

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 26 OF 2022

(Arising from Land Application No. 299 of 2019, originated from Application delivered at Temeke District Land and Housing Tribunal)

HAMIDU RASHIDI ZAYUMBA APPELLANT

VERSUS

AKIBA COMMERCIAL BANK1ST RESPONDENT

MWISHE MKUNGA2ND RESPONDENT

CHAMPION AUCTION MART3RD RESPONDENT

JUDGMENT

Date of last Order: 23/09/2022

Date of Judgment: 07/10/2022

KHALFAN, J.

The appellant has appealed to this Court against the decision of the District Land and Housing Tribunal at Temeke as per Hon. Chenya, Chairman in Land Application No. 299 of 2019. The appeal emanates from the impugned order dated 11.01.2022, which reads as hereunder:



AMRI

'Mbele ya R.I. Chenya, Mwenyekiti

*Kwa kadri ya Maombi ya Mwombaji inaonesha hayuko tayari kutoa ushahidi wa Shauri lake kwa kuwa ameshafahamishwa matokeo ya kutokuwa tayari kutoa ushahidi basi Baraza hili linalifuta Shauri hili chini ya Kanuni ya **13(2) ya G.N No. 174/2003** kwa gharama. Haki ya Rufaa imeelezwa.'*
(unquote).

Being aggrieved by the said decision, the appellant has preferred this appeal to this Court. The Amended Petition of Appeal has 5 grounds namely:

- '1. That the trial Tribunal erred in Law and fact by dismissing the appellant's application based on though (sic) the appellant informed the tribunal that he could proceed with the hearing, after collecting his document to be used at the hearing from his advocate's office, but the said reason was not considering (sic) and proceeded to dismiss the*



application without giving reason for refusal of appellant's prayer.

2. That the trial tribunal erred in law and fact by dismissing the applicant's application without the opinion of tribunal assessors as it contravenes the law.

3. That the trial tribunal erred in Law and fact by failure to consider the appellant (sic) notice that his advocate was on leave based on the end of year court vacation but the tribunal proceeded to dismiss the application without giving reason for the reason given by appellant.

4. That the trial tribunal erred in Law and fact to allow unqualified person to appear on behalf of the 1st respondent, and relied upon her prayer as Advocate to dismiss the application.

5. That the trial tribunal erred in Law and fact to allow cost without any legal justification.'



When the appeal was called for hearing, Mr. Alex Enock, learned Counsel appeared for the appellant. The 1st and 2nd respondents enjoyed the service of Ms Neema Msuya and Ms Brenda Godwin Mahimbo respectively. The 3rd respondent was absent and the appeal was heard in her absence. The appeal was disposed of orally.

Mr. Enock submitted on the 1st ground of appeal that the Trial Tribunal erred in law and fact because it dismissed the application under **Regulation 13 (2) of GN. No. 174 of 2003** and **Regulation 19(2) of GN. No. 174 of 2003** without considering the appellant's submission. He cited the case of **Eliumba Eliezel vs. John Jaja**, Civil Appeal No. 30 of 2020.

As for the second ground, Mr. Enock submitted that on the 11th January 2020, the record shows that the Trial Chairman set without the assessors. He cited the provisions of **Section 23(1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019**. He insisted that the requirement to sit with assessors under **Section 24 of Cap. 216 R.E. 2019** is mandatory by virtue of **Section 50(1) and (2) (a) and (b) of the Interpretation of Laws Act, Cap. 1 R.E. 2019**. It was submitted that that when a provision of law provides for the powers of



a body using the word 'shall', such power must be exercised to ensure that the duty is properly done. Thus, the decision is a nullity.

Mr. Enock submitted on the third ground that the impugned decision is contrary to the Court's practice. That, the Trial Tribunal wrongly interpreted the provisions of **Regulation 13(2) and (3) of GN. No. 174 of 2003** when it dismissed the appellant's application without considering that there was Court Vacation. He referred the Court to the case of **Elilumba (supra)**. At page 12 of the said case, it was observed that the Court's failure to consider the party's submission renders the decision a nullity.

Mr. Enock went on submitting on the fourth ground that the Trial Tribunal erred in law in awarding costs. He argued that the Chairman cannot make a decision in the absence of assessors by virtue of **Section 23(3) of the Land Disputes Courts Act, Cap 216 R.E. 2019**. He concluded his submission by praying for orders for nullification of the Trial Tribunal's proceedings.

Ms Msuya, resisted the appeal starting with the first ground that, the Trial Tribunal afforded the appellant the right to be heard. First, the appellant was given time to communicate with his advocate and



contemplated on how to proceed with the case. The application was dismissed after several adjournments due to absenteeism of the appellant's advocate. She applied for application of **Regulation 13(2) of GN. No. 174 of 2003** after the appellant's advocate was absent without assigning good cause for such absence.

She further submitted that, the first and third grounds are similar. She referred to Regulation **13(2) and (3) of GN. No. 174 of 2003**, and cited the case of **Didas Mathias Mushi vs. National Microfinance Bank PLC and Another**, Land Appeal Case No. 208 of 2020. She maintained that, the reason of being on Court Vacation is not plausible for want of advocate notice and therefore not a good cause for adjournment.

As to the second ground, Ms Msuya argued that, the law requires under **Section 23 (1) and (2) of Cap. 216 R.E. 2019**, the presence of assessors as well as consideration of their opinions by the presiding Chairman. In case the Chairman opts not to consider the said opinion, he is required to give reasons as to why he did not consider such opinion.



In the matter at hand, it was argued, there were two assessors namely **Mama Chikwindo** and **Mzee Masuno**. They are the ones who insisted that the appellant should be given 20 minutes break for him to contemplate and thereafter proceed with his testimony. Ms Msuya insisted that **Regulation 13 (2) of GN. No. 174 of 2003** was not applicable because of poor attendance of the appellant's advocate.

In response to the fourth ground, Ms. Msuya submitted that, the Trial Tribunal was justified to grant costs against the appellant because the second respondent continued to suffer loss as he has not been handed over the house in dispute which he bought at the auction.

As for Ms Mahimbo, she gave her submission by amplifying what was submitted by Ms Msuya. In his rejoinder, Mr. Enock essentially reiterated his submission in chief and prayed that the appeal be allowed.

Having gone through the records of this application and the parties' submission therein, the main issue is whether the appeal is meritorious. I will begin with the issue of dismissal of the application based on the absence of the learned Advocate.



Ms Msuya argued that **Regulation 13 (2) of GN. No. 174 of 2003** was not applicable because of poor attendance of the learned Advocate. It is true as submitted by Ms. Msuya, that the appellant has not placed before the Trial Tribunal any notice of absence of his Advocate. However, Section **59. (1) (g) of the Evidence Act [Cap 6 R.E 2002]** stipulates that: -

'59 (1) A court shall take judicial notice of the following facts-

- (a) not relevant*
- (b) not relevant*
- (c) not relevant*
- (d) not relevant*
- (e) not relevant*
- (f) not relevant*
- (g) the division of time, the geographical divisions of the world and public festivals, feasts and holidays notified in the Gazette.'*

The above provision of the law is very clear as it gives the courts discretion to take judicial notice on matters as prescribed by the law. In this case, the Trial Chairman did not consider the above position of the law. There is no dispute that the court vacation is well known to

all judicial officers. In this case, the issue is whether the appellant had a duty to produce a notice to establish grounds for his adjournment.

In my opinion, the Trial Chairman made an error for failure to take judicial notice. The record establishes that 11th of January, 2022, falls within the period of court vacation. It follows therefore that the order of dismissing the application was erroneous.

The other issue is whether the Trial Tribunal was properly constituted when it dismissed the application. Ms Msuya contended that on 11th January, 2022, the assessors were present. However, the available record on the said date establishes that the Trial Chairman did not sit with the assessors. This was contrary to **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019**, which requires the Chairman to sit with assessors who must give their opinion in writing before the Chairman makes his judgment. In addition to the above position, **Section 24 of the same Act, (supra)** provides as follows:

'24 In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound



by it, except that the Chairman shall in the judgment give reasons for differing with such opinion.'

The above position of the law was insisted by the Honourable Court of Appeal of Tanzania in the case of **Sikuzani Saidi Magambo and Another vs. Mohamed Roble**, Civil Appeal No. 197 of 2018, in which Madam Justice Kerefu, J.A., observed at pages 10 and 11 that:

'It is also on record that, though, the opinion of assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view 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. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed.'

In the instant appeal, the learned Counsel for the appellant has referred me to the case of **Eliumba Eliezel vs. John Jaja (supra)**,



where the Court of Appeal of Tanzania observed at page 8 and 9 of the Judgment that:

'The law is settled regarding composition of the Tribunal, it requires the Chairman of the Tribunal to sit with not less than two assessors who shall be required to give their opinion before the judgment. The position is provided under section 23 (1) & (2) of the Land Disputes Courts Act, Cap 216 RE 2019 in the following terms:

- (1) The District Land and Housing Tribunal establishes (sic) under section 22 shall be composed of one 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.'*

Now, subjecting the facts in the present case to the above legal position, it turns out to be clear that, the irregularity committed by the Trial Tribunal Chairman vitiated the decision.

I have scrutinized the record of the Trial Tribunal in particular the handwritten proceedings dated 11/1/2022 thus:

" 11/1/2022

Akidii. R. I.Chenya- M/kiti
Wajumbe

Mleta Maombi - Yupo

Mjibu Maombi 1. Neema Msuya wakili

2 Hawapo

3 Hawapo

K/b -Aisha Muone

Muombaji: Wakili wangu ana dhalula (sic).
Naomba tarehe ya karibuni. Mimi nilifiwa na
mwanangu.

Signed

11/01/2022

Neema Msuya: Kwa kuwa leo ni ahirisho la mwisho na
kwa kuwa wakili wake hayupo leo safari ya pili,
naomba aendelee mwenyewe chini ya Kanuni ya 13(2)
ya GN. No. 174/03.

Signed

11.01.2022

Baraza: Kwa tarehe 2 zilizotangulia wakili wa
muombaji hakuwepo bila taarifa na leo hakuna taarifa
yoyote inayoonesha yuko Mahakama Kuu au
Mahakama ya Rufaa. Hivyo namhoji muombaji kama
yuko tayari kuendelea mwenyewe chini ya Kanuni ya
13 (2).

Signed

11.1.2022

Baraza: Muombaji anaelezwa pia matokeo ya
kutokuwa tayari kuendelea na Shauri kwa kadri ya
matakwa ya Kanuni ya 13(2).

Signed
11.1.2022

Muombaji: Mwenyekiti leo sijajiandaa kuendelea naomba unisogezee mbele.

Signed
11.01.2022

Amri: Kwa kadri ya maombi ya muombaji inaonesha hayuko tayari kutoa ushahidi wa shauri lake. Kwa kuwa ameshafahamishwa matokeo ya kutokua tayari kutoa ushahidi basi Baraza hili linalifuta Shauri hili chini ya Kanuni ya 13(2) ya GN. No. 174/03 kwa gharama. Haki ya rufaa imeelezwa.

Signed
11.1.2022 "

Having quoted the above extract from the proceedings of the Trial Tribunal, I proceed to pose a question thus "*Does the record manifest the recording of opinion of assessors?*" The answer is clear. The assessors were not involved in making the decision that culminated to this appeal. The next question to be determined is whether the absence of opinion of assessors vitiated the impugned decision.

The issue is answered in the affirmative. The Trial Chairman's failure to record and consider the opinion vitiated the entire proceedings and the decision thereof. With this finding, there is no need to consider other grounds as they are rendered redundant.



In the upshot, I find the appeal before me as meritorious. The appeal is hereby allowed with costs. The impugned order of the Trial Tribunal, dated 11th January 2022, is hereby nullified. The file is hereby remitted to the Trial Tribunal, the parties to be heard before another Chairman. In the circumstances, I make no order as to costs.

Dated at Dar es Salaam this 7th October, 2022.



Court


F. R. KHALFAN
JUDGE
07.10.2022

Judgment delivered this 7th day of October, 2022 in the presence of Mr. Alex Enock, learned Counsel for the appellant, also holding brief for Ms. Neema Msuya, learned Counsel for the first respondent and Ms. Brenda Mahimbo, learned Counsel for the second respondent.




F. R. KHALFAN
JUDGE
07.10.2022