IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL 270 OF 2019

AGNERY FIBERTH MLENGE ..... APPELLANT

VERSUS

NDULU NSULWA ..... RESPONDENT

(Appeal form the Judgment and Decree of the District Housing and Land Tribunal for Kilombero/Ulanga district at Ifakara (Hon. C.P. Kamugisha, CM.))

dated the 25th day of October, 2019

in

Application No. 02 of 2018

JUDGMENT OF THE COURT

Date of Last Order: 17/11/2021 &
Date of Judgment: 10/12/2021

S.M. KALUNDE, J.:

This is an appeal against the decision of the District Housing and Land Tribunal for Kilombero/Ulanga district at Ifakara ("the tribunal") in Application No. 02 of 2018 dated 25th day of October, 2019. Before the tribunal the appellant unsuccessfully instituted a suit against the respondent for recovery of a piece of land measuring 79 acres located at Ngohelanga Village within Malinyi District in

Morogoro Region ("the suit land"). Aggrieved by the decision of the tribunal the appellant has preferred the present appeal.

The facts giving rise to the appeal as may be discerned from the record of appeal, show that on 19th April, 2015 the appellant entered into a land sale agreement for sale of the suit land for a consideration of Tshs. 7,000,000.00. The proceeds were to assist the appellant in the treatment of his father who was seriously sick at the time. It was agreed that Tshs. Tshs. 4,000,000.00. was to be paid at the signing of the agreement and the outstanding balance was to be paid by 30th May, 2015. Unfortunately, the appellants family was not happy with the actions of the appellant to sale the suit land. A proposal was made so that the land leased to the respondent for a period of three years at a cost of Tshs. 2,500,000.00 instead of an outright sale. Since the respondent had already paid Tshs. 4,000,000.00. parties allegedly agreed that Tshs. 1,500,000.00 be deducted and returned to the respondent to satisfy the lease price of Tshs. 2,500,000.00.

As pointed out above, the lease was to run for a period of three years. However, at the expiry of th lease, in 2017 the

respondent refused to yield up vacant possession of the suit land. The appellant commenced proceedings before the tribunal for recovery of land. The respondent insisted that the contractual price of Tshs. 7,000,000.00. was paid in two instalments as agreed between the parties and ownership documents were transferred to him. He thus contended to be the lawful owner of the suit land. In the end the tribunal was satisfied that the respondent has established that he purchased the suit land from the appellant. The tribunal declared the respondent to be the lawful owner of the suit land having lawfully purchased the same from the appellant. The application was dismissed with costs.

Discontented by the decision of the tribunal the appellant now appeals to this Court on seven grounds of grievance, namely:

(a) That the tribunal erred in law and in fact in delivering judgment different from the proceedings of the tribunal;

(b) That the tribunal erred in law and in fact in closing the applicant's case when the applicant was still calling more witnesses;

(c) That the tribunal erred in law and in fact in failing to consider that the sale agreement was

nullified by the Village Council for lack of consent from other family members;

(d) That the tribunal in law and in fact in relying on Exhibit D1;

(e) That the tribunal erred in law and in fact in holding that the final instalment was made on 30th May, 2015;

(f) That the tribunal erred in law and in fact in relying on the testimony of DW2 who said he witnessed payments being made on 01st July, 2015 when the agreement was signed on 04th July, 2015; and

(g) That the tribunal in law and in fact in relying on Exhibit D1 which was signed by the applicant, respondent and five Kitongoji members.

Relying on the above grounds, the appellant prayed for this Court to quash the proceedings and set aside the judgment and decree of the tribunal thereby ordering a fresh trial of the matter. In response to the above grounds the respondent filed a reply to the petition of appeal in which he objected to the appeal and the prayer for the dismissal of the appeal with costs.

On the 17th day of November, 2021 when the matter was slated for hearing, both parties appeared in person. I brought to the

attention of the parties that the records of the tribunal do not show whether the Chairman of the tribunal did not afford assessors an opportunity to readout their opinion before delivery of the judgment despite the fact that the application was conducted with the aid of assessors. In view of the alleged irregularity in the proceedings, I ordered parties to appraise the Court of their recollection of what transpired during the proceedings before the tribunal.

At the hearing, the appellant reported that indeed the trial was conducted with the aid of two assessors. He also remember the two assessors to have asked parties and their witnesses questions. However, he said he did not see or hear them deliver their opinion before delivery of judgment. He said, judgment was first scheduled for 10th October, 2019 and then adjourned to 25th October, 2019 when it was finally delivered. No opinion was readout.

