

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 1 OF 2022

(Arising from decision of the District Land and Housing Tribunal for Babati at Babati in Land Application No. 31 of 2015)

HEVENLIGHT DAVID MULENGEKI.....APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK (NMB).....1ST RESPONDENT

DENIS LEONARD MULENGEKI.....2ND RESPONDENT

JULIANA JOHN MUNISI.....3RD RESPONDENT

WILY J. NJAU.....4TH RESPONDENT

LJ INTERNATIONAL LTD.....5TH RESPONDENT

Date of last order: 25/1/2023

Date of judgment: 6/3/2023

JUDGMENT

BARTHY, J.

This appeal arises from the judgment and decree of the District Land and Housing Tribunal for Babati sitting at Babati (henceforth the trial tribunal) in Land Application No. 31 of 2015.



Briefly, the facts culminating to the matter before the trial tribunal are that, the appellant and the second respondent herein are wife and husband respectively having contracted their marriage in 1994 as evidenced by Exhibit P1 which is a marriage certificate.

It is gathered further from the record that, the couple used to live in their matrimonial house situated on Block R. Plot No. 342 at Nyunguli Babati (hereinafter referred as the suit land).

The second respondent mortgaged the suit land to the first respondent for the loan of Tsh. 30,000,000/=. The second respondent failed to service the loan; the first respondent sought to exercise its powers under the mortgage. Hence, the fifth respondent was engaged who disposed the suit land by public auction and the same was purchased by the fourth respondent.

The appellant claimed that, being the wife of the second respondent, she never consented the suit land to be mortgaged to the first respondent.

The trial tribunal dismissed the application for lack of merits. Being resentful of the trial tribunal's decision, the appellant has preferred the instant appeal raising three grounds of appeal as follows;



- 1. That, the trial tribunal grossly erred in law and facts for failure to consider stronger evidence adduced by the appellant versus the one adduced by the respondent hence ended to erroneous and unjust decision.*
- 2. That, the trial tribunal grossly erred in law and facts by determining the matter in favour of respondents without following proper procedures.*
- 3. That, the tribunal grossly erred in law and fact for failure to observe the law properly.*

The appellant therefore prayed for this appeal to be allowed with costs.

When the appeal was called on for hearing, the appellant appeared through Mr. Tadey Lister learned advocate. The second respondent appeared through Mr. Festo Jackson learned advocate. The first, third, fourth and fifth respondents never entered appearance despite being duly served.

The hearing of the appeal proceeded orally and the matter was set for judgment. However, in the course of composing the judgment I came through some pertinent issues apparent on the record which called this court to re-open the proceedings.

I therefore invited the parties to address the court on the propriety or otherwise of the proceedings before the trial tribunal on the following issues;



1. *Whether the trial chairpersons assigned reasons for the change of hands*
2. *Whether the change of assessors in the course of hearing vitiate the proceedings.*
3. *Whether the absence of opinion of the assessors is fatal.*

Mr. Tadey Lister the learned counsel for the appellant addressing the court on the first issue, he contended that there were almost five chairpersons who presided over this matter before the trial tribunal.

Among the presiding chairpersons, two of them heard the matter partly. Whereas, Hon. C. P. Kamugisha who heard the plaintiff's side and Hon. H. Mwiwaha heard the defence side.

It was argued by Mr. Tadey that, none of those chairpersons had assigned reasons for taking over the matter. He went on to state that, the Land Disputes Courts Act [CAP 216 R.E 2019], (the Act) and Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN 174 of 2003 (the Regulations) are silent as to the change of chairpersons.

However, under Section 51 (2) of the Act it states, where there is *lacuna* in the Regulations, the recourse should be Civil Procedure Code [CAP 33 R.E 2019], (the CPC). Therefore, under Order XVIII Rule 10 (1) and (2) of the

CPC it requires the presiding officer to finalize the matter. Should there be the failure to determine the case to its finality for whatever reason, then the successor must give reason for taking over the matter.

His arguments were supported with case authorities of **Sebastian Kafuba and 2 others v Sharifu Nuru Muswadiku** Consolidated Appeals No. 12 and 16 of 2022 HC at Bukoba (unreported), where the court referred to the case of **Kinondoni Municipal Council v. Q Consult Ltd** Civil Appeal No. 70 of 2016, on the interpretation of Order XVIII Rule 10 (1) and (2) of the CPC that an officer who does not assign reasons lacks jurisdiction.

It was further submitted by Mr. Tadey that, in the instant matter, all five presiding chairpersons did not give reasons for taking over the matter and therefore makes the proceedings nullity and the matter needs to be retried before another chairperson with new set of assessors.

Submitting on the second issue concerning the change of assessors, Mr. Tadey contended that, the issue is governed with Section 23 (2) of the Act, which requires the trial tribunal to sit with not less than two assessors; who at the end of the trial are required to give their opinion.



He went on to state that, Section 23 (3) of the Act provides for an exception. If there were two assessors and one of them or both had failed to appear the chairperson may proceed with one or by himself to the end. He further argued that, the record must show the presence or absence of the assessors.

He went on stating that, the record of the trial tribunal shows the case started with assessors namely Mrs. Matowo and Mr. Mohamed Chobu. However, from 31/8/2021 to 3/11/2021 the records show there was a new set of assessors different from the previous one. As the record indicates that there was a change of the assessors, therefore there was non- compliance of the law.

To reinforcement his arguments Mr. Tadey referred to the case of **Erica Chrisostom v Chrisostom Fabian & another** Civil Appeal No. 137 of 2020 Court of Appeal at Bukoba (unreported) whereby on page 7-12 the court held that, when there is a new set of assessors it makes the proceedings nullity for failure to abide to Section 23(3) of the Act.

Hence, Mr. Lister was of the view that the proceedings of the trial tribunal should suffer the similar fate.



The learned counsel for the second respondent Mr. Festo Jackson, on his submission he supported the arguments by Mr. Tadey and further made reference to the case of **M/S George Centre Ltd v The Honourable Attorney General**, Civil Appeal No. 29 of 2016 which was quoted in the case of **Kinondoni Municipal Council v Q Consult Ltd** whereby the Court expounded on the provisions of Order XVIII Rule 10 of the CPC.

He further maintained that; the record of the trial tribunal clearly shows that there was a change of chairpersons without assigning any reasons. Therefore, it makes the whole proceedings the nullity.

On the other issue concerning the omission for the assessors to give their opinion, Mr. Jackson referred to the case of **Zubeda Hussein Kayagali v Oliva Gaston Luvakule & another**, Civil Appeal No. 312 of 2017 Court of Appeal at Tabora (unreported) where it was held that, the absence of assessors' opinion vitiates the whole proceedings.

Mr. Jackson was therefore of the view that the remedy available is to nullify the whole proceedings and the decision of the trial tribunal.



Having heard the learned counsels' submissions, where basically they both pointed out the irregularities on the proceedings of the trial tribunal. It is now the duty of the court to address the issues raised;

To begin with the first issue as to whether the change of assessors in the course of hearing vitiate the proceedings.

As rightly pointed out by Mr. Tadey and Mr. Festo the learned counsel for the parties that, the records of the trial tribunal clearly show there was the change of the set of the assessors in the course of the hearing of the matter.

The records of the trial tribunal show that, the matter was at first assigned to Hon. T. J. Wagine Chairperson. Before the hearing had commenced Hon. C. P. Kamugisha took over and commenced hearing in which he recorded the evidence of PW1.

The record reveals further that, after several adjournments the matter was subsequently taken over by Hon. M. S. Mahelele chairperson. However, before hearing had resumed, Hon. F. Mdachi took over the matter.

After several adjournments, the matter was then before Hon. H. E. Mwihava chairperson who recorded the evidence of DW1 and DW2 and finally composed and pronounced the judgment.

However, no reasons whatsoever was assigned by such abrupt taking over of the matter between different chairpersons as I have indicated above.

The irregularity referred above hinges on the dictates of Order XVIII Rule 10 (1) of the CPC which stipulates as follows:

"10 (1) Where a judge or magistrate is prevented by death; transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it "

The said provision was amplified in the case of **Leticia Mwombeki v Faraja Safarali & 2 others** Civil Appeal No. 133 of 2019 Court of Appeal at Dar es Salaam (unreported) where the court had the following to say;

The essence of the cited order is to ensure that trial commenced by the trial Judge or Magistrate is completed by the same presiding judicial officer and in case he/she is unable, it is incumbent on the successor judicial officer to assign reasons for the continuation of the trial of a partly heard case. The rationale behind is that, the one who sees

and hears the witness is better placed to assess the credibility of such witness which is crucial in the determination of the case before the court and furthermore, the integrity of judicial proceedings hinges on transparency without which justice may be compromised.

The need to assign reasons for taking over of the partly heard matter was underscored in various decisions including; **Ms. Georges Centre Limited Vs Attorney General and Another**, Civil Appeal No. 29 of 2016, **Kajoka Masanga v Attorney General and Another**, Civil Appeal No. 153 Of 2016, **Mariam Samburo (Legal Representative of The Late Ramadahani Abas v Masoud Mohamed & Others**, Civil Appeal No. 109 of 2016 (all unreported).

The emphasis made from these decisions was that, a successor judge or magistrate has an obligation to put on record why he/she has to take over the case that is party heard by the predecessor. In the referred decisions all the subsequent proceedings before the successors took over without assigning reasons were nullified.

In the instant case the records are clear that no reasons were offered for the change of hands of the presiding chairmen before the tribunals. The irregularity is fatal and contravened with the requirement of the law. As



pointed out by the learned counsels, since the anomaly is fatal the only remedy is to nullify the whole proceedings and judgment of the trial tribunal.

Turning to the second issue on the change of assessors, both learned counsel had pointed out the irregularity on the proceedings of the trial tribunal for having two different sets of assessors in this matter.

The records of the trial tribunal show that when the matter commenced with the hearing, the set of two assessors who appeared on records were **Mrs. Matowo** and **Mohamed Chobu** in whom the evidence of PW1 was taken in their presence.

The record reveals further that on 10/3/2020 when the matter was called on for hearing Mrs. Matowo was bereaved and went to attend the funeral of her deceased brother, while the other assessor his contract had expired.

On the subsequent dates when the matter was called on for hearing there was a new set of assessors namely **M. Barie** and **J. Hyera** who presided over the matter to its finality. The record is however silent as to the whereabouts of **Mrs. Matowo**.

In determining whether it was proper for change of assessors in the course of the trial, the provision of Section 23(1) and (2) of the Land Disputes Courts

Act [CAP 216 R.E 2019], (the Act) for the DLHT to be properly composed, the chairperson is required to sit with not less than two assessors.

Under Section 23(3) of the Act it provides that, where one assessor is unable to proceed with the matter, the trial chairperson is required to proceed with the remained assessor and where both assessors are unable to proceed with the matter then the chairperson is required to proceed alone with the determination of the matter.

In the instant matter after the contract of one assessor had expired the trial tribunal had to continue with the remained assessor namely Mrs. Matowo. It was improper for the trial tribunal to introduce new assessors who never participated in the trial from the beginning.

This position is fortified by the decision of the Court of Appeal in the case of **B. R. Shindika t/a Stella Secondary School v Kihonda Pitsa Makaroni Industries Ltd** Civil Appeal No. 128 of 2017 Court of Appeal of Tanzania at Dar Es Salaam (unreported), in which the court nullified the proceedings for introduction of new assessor.



It is therefore clear the matter before the tribunal was presided over with different set of assessors which was the fatal irregularity and occasioned the miscarriage of justice.

On the third issue regarding the omission for the assessors to give their opinions, it was also supported by the counsels for both sides that the records of the trial tribunal had clearly shown there was no opinions of the assessors and no reason was stated by the trial chairperson for the same.

The record of the trial tribunal is consciously silent on the aspect of the assessors' opinion. No reason has been stated as to why there was no such opinion.

The form and language in which the assessors are required to give their opinion is provided for under Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN 174 of 2003 (the Regulations) which provides:

*"Notwithstanding sub-regulation (1) the Chairman shall before make 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 Kiswahiii".*

[Emphasis added].



The decision of the Court of Appeal in the case of **Emmanuel Oshoseni Munuo v Ndemaeli Rumishaeli Massawe**, Civil Appeal No. 272 of 2018 at Arusha (unreported) making reference to the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported), the Court while dealing with similar situation had this to say:

*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 added].*

Failure to record the opinion of assessors makes the decision a nullity. As decided in the case **Emmanuel Oshoseni Munuo v Ndemaeli**

Rumishaeli Massawe [supra], where the proceedings of the trial tribunal were nullified and the matter was ordered for retrial as there was a non-compliance of the law regarding not recording the opinion of the assessors, similar to the present matter.

Having pointed out the glaring irregularities and omissions above, which I find them to be fatal and the only remedy is to nullify the judgment, decree and all the proceedings of the trial tribunal and order a retrial before another chairperson with a new set of assessors.

I further order that new hearing be expedited as soon as possible owing to the fact that the matter has been pending in court since 2015.

As the omissions leading to the nullification of the judgment, decree and proceedings were pointed out by the court, I make no order as to costs.

I order accordingly.

DATED at **Babati** this 6th day of March, 2023.



G. N. BARTHY,
JUDGE
6/3/2023

Right of appeal is explained.



G. N. BARTHY,

JUDGE

6/3/2023



Delivered in the presence of Mr. Philemon Maige for the appellant and also holding brief of Mr. Festo Michael the counsel for the second respondent, the appellant and the second respondent in person.