IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT OF MOSHI

AT MOSHI

LAND CASE APPEAL NO. 07 OF 2019

(From the decision of the District Land and Housing Tribunal of Moshi District at Moshi in Land Case no. 111 of 2014)

ABDUL IBRAHIM LYIMO.....APPELLANT

VERSUS

SARAH IBRAHIM ABEID.....RESPONDENT

JUDGMENT

Date of Last Order: 19/6/2020

Date of Judgement: 20/10/2020

MWENEMPAZI, J

The appellant in this appeal is aggrieved with the decision of the District Land and Housing Tribunal of Moshi Hon. J, Sillas - Chairman delivered on the 11/3/2019. He therefore filed this appeal on the 24th May, 2019. He filed a memorandum of appeal with five grounds of appeal.

The respondent also filed a reply to the memorandum of appeal incorporating in it a notice of Preliminary objection.

The point raised reads as follows: -

> *"That, the Land Appeal no. 07 of 2019 is grossly time barred in terms of section 4(2) of the Land Disputes Courts Act, 2020 Cap 216 as amended by section 41(b) of the written Laws Miscellaneous*

an extension of time and show good cause for delay, and not to automatically assume such an extension of time.

He has cited the case of ***Augustino Elias Mdachi and two other vs Ramadhani Omari Ngaleba,*** **Civil appeal no. 270 of 270, High court of Tanzania at Dar es Salaam Registry** (unreported) where Hon. Muruke J, Observed that: -

> *"Though the law avails discretionary powers to court to enlarge time to appeal either before or after expiry of the period of limitation enlargement of time can only be sought in requisite application. In the event the law gives room for one to seek enlargement after expiry of Limitation period, that accommodates the fate of late appeals where one can lodge an application to seek enlargement and avail reasonable or sufficient cause for the delay"*

As to the applicability of section 19(2) of the Law of Limitation Act, Cap 89 R. E 2002, which gives discretionary powers to the court to disregard the days used in acquiring copies of Judgement while computing the period of Limitation, Hon. Mugasha, J (as she then was) in the case of ***Emmanuel Elikatao Mlai vs Omary frank Mshana and 2 others, Land Appeal no. 21 of 2011, High Court of Tanzania at Arusha*** held that:-

> *"Enlargement of time can only be sought in a requisite application as the court cannot be in appeal automatically exclude the time used to obtain copies of Judgement and Decree"*

That position was taken also by Hon. Dyassobera J in the case of ***Joseph Mushi vs Damson Katama Mivanga and two others, Civil Appeal***

Thus, in this case an application for extension of time was filed and registered as Misc. Application No. 7 of 2019. It was however not assigned instead directives were issued. The counsel for appellant has argued that in regard to the submission by the counsel for the respondent, the authorities cited have different circumstances from the present situation. There is no single case that had similar circumstances like the case at hand in terms of applying for extension of time, and then the court directives that an appeal be filed instead of an application for extension of time.

The counsel for the appellant has invited me to follow the wisdom in the case between ***The Registered Trusteed of the Marian faith Healing Centre@ Wanamaombi and the Registered Trustees of the Catholic Church Sumbawanga Diocese, Civil Appeal no. 64 of 2007, CAT at Dar es Salaam.*** In that case the court held a position that;

> *"Once the appellant makes such an application, the mere fact that he has made application but has not been furnished with a copy without any default in his part, is sufficient to entitle him to secure exclusion of the period from computing the period of limitation for appeal"*

I have read the record and the submission by the parties. I do accept the position requiring a party to apply for extension of time as the same is not automatic. However, the circumstances in this case are different and the appellant did not skip the requirement. Under the circumstances I find the objection not meritorious and overrule the same in order to uphold the

According to the counsel for the appellant it is not clear how the Honorable Chairman reached at such a conclusion; contents of a Judgment by District Land and Housing Tribunal are governed by the provisions of Regulation 20(1) (a) (b) (c) and (d) of the Land Disputes Courts (The District and Housing Tribunal) Regulations 2003. The regulation requires that the Judgement to consist finding on the issues. The counsel has cited cases of ***Edwin Isdori Elias vs Serikiali ya Mapinduzi ya Zanzibar***, [2004] TLR 297 and ***George Mingwe vs Republic*** [1989] TLR 20 insisting that Judgement must contain the point for determination, the decision thereon and the reasons for decisions.

All courts including the District Land and Housing Tribunals are enjoined by law to decide rights of parties upon scrutinizing the evidence and to give the reasons for their decisions. The counsel has submitted that the summary done by the Trial Tribunal Chairman on the 11th day of March, 2019 in the impugned Judgement was not an evaluation of the evidence for the two sides. The distinction between summary and an evaluation is notable upon considering the literal meanings of the two terms. To evaluate is to Judge or calculate the quality, importance, amount or value of something. On the other hand, to summarize is to express the most important facts or ideas about something. According to the counsel, the impugned Judgement is a summary because it lacks one part which is an evaluation.

In reply to the submission in support of the first ground of appeal, the Respondent's counsel has submitted that the submission by the appellant is

"The use of the Word "shall" does not necessarily mean that the provision in question is mandatory"

He has submitted that the cases ***of Edwin Isdori Alias vs. Serikali ya Mapinduzi ya Zanzibar [2004] TLR 297*** and ***George Mingwe vs. Republic [1989] T.L.R. 10*** which have been cited by the counsel for the appellant are distinguishable and they should be disregarded.

On the ground two and three were submitted jointly to the effect that the trial tribunal erred in law and fact by issuing judgement without the record of assessor's opinion and for failure to record opinions of assessors as part of the proceedings. The provisions of section 23(1) and (2) of the Land Courts Disputes Act provide as follows: -

"23 (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."

In this case, during the proceedings, when the case for defence had been closed on the 14th January, 2019 the Honourable chairman did not require the assessors to give their opinion as required by law. Though the opinion was not recorded, it was however referred in the Judgement at page 2. The counsel has cited the case of ***Ameir Mbarak & Another Vs. Edgar Kahwili, Civil Appeal No. 154 OF 2015, CAT at Iringa (unreported)***

where the court of appeal nullified the proceedings and the judgment of the District Land and Housing Tribunal and the Ruling of the High court after it found that, during the proceedings, assessors were not actively participating to the proceedings. Another case cited is that of ***Sikudhani Said Magambo & Another VS. Mohamed Roble, Civ. Appeal No. 197 of 2018, Court of appeal of Tanzania At Dodoma***.

The cited cases especially that of Ameir Mbarak& Another vs. Edgar Kahwili resembles the present case.

In the case of ***Edina Adam Kibona Vs. Absolom Swebe (Sheli), Civ. Appeal No. 286 of 2017, CAT at Mbeya (unreported)*** the court of appeal at page 6 had this to say: -

> *"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of the 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 judgement was composed, the same have no useful purpose."*

The requirement of the law as interpreted in the above decisions is that: -

1. Assessors must be given time to prepare and read their opinions in the presence of both parties.

2. It must be in the proceedings that, after the closure of defence case the trial chairman accords the assessors to prepare their opinion.

Failure to adhere to the two conditions renders the whole proceedings nullity.

The counsel for the respondent has submitted that it is true every District Land and Housing Tribunal is deemed to be properly constituted when composed by one chairman and not less that two assessors. And it is the requirement of the law that before the Chairman reaches the judgement assessors must give their opinion. The counsel referred the court to the provisions of section ***23(1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E.2002.***

In this case assessors gave their opinion in writing as per requirement of law, Regulation ***19(2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, G.N. No. 174 of 2003.*** The provisions read as follows: -

> *"Notwithstanding sub-Regulation (1) the Chairman shall, before making his judgement, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili".*

It is the submission of the Respondent that as far as assessors gave their opinion in writing immediately after the defence case was closed that being on 14th January, 2019, and the same is part of the record of the tribunal, absence of the same in the typed proceedings is a curable irregularity

under section 45 of the Land Disputes Courts Act, Cap. 216 R.E.2002. The same reads:

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice"*

The case of ***Ameir Mbaraka & Another vs Edgar Kahwili, Civil Appeal No. 154 of 2015, CAT AT Iringa*** (unreported) is distinguishable.

I will commence with the first ground of appeal. It is a complaint that justice was not seen to be done as the evidence was not evaluated by the Honourable chairman as to depict how he came into conclusion. According to the respondent all ingredients of the judgment were observed and it was not necessary that the Honourable Chairman should have outlined each stage. I have read the judgment; with due respect I agree that there was that skipping of the process. In my view, one should be guided by the judgement to the conclusion. That was not done, may be compliance was behind the thinking of the Honourable chairman. I understand that the chairperson heard the case himself and then he may have read the proceedings and composed the judgement. However, that is not shown in the judgment as to guide the parties. There is a conclusion and points that there was an opinion of the assessors.

On the other point, I was prepared to deal with the process of evaluation of the evidence as the court at the 1st appellate level is empowered to do so. However, the complaint in ground 2 and 3 makes it imperative to consider whether that will be practical and meet the needs for justice. The record in impugned proceedings and judgment show that the Tribunal Chairman referred to the opinion of assessors which is later found to be in writing in the proceedings. However, it is not clear in the record how the opinion found its way into the proceedings. The record shows that once the proceedings were closed on the 19th November, 2018 nothing was said on the opinion of assessors. An order for Judgement to be delivered on 14th January, 2019 was issued. On the date the counsel for the applicant informed the tribunal that they are there to receive the verdict. Then there is Judgement is scheduled on 12th February, 2019. The opinion in the written form is in the proceedings signed on 14th January, 2019 without showing how it came in. That indeed shows there is a problem in the proceedings. The process may have been thought later after consideration of the requirements of law; the record is not transparent enough to reflect how the opinion found its way to the proceedings. Under the circumstances I find the proceedings were vitiated from there.

The question is thus what should be the effect of that situation. The Counsel for the appellant has submitted that when there is no opinion of assessors the effect is to vitiate the whole proceedings and judgement of the District Land and Housing Tribunal. That is fundamental procedural error which has the effect of causing miscarriage of justice. The

case of ***Yakobo Magoiga Gichere Versus Penina Yusufu***, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania at Mwanza(unreported) where the Court of Appeal observed that: -

> *"With the advent of the Principle of Overriding objective brought by the Written Laws (Miscellaneous Amendments) (No. 3), Act No. 8 of 2018 which now requires the Courts to deal with cases justily, and have regard to substantive justice; section 45 of the LDCA, Cap. 216 should be given more prominence to cut back an over-reliance on procedural technicalities."*

The counsel has prayed the court to invoke its powers in terms of section 3A (1) (2) and 3B of Act No. 8 of 2018 and cure irregularity.

In determining the course to be taken after discovering the irregularity I will refer to two decision. First, once we agree the proceedings were marred by the irregularity of not requesting opinion from assessors and reflecting how it was received is the same as entering judgement without seeking the opinion of assessors, then the proceedings must be nullified as prayed by the counsel for the appellant. In the case of ***Ameir Mbarak and Azania Bank Corp Ltd versus Edgar Kahwili, Civil Appeal No. 154 of 2015, Court of Appeal of Tanzania at Iringa*** (unreported) where it was held that entering judgment without opinion of assessors is contravention of the mandatory requirements of section 23(1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002(the "LDCA") and that could not be waived under the curative provisions of section 45 of that law. Two, since the irregularity cannot be cured as suggested by the counsel for the Respondent then following the decision of the Court of

Appeal of Tanzania at Dar es Salaam in the case ***Civil Application No. 21/13/2017*** between ***Edgar Kahwili versus Amer Mbarak And Azania Bancorp Ltd***, the proper course of action is to issue an order for nullification of the proceedings and judgement of the District Land and Housing Tribunal. The nullification of the entire trial and the decision thereon does not deface the pleadings on record that the parties had filed and exchanged at the pre-trial stage. Thus, the case file is therefore ordered to be remitted to the trial tribunal for the trial to be conducted afresh and expeditiously before another Chairman and new set of assessors.

After consideration of the grounds as shown above, I find the matter at hand disposed and therefore I will not deal with ground four and five. The appeal has merit and is granted. Judgement of the District Land and Housing Tribunal is quashed and decree set aside and the case file is taken back for trial denovo as show in the proceedings paragraph. Since the error was occasioned by the tribunal it will be fair if each party will bear his own cost

It is ordered accordingly.

T. M. MWENEMPAZI
JUDGE
20/10/2020