THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 71 OF 2020
(Arising from Land Appeal No. 23 of 2020 of the District Land and Housing Tribunal for Mbeya)

ALHONCE SIWALE.....APPELLANT

VERSUS

ANDREA ANDIMILE KAMINYOGE.....1ST RESPONDENT
ISYA ANDIMILE KAMINYOGE.....2ND RESPONDENT
GRACE ANDIMILE KAMINYOGE..... 3RD RESPONDENT

JUDGMENT

Dated: 24th September & 4th November, 2021

KARAYEMAHA, J

This appeal stems from the decision of the District Land and Housing Tribunal for Mbeya (hereinafter the DLHT) in which the appellant Alhonce Siwale impugns its decision declaring that his counter affidavit contains prayers and staying execution of the decree while there was no any document intimating that the respondents namely, Andrea Andimile Kaminyoge, Isya Andimile Kaminyoge and Grace Andimile Kaminyoge, had appealed to the High court of Tanzania.

For obvious reasons to be apparent later, I will not reproduce the grounds of appeal or submissions by parties.

The brief facts material to this appeal, as can be gleaned from the record, are that in 2014 the respondents sued the appellant for threatening to evacuate them from plot No. 91 measuring 15 acres located at Songambele at Ukwile Village in Isandula Ward within Mbozi District. The respondents averred that they acquired that land from their father who also got it from the late Kibopile Kabuja since 1968. They continued cultivating in the same peacefully and undisturbed until 2013 when the appellant started claiming the land as his own. In 2012 the Ukwile Village Council granted them the Customary Right of Occupancy. They lamented that on 28/01/2014, after hearing the applicant's complaints only, the District Commissioner invalidated the Customary Right of Occupancy and ordered the OCD to summon them for further legal procedures. On 28/01/2014 the OCD through the OC-CID issued a temporally injunction via the Ukwile Village Executive Officer restraining the applicants from cultivating the land. On that base they prayed the DLHT grant the following orders:

1. *The declaration that the land in dispute belongs to the applicants.*
2. *The declaration that the respondent be the trespasser in the suit land.*
3. *General damages amounting to 10milion.*

4. *Costs of the application be borne by the respondent.*

5. *Any other reliefs this honourable Tribunal may deem fit.*

The appellant Written Statement of Defence encountered the respondents' claim. The appellant averred therein that the disputed land belonged to him and there are his relatives' graves. It was his defence that the applicants trespassed in his land hence denying him constitutional rights to own and enjoy it peacefully. He averred further that the grant of Customary Right of Occupancy was null and void. He consequently prayed the application to be dismissed with costs.

The DLHT found in favour of the respondent after dismissing the application with costs and directing the *"concerned authority"* to cancel the granted Customary Right of Occupancy.

Apparently, the respondents were aggrieved but failed to appeal in time. When the appellant moved the DLHT with an application for execution, the respondents through a series of application some of which were entertained by the High Court, challenged it. Lastly, the respondents lodged Application No. 23 of 2020 praying before the Hon. Tribunal to stay the execution of a decree in Application No. 23 of 2014 pending the hearing and determination of an intended appeal before the High Court. As usually the case, the appellant filed his counter affidavit. On receiving it, the respondents raised a two limb preliminary objection that 1st the

counter affidavit in supplementary affidavit filed by the respondent on 11/03/2020 was totally defective for combining a notice of preliminary objection, 2nd the counter affidavit filed by the respondent was fatally defective for containing prayers.

On preparing the judgment, I have painstakingly studied the proceedings of the main application, that is, Application No. 23 of 2014. As law directs, in land matters the Chairman is supposed to seat with not less than two assessors who are supposed to give their opinion as per section 23 (1) and (2) of the Land Disputes Courts Act, 2002 Act No. 2 of 2002. On reviewing the record, I noted that the trial Chairman sat with Kangele and Sara as assessors during the hearing of application No. 23 of 2014. The record reveals that on 16/12/2017, hearing of witnesses in the court room and at the *locus in quo* was completed. No sooner had the hearing of the matter had been concluded than the trial Chairman fixed a judgment date, that is, 30/03/2018. It is apparent that the there was no order for the assessors to prepare opinion. In view of that the record shows clearly that assessors did not give their opinion in court in the presence of the parties. The record reveals further that assessors wrote their opinion and filed the same with the DLHT but it is not indicated how they got in the tribunal's record. After noting this anomaly, I invited parties to prepare themselves and address this court on the noted anomaly.

In his brief submission, Mr. Ramsey Mwamakamba stated, among other things, that the record of the DLHT does not reflect that the Chairman gave a chance to assessors to give their opinion. To him, this meant that they did not actively and efficiently participate in the proceedings. He observed that this was a pure contravention of the law and it called for the retrial of the case.

On his side, the appellant was not ready for the order of the retrial because according to him errors were committed by the DLHT subordinate to this court. He was convinced that this court can take any other step than ordering a retrial.

I have dispassionately examined the record of the DLHT in the light of the learned counsel's oral argument. Obviously the DLHT flouted the procedures as far as the issue of participation of assessors in the trial of the case is concerned. The record of the DLHT clearly shows that the assessors took part in the trial, that is, during hearing of the matter. However, the record does not show that these assessors recorded their opinion and read it in the presence of parties before the chairman had composed a judgment as required by law. The proceedings of DLHT, specifically, page 49 of the typed proceedings show that when the Respondents concluded their case, the chairman went ahead to fix a date for judgment. He never invited the assessors to give their opinion as per

the requirement of the law. This was indeed a glaring omission. **Section 23 (2) of the Land Disputes Courts Act,** requires the assessors to give out their opinion before the chairman composes a judgment. It provides thus;

> *S.23 (1)* ***The District Land and Housing Tribunal*** *established under section 22* ***shall be composed of one chairman and not less than two assessors****; and*
> *(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****.*
> *[Emphasis supplied]*

This duty is further elaborated in the regulations made under the above law, that is, the **District Land and Housing Tribunal, Regulations, 2003. Regulation 19 provides thus:**

> *19 (2) 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.*
> *[Emphasis provided]*

In his judgment, the trial chairman is quoted referring to the assessors' opinion. But the question is, when and where did the assessors give their opinion? The answer to this question is certainly not available as the record of the trial tribunal is silent on this. This means there was

noncompliance with the provisions of the law cited above. The above provisions have been restated in many Court of Appeal decisions including the cases of ***Sikuzani Said Magambo & another v Mohamed Roble,*** (supra); ***General Manager Kiwengwa Stand Hotel v Abdallah Said Mussa***, Civil Appeal No. 13 of 2012, ***Ameir Mbarak and Azania Bank Corp. Ltd v Edgar Kahwili***, Civil Appeal No. 154 of 2015. In ***Edina Adam Kibona v Absolom Swebe (sheli),*** **Civil Appeal No. 286 of 2017, CAT, Mbeya sub registry (unreported)** the Court held that assessors' opinion must be given in the presence of parties.

In ***Ameir Mbarak,s*** case (supra) when the Court of Appeal noted that the record of the trial proceedings did not show if the assessors were accorded the opportunity to give their opinion as required by the law, but the chairperson only made reference to them in his judgment as in the current case, observed that:

> *"...in our considered view,* ***it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgment 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."***
> *[Emphasis added]*

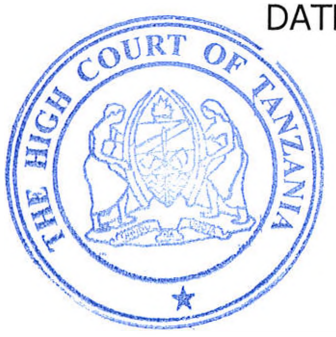
In the instant matter the original record contains written opinion of assessors. However the record does not show when and how did that opinion get into that record. This, in my humble view, suggests that the same was not given in the presence of parties. As such it serves no useful purpose. It is equally of no useful purpose for the chairman to refer to it in his judgment.

With that glaring omission, which in fact is total failure to comply with the requirements of the law, it means the whole trial and the resulting judgment were a nullity. Similarly, all subsequent applications and resulting orders were a nullity because they originated from proceedings and judgment which was null.

For those reasons, I declare both the proceedings and judgment of the trial tribunal a nullity and are accordingly nullified. The record should be remitted back to the trial tribunal for a fresh and expeditious trial before another chairman sitting with a new set of assessors.

Order accordingly.

DATED at **MBEYA** this **4th** day **of November, 2021**



J. M. KARAYEMAHA
JUDGE