IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CIVIL APPEAL NO. 91 OF 2019

EXAUD GABRIEL MMARI *(As Legal and Personal Representative of the Estate of the Late Gabriel Barnabas Mmari)*.....**APPELLANT**

VERSUS

YONA SETI AKYO.....**1st RESPONDENT**

DR. FRANK LAZARO SETI *(Being an Apparent Legal Representative of the Estate of the Late Lazaro Seti Akyoo)* .....**2nd RESPONDENT**

WILLIAM LULUNGE.....**3rd RESPONDENT**

ROBERT NDOOMBO KITOMARI.....**4th RESPONDENT**

EMMANUEL ANDREW SIKAWA.....**5th RESPONDENT**

ZAKARIA NDESARIO KAAYA.....**6th RESPONDENT**

EMMANUEL STEPHANO KAAYA.....**7th RESPONDENT**

JOSEPHAT LEMILIA.....**8th RESPONDENT**

AMANIEL JOHN SAMA *(Being an Apparent Legal Representative of the Estate of the Late John Sama)*.....**9th RESPONDENT**

THE MALULA VILLAGE COUNCIL.....**10th RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Massengi, J.)

dated 20th day of September, 2016

in

Land Case No. 26 of 2012

.....

JUDGMENT OF THE COURT

30th Nov & 3rd Dec, 2021.

FIKIRINI, J.A.:

This appeal emanates from the decision of the High Court of Tanzania at Moshi dated 20thSeptember, 2016, in which the appellant sued the respondents claiming ownership of a piece of land measuring 980

acres. The High Court dismissed the suit with costs for being time barred. Aggrieved, the appellant has instituted five grounds of appeal.

For the reasons which will be apparent soon, the intended grounds of appeal will not be reproduced. On 30th November, 2021, when this appeal was called for a hearing, Mr. Elvaison Maro and Mr. Kelvin Kwagilwa, both learned counsel appeared for their respective parties.

Mr. Maro prayed for and obtained leave to address us on two points that were not amongst the grounds of the intended appeal, which he wanted this Court to look at, before the hearing of the appeal could commence: **one,** that the notice of appeal to this Court which the respondents had lodged against the overruled preliminary objection was not yet withdrawn, and **two**, on the propriety or otherwise of the proceedings of the trial court, which sat without the aid of assessors as required by the law.

Addressing us on the first point on the notice of appeal, Mr. Maro contended that during the pendency of the suit at the trial court, the respondents raised a preliminary point of objection that the suit was time barred. The court overruled the objection in its ruling dated 28th November, 2014. Aggrieved, they filed a notice of appeal on 12th December, 2014, as

reflected at page 168 of the record of appeal. When the suit came for orders on the 21st September, 2015, Mr. Laizer, learned counsel who appeared for the respondents on that day, sought an adjournment, informing the trial court of the respondents' intention to withdraw the notice of appeal lodged before the Court of Appeal. Following several adjournments, on 4th March, 2016, the suit was fixed for hearing and was heard from 16th to 18th March, 2016.

Meanwhile at no point before the hearing commenced the court was furnished with withdrawal order from this Court. According to Mr. Maro the High Court ceases to have jurisdiction to hear a suit once a notice of appeal has been filed in the Court of Appeal and no withdrawal order has been made to that effect. To bolster his point, he referred us to the case of **Milcah Kalondu Mrema v Felix Christopher Mrema,** Civil Appeal No. 64 of 2011 (unreported).

The second point on the propriety of the proceedings, Mr. Maro contended that from the commencement of the hearing, the trial Judge never sat with assessors nor addressed them (the parties) on the requirement or on the option of choosing whether to have trial with assessors or not, which was in contravention of GN. No.63 of 2001 and GN.

No. 364 of 2005, which amended the former. Mr. Maro remarked that the irregularity is fatal as it touches on the court's jurisdiction for being with incomplete Coram. He contended that this was due to the fact the Land Case No. 26 of 2012, was filed in the High Court of Tanzania Land Division which was established vide GN. No. 63 of 2001. Mr. Maro referred us to section 5F of the said GN that has illustrated on assessors: that a Judge must sit with not less than two assessors; though not bound by their opinion, but on departure from their opinion reason must be given.

He informed the Court further that even when GN. No. 63 of 2001 was amended by GN. No. 364 of 2005, sitting with assessors was made an option that can be exercised by parties and their counsel. Other requirements remained as before. He thus argued that since the trial Judge never sat with assessors and parties never exercised their right to decide whether to sit with assesssors or not, the court was hence not properly constituted. Fortifying his position he cited the case of **B.R. Shindika t/a Stella Secondary School v Kihonda Pitsa Makaroni Industries Ltd,** Civil Appeal No. 128 of 2017 (unreported).

He thus implored us to invoke our revisional powers and quash the proceedings and order for the hearing of the suit to start all over.

Mr. Kwagilwa supported the raised concerns by Mr. Maro, the reasons advanced and decisions cited in support of the stance on both points raised. He admitted that there was no proof that the notice of appeal lodged had been withdrawn by the time the hearing commenced. He also acknowledged that although time has passed, there was no other option aside from complying with a legal requirement that the trial starts all over.

Both these two points will not detain us much. We have pondered on the concurrent submissions by the counsel for the parties, and we agree there are irregularities. The notice of appeal lodged on 10th December, 2014, was still intact as there was no proof that this Court had ever ordered its withdrawal. The case of **Milcah Kalondu Mrema** (supra), cited by Mr. Maro, has well rounded up the argument. At page 5 of the ruling the Court observed that:

> *"It is now settled that once a notice of appeal to this Court have been duly lodged, the High Court ceases to have jurisdiction over the matter."*

It was not the first time this Court was faced with the situation in the **Milcah Kalondu Mrema** case (supra). In **Arcado Ntagazwa v**

Buyogera Bunyambo [1997] T. L. R. 242, which referred to **Milcah Kalondu Mrema,** this Court stressed:

> *"Once the formal notice of intention to appeal was lodggged in the Registry, the trial judge was obliged to halt the proceedings at once and allow for the appeal process to take effect or until that notice was withdrawn or was deemed to be withdrawn."*

Since there was nothing placed before the court, that the lodged notice of appeal has been withdrawn or was deemed to be withdrawn, then the notice of appeal lodged is considered to be still intact. Under the circumstances, the High Court jurisdiction ceased to warrant continuation with the hearing. The effect is that all the proceedings which commenced from 16th March, 2016, onwards were a nullity. This includes the judgment and the corresponding decree.

This point alone would have sufficed to nullify those proceedings, but we find it appropriate also to discuss the second point also on the propriety of the proceedings.

As submitted by Mr. Maro and conceded to by Mr. Kwagilwa, the High Court (Land Division) became operational following the High Court Registries (Amendment) Rules, 2001, G.N. No. 63 of 2001, which amended

the High Court Registries Rules, 1984. Under the rules the properly constituted court consisted of a Judge sitting with two assessors. Under the rule it was also a condition that a Judge should consider the assessors' opinion even though not bound by them. If there is a departure from the given opinion, a Judge is required to give reasons for doing so.

This was however, changed when GN. No 63 of 2001 was amended through GN. No. 364 of 2005, the High Court Registries (Amendment) Rules 2005. The amendment essentially revoked and replaced Rules 5F and Rule 5G. In the amendment, the replaced provisions are couched as follows:

> "5F (1) *Except where both parties agree otherwise the trial of a suit in the Land Division of the High Court shall be with the aid of assessors.*
>
> (2) *Where in the course of the trial one or more of the assessors is absent the Court may proceed and conclude the trial with the remaining assessor or assessors as the case may be."*

What can be deduced from the provision, is that sitting with the aid of assessors though a mandatory obligation, but counsel and parties have an option of choosing the hearing to be with the aid of assessors or not. Once the choice is that a Judge should sit with the aid of assessors, then

the same set of assessors who were present at the commencement of the proceedings should sit in till the end. And the names of the selected assessors must be reflected on the record of proceedings. In case one or both assessors are absent, then a Judge either proceeds with the remaining assessor or without if both are absent to the end of the proceedings. In the case of **B. R. Shindika t/a Stella Secondary School** (supra), the court nullified the proceedings in the Land Case No. 197 of 2005, for failure to observe the procedure in place as provided under Rule 5F of GN. No. 63 of 2001.

There was no indication in the present case that a Judge intended to sit with the aid of assessors nor parties opting for the proceedings to be conducted with or without the aid of assessors. Failure to comply with the requirements provided under Rule 5F and 5G resulted in a fatal irregularity that rendered the proceedings and judgment of the trial court a nullity.

As intimated earlier on in this judgment, both points raised vitiated the proceedings. We therefore invoke the revisonal powers vested on us under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and nullify and quash the proceedings from 16thMarch, 2016, when hearing of suit commenced. Accordingly, we order that the matter be remitted to

the High Court for the proceedings to recommence from where they were on 16th March, 2016. The appeal is thus allowed with an order that each party bears its costs.

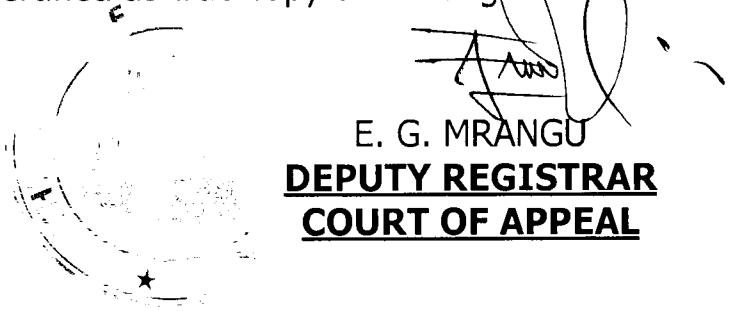
DATED at **ARUSHA** this 2nd day of December, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of Mr. David Kawa holding brief for Mr. Elvaison Maro, learned counsel for the Appellant and Mr. Kelvin Kwagilwa, learned counsel for the Respondent, is hereby certified as true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL