing and Land Tribunal for Kilombero district at Ulanga/Ifakara ("DLHT") dated 30th day of October, 2018 in Appeal No. 114 of 2017.

In 2017, before the Vigoi Ward Tribunal ("the ward tribunal"), the appellant unsuccessfully filed Case No. 02 of 2017 against the respondent for trespass into her land. Aggrieved by the decision of

the ward tribunal, the appellant appealed to the DLHT through Appeal No. 114 of 2017.

On 30th October, 2018, the DLHT upheld the decision of the ward tribunal and entered judgment in favour of the respondent. Undeterred, the appellant launched a second appeal to this Court seeking to challenge the decision of the DLHT based on eight grounds which are predicated on the following complaints:

1. That the DLHT erred in law and fact in entertaining the suit and deciding in favour of the respondent;

2. That the DLHT erred in law and fact in not considering that the appellant had stayed on the suit land for more than 39 years;

3. That the DLHT erred in law and fact in failing to consider the fact that the respondent does not consider the appellants entitlement o land because she was a woman;

4. That the DLHT erred in law and fact by failure to admit the necessary evidence adduced by the appellant; and

5. That the DLHT erred in law and fact in deciding in favour of the respondent based on weak evidence.

On 07th September, 2021, when the appeal came for hearing I brought to the attention of the parties the irregularities in the proceedings before the DLHT. I raised the issue *suo moto* upon noticing that before the DLHT assessors were not invited to ask questions. There was also no record indicating that the assessors were invited to readout their opinion in the presence of the parties. Further to that, the records of the DLHT did not contain the opinion of assessors despite the same being referred in the judgment by the Honourable Chairman. Upon noticing the above irregularities, I invited parties to address the Court on what transpired before the DLHT and the consequences thereof.

The appellant recalled that the appeal before the DLHT was conducted with the aid of assessors. However, she said that the assessors were not given an opportunity to ask question. She also recounted that the assessors were not invited to read their decision before delivery of the judgment.

On his part, the respondent admitted that the assessors sitting before the DLHT at the hearing of the appeal were not actively involved in asking clarifying questions. He contended that it was only the Chairman of the DLHT who asked questions and the parties responded in the presence of assessors. He also recalled never to have heard assessors deliver their opinion, but only heard the Chairman delivering the decision. He contended that it was not his fault that the proceedings before the DLHT were flawed.

The issue raised by the Court *suo motu* is based on the mandatory provisions of section 23 (1) and (2) of **the Land Disputes Court Act, Cap. 216 R.E. 2019** read together with regulation 19 (1) and (2) of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003**For ease of reference section 23 reads:

> *"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. *" [Emphasis Mine]*

As indicated above, the provisions of section 23 (1) and (2) are further amplified by regulation 19 (2) of G.N. 174 of 2003 which provides that: *"Notwithstanding sub-regulation (1)* ***the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.*** *" Emphasis Mine].*

My understanding of the above cited provisions is that a properly constituted tribunal is composed of the Chairman sitting with two assessors. The two assessors must participate in the entire trial and at the conclusion of the trial and before delivery of the judgment, assessors must give their opinion. The failure to have assessors actively involved in the trial or failure to afford them an opportunity to readout their opinion is a fatal irregularity which renders the proceedings a nullity as it is as good as assessors were not involved at all.

The above position of the law has been articulated by the Court of Appeal in its several decisions including the case of **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No.287 of 2017 (unreported) wherein the Court of Appeal considered the question of involvement of assessors and stated thus: -

> *"In view of the settled position of the law where the trial has to be conducted with the aid of the assessors/ ...* ***they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed ... since Regulation 19 (2) of the Regulations require 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 Mine]*

In the case of **Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa** (Civil Appeal No.129 of 2019) [2020] TZCA 1874; (25 November 2020 TANZLII) the Court of Appeal considered the consequence of failure to require assessors to readout their opinion

in front of the parties. In the said case, the record did not reflect whether assessors were required to give their opinion in the presence of the parties. However, the record contained the opinion and the same was referred in the judgment of the tribunal. The Court **(Mwarija, J.A.)** stated:

> *"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."***

In the case of **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 considered the consequence of lack of the opinion of assessors. In the said case the Court

(**Mugasha, J.A**) considered the wording of section 23 (1) and (2) of Cap. 216 stated:

> *"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." [Emphasis Mine]*

The Court went on to deliberate on the consequence of referring to the opinion of assessors which is not on the record and state that:

> *"Therefore, in our own considered view,* ***it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the Chairman in the judgement****. 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 Mine]*

Having identified the incurable irregularities, the Court commented on the way forward:

> *"In view of the aforesaid incurable irregularities, the trial was vitiated...* ***We***

> ***hereby nullify proceedings and judgment of the Tribunal...because they all stemmed from a nullity****... if any of the parties so wish, he/she may recommence the action in the Court of competent jurisdiction subject to the law of limitation." [Emphasis Mine]*

In the present case, the record show that the appeal was heard on 25th April, 2018. On the day the assessors present were **Mrs. Mhomera** and **Mrs. Fatuma**. The record show that after the appellant and respondent presented their case neither of the assessors were afforded an opportunity to ask questions. The matter was then fixed for judgment on 01st August, 2018. Owing to the absence of the ward tribunal records, on 01st August, 2018, judgment was adjourned to 30th October, 2018 when it was finally delivered. However, there is no record showing that before delivery of judgment assessors were afforded an opportunity to deliver their opinion as required by section 23 (2) of Cap. 216 and regulation 19 (2) of G.N. 174 of 2003. As stated above the failure to observe the quoted provisions was fatal irregularity which vitiated the proceedings before the DLHT.

Further to that, the records of the DLHT do not contain the opinion the assessors. However, the Chairman of DLHT purported to refer the said opinion in the typed judgment at page 2 where it stated:

> *"That being the circumstance I and my both honourable assessors do find that what was observed by the trial members of the Ward Tribunal in this case was quite right as far as the issue of the case is concerned."*

Given that there is no opinion of assessors in the records of the DLHT, it is strange for the chairman to purport to cite the same in the judgment. I am of a firm view that the lack of the opinion of assessors in the proceedings rendered the decision a nullity and it cannot be resuscitated by citing the same in the judgment.

On the strength of the above binding authorities, I am satisfied that the irregularities in the proceedings before the DLHT vitiated the proceedings and rendered the same a nullity. Having stemmed out of a nullity, I nullify the proceedings and judgment of the District Housing and Land Tribunal for Kilombero district at Ulanga/Ifakara in Appeal No. 114 of 2017.

That said, I invoke the powers of this Court under 43 (1) (a) of Cap. 216, revise and quash the entire proceedings before the tribunal; and consequently, set aside the judgment and decree thereon. As a way forward, I remit the casefile back to the DLHT and order an expedited rehearing of the appeal before another Chairman who shall be sitting with a new set assessors.

Having raised the issue *suo motu*, and it being a fault of the tribunal, I make no orders as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this **06th** day of **OCTOBER, 2021**.

THE HIGH COURT OF TANZANIA
LAND DIVISION

S.M. KALUNDE

JUDGE