

IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: KWARIKO, J. A., LEVIRA, J.A And MDEMU, J.A.)

CIVIL APPEAL NO. 197 OF 2020

JASMINE AYOUB ALLY MOSHA APPELLANT

VERSUS

RAMADHANI ALLY MOSHA RESPONDENT

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

(Fikirini, J.)

dated the 24th day of August, 2016

in

Land Appeal No. 32 of 2015

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JUDGMENT OF THE COURT

10th & 19th July, 2023

MDEMU, J.A.:

This is a second appeal by one Jasmine Ayoub Ally Mosha challenging the decision of the High Court of Tanzania at Moshi which dismissed her appeal and declared a property situated at Plot No. 46 Block "A" Section IV located at Majengo area within Moshi Municipality to be the estate of the late Ally Abdallah Mosha. The latter was the father of the respondent and a father-in-law of the appellant. This was on 24th of August, 2016.

Facts as may be gleaned from the record of appeal are to the effect that, the respondent Ramadhan Ally Mosha filed a land case in the District Land and Housing Tribunal of Moshi (the DLHT) praying for a declaration that, he be pronounced the lawful owner of the suit premises. Thus, a suit registered as Land Application No. 76 of 2011 was preferred against the appellant herein and one Independent Court Broker (Independent Agencies & Court Brokers (Ltd)), not a party to this appeal. In the end and after having heard seven witnesses for the respondent and three witnesses for the appellant, the DLHT declared the suit property, as said, to belong to the estate of the late Ally Abdallah Mosha. It however, contrary to the judgment, decreed the respondent herein the lawful proprietor of the suit property. This was on 6th March, 2014.

The appellant appealed unsuccessfully to the High Court of Tanzania at Moshi in Land Appeal No. 32 of 2015. The High Court (Fikirini, J. as she then was) endorsed the decision of the DLHT by placing the suit property in the estate of the late Ally Abdallah Mosha. The learned Judge however faulted the learned trial Chairman of the DLHT for extracting a decree declaring the respondent the lawful owner of the suit property contrary to the dictates of the judgment.

This decision again aggrieved the appellant, hence, the instant appeal fronting nine grounds of appeal. For reasons apparent to follow shortly, we will not be able to reproduce the fronted grounds of appeal.

The appeal was placed before us for hearing on 10th July, 2023 in which parties were represented by Mr. Alfred Sindato, learned Advocate for the appellant and Mr. Patrick Paul, also learned Advocate who appeared for the respondent.

Before the commencement towards determination of the instant appeal, we prompted counsel for the parties to address the Court on the involvement of assessors during the trial of the suit in the DLHT. We were minded so because our perusal to the record of appeal on involvement of assessors revealed that, **one**, assessors kept on changing in the course of the trial; **two**, in certain instances, they never participated; **three**, their opinion were not read to the parties and **four**, the trial DLHT did not take into account opinion of assessors in its judgment. We thus thought to hear from the learned counsel on these observations we made and the resultant consequences thereof.

Mr. Sindato commenced and submitted that, assessors were not involved in certain stages of the trial and also in some instances, went on changing. He thought, under the circumstances, the trial is a nullity. Mr.

Paul on his part conceded to the observation of the appellant's counsel but fronted that, such irregularities never prejudiced rights of the parties. He had two observations in this stance. **One**, there are circumstances where the law allows trial to proceed in absence of assessors and **two**, in event opinion of assessors are available in the record of appeal, then this Court may invoke the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap.141 R.E. 2019 (the AJA) for correcting such irregularities. In the alternative, he urged us to nullify both proceedings of the trial DLHT and that of the High Court on first appeal and order a retrial before a different chairman and another set of assessors.

At the outset, we are not going to determine and pronounce ourselves on the latter concern of the learned counsel regarding the provisions of section 4(2) of the AJA because the learned counsel opted to drop his concern on further reflection regarding application of that provision of the law.

We have examined the record of appeal and dully considered the submissions of both counsel for the parties. In essence, regarding assessors, trials in the DLHTs' are governed by the provisions of section 23 and 24 of the Land Disputes Courts Act, Cap. 216 R.E. 2019 (Cap.216). As a matter of emphasis, the two sections are reproduced as 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.

24. 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.

In the above reproduced sections of Cap. 216, we have underscored that **one**, the DLHT is dully constituted when is composed of a chairman and not less than two assessors. **Two**, the trial may continue in absence

of certain number of assessors but not all. **Three**, assessors must give their opinion before delivery of the judgment. **Four**, the chairman must take into account opinion of assessors in the judgment. **Five**, in event of departure to assessors' opinion, the chairman must assign reasons in respect of such departure.

On that understanding, it is not disputed in the instant appeal that, the chairman sat with more than two assessors. As alluded to above, assessors kept on changing in the course of trial. We find this to be improper. Our observation in the record of appeal on this aspect is as described in the paragraph below.

In the record of appeal, on 10th August, 2011, assessors present were Dangaya and Kimita. On 11th April, 2012 Dangaya and Mchau attended in which the evidence of Ramadhani Ally Mosha (PW1) was received in their presence. Later on 21st May, 2012 assessor Mushi attended. This one was different from the above named assessors and continued to attend on 6th of August, 2012 and further on 17th September, 2012 whereby, assessor Sara joined in which the evidence of Hilazad Ally Samsawe and Zahara Ally Mosha, PW2 and PW3 respectively was taken in their presence. On 4th December, 2012, J. Mushi and J. Mmasy participated as assessors in the evidence of Asia Ally Mosha (PW4) and

Willy Benjamin Mosha (PW5). Later on 4th February, 2013, Mushi and Mmasy appeared again in which the evidence of Adamu Thomas Mille Mosha (PW6) was taken whereas J. Temu and S. Mchau attended in the DLHT on 8th April, 2013 during the testimony of Amiri Ally Moshi (PW7). However, the record of appeal reveals further at pages 98 through 110 that, the evidence of Jasmine Suleiman Ayoub (DW1) and Ally Ibrahimu Mosha (DW2) were taken in absence of any in the long list of assessors depicted in the foregoing analysis and the record of appeal as well.

We have endeavored mindful to retrieve the foregoing in the record of appeal on what transpired in the trial regarding participation of assessors for purposes of ascertaining compliance of the provisions of section 23 of Cap. 216 requiring the tribunal to be constituted by the chairman and not less than two assessors. In the instances we stated above, the Chairman sat with two assessors or more. But as we have demonstrated, assessors kept on changing and in the intervals of their attendance for trial, they were almost seven assessors namely: Dangaya, Kimita, S. Mchau, Mushi, Sara, Mmasy and J. Temu.

In our view, we do not think if, in the course of legislating the provisions of section 23 of Cap.216, the Legislature intended that as long as assessors in attendance are not less than two, then the tribunal is dully

constituted in terms of the law regardless of irregular changing of assessors in the trial, as in this case, where the number went up to seven and they never consistently participated in the trial. Our observation in this, is this that, there should be appointed assessors once and for all to participate in trial of a certain case whose number should not be less than two. Equally, are the appointed assessors if, one or some of them do not attend, then the chairman and the remaining assessor or assessors may continue and conclude proceedings in terms of the provisions of section 23 (3) of Cap.216.

The trial in the DLHT on this aspect was chaotic. It is difficult, in the circumstances, even to ascertain assessors appointed to participate in the trial. It is obvious therefore that, assessors were not fully involved throughout the conduct of trial. See **B. R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Ltd.** Civil Appeal No. 128 of 2017; **Emmanuel Christopher Lukumai v. Juma Omary Mrisho**, Civil Appeal No. 21 of 2013 and **Y. S. Chawalla & Co. Ltd. v. Dr. Abbas Teherali**, Civil Appeal No.70 of 2017 (all unreported). The consequences for noncompliance are stated in many decisions. For instance, in **Emmanuel Christopher Lukumai v. Juma Omary Mrisho** (supra) at page 4 of the judgment, the Court observed that:

The consequences of unclear involvement of assessors' vitiate the trial and it is rendered a nullity.

Being guided by the foregoing position of the law, we find and hold that, assessors in the present case were not fully involved in the trial, hence a nullity.

The second ground we need to resolve, as said, the defence evidence of Jasmine Suleiman Ayoub (DW1) and that of Ally Ibrahimu Mosha (DW2) was obtained in absence of assessors. As demonstrated above, in land disputes, attendance of assessors must be fully realized throughout the trial for them to be able to make informed and rational opinion. (See **Emmanuel Christopher Lukumai v. Juma Omary Mrisho** (supra).

The third component we observed regarding assessors involvement relates to failure of the trial Chairman of the DLHT to read opinion of assessors to parties. As stated in **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported), such opinion must be reflected in the record and as stated by the Court in **Sikuzani Saidi Magambo & Another v. Mohamed Roble**, Civil Appeal No.197 of 2018 (unreported), such opinion has to be read in presence of the

parties. In the judgment of the trial DLHT found at pages 119 through 122 of the record of appeal, it is not indicated if assessors were required to give their opinion leave alone the fact that such opinion were not read over to parties as legally required. In fact, in a five pages judgment of the trial DLHT, there is only one sentence at page 121 of the record of appeal which stating on assessors. It is in this way:

However as opined by the wise assessors there is no good evidence to convince this tribunal that the suit property was once bequeathed or inherited by the late Ayub Abdallah Masha a.k.a. Ayub Ally Masha.

In our view, this single sentence may not witness neither that opinion of assessors were solicited by the trial Chairman nor made available nor read in presence of the parties. The least we can say is that, the trial Chairman's judgment was arrived at in ignorance of opinion of assessors. This therefore offended the provisions of section 24 of Cap. 216 mandating the trial chairman to take into account opinion of assessors in his decision. Regarding this, in **Edina Adam Kibona v Absolom Swebe (Sheli)** (supra), at page 4 the Court observed:

*What is at issue in the present case was also at issue in **Ameir Mbarak and Azania Bank Corp Ltd. v.***

Edigar Kahwili, Civil Appeal No. 154 of 2015 (unreported). There, like here, the record of proceedings did not show if the assessors were accorded opportunity to give their opinion as required by the law but the chairman made reference to them in his judgment. We observed:

Therefore in our considered view, it is unsafe to assume the opinion of assessor which is not on the record by merely reading the acknowledgment of the chairman in the judgment. In the circumstances, we are of the considered view that, assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity.

On our part, the totality of all these is that, the trial DLHT reached its decision without assessors being required to give their opinion and they did not in essence give any. As we observed above, assessors also kept on changing in the course of trial and in certain instances, they did not attend at all. The trial Chairman equally did not take into account opinion of assessors. For the foregoing, we hold such irregularity to be fatal and vitiate the proceedings. In consequence thereof, we nullify proceedings of the trial DLHT, judgment and decree and further proceed to quash proceedings and judgment of the High Court. We thus invoke the

provisions of section 4 (2) of the AJA and order for a retrial of a case before another chairman with new set of assessors. As this land dispute was first filed in the year 2011, which is almost twelve years now, the trial tribunal is urged to act expeditiously. Each part shall bear own costs.

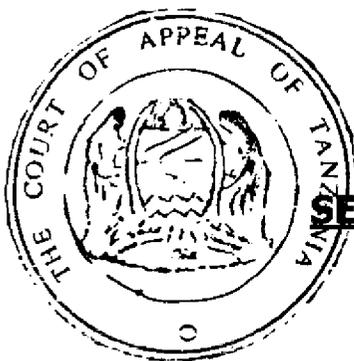
DATED at MOSHI this 18th day of July, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered on 19th day of July, 2023 in the presence of Mr. Alfred Sindato, learned counsel for the Appellant and the respondent present in person, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "E. G. Mrangu", is written over the printed name.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL