

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MUGASHA, J.A., FIKIRINI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 96 OF 2022

PETER OLOTAI.....APPELLANT

VERSUS

REBECA TOAN LAIZER.....1ST RESPONDENT

NESERIAN TOAN LAIZER.....2ND RESPONDENT

MARTHA TOAN LAIZER.....3RD RESPONDENT

JOYCE TOAN LAIZER.....4TH RESPONDENT

TOAN S. LAIZER.....5TH RESPONDENT

FIRST WORD INVESTMENT COURT BROKER.....6TH RESPONDENT

HARPREET BRAR.....7TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania

at Arusha

(Mzuna, J.)

dated the 3rd day of July, 2020

in

Land Case No. 26 of 2017

JUDGMENT OF THE COURT

31st October & 3rd November, 2023

MUGASHA, J.A.:

In the High Court of Tanzania at Arusha, Peter Olotai, the appellant herein, sued Rebeca Toan Laizer, Nesian Toan Laizer, Martha Toan Laizer, Joyce Toan Laizer, Toan S. Lazier, First World Investment Court Broker and Harpreet Brar, the 1st to 7th respondents herein. The appellant claimed to be the lawful owner of Farm No. 745 held under

Certificate of Title No. 15011 situated in Loiborserat Village in Simanjiro District within Manyara Region which he alleged to have acquired pursuant to a transfer effected on 11/1/2016 by the Harpreet Brar, the 7th respondent herein. It was averred by the appellant that, besides embarking on developing the farm, he paid all Government dues. Thus, the appellant prayed for judgment and decree against the respondents on the following orders: **one**, a declaration that he is the lawful owner of the farm; **two**, a perpetual injunction imposing restraint from being interfered with peaceful enjoyment and development of the farm in question; **three**, general damages for time wasted and embarrassment; and **four**, costs and other reliefs which the court deemed fit to grant. After a full trial, the suit was dismissed with costs.

It is against the said backdrop, the undaunted appellant has preferred an appeal to the Court fronting five points of grievance including a complaint faulting the learned trial Judge to have conducted the trial of Land Case No. 26 of 2017 without the aid of assessors. For reasons to be apparent in due course we have opted not to reproduce the other grounds of appeal and neither shall we give a factual account underlying the appeal.

At the hearing of the appeal, the appellant was represented by Messrs. Elvaison Erasmo Maro and Jovin Ndungi, learned counsel, the 1st to 6th respondents enjoyed services of learned advocate Edna Mndeme whereas for the 7th respondent had the services of Messrs. Shadrack Boniface Mofulu and John Kasegenya, learned counsel.

In arguing the appeal, Mr. Maro adopted the written submissions earlier and a list of authorities earlier filed. He submitted that, the trial was irregular because it was conducted without the assessors which is contrary to the dictates of Rules 5F and 5G of the High Court Registries Rules of 1984 as amended by Government Notices No. 63 and 364 of 2001 and 2005 respectively. He clarified that, whereas under G.N 63 of 2001 it was mandatory for the trial of a land dispute to be conducted with the aid of assessors, under G.N 364 of 2005 parties are entitled to opt on the trial to be conducted with or without the aid of assessors.

It was thus argued that, given that in the present matter there is no indication of parties agreeing on any option as to the involvement of the assessors, the trial conducted without the aid of assessors was irregular and against the dictates of the law and it vitiated the entire trial proceedings. On the way forward, Mr. Maro urged us to set aside the trial proceedings and the resulting judgment. To support his

propositions, Mr. Maro cited to us the cases of **B.R. SHINDIKA t/a STELLA SECONDARY SCHOOL VS KIHONDA PITSA MAKARONI INDUSTIRES LIMITED**, Civil Appeal No. 128 of 2017 and **EXAUD GABRIEL MMARI (as Legal and Personal Representative of the Estate of the late Gabriel Barnabas Mmari VS YONA SETI AKYOO AND 9 OTHERS**, Civil Appeal No. 91 of 2019 (both unreported).

On the other hand, the learned counsel for the respondents conceded to the ground of complaint and the related submissions canvassed by Mr. Maro. They as well, urged the Court to nullify the trial proceedings and the resulting judgment and order a fresh trial to be conducted in accordance with the dictates of the law.

Having considered the ground of appeal, the submissions by the learned counsel for either side, our task is to determine the propriety or otherwise of the trial.

It is glaring that, the case which is a subject of this appeal was a land dispute whose adjudication before the High Court is governed by among others, the High Court Registries Rules, 1984, as amended by Government Notice 63 of 4/5/2001 and Government 364 of 11/11/2005 whereby Rule 5F stipulates as follows:

"5F (1) – Except where both parties agree otherwise the trial of a suit in the Land Division of the High Court shall be with the aid of two assessors.

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

What is embraced in the amendment of the Registries Rules vide Government Notices 63 and 364 of 2001 and 2005 respectively, is that the adjudication of the land dispute must be presided by a Judge sitting with two assessors except where parties opt and agree otherwise. Also, where a trial is conducted with the aid of assessors, though not bound by their opinion given at the end of the trial, the Judge is required to take into account the opinions of the assessors and give reasons for differing with such opinion in the judgment. Another introduced feature is that, where in the course of the trial one or more assessors is absent, the trial should not be stalled and instead it has to continue in the presence of the remaining assessor or assessors.

Thus, under the current position, at the commencement of the trial, the judge must engage the parties, inform them on their right to

opt for the trial to be conducted with the aid of assessors or not. If the parties opt and agree that assessors should be involved, then the trial must be conducted with the aid of assessors. In this regard, it is crucial for the Judge to put on record whatever option taken by the parties. The Court was confronted with an akin scenario in the case of **EXAUD GABRIEL MMARI** (As legal and personal representative of the Estate of the late **GABRIEL BARNABAS MMARI VS YONA SETI AKYO and 9 OTHERS**, Civil Appeal No. 91 of 2019 (unreported). Having considered paragraphs 5F and 5G of the High Court Registries Rules as amended vide Government Notice Nos 63 and 364 of 2001 and 2005, respectively, the Court observed thus:

"What can be deduced from the provision, is that sitting with the aid of assessors though a mandatory obligation, but counsel and parties have an option of choosing the hearing to be with the aid of assessors or not. Once the choice is that a Judge should sit with the aid of assessors, then the same set of assessors who were present at the commencement of the proceedings should sit in till the end. And the names of the selected assessors must be reflected on the record of proceedings. In case one or both assessors are absent, then a Judge

*either proceeds with the remaining assessors or without if both are absent to the end of the proceedings. In the case of **B. R. Shindika t/a Stella Secondary School** (supra), the court nullified the proceedings in the Land Case No. 197 of 2005, for failure to observe the procedure in place as provided under Rule 5F of GN. No. 63 of 2001."*

Finally the Court held:

There was no indication in the present case that a Judge intended to sit with the aid of assessors nor parties opting for the proceedings to be conducted with or without the aid of assessors. Failure to comply with the requirements provided under Rule 5F and 5G resulted in a fatal irregularity that rendered the proceedings and judgment of the trial court a nullity."

On account of the stated position of the law, what transpired at the trial under scrutiny is against the dictates of the law. We are fortified in that regard, having considered that, when the trial was conducted between 16/5/2019 and 28/2/2020 as reflected from pages 342 to page 389 of the record of appeal and evidence of both sides was taken, the record is completely silent if the trial was conducted with the aid of

assessors as none was present and if parties had opted as such. This was a serious omission and we agree with the learned counsel for either side that, the trial court was not properly constituted to adjudicate the land dispute and in addition it was not clothed with jurisdiction to preside over and determine the respective land dispute.

We wish to add that, given that parties have a right to opt and agree on the trial to be conducted without assessors or not, in future before the commencement of the trial, the Judge must invite parties or their respective learned counsel to address him/her if they wish to dispense with the conduct of trial with assessors or not. For avoidance of any doubt whatsoever, such engagement of the parties or their respective learned counsel and the findings of the Judge must be put on record.

Thus, in view of what we have endeavoured to discuss, in the absence of any indication that parties opted and agreed that the trial be conducted without assessors, the trial was a nullity and the resulting judgment cannot be spared. Thus we find the first ground of appeal merited and it is allowed.

On the way forward, the trial proceedings and the resulting judgment are hereby nullified. Consequently, we direct the case file to

be remitted to the High Court for it to conduct an expedited trial in accordance with the dictates of the law and to be precise, the High Court Registries Rules 1984 as amended by Government Notices No. 63 and 364 of 2001 and 2005, respectively. Since the determination of the first ground suffices to dispose of the appeal, we shall not embark on the determination of the remaining grounds of appeal.

DATED at **ARUSHA** this 1st day of November, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 3rd day of November, 2023 in the presence of Mr. Abdallah Alli holding brief for Mr. Evaison Maro, learned counsel for the Appellant and Mr. Shadrack Boniface Mofulu, learned counsel for the 7th respondent, also holding brief for Ms. Edna Mndeme, learned counsel for the 1st to 6th Respondents, is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL