IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: JUMA, C.J., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 137 OF 2020

ERICA CHRISOSTOM ..... APPELLANT

VERSUS

CHRISOSTOM FABIAN
JUSTINIAN JOHN ..... **RESPONDENTS**

(Appeal from the Judgment of the High Court of Tanzania, at Bukoba)

(Mwangesi, J.)

dated the 1st day of June, 2016
in
Land Appeal No. 34 of 2014

.....

JUDGMENT OF THE COURT

23rd & 27th August, 2021

MWAMBEGELE, J.A.:

The appellant Erica Chrisostom and the first respondent Chrisostom Fabian are, respectively, wife and husband. Way back in 2011 the first respondent sold to the second respondent, Justinian John, a parcel of land situate at Bwoki Village in Bugandika Ward within the Misenyi District of Kagera Region at a tune of Tshs. 5,000,000/=. As it were, the appellant was not involved in the transaction. Upon learning the existence of the

transaction, the appellant lodged Land Application No. 67 of 2012 in the District Land and Housing Tribunal for Kagera at Bukoba to challenge the sale. One of the grounds to challenge the sale was that the first respondent could not legally dispose of the disputed land as he was a mentally challenged person.

The District Land and Housing Tribunal (henceforth the Tribunal) decided in favour of the appellant on the ground that the sale agreement between the respondents was null and *void ab initio* for the reason that at the time of conclusion of the agreement, the first respondent was of unsound mind thereby making him legally incompetent to enter into any valid contract. Similarly, the Tribunal nullified the agreement on the ground that the disputed land was a matrimonial property which could not be disposed of without the consent of the appellant. The appellant was ordered to reimburse the purchasing price to the second respondent within ninety (90) days of the order.

The decision of the Tribunal did not amuse the appellant. She thus lodged an appeal to the High Court of Tanzania at Bukoba vide Land Appeal No. 34 of 2014. Her appeal to the High was premised on two grounds. In the first ground, the appellant complained that, the Tribunal

erred in law in ordering a reimbursement of the purchase price. In the second ground, the appellant complained that the Tribunal erred in law in denying the appellant an order for costs. Having heard the parties, the first appellate court upheld the decision of the Tribunal and, consequently, dismissed the appeal.

Undeterred, the appellant, through Mr. Mathias Rweyemamu, learned advocate, from a law firm going by the name of Equator Law Chambers, has come to us on this second and final appeal. Her appeal has been premised on four grounds of complaint. However, for reasons that will come to light shortly, we shall not reproduce all of them.

When the appeal was called on for hearing on 23.08.2021, the appellant appeared and was represented by Mr. Mathias Rweyemamu, learned advocate. The second respondent appeared in person, unrepresented. The first appellant did not enter appearance. The notice of hearing which was effected on him shows that he was served.

Given that the first respondent defaulted appearance despite being duly served, Mr. Rweyemamu prayed that the hearing of the appeal proceeded in his absence in terms of rule 63 (2) of the Tanzania Court of

Appeal Rules (henceforth the Rules). The second respondent, initially, resisted the prayer stating that the first respondent is the one who disposed of the disputed land to him thus hearing the appeal in his absence might be detrimental to him. However, upon a short dialogue and being enlightened on the provisions of rule 63 (2) of the Rules and the consequences of nonappearance of parties, the second respondent agreed to follow the letter of the law. In consequence, we granted Mr. Rweyemamu's prayer and proceeded to hear the appeal in the absence of the first respondent.

Mr. Rweyemamu had earlier on lodged in the Court written submissions in support of the appeal in terms of rule 106 (1) of the Rules which he sought to adopt as part of his oral address before us. However, Mr. Rweyemamu, in his oral address before us clarified only on the foUrth ground which is:

> *"That the High Court grossly erred in law for not nullifying the proceedings of the trial Tribunal entered without maintaining consistency of Tribunal assessors and trial chairman which vitlated the proceedings."*

The learned counsel opted to take that course of action, and to our mind rightly so, because the ailment in the ground, if successfully argued, would pre-empt the rest of the grounds, which would be argued in the alternative.

On the fourth ground, the learned counsel submitted that the trial was conducted with the assistance of assessors as required by the law but that those assessors kept on changing throughout the entire trial. He submitted that at the beginning of the trial on 26.07.2012, the Tribunal was constituted by Hon. R. L. Cheya as Chairman and Messrs. Bwahama and Mpanju during which the issues were framed. However, on the following hearings, the assessors kept on changing as follows: on 24.10.2012; Annamary and Kawegere, on 23.01.2013; Annamary and Kawegere, 22.08.2013; Nyakato and Mpanju and, finally, on 10.12.2013 Nyakato and Kawegere. Mr. Rweyemamu submitted that the fact that Bwahama and Mpanju commenced with the trial but did not take it to the end and other assessors chipped-in thereafter, the provisions of section 23 (1) and (3) of the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002 (henceforth the Land Disputes Courts Act), were blatantly

flouted. That was a fatal ailment which vitiated the whole proceedings, he submitted.

Having so clarified on the foUrth ground of appeal, the learned advocate implored us to nullify the proceedings and order a fresh trial before another chairman and a new set of assessors.

Responding, the second respondent objected to the prayer for a retrial by Mr. Rweyemamu. He submitted that the hearing proceeded in the presence of assessors as required by law, the witnesses were called and the verdict was given. He prayed that the ground had no merit at all and prayed that the appeal be dismissed.

We have considered the contending arguments by the parties to this appeal in the light of the record of appeal. Indeed, the record bears out that the Tribunal was presided over by Hon. R. L. Cheya throughout the trial assisted by different assessors. As rightly submitted by Mr. Rweyemamu, the matter started by framing up issues on 26.07.2013, during which the Tribunal was constituted by Hon. R. L. Cheya as Chairman and Messrs. Bwahama and Mpanju. Thereafter, Hon. Hon. R. L. Cheya continued to chair the Tribunal but the assessors sitting with him

kept on changing. At the end, the assessors who commenced with the hearing were not the ones who gave opinion to the presiding chairman. We agree with Mr. Rweyemamu that this offended against the provisions of section 23 (2) and (3) of the Land Disputed Courts Act. We shall demonstrate.

We start with section 23 (2) and (3) of the Land Disputed Courts Act. For easy reference, we reproduce it hereunder:

> *"(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.*
>
> *(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence"*

In terms of subsection (3) of section 23 of the Land Disputes Courts Act reproduced above, the two assessors who commenced with the hearing

of the matter ought to have proceeded with the hearing up to the end where, in terms of subsection (2) of the same section, they would give their opinion. It is also clear in subsection (3) that if, for some compelling reason, one member could not be able to proceed with the hearing, the chairman and the remaining assessor, if any, would continue and conclude the proceedings notwithstanding the absence. As stated above, this is not the case in the matter before us. What is the effect of this shortcoming? It is to this question to which we now turn.

The effect of failure to comply with the letter of section 23 of the Land Disputes Court Act is not a virgin territory. It has been traversed by the Court before. In the unreported **Ameir Mbarak and Azania Bank Corp Ltd v. Edgar kahwili**, Civil Appeal No. 154 of 2015, like in the present case, the District Land and Housing Tribunal was presided over by a chairman who was sitting with two assessors. However, the sets assessors changed in the proceedings. The Court held that the course of action was a fatal irregularity to the proceedings. It vitiated the whole proceedings and was not curable under section 45 of the Lands Disputes Courts Act. The Court observed at p. 9 of the typed judgment:

"Since neither of the two sets of assessors were involved throughout the entire trial, the trial was not conducted by a duly constituted Tribunal as required by section 23 (1) and (2) of the Land Disputes Courts Act ...."

Having acknowledged the tenor and import of the provisions of section 23 (3) of the Land Disputes Courts Act, the Court relied on its previous unreported decisions in **Awiniel Mtui and 3 Others v. Stanley Ephata Kimambo and Another**, Civil Appeal No. 97 of 2015 and **Samson Njarai and Another v. Jacob Mesoviro**, Civil Appeal No. 98 of 2015 to articulate that:

"The consequences of unclear involvement of assessors in the trial renders such trial a nullity."

The Court then proceeded to nullify the proceedings and judgment of the District Land and Housing Tribunal as well as those of the High Court on first appeal.

We encountered a somewhat identical scenario in **B. R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017 (unreported) and followed **Ameir**

Mbarak (supra). In **B. R. Shindika** (supra), in our decision which was pronounced to the parties on as recent as 19.06.2021, we held:

> *"... once trial commences with a certain set of assessors, no changes are allowed or even abandonment of those who were in the conduct of the trial. ... Cases tried with the aid of assessors had to be concluded with the same set of assessors ... unless the circumstances stated under Rule 5F (2) above applied."*

For the avoidance of doubt, rule 5F of the High Court Registries (Amendment) Rules 2001 as amended GN. No. 364 of 2005 to which the Court made reference, reads:

> *"(2) Where in the course of the trial one or more of the assessors is absent the Court may proceed and conclude the trial with the remaining assessor or assessors as the case may be."*

In view of the authorities we have cited above, we find and hold that the shortcoming of changing assessors in the course of the trial was fatal and vitiated the proceedings of the Tribunal.

There is yet another disquieting feature in the proceedings at the trial before the Tribunal which goes with the above ailment and which we think

should not go undetected. This is that the assessors who commenced with the hearing are not the ones who gave opinion to the presiding chairman on the basis of which a judgment was composed. As already stated above, but for necessary repetition, the trial commenced with drawing issues on 26.07.2012 and it was Messrs. Bwahama and Mpanju who were present. On 24.10.2012 it was Ms. Annamary and Mr. Kawegere who were present as assessors during which the appellant testified. The appellant went on to testify in the presence of the same set of assessors on 23.01.2013 and closed her case. The defence commenced on 22.08.2013 in the presence of Messrs. Nyakato and Mpanju as assessors. The respondent had one witness; Leonard Kyaruzi Kabagile, who testified on 10.12.2013 in the presence of Messrs. Nyakato and Kawegere as assessors. Finally, the assessors' opinion to the chairman were given by Ms. Annamary (appearing at p. 60 of the record of appeal) and another member who did not indicate his name but the signature appears to depict the name Kawegere whose opinion appears at p. 59 of the record of appeal.

As already stated above, it is the assessors who commenced with the hearing of a case who are supposed to go on with the hearing and give

their opinion at the end of the trial. As the Court of Appeal for Eastern Africa held in **Joseph Kabul v. Reginam** (1954) 21 EACA 260.

> *"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity."*
> [Cited in **Ameir Mbarak** (supra)].

We are certain that what was held by the erstwhile Court of Appeal for Eastern Africa in **Joseph Kabui** (supra) is still good law in our jurisdiction today. Thus, the fact that the assessors who gave opinion to the chairman of the Tribunal on which he based his decision were not the ones who commenced with the hearing of the matter, the whole proceedings and attendant judgment of the Tribunal were a nullity.

For the reasons we have endeavoured to assign hereinabove, we find and hold that the proceedings and judgment of the trial Tribunal were a nullity. We quash them and set aside the attendant orders. As the proceedings, judgment and order of the first appellate court stem from nullity proceedings, we quash them and set aside the flanking orders as well. We order that the matter be remitted to the trial Tribunal to be heard *de novo* before another chairman and a new set of assessors.

In the peculiar circumstances of the case, we make no order as to costs.

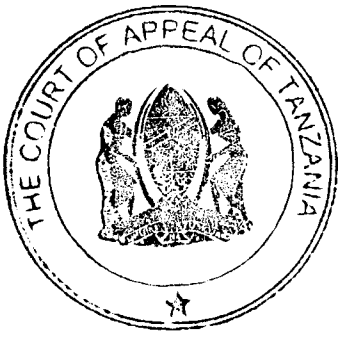
DATED at **BUKOBA** this 26th day of August, 2021.

I. H. JUMA
CHIEF JUSTICE

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of Mr. Mathias Rweyemamu, counsel for the Appellant, 1st Respondent absent and 2nd Respondent in person is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL