IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 169 OF 2021

(Originating from the judgment and decree of the District Land and Housing Tribunal for Ilala in Land Application No. 128 of 2013)

IDDI MFAUME YANGE ..... APPELLANT

VERSUS

HEMED MUSTAFA as personal legal Representative of the late

SALMA MUSTAFA SWALEHE ..... RESPONDENT

JUDGMENT

25/5/2022 & 28/6/2022

A. MSAFIRI, J

The appellant Idd Mfaume Yange has lodged this appeal having been aggrieved by the judgment and decree of the District Land and Housing Tribunal for Ilala at Ilala (trial Tribunal) in Land Application No. 128 of 2013 delivered on 13/10/2017. He has advanced three grounds of appeal which are;

1. The trial Chairman erred in law and fact in declaring the Respondent the owner of the suit land which is at Chanika Msumbiji with size of 1 ½ acre.

2. The trial Chairman erred in law and fact in entertaining the suit against the Appellant.
3. The trial Chairman erred in law and fact in failing to analyze evidence before it.

He prayed for the appeal to be allowed with costs.

The hearing of the appeal was by way of written submissions. The appellant appeared in person, not legally represented. The respondent was represented by the learned advocate Abdallah Gonzi.

Before embarking on the analysis of the evidence of record and the submissions by parties, I will briefly narrate the background of this appeal. According to the application filed by Hemed Mustafa (now the respondent) as the applicant before the trial Tribunal, the late Salma Mustafa Swalehe who was also known as Jamillah Selemani Mfaume Yange was the mother of Hemed Mustafa, the applicant.

That during her life, Salma Mustafa Swalehe bought various unsurveyed Plots of Land (herein as suit land/suit premises). Upon the death of Salma Mustafa Swalehe, the applicant's father namely Mustafa Salehe was appointed as an administrator of the estate of the late Salma Mustafa. That, the said Mustafa Salehe also died before he could complete the full administration of all the properties of the late Salma Mustafa. That, after the death of Mustafa Salehe, the applicant was appointed the administrator of the estate of his deceased mother namely Salma Mustafa, and he

started to perform duties of collecting the assets of the deceased so as to distribute to the lawful heirs.

It is in the evidence that the 1st respondent Idd Mfaume Yange (who is now the appellant), claimed that the suit land was never bought by the applicant's mother as alleged but was the property of his late father one Mfaume Selemani or Mfaume Yange and upon his father's death, the appelant, his brothers and sisters became the lawful owners of the disputed pieces of land because they are the legal heirs. After hearing of the application, the trial Tribunal, declared the applicant a lawful owner of one of the unsurveyed plot measured at 1 ½ acre, located at Chanika Msumbiji, Ilala Municipal Dar es Salaam. The 1st respondent was aggrieved and filed this appeal.

I have read the three grounds of appeal and read the submissions in support and opposition of the appeal.

In the submission in chief, the appellant raised a point of law that during the trial, the assessors did not give their opinion as the same are not reflected in the proceedings. He pointed that Regulation 19(2) of the Land Disputes (District Land and Housing Tribunal) Regulations, 2003 GN. No. 174/2003 require the assessors' opinion to be read to the parties before the Chairperson compose the judgment. He added that, the parties were not availed with an opportunity to know what did the assessors opine and it was a clear violation of the law.

In reply on that point, the respondent through his advocate submitted that, the appellant has introduced a new ground of appeal in his submissions, and this should not be entertained by the Court.

Nevertheless, he argued that, the trial Chairperson did not write her judgment without getting an opinion of the assessors but rather in recognition of the importance of the said opinion, the trial Chairperson adjourned the judgment until she would get the assessors opinion.

The counsel for the respondent stated further that, at page 4 of the judgment, the trial chairperson said;

> *"That having so argued, I hereby concur with the opinion of my prudent assessors that this application is partly meritorious".*

The counsel argued that the above quotation from the judgment of the trial Tribunal proves the appellant was wrong in his allegations that there was no opinion by the assessors. He added that the provisions of Regulation 19 (2) of the Land Disputes (District Land and Housing Tribunals) Regulations, (supra) were complied with, when the trial Chairperson adjourned the matter to receive assessors opinion before the judgment.

He argued that, under Regulation 19(2), there is no requirement of the opinion of assessors to be read to the parties. He added that, under the

said provisions, the assessors give their opinions to the Chairperson who makes his judgment. He said that the appellant is misconstruing the laws.

In rejoinder, the appellant stated that the respondent is misleading the Court by submitting that the appellant is introducing a new ground of appeal. He argued that, the 3rd ground of appeal is wider in its context. The analysis of evidence covers not only looking at evidence but seeing their correlation with other pieces of evidence and assessors opinion.

He contended that, in the course of composing judgment, the trial Tribunal had to have first the position of the wise assessors who were part to the hearing of the suit and relate the assessors' opinion with the evidence given by the parties to the suit. He concluded that, there is nowhere in the proceedings of the trial Tribunal which shows that the assessors were invited to give their opinion and what was the nature of the opinions.

Having heard both parties on the issue of assessors' opinion, I am of the view that, the appellant did not err in raising this issue as it is the point of law. I believe that, since the raised issue is a point of law, it can be raised at this stage of appeal. If it could not be raised by the appellant or respondent, then the Court could have raised it suo motu and direct the parties to address it.

In the circumstances like the present one where the point of law has been raised by one of the parties, I am of the view that it is the Court's duty to

look at the purported irregularity or non-compliance of the law, make a finding and decision on the same. The Court cannot disregard the errors or irregularities apparent on the face of records, whether it is raised by party to the case or observed by the Court suo motu.

By this, I will determine the point of law on whether the trial Tribunal complied with the provisions of procedural law while conducting the hearing and determination the Application No. 128/2013 which is the origin of this appeal.

The appellant has averred that the assessors' opinion were not read over to the parties as per the requirement of the law. The respondent's counsel argued back that the law does not require the opinion of the assessors to be read over to the parties but for assessors to give their opinion to the Chairperson who composes the judgment.

It is the requirement of the law that the assessors should give out their opinion before the Chairman composes his judgment. This is a requirement under Section 23(1) and (2) of the Land Disputes Court Act, Cap 216 R.E. 2019. This requirement is further elaborated in the regulations made under the above law, that is the District Land and Housing Tribunal, Regulations, 2003, Regulation 19(2) which provides thus;

> *"19(2); Notwithstanding sub-regulation (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 may give his opinion in Kiswahili."

Elaborating on this requirement, the Court of Appeal in numerous cases have established that, assessors' opinion must be in the record and must be read to the parties before the judgment is composed. (See the case of **Edina Adam Kibona vs. Absolom Sebe (Sheli),** Civil Appeal No. 286 of 2017, CAT, Mbeya (unreported).

The proceedings shows that on 10/7/2017, after hearing, the case was set for judgment delivery. However the judgment was not delivered because there was no opinion of the assessors. The records read as follows:

"Tribunal: the matter is here for judgment but the same is not ready as there is no opinion of my wise assessors, as they are indisposed. I fix another date".

On 23/8/2017, again the matter was set for judgment, however it was adjourned as there was no opinion of assessors. The records read as follows;

"Tribunal: The matter is here for judgment but I still do not have assessors to draft their opinion in this I fix another date".

The matter was fixed for judgment on 13/10/2017. On that date, the judgment was delivered. There was no any mention of the assessors opinion or explanation on whether the opinion were ready and were read

over to the parties before the Tribunal. However, the written opinion of the two assessors are attached in the records and shows that the opinion was signed by the two assessors on 12/10/2017, a day before the judgment.

The proceedings does not show if and when that opinion were read over to the parties as is the requirement of the law. As observed, the proceedings shows that the judgment delivery was postponed for several times waiting for the assessors opinion. However, the proceedings suddenly show the judgment delivery without explanation on when and where the assessors gave their opinion. I find that this was glaring irregularity which is on the face of record.

In the Tribunal's judgment, at page 4, the trial Chairperson said to concur with the opinion of the assessors. However as said earlier, the record of the proceedings did not show if the assessors were accorded the opportunity to give their opinion as required by the law.

In the case of **Edina Adam Kibona vs. Absolom Swebe (Sheli), (Supra),** the Court of Appeal held that;

> *"....the Chairman must require every assessor present to give his opinion. It may be in Kiswahili.* ***That opinion must be in the record and must be read to the parties before judgment is composed". (Emphasis mine).***

From the record of the proceedings, it is clear that, the trial Chairperson did not avail time to the assessors to give their opinion by reading the same to the parties, and parties were not given opportunity to know the nature of the assessors opinion. This shows that the trial Chairperson failed to comply with the requirements of the law and it renders the whole trial and the resulting judgment a nullity. For the above reason, I need not labour in determining on the rest of the grounds of appeal. The raised irregularity is sufficient to dispose the whole appeal.

In the circumstances, I find the glaring omission to be fatal and invoking the powers under Section 43(1) (b) of Land Disputes Courts Act, I quash the proceedings of the trial Tribunal and set aside the judgment and decree thereof. I further order an expedited fresh hearing of the matter before another Chairperson with a different pair of assessors. The said retrial to be conducted within a period of five months from the date of this court's judgment.

Appeal allowed. Each party shall bear its own costs because the retrial was caused by the trial Tribunal.

Order accordingly. Right of appeal explained.

A. MSAFIRI

JUDGE

28/6/2022