IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUGASHA, J.A., MZIRAY, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 286 OF 2017

EDINA ADAM KIBONA .....APPELLANT

VERSUS

ABSOLOM SWEBE (SHELI) .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Lukelelwa, J.)

Dated the 30th day of September, 2010
in
Land Appeal No 12 of 2008

JUDGMENT OF THE COURT

6th & 12th December, 2018

MWAMBEGELE, J.A.:

At the hearing of the present appeal, Mr. Justinian Mushokorwa, the learned counsel who appeared for the appellant, after a dialogue which took some considerable time, conceded to the concern raised by the Court on its own motion on the propriety or otherwise of the assessors not being fully involved at the trial in the District Land and Housing Tribunal. We

raised such a concern because it is apparent on the record of appeal that, when the Chairman of the District Land and Housing Tribunal (Emmanuel J. Ntenga) closed the case for the defence on 28.01.2009 as shown at p. 22 of the record of appeal, he did require the assessors to give their opinion as required by Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (hereinafter referred to as the Regulations) but proceeded to slate a date on which the judgment would be pronounced. The respondent, who appeared in person, unrepresented, had nothing useful to respond to the legal query. He just asked the Court to decide in terms of the dictates of the law.

We were confronted with an akin situation in the ongoing sessions in **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported). Mr. Mushokorwa, conceded that what we held in **Tubone Mwambeta** on the point is applicable in the present appeal as well. In the present appeal, we shall do no better that reiterate the position we took on the point in **Tubone Mwambeta** (supra).

We start our determination by stating that in terms of sub-sections (1) and (2) of section 23 of the Land Disputes Courts Act, Cap. 216 of the

Revised Edition, 2002 (hereinafter referred to as the Act), the District Land and Housing Tribunal is composed of one Chairman and not less than two assessors. We will let the two subsections speak for themselves; they read:

> *"(1) The District Land and Housing Tribunal established under section 22 shall be composed of one 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."*

The provisions of Regulation 19 (2) of Regulations impose a duty on the Chairman to require every assessor present at the conclusion of the hearing to give his opinion in writing before making his judgment. Regulation 19 (2) of the Regulations read:

> *"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."

What is at issue in the present case was also at issue in **Ameir Mbarak and Azania Bank Corp Ltd v. Edgar 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 the assessor which is not on the record by merely reading the acknowledgement of the Chairman in the judgment. In the circumstances, we are of a 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".

In **Tubone Mwambeta** (supra), in underscoring the need to require every assessors to give his opinion and their opinion be on record, we observed:

"In view of the settled position of the law, where the trial has to be conducted with the aid of the 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. ... 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."* [Emphasis supplied].

[See also: The **General Manager Kiwengwa Stand Hotel v. Abdallah Said Musa**, Civil Appeal No. 13 of 2012 (unreported)"].

Adverting to the case at hand, when the Chairman closed the case for the defence, he did not require the assessors to give their opinion as required by the law. On the authorities cited above, that was fatal irregularity and vitiated the proceedings.

We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, it terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed.

For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose.

For the reasons we have endeavoured to give, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 to nullify the proceedings and judgment of both

courts below. We order that, if the parties are still interested, an expedited fresh hearing before another Chairman and a new set of assessors be commenced.

It is so ordered.

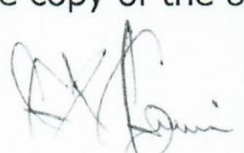
DATED at **MBEYA** this 10th day of December, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL