

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A. And KHAMIS J.A.)

CIVIL APPEAL NO. 85 OF 2021

KIKUMBI CHALLAH MRISHO1ST APPELLANT
RAMADHANI JUMA PAZI.....2ND APPELLANT

VERSUS

**NASSER JOSEPH (As Administratrix of the Estate of the late
Mwajuma Juma Chande).....RESPONDENT**

**(Appeal from Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Maghimbi, J.)

dated the 20th day of November, 2019

in

Land Appeal No. 139 of 2017

.....

JUDGMENT OF THE COURT

19th February & 7th March, 2024

KITUSI, J.A.:

This appeal presents one uncommon feature. It originates from the decision of the High Court in its appeal jurisdiction from the District Land and Housing Tribunal (DLHT) for Temeke. The matter involves a piece of land located at Mbagala Kibondemaji area within Temeke District and registered as Plot No. 437 Block 'B'. The basis of the complaint by the respondent at the DLHT was that the first appellant trespassed on that land and constructed a house thereon claiming that he had purchased it from the second appellant.

The DLHT entered judgment for the respondent by declaring her the rightful owner of that parcel of land. The appellants unsuccessfully appealed to the High Court. This is their second appeal, which raises four grounds for the determination by the Court.

Ahead of the date of hearing the parties presented written submissions. In the course of the submissions the appellants sought leave to argue two additional grounds of appeal and abandoned three of the original grounds. The prayer for arguing additional grounds was premised on rule 106 (3) (b) (ii) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The two additional grounds are that; the DLHT was not properly constituted for contravening section 23 (1) and (2) of the Land Dispute Courts Act Cap 216, hereinafter the Act, which requires proceedings before the DLHT to be conducted in the presence of assessors. The other ground is that, the proceedings at the DLHT are a nullity for omitting opinion of assessors. The appellants prayed for an order nullifying the proceedings, quashing the judgments of the DLHT as well as that of the High Court and order a retrial. Three of our previous decisions on this point were cited.

In her written submissions, the respondent conceded to the infraction and joined hands with the appellants in praying for an order of

retrial. Paradoxically, at the hearing, the respondent who was represented by Mr. Francis Stolla, learned advocate, changed course and retracted the concession. This is the aspect of the case which we had earlier observed as being uncommon.

Mr. Deogratius Ogunde Ogunde, learned advocate representing the appellants, drew our attention to several pages in the record of appeal showing no indication in the coram that the members or assessors were present. In one instance, there was only one member. To this, Mr. Stolla responded dismissively by submitting that the record did not indicate that the members were absent. In any event, he argued, the issue of assessors did not come up both before the DLHT and the High Court, so it was not addressed. The learned advocate further submitted that since the judgment of the DLHT refers to assessors, it suggests that they were present.

In our view, Mr. Stolla's new position is unmaintainable for a number of reasons. **One**, the written submissions which the learned advocate now wishes to abandon were drawn and filed by Clement E. A Kihoko of Rollette & Co. Advocates. Mr. Stolla has not complied with rule 24 of the Rules which requires notice of change of address to be given ahead of the date of hearing. Mr. Stolla would therefore be a

stranger to the proceedings if we were to take that strict view. **Two**, the retraction of the concession does not ryme with rules of fair hearing in that it takes the other side by surprise.

Three, we agree with Mr. Ogunde that in about four instances, hearing proceeded without an indication on the record that a member or members attended. We do not accept Mr. Stolia's argument that the members were in attendance simply because they were not recorded as being absent. This is defeated by the record indicating at page 48 that only one member attended on that occasion.

Given the above position, particularly the fact that the Court record speaks for itself in favour of the appellants' submissions, it becomes irrelevant whether or not the two additional grounds of appeal are conceded or not. We agree with Mr. Ogunde that the proceedings before the DLHT were a nullity even if this issue was not canvassed during the trial nor at the High Court, because this is a jurisdictional issue which can be raised at any time. We nullify the proceedings as we did in the cases cited to us by the appellants' counsel, that is; **Ameir Mbarak & Another v. Edgar Kihwili**, Civil Appeal No. 154 of 2015 and **Emmanuel Christopher Lukumai v. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013 (both unreported). We quash the judgments of

the DLHT and that of the High Court and set aside any orders arising from them.

This point is sufficient to dispose of the matter.

Having quashed the judgments and set aside the orders, we remit the record to the trial Tribunal for it to conduct an expedited retrial according to law. Costs shall abide the outcome of the retrial.

DATED at DAR ES SALAAM this 5th day of March, 2024.

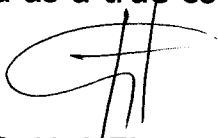
W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 7th day of March, 2024 in the presence of Mr. Deogratius Ogunde, learned Counsel for the Appellants, and also holding brief for Mr. Francis Stolla learned Counsel for the Respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL