IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., KIHWELO, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 180 OF 2021

BADRU ISSA BADRU.....APPELLANT

VERSUS

OMARY KILENDU..... ..... 1ST RESPONDENT

HASHIM RUNGWE t/a H. RUNGWE LTD ..... 2ND RESPODENT

(Appeal from the decision of the High Court of Tanzania, Land Division at Dar es Salaam)

(De-Mello, J.)

dated the 28th day of September, 2012
in
Land Appeal No. 93 of 2009
.....

JUDGMENT OF THE COURT

6th & 15th February, 2024

KIHWELO, J.A.:

The appellant, Badru Issa Badru, is sturdily contesting the decision of the High Court of Tanzania (Land Division) (De-Mello, J.) in Land Appeal No. 93 of 2009 which reversed the decision of the District Land and Housing Tribunal (henceforth "the Tribunal") in Application No. 19 of 2006. That decision declared the appellant the lawful owner of the house located at

Manzese Sisi kwa Sisi within Dar es Salaam. We shall henceforth refer to the described premises simply as "the suit house".

More particularly, in the application before the Tribunal, the 1st respondent claimed to have been the lawful owner of the suit house which was sold to him by the 2nd respondent acting as the agent of the heirs of the late Hamis Mlenzi who was the 1st respondent's landlord in another house located at Chang'ombe area within Dar es Salaam for over 20 years. From a fleeting glimpse of facts on record, it comes to light that, the 1st respondent was offered the suit house for TZS 12,000,000.00 and part of this amount was paid in three instalments of TZS 1,000,000.00, TZS 10,000,000.00 and TZS 200,000.00. The remaining balance of TZS 1,800,000.00 remained unpaid until when the dispute was referred to the Tribunal and the suit house was yet to be handed over to the 1st respondent, as that was to await evicting tenants from the suit house. Nonetheless, despite the foregoing circumstances, the 2nd respondent sold the suit house to the appellant for TZS 15,000,000.00 in total disregard of the earlier purchase arrangements with the 1st respondent.

Thus, on 13th January, 2006 the 1st respondent lodged Application No. 19 of 2006 before the Tribunal seeking, among other things, declaration that

the 1st respondent being the lawful purchaser for value is the rightful owner of the suit house and therefore compel the 2nd respondent to receive the balance of the purchase price. It is noteworthy that, on 21st May, 2007 the applicant prayed and was granted leave to join in the application as the 2nd respondent. As it turned out, the Tribunal upon full trial came to the conclusions that, there was no sale agreement between the 1st respondent and the 2nd respondent and declared the appellant the lawful owner of the suit house.

Unamused with the decision of the Tribunal, the 1st respondent preferred an appeal to the High Court in Land Appeal No. 93 of 2009 (the High Court) which was grounded on seven points of grievance. Upon full determination, the High Court allowed the appeal by reversing the decision of the Tribunal and declared the 1st respondent the rightful purchaser of the suit house.

Feeling that justice was not rendered, and in further quest for justice, the appellant seeks to impugn the verdict of the High Court, and has presently filed a memorandum of appeal with eight grounds which can be crystalized as follows.

1. *That, the learned first appellate Judge erred in law in not finding that the proceedings of the trial Tribunal were nullity for improper composition as assessors changed amidst the hearing.*

2. *That, the learned first appellate Judge erred in law in not finding that the proceedings of the trial Tribunal were nullity since the trial Chairman did not fully involve the assessors.*
3. *That, the learned first appellate Judge erred in law by not determining all the issues that were framed.*
4. *That, the learned first appellate Judge erred in law for not making consequential orders as regards the appellant's rights on the sale transaction.*
5. *That, the learned first appellate Judge erred in law and fact in not finding that there was no valid sale agreement between the 1st respondent and the 2nd respondent.*
6. *That, the learned first appellate Judge erred in law and fact in not finding that the appellant was a bonafide purchaser for value without notice of any oral sale agreement between the 1st respondent and the 2nd respondent.*
7. *That, the learned first appellate Judge erred in law and in fact in not finding that the 1st respondent had breached the purported sale agreement.*
8. *That, the learned first appellate Judge erred in her analysis of evidence and application of law.*

Mr. Dennis Michael Msafiri, learned counsel entered appearance for the appellant while Mr. Mashaka Mfala and Mr. Sylivanus Mayenga both learned counsel represented the 1st respondent. The 2nd respondent was absent but notice of hearing was duly served upon him on 25th January, 2024 according

to the affidavit of the court process server and therefore, from the very outset, Mr. Msafiri prayed and was granted leave to proceed with hearing of the appeal in the absence of the 2nd respondent in terms of rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

It is momentous to state that Mr. Mfala had earlier on raised preliminary points of objection notice of which was lodged in Court on 1st February, 2024. However, upon further reflection, the learned counsel elected to abandon the preliminary objections and we duly marked so.

In support of the appeal Mr. Msafiri premised his submissions by praying to stand by the written submissions which were earlier on lodged in Court on 28th July, 2021 without more. In the written submissions, arguing in support of the first ground of appeal, the learned counsel contended that, going by the record, it is conspicuously clear that, the mandatory provisions of section 23 of the Land Disputes Courts Act, Cap. 216 (henceforth "the Act") were not complied with to the letter. Elaborating further, the learned counsel highlighted in minute detail how assessors kept on changing from one date of hearing to another in total disregard of the mandatory provisions of section 23 of the Act. He referred us to pages 41, 42, 43, 56, 58, 60, 61, 63 and 64 of the record of appeal to demonstrate his proposition. The

learned counsel placed reliance in our earlier unreported decisions of **Ameir Mbarak and Another v Edgar Kahwili**, Civil Appeal No. 154 of 2015 and **Emmanuel Christopher Lukumai v. Juma Omari Mrisho**, Civil Appeal No. 21 of 2013 and submitted that the proceedings of the Tribunal were nullity which renders the resultant decision by the High Court nullity.

Addressing the second ground of appeal, the learned counsel for the appellant contended that the learned Chairman of the Tribunal did not call upon the assessors who composed the Tribunal to give their opinion prior to the pronouncement of the judgment as required by law. Elaborating, the learned counsel submitted that, it is apparent from the judgment of the Tribunal that the learned Chairman considered the opinion of the assessors but differed with them. The learned counsel went on to elaborate further that, the record of appeal is silent as to whether or when exactly the assessors gave their opinion and more glaring is the conspicuous absence of the assessors' opinions in the record of appeal contrary to the dictates of the law in particular section 23 (2) of the Act and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003.

Thus, on the score of the alleged variety of irregularities committed by the Tribunal, the learned counsel impressed upon us to vacate the decision

of the High Court which arose from proceedings of the Tribunal which were a nullity.

In reply to both the first and the second grounds of appeal, the 1st respondent's counsel upon praying to stand by the written submissions which were earlier lodged in Court, he argued that the first and second grounds were new as they were not raised before the first appellate court. As such, he urged that the Court should not entertain them, citing the case of **Hassan Bundala @Swaga v. Republic**, Criminal Appeal No. 386 of 2015 and **Farida Mbaraka and Farida Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (both unreported) in which we held that an appellate court cannot consider or deal with issues that were not considered and determined by the lower court.

Upon our prompting on whether the Court cannot entertain those new grounds under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) considering the fact that these grounds raise important points of law, the respondents' counsel admittedly argued that, in terms of section 4 (2) of the AJA the Court has such power, authority and jurisdiction vested in the High Court from which the appeal arose. He therefore agreed that the court can determine these grounds. However, the respondents' counsel, apart

from that admission, quite surprisingly and for an obscure cause did not make any submissions, leave alone useful submissions in response to the first and the second grounds of appeal. We may at this point remark in passing that, we find it completely inexplicable why the respondents' counsel did not deem it necessary to submit in response to the two grounds of appeal.

The issue that emerges from the above discussion is whether or not the appeal before us crumbles on the basis of the two grounds of appeal which we have already discussed. We think, it will only be pretentiously academic to deal with the rest of the grounds of appeal as we fully subscribe to the submission by the learned counsel for the appellant that on the score of the alleged variety of irregularities committed by the Tribunal the decision of the High Court cannot survive as it resulted from nullity proceedings of the Tribunal. We think, it will conveniently suffice if we simply deliberate on these two grounds of appeal.

Our starting point will involve a reflection of the law that provides for composition of the Tribunal. For the sake of clarity, we wish to excerpt the provisions of section 23 of the Act which provides thus:

"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.***

(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 the proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings*** *notwithstanding such absence* [Emphasis added].

We have purposely emboldened a portion of the extract so as to illustrate that the presence and involvement of assessors in the administration of justice before the Tribunal is inevitably essential and that at least one of the assessors must be among the assessors who must be in attendance throughout the trial. We made corresponding observations in the case of **Ameir Mbarak and Another** (supra) and **Emmanuel Christopher Lukumai** (supra) when faced with analogous situation.

It is momentous to state that, although the provisions of section 23 (3) of the Act do not expressly state that the assessors must be in attendance throughout the trial, but case law has interpreted to that effect and the logical conclusion is that assessors are expected to be present throughout the proceedings. The reason is not far-fetched, it is just logical that for assessors to make an informed and rational opinion at least the presence of one of them throughout the trial is essential. In the case of **Joseph Kabul v. Reginam** [1954-55] EACA Vol. XXI-2 the erstwhile Court of Appeal for East Africa held:

> *"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity."*

With respect, we think there is validity and substance to the submission by the learned counsel for the appellant that since assessors kept on changing throughout the trial, that was very irregular and hence it vitiated the trial and the only remedy is to nullify the proceedings and judgment of the Tribunal and the resultant proceedings and judgment of the High Court.

Furthermore, there is another infraction as regards the proceedings of the Tribunal as the learned counsel for the appellant argued and rightly so in our mind that the judgment of the Tribunal repeatedly refers to the opinion

of assessors which the learned Chairman of the Tribunal considered while composing his judgment but opted to differ with them. However, quite unfortunate, assessors' opinions are not part of the record of appeal. Time and again we have emphasized that opinion of assessors must be read to the parties and their opinion must be on record. In the case of **Edina Adam Kibona v. Absolom Swebe (SHELI)**, Civil Appeal No. 286 of 2017 confronted with an akin situation, we cited our earlier decision in the case of **Ameir Mbarak and Another** (supra) in which we observed that:

> *"Therefore, in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment of the Chairman in the judgment. In the circumstances, we are of the 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".*

On the basis of the above stated reasons, and considering that this aspect went unnoticed by the first appellate court, we agree and hold that the score of the alleged variety of irregularity committed by the Tribunal, the decision of the High Court cannot survive as it resulted from nullity proceedings of the Tribunal. We therefore nullify the proceedings and judgment of the Tribunal and that of the High Court because they stemmed

from a nullity. Going forward, we remit the matter to the Tribunal for Kinondoni for retrial of Land Application No. 19 of 2006 before another Chairman and new set of assessors according to law.

It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of February, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of February, 2024 in the presence of Ms. Winner Julius, learned counsel holding brief for Mr. Denis Msafiri, learned counsel for the Appellant, also for Mr. Mashaka Mfala and Mr. Silvanus Mayenge, both learned counsel for the 1st Respondent and in the absence of the 2ndRespondent, is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL