IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 104 OF 2021

WILLIAM GEORGE MBEZI ..... APPELLANT

VERSUS

1. **TANZANIA POSTAL BANK PLC**
2. **TULVIN INVESTMENT** } **..... RESPONDENTS**
3. **SHABAN ALLY KIPALILA**

(Being an appeal from the Judgment and Decree of District Land and Housing Tribunal for Morogoro District at Morogoro

(M. Khasim, CM)

dated the 31st day of November, 2020

in

Land Application No. 148 of 2017

JUDGMENT OF THE COURT

S.M. KALUNDE, J.:

This is an appeal challenging the decision of the District Land and Housing Tribunal for Morogoro District at Morogoro (hereafter "the trial tribunal") dated 31st day of November, 2020 in Land Application No. 148 of 2017 (hereafter "the application"). The application at the trial tribunal terminated in favour of the respondents. The decision of the trial tribunal infuriated the appellant who has now knocked onto the doors of this Court in an appeal.

The facts leading to the present appeal are not hard to grasp. They are as follows: the appellant was the lawful owner of house identified as **House No. 1836** located at Chamwino within the Region and Municipality of Morogoro with Residence Permit No. 1670 issued on 23.03.2011 (hereafter "the suit property"). In 2014 through a Credit Facility Letter dated 16.07.2014 the suit property was pledged as security to secure a loan of Tshs. 4,000,000.00 advanced to Ms. Gloria Tulinagwe Mwambungu. The appellant executed the Credit Facility Letter as guarantor to the said to Ms. Gloria Tulinagwe Mwambungu. According to the facility, the loan was to be repaid within twelve (12) months. Subsequently, the facility was advanced and utilized by the said Ms. Gloria. It would appear that Ms. Gloria defaulted in repaying the loan. By 12.05.2015 the outstanding amount stood at Tshs. 2,214,422.34. In terms of section 127(1) and (2) of **the Land Act, Cap. 113 R.E. 2019**, the 1st respondent issued a Sixty Days' Notice of Default to Ms. Gloria Tulinagwe Mwambungu and served a copy to the appellant. The Notice of Default was due to expire on 16.07.2015. However, on 27.05.2015, Anita Abdi Gembe, who is allegedly the appellants wife filed a suit at the trial tribunal against Ms. Gloria Tulinagwe Mwambungu; the 1st respondent; the appellant; and Property Masters. The application was registered as **Land Application No. 103 of 2015**. On the 20.06.2016 Land Application No. 103 of 2015 was dismissed.

Following the dismissal of Land Application No. 103 of 2015 the 1st respondent appointed the 2nd respond to recover the outstanding amount through auctioning the suit property. On 15.05.2017, through Habari Leo News Paper, the 2nd respondent advertised an auction of the suit property

Consequently, on 11.06.2017 the suit property was auctioned to the highest bidder. The 3rd respondent emerged as the highest bidder at the bidding cost of Tshs. 8,000,000.00. After complying with the necessary requirements including payment of the bidding price, on 12.06.2017 the 3rd respondent was issued with a certificate of sale finalizing the transaction.

Sixteen days later, on 28.06.2017, the appellant filed Land Application No. 148 of 2017. In the application at the trial tribunal, the appellant claimed that he was never informed of the default and that the suit property was sold at a throw away price to a planted bidder. He also contended that the auction was not advertised and that there was foul play in the auction process. In view of the above illegalities the appellant made the following prayers: (a) that the auction dated 11.06.2017 be declared illegal, null and void; (b) that an order be issued revoking the auction; (c) a declaration that the appellant remained the lawful owner of the suit property; and (d) damages and costs of the suit

The respondents successfully challenged the application. The trial tribunal resolved that the appellant was fully aware of the default and the auction. In arriving at that conclusion, the tribunal made a finding that since the appellants wife challenged the sale of the suit property and upon dismissal of the application then the sale proceeded the appellant cannot allege that he was not aware of the default or let alone the impending sale of the said property. The tribunal was also content that all the procedure for the public auction of the suit property were ccomplied. In the final analysis the trial tribunal concluded that the sale of the suit property was valid. The 3rd respondent was declared a lawful owner of the suit property and an

eviction order was issued against the appellant. In the end the trial tribunal dismissed the application. It is this decision which is the subject protest in the present appeal.

Before this Court the appellant has preferred nine (9) grounds of appeal which were contained in his Memorandum of Appeal. The memorandum of appeal was later supplemented by additional grounds of appeal filed on 26th January, 2022 containing two further grounds. The eleven (11) grounds of appeal may be summarized into the following major complaints:

(1). That, the trial tribunal erred in failing to appreciate that the auction was illegal for lack of the Notice of Default to the appellant;

(2). That, the trial tribunal erred in holding that a Notice of Default to the appellant was optional;

(3). That, the guarantee agreement "TAMKO LA MDHAMINI" was illegal for contravening the law and principles of natural justice;

(4). That, the trial tribunal erred in validating the sale of the suit price at a throw away price;

(5). That, the trial tribunal failed to properly evaluate evidence on record and decided the case without considering the evidence on record;

(6). The proceedings of trial tribunal were illegal as assessors were not given to readout their opinions in front of the parties; and

(7). The auction was conducted on a public holiday.

By consent of the parties the appeal was argued by way of written submissions. Submissions were dully filed in accordance with Court orders. **Mr. andrew Jackob Kanonyele**, learned advocate drew and filed submissions of the appellant whilst those of the 1st and 2nd respondent were prepared and filed by **Mr. Innocent Mhina**, learned advocate. On their part, the 3rd respondent retained the services of **Mr. Ignas Seti Punge**, learned advocate in drafting and filing their submissions.

Having thoroughly gone through the records, the ground of appeal and submissions of the parties, and for the reason that shall become apparent later in this judgment, I propose to first resolve the complaint raised by the appellant to the effect that the trial tribunal failed to afford the assessor to read out their opinion in the presence of the parties as required by law. The requirement to have assessors read out their opinion is provided for under section 23 of **the Land Disputes Court Act, Cap. 216. R.E. 2019** (henceforth "the LDCA) read together with regulation 19 of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G.N. 174 of 2003** ("the Regulations"). For ease of reference, section 23 is reproduced hereunder:

"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.***"

(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 is mine]

The position under section 23 (2) of the LDCA quoted above is amplified under regulation 19(2) of the Regulations. The regulation 19(2) 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]

My understanding of the two above quoted provisions is that a properly constituted tribunal in terms of the Act is composed of the Chairperson and two (2) assessors. See **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015, Court of Appeal

at Iringa (unreported). The other important takeaway from the above section is that the two assessors must, at all times, be present throughout trial; and be actively and effectively involved in the proceedings so that they can have a meaningful contribution in advising the tribunal through their opinion. However, section 23(3) of the LDCA provides a flexibility in that where, for any reasons, one or all the assessor misses a hearing session, the tribunal may proceed with the remaining assessor or without any assessor, as the case may be. However, the important caution underlined in the above sections is that prior to delivery of the judgment assessors the presiding chairperson shall, require every assessor present at the conclusion of the hearing to give their opinion in writing and the assessor(s) so present may give his/her opinion in Kiswahili.

The requirement to have assessors give their opinion in the presence of the parties has been amplified in various decision of our superior court, the Court of Appeal. In the case of **Edina Adam Kibona vs Absolom Swebe (Sheli)** (Civil Appeal No.286 of 2017) [2018] TZCA 310; (10 December 2018) having cited its previous decision in **Ameir Mbaraka and Azania Bank Corp. Ltd v. Edgar Kahwili and Tubone Mwambeta vs. Mbeya City Council**, the Court of Appeal (**MWAMBEGEIE, J.A.**) recapitulated that failure to call upon the assessors to give opinion and to let the parties know the contents of the assessors' opinion was a disastrous defect. The Court of Appeal stated: -

> *"Adverting to the case at hand, when the chairman closed the case for the defence, he did not require the assessors to give their opinion as required by law. On*

the authorities cited above, that was fatal irregularity and vitiated the proceedings.

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 District Land and Housing Tribunal 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.***

For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. ***However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose."***

[Emphasis is mine]

In the above cited case, the Court invoked its revisional powers under section 4 (2) of **the Appellate Jurisdiction Act, Cap. 141** of the Revised Edition, 2002 (now R.E. 2019) and nullified the proceedings and judgment of the tribunal and High Court. It went on to order an expedited hearing with a new Chairman and set of assessors if parties were still interested.

See also **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal No.197 of 2018) [2019] TZCA 322; (01 October 2019 TANZLII); and **Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa** (Civil Appeal No.129 of 2019) [2020] TZCA 1874; (25 November 2020 TANZLII) all unreported.

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:*
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> > *"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 added]"

Guided by the above position of the law and authorities I shall proceed examine the circumstances in the present appeal. There is no dispute that the present case was heard with the aid of assessors. The records show that hearing of the defence case commenced and closed on 08.10.2020. On the day assessors present were MPITE and MNGAZIJA. It is on record that upon conclusion of the defence case the tribunal ordered judgment to be delivered on 30.11.2020. It is also not in dispute that on 30.11.2020 judgment was accordingly delivered in the presence of the 3rd respondent and absence of the appellant and the 1st and 2nd respondents.

I have examined the records at the conclusion of the defence case and before delivery of judgment and noted that they do not indicate whether or when the assessors were invited to state the contents of their written opinions in the presence of the parties. However, the records of appeal forwarded to this Court contains the opinion signed by one assessor, one Mr. Rashid Mpite. In the typed judgment the learned chairperson made the following remarks:

"On the 31st March, 2020 when the case was fixed for defence hearing, we proceeded with only one assessor as it allowed by the law as per section 23(3) of the Land Disputes Courts Act No. 2 of 2002 and due to that, this case was opined by that only remaining assessor who opines as quoted here under:"

Having quoted an excerpt from the opinion of the wise assessor the learned chairperson stated:

"I am at one with the assessors opinion simply because the applicant herein failed to prove his case to the required standard, the respondents herein established their case to the balance of probability and due to that, they are entitled to some reliefs as follows ..."

However as pointed out earlier, despite quoting the same in the judgment, the proceedings indicate the learned chairperson did not require the wise assessors to give the opinion in the presence of the parties as required by law as explained above. In view of the fact that the record does not show that the remaining assessor was required to give the said opinion in the presence of parties before the judgment was composed, I fail to understand how and at what stage the said opinion found its way in the court record and eventually in the judgment. As stated in the above cited authorities, the failure by the Chairman to require the remaining assessor to state the contents of his written opinion 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 instant case, it would appear that the appellant identified the irregularity in the proceedings of the trial tribunal and requested to filed and leave was granted for them to file additional grounds of appeal. on 26.01.2022 they filed an additional grounds of appeal in which they raised two grounds of appeal. In the filed grounds one of the grounds was that **"the trial tribunal erred in law and in fact in not giving assessors audience to pronounce their opinions before the parties"**.

It is unfortunate that despite identifying and including the same in the additional grounds of appeal parties, including the appellant, did not make submissions relating to the same. Probably, in the hope that the Court would grace the irregularity and proceed to the merits of the case. However, as pointed out earlier, the failure by the learned trail Chairperson to require the assessors to state the contents of the written opinion in the presence of the parties rendered the proceedings of the trial tribunal a nullity because it was tantamount to hearing the application without the aid of assessors. The abandonment or refusal by the parties to submit on the raised ground of appeal tantamounted to abdicating their right to be heard.

On my part, based on the provisions and previous decisions cited above, I am satisfied that the pointed irregularity amounted to fundamental procedural errors that have occasioned a miscarriage of justice to the parties and vitiated the proceedings and entire trial before the trial tribunal. This suffices to dispose of the matter. I will therefore not labour into considering the substantive merits of the appeal.

That said and done, I have no alternative other than invoking the revisional powers bestowed to this Court in terms of section 43 of the LDCA and revise the entire proceedings of the trial tribunal in Land Application No. 148 of 2017. 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 to pursue their rights subject to the laws and rules of limitation. Should either of the parties refile the matter before the trial tribunal, I make an order that the matter be retried before another Chairman and with a new set of assessors.

In the end and for the above reasons, the appeal succeeds to extent explained above. Having determined the appeal on my individual efforts no order for costs is made.

It is so ordered.

DATED at **DAR ES SALAAM** this **13th** day of **DECEMBER, 2022.**

S. M. Kalunde

JUDGE