IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL CASE NO. 57 OF 2021

(From the Decision of District Land and Housing Tribunal of Kinondoni in Application No. 509 of 2016)

AIDAN S. MWAKAPILA.....1st APPELLANT
IRENE MWAKAPILA.....2nd APPELLANT

Versus

LUCAS W. TAIRO.....1st RESPONDENT
TATUMA MMINDU.....2nd RESPONDENT

JUDGMENT

25/11/2021 & 2/03/2022

Masoud J.

The appellants are challenging the decision of the District Land and Housing Tribunal which declared the first respondent the lawful owner of the disputed land. The disputed land was alleged to have been trespassed by the appellants. In the said decision, the appellants were also ordered to pay the first respondent general damages to the tune of Tshs 1,000,000/- and costs of the suit.

The disputed land was described by the first respondent as one situated at Kibamba, Hondogo area within the city of Dar es Salaam. It is on the record that the first respondent was getting legal assistance on legal aid basis as per a letter dated 23/9/2016 from the Legal and Human Rights Centre referenced

LHC/LAC/KIN/16/1687/04. It was alleged by the first respondent that he acquired the disputed land by purchasing the same from one Asha Mussa on 16/05/2006 and in the course of the trial before the district tribunal the relevant sale agreement was tendered and admitted in evidence. In such respect, it was alleged that the second respondent's purported sale of the disputed land to the appellant was unjustified.

The appellants on their part disputed the claims by the first respondent, saying that they were the lawful owners of the disputed land. They alleged to have lawfully purchased the disputed land from the said second respondent. As was the first respondent, the appellants also tendered the relevant sale agreement which was equally admitted in evidence.

The appellants advanced a number of grounds of appeal as is apparent in the memorandum of appeal. The appeal was vigorously contested. The appellants were represented by Mr Erasmus Buberwa, learned Advocate, while the first respondent was advocated by Mr Sylvester Shayo, learned Advocate.

The grounds of appeal which formed the basis of the rival written submissions duly filed on the record by the respective learned Advocates were as here under paraphrased although the sixth ground in the memorandum of appeal was abandoned.

The grounds of appeal argued were, (i) failure of the trial tribunal to evaluate the evidence; (ii) declaring the appellants trespassers in their own suit land contrary to the evidence; (iii) wrongfully awarding costs to the first respondent in the legal aid case; (iv) wrongfully awarding damages which were not borne in the evidence; (v) wrongfully relying on Exhibit P.1 as a proof of ownership of the disputed land which notwithstanding that it was not properly indorsed and signed; (vi) failure to consider that the appellants' size of land was quite different from that of the first respondent; (vii) departing from the opinion of assessors without assigning reasons; and (viii) the decision of the trial tribunal is irregular for not containing written opinions of the assessors.

Having considered the rival submissions on the record, I found it fit to start with the last two grounds of appeal which relate to participation of assessors by giving their written opinion. The issue emerging from the relevant rival submissions were, firstly, whether the assessors were required to give their opinions in writing before Chairman of the trial tribunal reached the judgment; secondly, if the first issue is in the affirmative whether such opinions were availed in the presence of the parties; thirdly, whether such opinions were considered by the Chairman of the trial tribunal in his final verdict.

In relation to the rival submissions which gave rise to the above issues, I was convincingly referred to relevant provisions of law and authorities of the Court of Appeal of Tanzania regarding participation of assessors in the proceedings of the District Land and Housing

Tribunal and the effect of the failure to comply with the provisions relating to such participation. Accordingly, the provision of section 23(2) of the Land Disputes Courts Act cap. 216 R.E 2019 were referred which reads and I hereby quote thus:

> *23(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 opinion before the Chairman reaches the judgment.*

I was equally referred to section 24 of the said Cap. 216 above, which provides and I quote:

> *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.*

As if the foregoing was not enough, the rival arguments advanced saw the counsel for the parties citing regulation 19(1) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003, GN. 174 of 2003 which reads and I hereby reproduce the provision verbatim thus:

> *Notwithstanding subsection (1), the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor my give his opinion in Kiswahili.*

The most recent Court of Appeal decision on the issues which was decided on 7/10/2021, and which was heavily relied on by Mr Buberwa, was **Dr Clemence Kalugendo v Peter Andrew Athuman**, Civil Appeal No. 92 of 2018. Mr Buberwa, learned Advocate, demonstrated that the decision relied also on previous decisions of the Court of Appeal on the issues relating participation of the assessors in such proceedings and giving opinion.

Indeed, a glance at the judgment showed that the said decision relied on the following decisions of the Court of Appeal on the point; **Edna Adam Kibona v Absolom Swebe (Shell)**, Civil Appeal No. 286 of 2017; **Ameir Mbaraka and Azan Bank Corp. Ltd v Edgar Kahwili**, Civil Appeal No. 154 of 2015; **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No. 287 of 2017; and **Sikuzani Said Magambo and Another v Mohamed Roble**, Civil Appeal No. 197 of 2018. All these authorities underlined the requirements of giving the opinion in writing which opinion must also be availed in the presence of the parties by reading so as to enable them to know the nature of the opinion, and whether or not such opinion has been considered in the final verdict.

In **Edna Adam** (supra), the Court of Appeal went further to hold that such opinion must be in the record, and must be read to the parties before the judgment. In a more or less similar vein, the Court of Appeal in **Ameir Mbaraka** (supra) stated that "*...it is unsafe to assume the opinion of the assessors which is not on the record by merely reading acknowledgment of the Chairman in the judgment.*"

Equally, having found that the record of appeal neither indicated that the Chairman directed assessors to give their opinion nor contained the written opinion which was purportedly acknowledged in the judgment of the trial tribunal, the Court of Appeal in **Dr Clemence Kalugendo** (supra) was settled that it was unsafe to assume the contrary.

