IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 153 OF 2022

(Originating from the decision of the District Land and Housing Tribunal for Manyara at Babati, Application No. 5 of 2017)

JASMINI ALLY ..... APPELLANT

VERSUS

PHILIPO AKWESO ..... RESPONDENT

JUDGMENT

13/02/2023 & 20/03/2023

KAMUZORA, J.

The Appellant was dissatisfied by the decision of the District Land and Housing Tribunal for Manyara Region (hereinafter "the trial Tribunal"), which dismissed her claim against the Respondent herein. She has preferred this appeal seeking to have that decision overturned. The crux of the dispute leading to this appeal is a piece of land measuring 1¼ acres located at Gharebay village, Endasaki ward within Hanang district Manyara Region (hereinafter "the suit land").

Briefly, the facts reveals that the Appellant Jasmin Ally (PW1) was married to Mohamed Said Kessy (PW2) in 1991. According to PW1, her in-laws were allocated 8 acres of land which included the suit land during

Operation Vijiji, in 1974. PW2 claimed claimed to have inherited the suit land from his parents in 1992. They were in peacefully occupation of the suit land from 1992 and PW1 used to cultivate maize and beans in the suit land. On 09/12/2016 PW1 found the Respondent with his seven children cultivating the suit land. She informed PW2, who advised her to report the matter at the police station. At the police station, the Appellant was advised to refer the dispute in the trial Tribunal.

The Respondent claimed to have purchased the suit land which is triangular in shape from Hamis Abdallah in 1996 at the consideration of TZS 600,000/=. The sale agreement was witnessed by Amir Hamis Abdallah (DW3), the vendor's son and Abubakari Yusuph Ngulo (DW2) the then village executive officer. He accounted that the dispute is not on ownership or trespass as the Appellant purports, rather it is demarcation dispute. According to the Respondent, the Appellant's husband uprooted the sisal hemp that marked their boundary and trespassed in his land in September, 2016. He referred the dispute to the village council where he was summoned and promised to rectify the boundaries but in vain. The Respondent decided to install the boundaries. The Respondent denied to have trespassed into the Appellant's land.

After hearing the parties and visiting the *locus in quo*, the trial Tribunal found that the dispute was devoid of merits as there was no

ample evidence that the Respondent trespassed into the Appellant's piece of land, it therefore dismissed the application with costs. The Appellant was not pleased by that decision hence, preferred this appeal raising 5 grounds which are reshaped hereunder: -

a) *That, the District Land and Housing Tribunal erred in law and facts to decide in favour of the Respondent that the suit land was legally acquired by way of sale transaction in the absence of the mandatory documentary evidence;*
b) *That, the District Land and Housing Tribunal erred in law and facts to decide in favour of the Respondent regardless of the irregularities of the trial proceedings;*
c) *That, the District Land and Housing Tribunal erred in law and facts to decide in favour of the Respondent regardless of the contradictory evidence of the Respondent in relation to the size of the suit land;*
d) *That, the District Land and Housing Tribunal erred in law and facts for failure to properly define the boundaries between the two conflicting ownerships and for naming the Appellant 'A LIAR'; and*
e) *That, the District Land and Housing Tribunal erred in law and facts for his failure to analyse and accord proper weight the evidence of the Appellant which appeared to be stronger than that of the Respondent.*

At the hearing of the appeal, the Appellant was represented by Mr. Raymond Joakim Kim, learned advocate while the Respondent appeared in person, unrepresented. The appeal was heard *viva voce*. The

Appellant's counsel submitted in support of the 1st, 2nd and 5th grounds and dropped the 3rd and 4th grounds.

The counsel for the applicant started submitting in support of the 2nd ground of appeal. He contended that the proceedings of the case before trial Tribunal are flawed for irregularities. He accounted that the dispute was preferred in the trial Tribunal in 2017 before Kamugisha Chairman who presided over the case until 29th April 2019 when hearing was completed and defence case closed. That, the said Tribunal chairman was transferred before he delivered the decision hence another chairman Hon. Mahelele took over the case without assigning reasons for his taking over but he however asked the parties to wait for the previous chairman. That, another chairman Hon. Mdachi continued adjourning the case and then scheduled for visiting of the *locus in quo*. That, on 24/11/2021 another chairman Hon. Mwihava took over the matter without assigning the reasons. When the case was before him, the Respondent herein addressed the trial Tribunal that the Appellant defaulted appearance without reasons. That, the chairman dismissed the case with costs for want of prosecution without reading the case file as he could have discovered that the hearing of the case was completed. That, the Appellant sought and managed to restore the case and the Tribunal visited the *locus in quo* was on 15/07/2022 but the chairman went alone together

with militiamen in the absence of assessors although they were recorded in the proceedings that they were present.

According to Mr. Kim, the assessors in the case are not the same who presided over the case to its finality because they were changed when Mwihava took over the case. That, the first set of the assessors were Hassan Orondi and Rabeca Matowo who sat with Mr. Kamugisha at the hearing of the case until the closure of the defence evidence. That, another set of assessors were Mr. Bariye and Ms Hamida introduced on 15/07/2022 and they are ones who gave opinion considered in determining the case. He insisted that the law mandates assessors who sat and heard the case to give their opinion and not otherwise. He added that, although the assessors' opinions were recorded in the proceedings, they were not reflected in the judgment.

In Mr. Kim's view, the irregularities committed after the closure of the case and when the new chairman took over the case vitiated the proceedings. He supported his argument with the decision of this Court in **Gonyoka Gichenoga Vs. Sideta Shabaqut,** Land Appeal No. 12 of 2022 (unreported). The learned advocate maintained that the proceedings of the Tribunal from the time Mahelele took over the case to the time the decision was made should be quashed and set aside. That, the decision be made based on the record by Kamugisha. He also referred

the decision of the Court of Appeal in **B.R. Shindika t/a Stella Secondary School Vs. Kihonda PISA Makaroni Indistries,** Civil Appeal No. 128 of 2017 (unreported).

Submitting in support of the 1st ground of appeal, Mr. Kim asserted that the Tribunal chairman relied on the evidence that the Respondent purchased the land but no sale agreement was tendered to support his evidence. It was counsel's contention that since the sale agreement was not tendered, there was no ample evidence to support the fact that the Respondent was the lawful owner of the suit land.

On the 5th ground the counsel for the Appellant averred that the chairman failed to analyse evidence resulting into erroneous decision. He explained that the chairman dealt with the evidence of the Appellant without discussing the evidence of the Respondent. That, he failed to realise that the dispute in this matter was whether the suit land was either 1¼ or 1¾ and not demarcations hence, erred by considering the dispute as based on demarcations.

In concluding, Mr. Kim prayed that the Appellant be declared the lawful owner of the disputed land by allowing the appeal with costs. Alternatively, the counsel for the Appellant prayed that the proceedings and decision of the trial Tribunal be quashed and set aside with costs due to irregularities pointed out.

Challenging the appeal, the Respondent admitted that the case was filed in 2017 and evidence was received from both parties by Hon. Kamugisha. That, after the closure of defence evidence, what remained was to visit the *locus in quo* and the disputed land as per the Appellant was 1¼ acres. That, when Mwihava took over the case the Appellant defaulted appearance for a long time and the case was dismissed without costs. After the case was restored in 2022, they went to the *locus in quo* on the scheduled date. According to the Respondent, he did not know the names of the assessors mentioned, but he admitted that they participated at the hearing of the case. The Respondent also admitted that both parties were present at the locus in quo together with neighbours and militiamen and the Appellant showed the disputed land which was 5 feet by 116 feet. That, the chairman saw the sisal plant which was mentioned in his evidence as demarcation and photographs were taken and the judgment date was fixed.

The Respondent accounted that there was evidence proving that he purchased the suit land but Hon. Kamugisha refused his purchase document when he tendered it on account that it was not necessary. The Respondent was of the view that the decision of the Tribunal is correct because they visited the *locus in quo* in the presence of the Appellant who

identified the disputed land and the Tribunal found that the dispute was on the demarcation and not claim of 1¼ acres of land. He added that case authorities referred by counsel for the Appellant are irrelevant and the same should be disregarded. He thus prayed for the appeal to be dismissed with costs and this court confirm the decision of the trial Tribunal.

In his rejoinder, Mr. Kim insisted that the land is estimated at 1¼ thus, it is not true that the Appellant did not identify the disputed land. He maintained that the Respondent trespassed into the land measuring 5 feet by 116 feet. That, the Respondent also admitted that assessors were interchanged. He reiterated prayers made in the submission in chief.

I have given deserving weight to the grounds of appeal and the submissions for and against the appeal. I will determine the appeal based on the sequency adopted by counsel for the Appellant and the Respondent.

To begin with the 2nd ground of appeal, Mr. Kim faulted the trial Tribunal proceedings for being marred with glaring irregularities, which in his view, vitiated the proceedings. The first irregularity pointed is that there was succession of chairpersons without assigning reasons. I have perused the trial Tribunal proceedings and it is undisputed fact that the case was before Hon. Kamugisha from its start to 26/02/2018 when he

completed hearing of the defence evidence. The case was scheduled for visiting the *locus in quo* on 18/05/2018, but it went through series of adjournments before the same chairman until 05/10/2018. On 29/04/2019, it was placed before Hon. M. S. Mahelele who adjourned it to 10/06/2019. On 10/06/2019 and 18/06/2019 the case was adjourned before Hon. M. N. Ntumengwa to 30/07/2019. On that date, it was again placed before M. S. Mahelele who made the following observation:

"Where the case has so far reached, it is the one heard it has to conclude the hearing and that is Mr. Kamugisha who got transfer to Ifakara DLHT

SGD

30/07/2019."

He scheduled the case for hearing on 03/10/2019 whereafter it went through series of adjournments before Hon. Mahelele waiting for Hon. Kamugisha to finalize by visiting the *locus in quo* until 28/08/2020. On 21/04/2021, 21/05/2020 and 29/06/2020 the case was adjourned before Hon. Mdachi and on 24/11/2021 Mwihava took over the matter who immediately dismissed the case for non-appearance of the applicant (Appellant herein). The Appellant through formal application managed to restore the case and the Tribunal through Mwihava, chairman visited the

locus in quo on 16/07/2022. This was proceeded over by a judgment which is subject to the current appeal.

From the above set of events, it is noteworthy that from 09/08/2018 when Hon. Kamugisha was marked absent for the first time to 24/11/2021 when Mwihava took over, is a period of almost three years. As per record of the Tribunal, one could conclude that the adjournments of almost three years were for Hon. Kamugisha to finalize the case by visiting the *locus in quo*. Further, it is manifest in the proceedings dated 30/07/2019 that Kamugisha was transferred to another station, that is Ifakara DLHT. That being made apparent in the record, justified taking over of the case by another chairman. The position of the law is that when a judicial officer takes over a partly heard matter, he/she has to assign reasons for taking over. That position was reaffirmed in numerous decisions including the Court of Appeal decision in **M/S Georges Centre Limited Vs. The Honourable Attorney General and Another,** Civil Appeal No. 29 of 2016 (unreported), where it was held that:

> *"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion* ***unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an***

obligation to put on record why he/she has to take up a case that is partly heard by another. "[Emphasis added]

In this appeal, it was reflected in the proceedings on 30/07/2019 that Hon. Kamugisha was transferred to another station. However, the presiding chairman did not take over the case and recorded that the stage it reached would require the chairman who heard it to finalise the same. It is unfortunate that, the said Hon. Kamugisha never finalised the case and the same was pressed before Hon Mwahava who proceeded with the remaining process without assigning the reason as to why Hon. Kamugisha could not complete the case. I understand that justice does not demand waiting for Kamugisha for the whole period while there were other chairpersons who could have taken over in accordance with the law. However, the taking over by Mwihava chairman, was flawed by irregularities for failure to assign the reasons. In the spirit of the above cited case, I agree with the counsel for the Appellant that there were irregularities in the proceedings of the trial Tribunal.

On the argument in respect of the procedure of visiting the *locus in quo*, I do not agree with Mr. Kim's argument that assessors were not involved. He however admitted in his submission that the assessors were recorded to be present. The Respondent insisted that although he did not know the names of the assessors, they participated during the visit at the

locus in quo. The record explicitly shows that the Tribunal was constituted by Hon. Mwihava as the chairman aided by Mr. Hyera and Ms Hamida as assessors. In my considered view, in absence of any fact to the contrary, the conclusion is that assessors were involved much as the Tribunal records reveals their presence. Legally, the record of the court/Tribunal are considered correct record reflecting what transpired in court/Tribunal.

