IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 174 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 5 of 2018)

MUSSA KHALID MUSSA ..... 1ST APPELLANT

SHANI KHALID MUSSA ..... 2ND APPELLANT

ALMASI KHALID MUSSA ..... 3RD APPELLANT

BINGI KHALID MUSSA ..... 4TH APPELLANT

VERSUS

ZAINA OMAR MWETE ..... RESPONDENT

Date of last Order: 15/09/2022

Date of Judgment: 18/10/2022

JUDGMENT

I. ARUFANI, J

This judgment is for the appeal arising from the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (hereinafter referred as the tribunal) delivered in Land Application No. 5 of 2018. The history of the matter in a nutshell is to the effect that, while the respondent acting as an administratrix of estate of the late Mwange Mussa Kahuli she filed the afore mentioned Land Application No. 5 of 2018 at the tribunal against the appellants.

The respondent urged the tribunal to declare the house located at Manzese – Midizini area within Ubungo District in Dar es Salaam Region –

House No. MZS/MDZ/121 is the property under the estate of her late mother namely Mwange Mussa Kahuli. She urged the tribunal to permanently restrain the appellants jointly and severally and their agents from interfering with the suit property and costs of the application. The appellants disputed the respondent's claims and stated the suit property was the property of their late grandfather namely Mussa Kahuli who was the father of the late Mwange Mussa Kahuli (mother of the respondent) and the late Khalid Mussa Kahuli, (father of the appellants).

After full hearing of the matter the tribunal declared the house in dispute is part of the estate of the late Mwange Mussa Kahuli and awarded the respondent costs of the matter. Upon being dissatisfied by the decision of the tribunal the appellants filed in the court the instant appeal basing on the following grounds: -

1. *That the honourable Chairman of the District Land and Housing Tribunal erred in law and fact in declaring that the property in issue was acquired by Mwange Mussa Kahuli by adverse possession without considering the fact that she did not occupy the suit property exclusively, hostile, open and notorious and her occupation was not intended to hold it as one's own property.*
2. *That the trial Chairman erred in law in proceeding to give orders related to distribution of the estate instead of dealing*

with the issue of ownership of the suit land whether the same belonged to Mussa Kahuli or Omary Mwete.

3. *That the trial Chairman erred in law and in fact in holding that the mere recording of the name of Mwange Mussa as the occupier of the suit land for purpose of payment of property tax to be evidence of ownership of the suit land.*
4. *That the trial Chairman erred in law and failed all together to analyse the evidence on record and arrived at a wrong holding of granting ownership to the respondent.*

At the hearing of the appeal the appellants were represented by Mr. Barnaba Luguwa, learned advocate and the respondent was represented by Emmanuel Richard Machibya, learned advocate. By consent of both sides the appeal was argued by way of written submissions and I commend both sides for filing their written submissions within the time scheduled by the court. After reading the submissions filed in this court by both sides and after carefully going through the record of the tribunal the court has find there are some irregularities in the proceedings of the tribunal which are vitiating the judgment the appellants are challenging before this court.

The court has found the evidence adduced before the tribunal by the witnesses were not signed as required by the law and it is not indicated anywhere in the proceedings of the tribunal the opinion of the assessors contained in the file of the tribunal was read at the tribunal in

the presence of the parties. In addition to that the respondent is indicated in the title of the judgment of the tribunal and in this appeal, she was suing on her own capacity while the application filed in the tribunal and the judgment of the tribunal shows she was suing under the capacity of being administratrix of estate of her late mother, Mwange Mussa Kahuli.

Upon addressing the counsel for the parties about the stated irregularities they conceded to the same and prayed the court to return the matter to the tribunal for trial de novo before another chairman with competent jurisdiction who will sit with new set of assessors. Under that circumstances the court has found it is proper to start with determination of the observed irregularities under the revisional powers conferred to this court by section 43 (1) (a) of the Land Disputes Courts Act, Cap 216 R.E 2019 (henceforth the LDCA) before indulging into determination of the merit and demerit of the appeal filed in this court by the appellants.

Starting with the point relating to the mode of taking evidence adduced before the tribunal the court has found that, the tribunal is governed in its activities by the LDCA and the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN No. 174 of 2003 (henceforth the Regulations). However, the mentioned laws do not provide for how the District Tribunal is required to record evidence adduced before it.

That being the position of the law the court has found under the guidance of section 51 (2) of the LDCA the District Tribunal is required to be governed by Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 R.E 2019 (henceforth the CPC) which provides for how evidence of witness testifying in court or tribunal is required to be taken. The cited provision of the law states as follows: -

> *"**The evidence of each witness shall be taken down in writing**, in the language of the court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative **and the judge or magistrate shall sign the same.**"*[Emphasis added].

The wording of the above quoted provision of the law and specifically the bolded part shows clearly that the evidence of each witness testifying before the court or District Tribunal is required to be taken down in writing by or under the personal direction and superintendence of the judge or magistrate in a narrative form. After the judge or magistrate taken down evidence of a witness, he or she is required to sign the evidence of each witness. The task given to the judge or magistrate by the above cited provision of the law is mandatory to be performed as the law is coached in mandatory form.

The main purpose of requiring a judge or magistrate to sign the evidence of each witness as stated by the Court of Appeal in the case of **Yohana Musa Makubi V. R**, Criminal Appeal No. 556 of 2015, (unreported) is to authenticate the recorded evidence. When the Court of Appeal was dealing with the issue of evidence recorded without being signed by the trial judge in the above cited case it made the following observation: -

> *"... the meaning of what is authentic can it be safely vouched that the evidence recorded by the trial judge without appending her signature made the proceedings legally valid? The answer is in negative. We are fortified in that account because, in the absence of signature of trial judge at the end of testimony of every witness: Firstly, it is impossible to authenticate who took down such evidence. Secondly, if the maker is unknown then, the authenticity of such evidence is put to question as raised by the appellant counsel. Thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; fourthly, such evidence does not constitute part of the record of trial and the record before us ..."*

That being the position of the law and after seeing the chairman of the District Tribunal is also governed by the above quoted provision of the law via section 51 (2) of the LDCA the court has found the proceedings of the tribunal shows the evidence of the respondent in the present application, Zaina Omar Mwete and her witness namely Mohamed Ally

Halisi who testified before honourable Ling'wecha, Chairman as PW1 and PW2 respectively were not signed as required by the above quoted provision of the law. Likewise, the evidence of Tunu Khalid Mussa, Ayubu Seif and Bungara Hussein who testified before honourable Rugarabamu, Chairman as DW1, DW2 and DW3 respectively were not signed as required by the above quoted provision of the law.

Now the question is what is the effect of a trial judge, magistrate or chairman of the District Tribunal failure to sign evidence of a witness testified before him in the proceedings and the subsequent decision arrived by the court or tribunal. The answer to the above question can be found in the afore cited case of **Yohana Musa Makubi** (supra) where the Court of Appeal stated that: -

> *"We are thus satisfied that, failure by the judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted."*

From the above quoted excerpt, it is crystal clear that, as the evidence taken down from the witnesses testified in the matter for its determination which its decision is the basis of the appeal at hand were not signed by the Chairpersons of the tribunal, the court has found the

whole evidence used to determine the matter was not reliable as it was not authentic. In the premises the court has found that, as the evidence adduced before the tribunal was not signed as required by the law then it is as night follow the day that even the decision arrived by the tribunal is a nullity.

Apart from the above stated irregularity which the court has found it has rendered the proceedings of the tribunal incurably defective and the decision given thereat a nullity but the court has also found the opinion given by the assessors sat with the tribunal's chairman is not only that is not clear but also it was not read before the parties as required by the law. The court has found it is a requirement of the law as provided under Regulation 19 (2) of the Regulations that, where a Chairman of the DLHT has sat with assessors in a hearing of a land matter he is required to require every assessor present at the conclusion of hearing of the matter to give his or her opinion in writing.

The interpretation of how opinion of assessors sat with chairman of the District Tribunal should be given was made by the Court of Appeal of Tanzania in the case of **Tubone Mwambeta V. Mbeya City Council**, Civil Appeal No. 287 of 2017, CAT of Appeal at Mbeya (unreported) where it was stated 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 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."

That being the position of the law the court has found the proceedings of the tribunal shows after conclusion of hearing of the matter the chairman of the tribunal adjourned the matter for the purpose of enabling the assessors sat with him at the hearing of the matter to prepare their opinion. The court has also found there is a document containing opinion of the assessors sat with the Chairman of the tribunal in the record of the tribunal.

However, it is not indicated anywhere in the proceedings of the tribunal when that opinion was filed in the record of the tribunal and whether it was ever read over at the tribunal in presence of the parties as required by the position of the law stated hereinabove. The above stated position of the law is fortified further by the case of **Edina Adam Kibona V. Absolom Swebe**, Civil Appeal No. 286 of 2017 (unreported) where the Court of Appeal stated that: -

"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, in terms of

Regulation 19 (2) of the Regulations, the Chairman of the DLHT 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.***"[Emphasis added].

As the proceedings of the tribunal do not state anywhere if the opinion of the assessors contained in the record of the tribunal was read over to the parties before composition of the judgment and delivered of the same to the parties, it is crystal clear that the above stated requirement of the law was not complied with. The question here is what is the effect of failure to require opinion of the assessors to be read in the presence of the parties before the judgment is composed. The answer was given by my learned brother Kahyoza, J in the case of **Anna Busuro V. Amari Mwita,** Miscellaneous Land Appeal No. 41 of 2019, HC at Musoma where he stated as follows: -

"DLHT failed to actively involve the assessors in the determination of the appeal. It failed to cause the written opinion of the assessors to be read in the presence of the parties. Thus, the DLHT heard the appeal without aid of the assessors in violation of the clear provisions of section 23 of the Land Disputes Courts Act, Cap 216 R.E 2019 and Regulation 19 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations). The omission is an incurable defect and it renders the proceedings a nullity."

While being guided by the position of the law stated hereinabove which I have no reason to differ with my learned brother the court has found that, despite the fact that the chairman of the tribunal stated in the judgment of the tribunal that he subscribed with the opinion of the assessors sat with him at the hearing of the matter but as the opinion of the assessors was not read before the tribunal in the presence of the parties before the judgment being composed as required by the law, the judgement composed by the chairman of the tribunal is a nullity.

That being the position of the matter and after seeing the counsel for the parties have conceded to the stated irregularities the court has found there is no way the judgment of the tribunal can be left to stand for whatever reason. Consequently, the court has found there is no need of going to the merit or demerit of the grounds of appeal filed in this court by the appellants. In lieu thereof the court is invoking the powers conferred to it by section 43 (1) (a) of the LDCA to revise the proceedings and judgment of the tribunal.

In the premises the proceedings and judgment of the tribunal are hereby nullified and as prayed by the counsel for the parties the matter is remitted to the tribunal for trial de novo before another Chairman with competent jurisdiction sitting with new set of assessors. As the above

stated decision was based on the points raised by the court suo moto there will be no order as to costs. It is so ordered.

Dated at Dar es Salaam this 18th day of October, 2022

I. Arufani

JUDGE

18/10/2022

Court:

Ruling delivered today 18th day of October, 2022 in the presence of Mr. Barnaba Luguwa, advocate for the appellants and in the presence of Mr. Emmanuel Richard Machibya, advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

18/10/2022