IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO 28 OF 2019

(Arising from the Land Application No 29/2016 of the District Land and Housing Tribunal for Tarime at Tarime)

AFRICAN BARRICK NORTH MARA GOLD MINE LTD.....APPELLANT

Versus

MASEKE MARWA HAMBA ..... RESPONDENTS

JUDGMENT

24th& 31th March, 2020

Kahyoza, J.

Maseke Marwa owned a piece of land within Nyangoto village. African Barrick North Mara Gold Mine LTD, (the Company) entered into a contract with Maseke where the former wanted to acquire the latter's land. Maseke expected the Company to compensate him and build two houses for him. The Company, on her side, contended that Maseke was paid compensation according to the contract and that she had no duty to build two houses for him. Maseke instituted an application in before the District Land and Housing Tribunal for Tarime at Tarime (the tribunal) praying the Company to be ordered to build him two houses according to the agreed design. Maseke also claimed for mesne profits to the tune of Tshs. 60,000/= per month.

The tribunal decided in favour of Maseke. The Company appeals to this Court on the ground that there was no proof that the Company was required to build a house to Maseke, that the tribunal did not consider the evidence that Maseke was paid compensation of Tzs 10,661,604/= for his land, house and crops, that the tribunal granted relief not prayed for and lastly that the tribunal failed to record the opinion of the assessors and assign reasons for differing with them.

I perused the record of the Tribunal and found out that the Chairman did not require the assessors to give their opinion and cause the same to be read to the parties. I required the parties to address the Court regarding the omission. The appellant advocate Mr. Geofrey Kange informed the Court that it was his fourth ground of appeal that the chairperson did not record the opinion of the assessors and assign reasons for differing with them. I called upon him to argue that ground of appeal only.

The appellant's advocate submitted that the Chairman of the District Land and Housing Tribunal erred to give its judgment without recording the opinion of assessors and without giving the reasons for disagreeing with them. He referred to page 5 of the typed judgment where the chairman stated that "*I differ with the opinion of both of my assessors who have given their opinion to the effect that the applicant has no right to be compensated to the two houses which were not built by the respondent.*"

The appellant's advocate contended further that the Chairman of the tribunal did not record what the assessors said. He added that it is the position of the law and the Court of Appeal of Tanzania that the opinion of the assessors must be recorded in full in the judgment and that if the chairman differs with the opinion of he has to account for that. He concluded that failure to record the opinion of assessors and to read them out to the parties renders the proceedings a nullity and prayed the Court to order trial *de novo*.

The respondent, who appeared in person had nothing useful to respond to the legal query. He only stated that the opinion of the assessors was read to them before the date of judgment.

This Court raised the concern because it is apparent on face of record that when the Chairman of the Tribunal closed the case for the defence on the 07/05/2019, did not require the assessors to give their opinion as required by regulation 19 (2) of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N.174/2003 No. (the Regulations)**. The Chairman slated a date on which the judgment would be pronounced. Regulation 19 (2) states:

> *"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"*

I scrutinized the record and found that the assessors did give their opinion in writing, despite the fact that the Chairman did not accord them and opportunity to do so. They must have opined as a matter of practice and as they were not called upon to submit their written opinion. It is a settled position of the law that failure to accord assessors an opportunity to submit their written opinion vitiates the proceedings of the tribunal. This stance was taken by the Court of Appeal in *Edina Adam Kibona V Absolom Swebe* CIVIL APPEAL NO. 286 OF 2017 CAT (Unreported). The Court of Appeal stated:-

> *"We wish to recap at this stage that the trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and*

at the conclusion of evidence, it 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 Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed.

For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. *And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose." (emphasis added)*

It is very important for the Chairman, to comply with regulation 19(2) of the **G.N.174/2003 before making his judgment to require every assessor present at the conclusion of hearing to give his opinion in writing**. The record should bear that testimony.

There is yet another fatal omission in the Tribunal's record. As submitted by the appellant's advocate the Chairman did not read the opinion of the assessors to parties before he delivered his judgment. The respondent contended that chairman read the opinion of the assessors before he delivered the judgment. The appellant's advocate vehemently opposed that allegation. I keenly examined the record. There is nowhere indicated that the assessors' opinion was read out to the parties. It is settled position as shown above that failure to read out the opinion of the assessors in the presence of the parties denies that parties an opportunity to know the opinion of the assessors, amounts to a fundamental error and renders the

proceedings a nullity. This position was taken by the Court of appeal in *Edina Adam Kibona V Absolom Swebe (*cited above*) and in Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble* Civil Appeal No. 197 of 2018 (CAT Unreported). In the latter case the Court of Appeal stated-

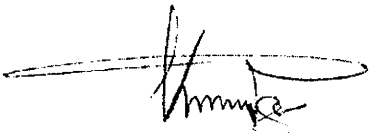
> *"It is also on record that, though, the opinion of the assessors was not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed.*
>
> *On the strength of our previous decisions cited above, we are satisfied that* ***the pointed omissions and irregularities amounted to a fundamental procedural error that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal****, as well as those of the first appellate court." (emphasis added)*

In the upshot, I am of the firm view that the District Land and Housing Tribunal failed to actively involve the assessors in the appeal, in violation of the clear provisions of the **section 23 of the Land Disputes Courts Act, Cap** 216 (R.E. 2002) and **regulation 19 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations** G. N. 174/2003. The omission is fatal and vitiates the proceedings, rendering it hearing of appeal without assessors.

Consequently, the proceedings are quashed and the judgment set aside. I direct the appeal to be heard afresh immediately, before another Chairman and with a new set of assessors.

Each party shall bear its costs as the ground for retrial was caused by District Land and Housing Tribunal.

It is ordered accordingly.

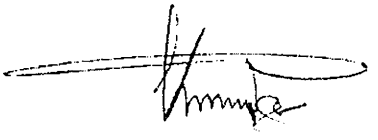


J. R. Kahyoza

JUDGE

31/3/2020

Court: Judgment delivered at 03.00 pm. Mr. Davis Muzahula, the appellant's advocate and Mr. Maseke Marwa Hamba, the respondent, both were present and discharged at 09.00am before the judgment was delivered. **Copies of the Ruling to be dispatched to them.** B/C Mr. Charles present.



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