Although my conclusion is that assessors participated at the *locus in quo*, the record shows that the procedure of visiting the *locus in quo* was not adhered to. Those procedures were laid down in the case of **Nizar M.H. Vs. Gulamali Fazal Janmohamed** [1980] TLR 29. In that case it was held:

> "*When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witness as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof.* ***When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in***

court given by the witnesses. We trust that this procedure will be adopted by the courts in future." (Emphasis added)

The circumstances in this appeal reveal that such procedure was not strictly adhered to. After recording notes from the witnesses at the *locus in quo*, the Tribunal did not re-assemble so that the notes recorded and whatever was found thereat could have been read out to the parties. The consequence of failure to adhere to that requirement was discussed by the Court of Appeal when faced with similar scenario in the case of **Sikuzani Saidi Magambo and Another Vs. Mohamed Roble**, Civil Appeal No. 197 of 2018 (unreported), where it had this to say:

"Now, in the case at hand, as intimated earlier, at best the record of the Tribunal's proceedings only indicated that on 3rd June, 2016 the Tribunal conducted a visit at the locus in quo without more. ***... Tribunal never reconvened or reassembled in the court room to consider the evidence obtained from that visit.*** *We are therefore in agreement with both parties that the Tribunal's visit in this matter was done contrary to the procedures and guidelines issued by this Court in* ***Nizar M.H. Ladak****, (supra). It is therefore our considered view that, this was a procedural irregularity on the face of record which had vitiated the trial and occasioned a miscarriage of justice to the parties."*(Emphasis added)

Being guided by the above position it is my settled mind that failure to by the trial Tribunal to reconvene or reassemble to consider the

evidence obtained at the locus in quo and read the notes to the parties was procedural irregularity which vitiated the trial and occasioned miscarriage of justice to the parties. I therefore find this argument merited.

Another postured irregularity is based on the role played by assessors. As pointed out by Appellant's counsel, the case throughout was heard by Hon. Kamugisha with the aid of two assessors, that is Mr. Hassan Orondi and Ms. Rebeca Matowo who were present during hearing of evidence of the applicant and defence. After closure of the evidence, Mr. Mwihava who completed the matter by visiting the *locus in quo*, took up the matter with another set of assessors, Mr. Hyera and Ms. Hamida.

In my perusal to the record, I encountered no written opinion of assessors as required by the law. The judgment of the trial Tribunal did not feature the assessors' opinion as it reflected his personal view. That was a serious irregularity because it is violation of mandatory requirements under the provision of section 23 (2) of the Land Disputes Courts Act Cap. 216 [R.E 2019] and Regulation 19(2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2002, G.N No. 174 of 2003. Section 23(2) of the LDCA provides:

"(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."

Regulation 19(2) of G.N No. 174 of 2003 provides:

"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."

From the above exposition and position of the law, the Tribunal was not dully constituted for there was change of assessor and no reflection if they gave their opinion. It must be noted that the Tribunal become dully constituted once it is presided over by the chairman and two assessors. Participation of the assessors is not symbolic, they must also participate in the judgment through giving their opinion. The law mandates that such opinion must be in writing. The procedure also entails reading of the opinion of the assessors to the parties before composing the judgment, and the opinion reflected in the judgment especially on dissenting points.

In the appeal under scrutiny, there was variation of assessors without stating reasons. Two sets of assessors were involved in the proceedings and neither set of assessors gave their opinion as required by the law. In the case of **Edina Adam Kibona Vs. Absolom Swebe**

(Sheli), Civil Appeal No. 286 of 2017 (both unreported), the Court observed as follows:

> *"... as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19(2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahiii:* ***That opinion must be in the record and must be read to the parties before the judgment is composed.***"
> [Emphasis added]

Similarly, in **Tubone Mwambeta Vs. Mbeya City Council**, Civil Appeal No. 287 of 2017 (both unreported), the Court held:

> *"In view of the settled position of the law, where the trial has been 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."*

Based on the above, the irregularities pointed out vitiate the trial and prejudiced the parties. I therefore find merit in the second ground of appeal.

Determination of the second ground is in itself sufficient to dispose the appeal. I therefore find no compelling reasons to dwell on determining the rest of the grounds of appeal because they relate to evidential matters which cannot be dealt with without ascertaining propriety of the trial record.

From what I have endeavoured to discuss above, the appeal is merited to the extent above explained hence, allowed. Since the proceedings at the visiting of the *locus in quo* and decision thereon were made in contravention of the law, I hereby quash and set aside proceedings of the Tribunal after closure of the defence case on 26/02/2018 and the judgment and decree emanating therefrom. The file be remitted back to the trial Tribunal with an order that the case proceed from where it ended on 26/02/2018 before another chairman and the same original set of assessors if they can still be secured. As this appeal is allowed based on ailment in the proceedings in which neither of the parties are to blame for, I order each party to bear its own costs.

DATED at **ARUSHA** this 20th March, 2023.

D. C. KAMUZORA

JUDGE