IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 506 OF 2021

WILLIAM VICENT MAEDA ..... APPELLANT

VERSUS

HAPPINESS PATRICK (suing through a next friend, Leokadia Gaspar Charahani) ..... **RESPONDENT**

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

(Makani, J.)

Dated the 6th day of December, 2017
in
Land Appeal No. 62 of 2016

JUDGMENT OF THE COURT

4th & 15th November, 2022

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Shinyanga (Makani, J) in Land Appeal No. 62 of 2016. The appeal to the High Court originated from the judgment of the District Land and Housing Tribunal for Shinyanga (the Tribunal) dated 22/7/2016 made in Application No. 90 of 2012.

The respondent, Happiness Patrick (a minor) who was suing through her next friend, her mother Leokadia Gaspar Charahani instituted the application in the Tribunal against the appellant, William

Vincent Maeda claiming that the appellant had trespassed into her Plot No. 1466 Block 'L' situated in Kahama town (the disputed property). She contended that, the disputed property was allocated to her daughter vide a Letter of Offer Ref. LD/KDC/20508 dated 8/8/2012. In the application, the respondent sought the following reliefs.

(i) An order evicting the appellant from the disputed property
(ii) An order directing demolition of structures erected by the appellant on the disputed property
(iii) Costs of the application; and
(iv) Any other reliefs which the DLHT may deem fit to grant.

On his part, through his written statement of defence, the appellant disputed the claims. He contended that he was the lawful owner of the disputed property, the same having been allocated to him by the Kahama District Council vide a Letter of Offer bearing the same Ref. No. LD/KDC/20508 as the one relied upon by the respondent. He said however, that ,the document was issued to him on 12/3/2012.

During the hearing of the application, the respondent and the appellant relied on the evidence of three and two witnesses

respectively. Having considered the oral and documentary evidence tendered by both sides, the Tribunal found that the respondent had failed to prove her claims. It found that, the disputed property could not be allocated to the respondent in her own name because she was a minor. It observed further that, in any case, the offer which was in the name of the respondent was revoked and the disputed property was thus properly allocated to the appellant. The Tribunal thus dismissed the application.

Aggrieved by the decision of the Tribunal, the respondent successfully appealed to the High Court. In her judgment, the learned first appellate Judge found; first, that apart from breaching the procedure of issuing a notice to the respondent before it revoked her Letter of Offer, Kahama District Council did not have the power of doing so because it is only the President who is vested with such powers. Secondly, because the authority which purportedly revoked the respondent's Letter of Offer was the one that issued it, having realized that the procedure for allocating land to a minor was not followed, it ought to have regularized the ownership by the respondent, of the disputed property by including the name of her guardian, instead of using the defect to revoke that granted right.

On the basis of the above stated reasons, the learned first appellate Judge declared the respondent the lawful owner of the disputed property. She was of the view that, since the respondent was the first to be allocated the disputed property, she had better title than the appellant whose Letter of Offer was issued after the purported revocation by the Kahama District Council.

The appellant was aggrieved by the decision of the High Court and therefore, preferred this appeal raising four grounds in his memorandum of appeal. After service upon him of the record of appeal, the respondent invoked the provisions of Rule 100 (1), (2) and (3) of the Tanzania Court of Appeal Rules and lodged a notice consisting of the grounds for affirming the decision of the High Court. For the reasons which will be apparent herein, we will not consider the grounds in both the memorandum and the notice of affirming the impugned decision. We do not therefore, find it necessary to state their substance.

At the hearing of the appeal, the appellant was represented by Mr. Kamaliza Kayaga while the respondent had the services of Mr. Frank Samwel, both learned advocates.

Before the appeal could proceed to hearing, we brought to the attention of the learned counsel for the parties, the irregularity which is apparent on the record of the Tribunal. At page 82 of the record, it is clear that the Chairman did not comply with Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 (hereinafter the Regulations). The proceedings dated 29/4/2016, the date on which the trial was concluded, read as follows:

> ***Mr. Lema, Advocate:*** *Your honour, we have no other witness to call upon. We pray to close evidence on our side.*
>
> ***Tribunal:*** *Prayer granted. Defence case closed.*
>
> ***Order:*** *1. Judgment on 31/5/2016.*
>
> *2. Parties and learned counsel duly warned.*

The record is silent as regards compliance by the Tribunal Chairman of reg. 19 (2) of the Regulations because the record of appeal does not contain the opinion of the assessors. However, upon the perusal of the original record of the Tribunal, the same was found to contain two documents shown to be the opinion of the two assessors

who sat with the Chairman. Given the noted defects, we required the learned counsel for the parties to address the Court on the effect of the irregularities.

Mr. Kayaga submitted that, the omission made by the Chairman is a fatal irregularity because, even if the assessors had given their opinion in writing, the same ought to have been read in the presence of the parties. In the circumstances, the learned counsel urged us to exercise the powers of revision vested in the Court by s. 4 (2) of the Appellate Jurisdiction Act (the AJA) to nullify the proceedings of the Tribunal, set aside the judgment and consequently also nullify the proceedings and quash the judgment of the High Court on account that the same have originated from the proceedings of the Tribunal which were nullity. On the way forward, the appellant's counsel prayed for an order directing that the application be heard *denovo* before another Chairman and new set of assessors.

On his part, Mr. Samwel conceded that there was a breach of reg. 19 (2) of the Regulation for failure by the Chairman to require the assessors to give their opinion, which opinion should have been read in the presence of the parties. The respondent's counsel argued however, that the omission is not fatal. He urged us to invoke the overriding

objective principle as well as s. 25 of the Act to disregard the irregularities.

As pointed out above, the record does not show that the Tribunal Chairman had complied with reg. 19 (2) of the Regulations. That provision states as follows:

> *"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."*

As shown above, despite the omission, the documents containing written opinion of the assessors were placed in the record of the Tribunal on a later date after the day which was initially fixed for delivery of the judgment. It is shown that the documents were written and filed on 3/6/2016 while the judgment was fixed to be delivered on 31/5/2016. Although in the judgment, which was delivered on 22/7/2016, the Chairman indicated that he considered the opinion of the assessors, the manner in which the two documents were filed in the record is not clear.

In any case, even if it is to be taken that the Chairman considered the opinion of the assessors because the documents appear to have

been written before the date on which the judgment was delivered, still it is obvious that the parties were not afforded the opportunity of having the knowledge of existence of those documents and the substance of their contents. Since transparency in court proceedings is a cornerstone of our justice delivery system, the omission is, in our considered view, an incurable irregularity because it breached the mandatory requirement of conducting the hearing with the aid of assessors, the requirement which is provided for under s. 23 (2) of the Land Disputes Courts Act.

In the case of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 (unreported), the Court observed as follows on failure by the Chairman to require the assessors to give their opinion in the presence of the parties:

> *"In view of the settled position of the law, where the trial has been conducted with the aid of assessors . . . they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed. We are increasingly of the considered view that, since regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in*

writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict."

- See also the case of **Dora Twisa Mwakikosa v. Anamary Twisa Mwakikosa,** Civil Appeal No. 129 of 2019 (unreported). Faced with the situation akin to the one in the present case, in the above cited case, the Court stated as follows:

"In the case at hand, as shown above, the record does not reflect that assessors were required to give their opinion in the presence of the parties after the closure of defence case. The written opinions of the assessors did however, find their way into the record in an unexplained way. Nevertheless, in his judgment, the Chairman stated that he considered those opinions. In our considered view, since the parties were not aware of existence of the assessors' opinions, we agree with the counsel for the parties that in essence, the provisions of Regulation 19 (2) of the Regulations were flouted."

Having found that the omission was fatal, we exercise the powers of revision vested in the Court by s. 4 (2) of the AJA and hereby nullify the proceedings of the Tribunal and set aside its judgment. Since the proceedings and the judgment of the High Court stemmed from the

proceedings of the Tribunal which were a nullity, we also hereby quash those proceedings and set aside the judgment. We consequently order a fresh trial before another Chairman and a new set of assessors.

Since the issue upon which the appeal has been disposed was raised by the Court, we make no order as to costs.

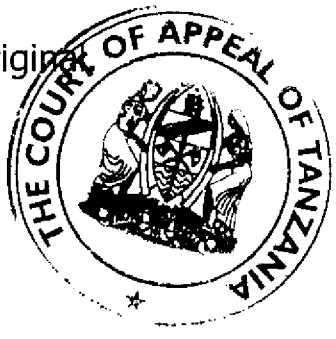
DATED at **SHINYANGA** this 11th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 15th day of November, 2022 in the presence of Mr. Frank Samuel holding brief for Mr. Kamaliza Kayaga, learned Counsel for the Appellant and Mr. Frank Samuel, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL