IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 246 OF 2022

(Originating from the Judgment and Decree in Land Application No. 232 of 2020 at Temeke District Land Housing Tribunal delivered on 13 October 2022, Hon. Sillas, Chairman)

SALMA HASSAN MWAHIMU ..... APPELLANT

VERSUS

INNOCENT HEZRON MWAIKAMBO.....1ST RESPONDENT
TANZANIA POSTAL BANK PLC.....2ND RESPONDENT

JUDGMENT

Date of last Order:20/02/2023
Date of Judgment:28/02/2023

K. D. MHINA, J.

In the District Land and Housing Tribunal ("the DLHT") for Temeke at Temeke in Land Application No. 232 of 2020, the appellant herein sued the respondents, Innocent Hezron Mwaikambo and Tanzania Postal Bank PLC, jointly and together. She claimed for a declaration that the mortgage of the matrimonial house without her consent was illegal; a perpetual injunction against the respondents restraining them from auctioning/trespassing the suit property; general damages; and costs for the suit.

The brief facts which led to the institution of Application No. 232 of 2020 before the DLHT are that on 23 February 2016, Innocent Hezron Mwaikambo, the first respondent, used as collateral the Residential Licence of his house located on Plot No. TMK/KEKO/MAG5/34, located at Keko Magurumbasi, within Temeke Municipality, guaranteed a loan of TZS 25,000,000/= which was advanced by the second respondent, Tanzania Postal Bank PLC to him (first respondent). That was the second time the second respondent advanced the loan facility to the first respondent.

The Residential Licence showed that the mortgaged property was registered under the sole name of Innocent Hezron Mwaikambo after the change of ownership from Enefa Karago Samwel, the first respondent's mother, on 23 September 2014. In the affidavit deponed by the first respondent to show his marital status, he averred that he was single. Upon being satisfied by the information furnished by the first that the mortgaged property was free from any incumbrance, the second respondent issued the loan facility on the terms and conditions agreed upon by the parties.

It is this background that prompted the appellant to rush and seek redress in the DLHT, alleging, among other things, that she has been the legal wife of the mortgagor since 20 July 2013; therefore, in law, her consent was to be sought and obtained before embarking on the mortgage transaction.

After the trial, the DLHT dismissed the suit and declared that the mortgaged property was not the matrimonial home. Aggrieved by that decision, the appellant preferred this Appeal, raising the following six grounds: -

1. *That the Honourable chairman erred in law and fact by not recording opinion of the assessors*
2. *That the Honourable chairman erred in law and fact by not reading opinion of the assessors*
3. *That the Honourable chairman erred in law and fact by not determining on the issue of whether the house in dispute was matrimonial home.*
4. *That the Honourable chairman erred in law and fact by deciding the matter based on unframed issues*
5. *That the Honourable chairman erred in law and fact by deciding the property in dispute is not matrimonial without considering the evidence as a whole.*

6. *That the Honourable chairman erred in law by taking into consideration views of the assessor who was not present throughout the proceedings*

At the hearing of the appeal, the appellant had the services of Mr. David Andindilile, learned counsel, while the 1st respondent was absent despite being duly served, and Ms. Lovenia Pilimbe, also learned counsel represented the second respondent.

When given the floor, Mr. Andindilile first abandoned the third, fourth, fifth, and sixth grounds of appeal. He combined grounds 1 and 2 and submitted that section 23 (1) and (2) of the Land Dispute Courts Act requires the Chairman of the Tribunal to sit with at least two assessors. Those assessors are required to give their opinion before the Chairman composes the decision.

He further submitted that Regulation 19 (2) of the Land Dispute Courts [The DLHT Regulations] G.N No 174 of 2003 requires the assessors to give their opinion in writing before the Chairman composes the decision.

Regarding the appeal at hand, he submitted that on the same date, DW1 testified at the DLHT, the Chairman delivered the Judgment

without reading the assessors' opinion. Therefore, it was doubtful even there were written opinion by assessors. To bolster his argument, he cited **Elilumba Eliezel vs. John Jaja**, Civil Appeal No. 30 of 2020 (Tanzlii), where the Court of Appeal held that;

> *"It has to be noted that the opinion given by assessors sitting in the Tribunal has to be recorded...."*

Elaborating further, Mr. Andindilile submitted that though on page 4 of the judgment it was recorded that one assessor named Mwasengela gave his opinion, the tribunal proceedings do not indicate if the Chairman recorded the opinion of the assessors. On this, he referred again to the cited case of **Elilumba** (Supra) on page 11, where the Court of Appeal held that when the opinion is not in the record, it is not enough for the Chairman to refer to that opinion.

He concluded by submitting that the effect of not recording the opinion of assessors as per the cited case **Elilumba** (Supra) vitiates the proceedings; therefore, he prayed for DLHT proceedings to be quashed and the decision to be set aside and re-trial to be ordered.

On his part, Ms. Pilimbe opposed the appeal and submitted that section 23 (3) of the LDCA provides an exception to the general rule and that the Chairman may proceed without the aid of assessors.

Therefore, she submitted that the Chairman was right to compose the Judgment because after concluding the hearing of the matter, the Chairman communicated with one assessor who was present and then right away composed the judgment.

In a brief rejoinder, Mr. Andindilile stated that it was true that there was one assessor but that assessor's opinion was not recorded in writing as per the law's requirements.

He rejoined that the argument that the Chairman communicated with the assessor is of no merit because of the absence of the written assessor's opinion.

Having heard the submission from advocates, the entry point in determining this appeal is section 23(2) of the Land Disputes Courts Act Cap. 216 R. E. 2019 (LDCA), which provides for the requirement of assessors' opinion. It reads:

(2) The District Land and Housing Tribunal shall be dully constituted when held by a Chairman and two assessors ***who shall be required to give out their opinion before the Chairman reaches the Judgment.*** *" [Emphasis Provided]*

Further, Regulation 19 (2) of the Land Dispute Courts [The DLHT Regulations] G.N No 174 of 2003 requires the assessors to give their opinion in writing before the Chairman composes the decision. The regulation reads:

"Notwithstanding the provision of 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" [Emphasis provided]*

From the above provisions of law, two issues arise;

One, it is mandatory for the assessors to give an opinion before the Chairman reaches a decision.

Two, the assessors must give their opinion in writing.

In addition to the above, in a number of cases, the Court of Appeal of Tanzania has already developed some fundamental guidelines on how the assessor's opinion should be and the procedure to follow.

One, the opinion must be availed in the presence of the parties to enable them to know the nature of the opinion and whether or not the Chairman has considered such opinion in the final verdict. See **Emmanuel Oshoseni Munuo vs. Ndemaeli Rumishaeli Massawe**, Civil Appeal No. 272 of 2018 (Tanzlii).

Two, the assessors' opinions must be read out to the parties. See **Peter Makuri vs. Michael Magwega**, Civil Appeal No. 107 of 2019 (Tanzlii).

Three, the assessors' opinion has to be recorded regardless of whether the Chairman agrees or disagrees see **Elilumb**a (Supra)

I now turn to the matter at hand and test if the procedure of recording the assessors' opinion passes the above guidelines.

Canvassing through the proceeding of the Tribunal (Handwritten), I found on 13 October 2022, after DW1 concluded to testify as the only

defence witness, the DLHT proceeded to compose and deliver the Judgment on the same date.

Further, I found that the Chairman proceeded with only one assessor. But when I had thoroughly gone through the record of the DLHT, I could not locate the assessor's opinion before the Chairman fixed the matter for Judgment.

Further, the records do not suggest if there was an opinion from the assessor availed and read to the parties.

In her submission, Ms. Pilimbe raised two issues; **one**, that there is an exception to the general rule under section 23(3) of the LDCA, and **two**, that after concluding the hearing of the matter, the Chairman communicated with one assessor who was present and then right away composed the judgment.

To start with the first issue, I wish to cite the relevant provision of law, i.e.,. section,23(3) of the LDCA which reads;

> *"Notwithstanding the provision 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."

That provision of law is the exception of Section 23(1) and (2) of the same Act, and that can be elaborated that the composition of the Tribunal has been pegged to be mandatory for a chairman to sit with not less than two assessors, but there is an exception under sub-section 3 of section 23, that in the event the circumstances cause the absence of one or both assessors the DLHT may proceed with the matter with one on in the absence of the assessors. Therefore, the exception here is in the composition of the Tribunal.

Further, if the Chairman proceeded with only one assessor, they must record the opinion of that single assessor as a mandatory requirement. The only situation where the DLHT can compose a decision without the assessors' opinion is when the matter proceeded in the absence of assessors.

In the matter at hand, the trial proceeded with a single assessor; therefore, it was mandatory for the DLHT to abide by the requirements of the law.

On the second issue, it is of no merit because, as I alluded to earlier, the law requires that the assessors' opinion be recorded; therefore, the oral communication between the Chairman and the assessors without putting the same in writing is of no value and merits.

On page 4 of the Judgment, the DLHT Chairman indicated that the assessor gave his opinion, but as I said earlier, the record does not indicate if the opinion was recorded in writing and read to the parties. The Court of Appeal in the cited case of **Elilumba** (Supra) already held the remedy in such a scenario as follows;

> " *Since assessors' opinion referred to by the Chairman cannot be located in the record of appeal, it is as good as not being there."*

Flowing from above, it is quite clear that the trial DLHT faulted the procedure of recording the assessor's opinion to the extent that the matter was decided without the aid of assessors while there was an assessor who participated in the trial.

As for the remedy for that fault, the decisions of the Court of Appeal in the cited cases of **Elilumba**, **Emmanuel Oshoseni Munuo,**

and **Peter Makuri** (Both Supra) are instructive that the fault is fatal as it vitiates the proceedings.

In the upshot, I find that the proceedings of the Tribunal were vitiated; therefore, a nullity and the resultant Judgment also a nullity.

Consequently, I quash the proceedings and set aside the Judgment and Decree of the DLHT for Temeke in Land Application No.232 of 2020. In lieu thereof, I order a re-trial before another Chairman and a new set of assessors. The appeal is allowed with costs.

I order accordingly.

DATED at **DAR ES SALAAM** this 28/02/2023.

K. D. MHINA

JUDGE