On his part, the respondent also recalled hearing assessors asking questions but not delivering their opinion. He also remembered to have heard the judgment being delivered without hearing the assessors reading their opinion.

At this juncture I wish to point out that, I raised the issue ***suo motu*** based on the requirement of section 23 (1) and (2) of **the Land Disputes Courts [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**. The section 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]

The position under section 23 (2) of Cap. 216 is further amplified under regulation 19(2) of G.N. 174 of 2003. The regulation states 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]

The wording of section 23 (1) and (2) of Cap. 216 read together with regulation 19 (2) of G.N. 174 of 2003 demands that upon conclusion of the trial and before delivery of judgment the Chairman of the tribunal must afford every assessor an opportunity to present his or her opinion in the presence of the parties. This view has been maintained by the Court of Appeal in several decision including the case of **Ameir Mbarak and Azania Bank Corp. Ltd vs. Edgar Kahwili**, Civil Appeal No. 154 of 2015; **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No.287 of 2017 (unreported); and **Dora Twisa Mwakikosa vs. Anamary Twisa Mwakikosa** (Civil Appeal No.129 of 2019) [2020] TZCA 1874; (25 November 2020 TANZLII).

In **Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa** (supra) the Court of Appeal, (**Mwarija, J.A.**) stated:

> *"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. When confronted with a similar situation as in this case, we held as follows:*

> *"We are increasingly of the considered view 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 inwriting,* ***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 supplied]"

In the instant case, it is common ground that the trial was conducted with the aid of two assessors. The record show that on 25th July, 2019 when the tribunal framed issues and commenced hearing of the applicants case the assessors present were **Mrs.**

Otilia Mhomera and **Mr. Omari Abdallah**. The two assessors attended the entire trial until the conclusion of the defence case on 04th September, 2019. At the closure of the defence case the tribunal made the following orders:

> ***"Order**: Assessors to give their opinion.*
>
> *Judgment on 10/10/2019*
>
> ***Sgd.***
>
> ***4/9/2019"***

On the 10th day of October, 2019 the judgment was not ready so the matter was adjourned to the 25th day of October, 2019. On the respective day the assessors present before the tribunal were Mrs. Fatuma and Mr. Mohamed. This set was different from the set of assessors that heard the case. The opinion was therefore not read as even the present assessors were not the one who had heard the evidence. Judgment was finally delivered on 25th day of October, 2019. The coram for the day read as follows:

> *"**Date: 23/10/2019***
>
> *Coram: C.P. Kamugisha C/man*
>
> *Applicant: Present*
>
> *Respondent: Present*

Tribunal: *Judgment delivered.*

Right of appeal fully explained.

Sgd.

25/10/2019"

The above records are clear that on the date of delivery of the judgment the assessors who had attended the trial were not present and no opinion was read over to the parties. Surprisingly, the Chairman, at page 4 of the typed judgment purported to refer the opinion of the two assessors, that is Mrs. Otilia Mhomera and Mr. Omari Abdallah. That opinion is even included in the records of the tribunal. However, as pointed out above, the records of the tribunal do not show that, at any stage, the assessors were invited readout their opinion in the presence of parties. That was clear breach of the mandatory provisions of section 23 (1) and (2) of Cap. 216 read together with regulation 19 (2) of G.N. 174 of 2003. In view of the decision cited in **Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa** (supra), the failure by the Chairman to require the assessors to state the substances of their written opinions in the presence of the parties rendered the proceedings and decision of the tribunal a nullity as it was tantamount to hearing the application without the aid of assessors.

That said and done, I have no alternative other than invoking the revisional powers vested to this Court in terms of section 43 of **the Land Disputes Courts Act** (supra) and revise the entire proceedings of the District Land and Housing Tribunal for Kilombero/Ulanga district sitting at Ifakara in Application No. 02 of 2018. Accordingly, I quash all the proceedings therein and set aside judgment and decree resulting therefrom. In the circumstances, whoever is interested may approach the appropriate forum subject to the rules of limitation. Should either of the parties refile the matter before the tribunal, I make an order that the matter be retried before another Chairman and new set of assessors. Having raised the issue *suo motu*, and it being a fault of the tribunal, I make no orders as to costs.

Order accordingly.

DATED at **MOROGORO** this **10th** day of **DECEMBER**, **2021**.

S.M. KALUNDE

JUDGE