Using the above authorities, Mr Buberwa took the court through the record of proceedings and the judgment insisting that the tribunal sat with two assessors. He also showed how in the judgment the Chairman acknowledged the opinion to the effect that it favoured the appellants. Of significance, the learned counsel also showed the court that the acknowledged opinion was neither in its substance found in the judgment nor the proceedings of the trial tribunal. Relevant dates were shown and in particular on 29/1/2020 when the Chairman said that the assessors had opined although none of the assessors was present in the tribunal and the opinion was not read and not made part of the record.

On his part the Advocate for the first respondent had it that the opinion may be pronounced in the presence or absence of the assessors as they are marked to have discharged their duties upon giving the opinion in writing. Thus, he was of the view that the authorities were not applicable. He seemed also to be of the view that the tribunal's Chairperson has not necessarily to sit with assessors when delivering his judgment.

The learned Advocate did not seemingly dispute that the written opinion is not part of the proceedings. His argument was that since the opinion was not the basis of the decision, it does not matter whether or not the opinion is on the record of the proceedings. After all, he argued, the court should bear in mind that regulation 19(2) which is heavily relied on by the appellants is subject to sections 23(2), 24 and section 45 of cap. 216. The learned Advocate did not say anything as regards to the case of **Dr Clemence Kalugendo** (supra) which reasoned to the effect that where the written opinion is not on the record despite being acknowledged in the judgment, the provision of section 45 will not apply to salvage the miscarriage of justice occasioned. In this respect, the Court of Appeal reasoned thus from page 8-9 of its typed judgment:

> *We are however mindful of the provisions of section 45 of Cap. 216 which provides that no decision of the Tribunal will be reversed or altered on appeal on account of any error, omission, or irregularity in the proceedings, unless such error or irregularity has in fact occasioned a failure of justice. Nevertheless, in the circumstances of the instant appeal, for the reason we have endeavoured to give.....we are satisfied that the omission....occasioned miscarriage of justice.....lack of the written opinion indicate that assessors did not fully participate in the decision making process before the Chairman composed the Tribunal's judgment as required by law.....the omission to involve assessors in decision making goes to the root of the proceedings rendering the entire trial a*

nullity. In the event, the provision of section 45 of Cap. 216 cannot be brought into play in the circumstances of the appeal at hand.

In the light of the foregoing, I endeavored to examine the record of the proceedings to appreciate the validity of the arguments made with reference to the proceedings. It is indeed on the record that at the conclusion of the trial on 22/08/2019, the trial tribunal's Chairman entered an order for judgment on 24/10/2019 and directed members to opine. On 24/10/2019, the Chairman is on the record saying that members could not manage to record their opinion. He thus adjourned the judgment to 29/01/2020 and required the members to opine.

When the matter came for judgment on 29/01/2020, the Chairman in the absence of the assessors, had it on the record that the assessors have given their opinion which opinion favoured the appellants. In so doing, the Chairman proceeded to fix the matter for judgment on 02/04/2020. Eventually, the judgment was delivered on 02/04/2020 again in the absence of the assessors.

Clearly, the opinion of the assessors was brought to the attention of the parties on 29/1/2020 in the absence of the assessors and without being read to the parties and without the opinion being made part of the record. When the matter came up for judgment in the absence of the assessors on 02/04/2020, the parties were clearly not aware of the substance of the opinion. No doubt that when the Chairman acknowledged the opinion of the assessors in the judgment and

purported to explain why he differed with the assessors, the parties could not reasonably appreciate the reasoning as the substance of the assessors' opinion was not availed. I say so because as to why the assessors' opinion favoured the appellants was not at all disclosed.

My scrutiny of the trial tribunal's case file revealed what appeared as a written opinion by one of the assessors. There is however nothing showing when it was indeed given and made part of the record if at all. It was purportedly made by one of the assessors and favorably acknowledged by the other in the same document. There was nothing in the proceeding that it formed part of the record.

Again, if the document were truly to be regarded as the written opinion forming part of the record and read to the parties before judgment, it would be clear that there were no reasons given why the Chairman differed with the opinion. I say so after having regard to the substance of the purported opinion. Nonetheless, in the light of case of **Edina Adam Kibona** (supra) and the case of **Sikudhani Said Magambo and Another** (supra), the purported opinion in the trial tribunal case file which was purportedly referred but not read to the parties by the Chairman before composition and delivery of the judgment saved no useful purpose.

On the basis of my findings herein above which reflect the submissions of the counsel for the appellants on the irregularities relating to the treatment of the assessors' opinion and violation of

the relevant law, I am satisfied that the irregularities are so serious that they affect the proceedings and the judgment. With these findings whose consequences is nullification of the proceedings and the judgment, it is academic exercise to labour on the remaining grounds of appeal. On this position, I am guided by the authorities cited above that such omission and irregularities amount to fundamental procedural errors that occasion miscarriage of justice to the parties and which tend to vitiate the proceedings and the entire trial.

In the results, the appeal has merit for reasons stated and in so far as the grounds relating to assessors' opinion are concerned. In view of the findings, I hereby invoke my revision powers and proceed to nullify the entire proceedings, quash and set aside the judgment and order the matter to be re-tried afresh by another Chairman of the trial tribunal sitting with a new set of assessors in accordance with the law. In the circumstances, the respondents are not condemned to pay costs.

It is so ordered.

Dated and Delivered at Dar Es Salaam this 2nd day of March 2022.

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B.S. Masoud

Judge

THE HIGH COURT OF TANZANIA
LAND DIVISION