IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., AND KEREFU, J.A.,)

CIVIL APPEAL NO. 128 OF 2017

B.R. SHINDIKA t/a STELLA SECONDARY SCHOOL.....APPELLANT

VERSUS

KIHONDA PITSA MAKARONI INDUSTRIES LTD..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Mkuye, J.)

dated the 24th day of November, 2015

in

Land Case No. 197 of 2005

.....

JUDGMENT OF THE COURT

30th April, & 19th June, 2021

LILA, J.A.:

The respondent, Kihonda Pitsa Makaroni Industries Limited, instituted a suit in the High Court of Tanzania (Land Division) (henceforth the trial court) against the appellant, B. R. Shindika t/a Stella Secondary School, praying for: -

(i) A declaration that the plaintiff is the owner of all that parcel of land known as Plot No. 194B, Land Office No. 63661 registered under Certificate of Title No. 25837.

(ii) The defendant be ordered to give vacant possession of the suit premises.

(iii) The defendant be ordered to demolish the structures erected on the plaintiff's plot and restore it back to its original position.

(iv) The defendant pay to the plaintiff TZS 60,000,000.00 being general damages.

(v) The defendant pays interest on (iii) above at the rate of 300% per annum from February, 2005 to the date of judgment.

(vi) The defendant pay interest on the decretal sum at the rate of 12% per annum from the date of judgment till payment in full.

(vii) Costs of the suit be paid by the defendant.

(viii) Any other relief this Honourable Court may deem fit to grant be so granted

The appellant totally refuted the respondent's claims and raised a counterclaim in his written statement of defence. He averred that he was allocated the suit property by Mtongani Village Government on 2/6/1977 and registered on 16/6/1977 under certificate DSM VC10 and in 1999, he started to develop the same. He thus owned it under a deemed right of occupancy. In addition, he counter-claimed for payment of TZS 262, 3000,000.00 as

compensation for the unexhausted improvements effected on the land. His claim was founded on being the owner of suit land under deemed right of occupancy on which he has partly already erected several buildings now used as Stella Secondary School and partly used as a coconut and other crops farm all of which were valued at TZS 262,300,000.00.

In what seemed to be a highly contested trial, both sides summoned three witnesses. The respondent's case was founded on Nilish Patel (PW1), Juma Legela (PW2) and Carlos Mbigamno (PW3) while the appellant relied on the evidence of Bole Raphael Shindika (DW1), Samson Enock Lujiga (DW2 and Stephen Tonya Bunju (DW3).

The material facts as may be gleaned from the record of appeal is as follows: The respondent is a holder of a certificate of Title with No. 25837 issued on 27th March 1981 in respect of a piece of land on Plot No. 194 B, Mbezi Industrial Area which comprises 7,987 square meters for 99 years (the suit land). Even prior to, the respondent claimed to have owned the same through an offer issued by the Ministry of Lands on 13/7/2004 and had been paying necessary land fees. Upon a visit to the Plot in February 2005, the respondent was surprised to find a number of buildings and some

construction being undertaken on it by the appellant. So as to ascertain if that Plot was allocated to another person, the respondent conducted an official search which confirmed that it was still in her name. That finding prompted the respondent to institute the suit praying for the above outlined reliefs.

On the other side, the appellant denied the claim of the respondent in his written statement of defence and raised a counter claim. As shown above, he claimed to be the owner of the suit land after being allocated the same by the village government of Kunduchi Mtongani Village way back in the year 1977 after which he started developing it and paid various contributions to the village as well as necessary fees. He denied having been paid compensation for that land.

In the final analysis, the respondent emerged a winner and was declared the lawful owner of suit plot, the appellant was ordered to give vacant possession of the suit premises and to pay the respondent TZS 10 Million as general damages.

On the other hand, the trial court found the appellant's counter claim baseless and dismissed it. It reasoned that the allocating authority which

would be responsible to pay compensation was not made a party to the suit. It held further that as the land was not surveyed, the respondent who held a Certificate of Title over it had a better title than the appellant because issuance of such a certificate extinguished the deemed right of occupancy. That holding did not amuse the appellant hence this appeal.

In this appeal the appellant has accessed the Court seeking to impugn the High Court decision through a memorandum of appeal premised on five grounds. A notice of intention to add one more ground was, in terms of Rule 113(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), subsequently lodged to make a total of six grounds. However, for a reason to be unfolded shortly, we see no compelling reason to recite the said grounds of appeal.

Before us for hearing of the appeal, Mr. Joseph Rutabingwa, learned advocate, appeared representing the appellant who was also present in Court. On the other side, Mr. Erasmus Buberwa, also learned advocate, appeared representing the respondent. The parties, respectively, lodged written submissions in terms of Rule 106(1) and 106(8) of the Rules and lists of authorities to be relied upon during the hearing of the appeal in terms of

Rule 34(1) of the Rules. The learned counsel for both sides adopted the respective submissions and made brief elaborations on them. However, given the course we have taken in resolving the appeal which does not call for a resort to them, we think that it will be unjust if we will not commend them for the thorough research they made which could have assisted us significantly in the determination of the appeal. We leave it just that.

On our perusal of the record of appeal, we noted that assessors were involved in the trial of the case. But, there was change of assessors and at a certain stage there was complete abandonment of them. That prompted us to raise *suo motu* a question to the learned counsel of the parties whether the procedure adopted was proper. We accordingly engaged the learned minds to address us on that infarction. Expounding on the question raised by the Court, both, counsel were agreed that it was improper and vitiated both the proceedings and judgment of the trial court. Neither of them was able to cite any law or make reference to any decision of the Court to that effect. Commenting on the way forward, they urged to the Court that it would be proper that, upon nullification of the proceedings and judgment, the matter be remitted back to the trial court for it to hear it *de novo*.

So as to appreciate the essence of the Court's concern, we think, we should demonstrate what transpired at the trial court. The record of appeal tells it all. It bears out that the case was tried by three judges, that is Rumanyika, J., Ndika, J. (as he then was) and Mkuye, J. (as she then was). It is clear that the first witness for the respondent one Nilish Patel (PW1) testified on 7/3/2013 before Rumanyika, J. from page 112 to page 119. He had sat with Kimolo and Mtumba as assessors. The case then suffered from two adjournments. On 19/4/2013 while sitting with the same set of assessors, the second witness one Juma Legela (PW2) gave his evidence from page 122 to 123. He did not complete his testimony. The hearing was, again, adjourned. On 22/7/2013, the case landed in the hands of Ndika J. (as he then was) and on 23/6/2014, he recorded the evidence of Carlos Mbigamno. He sat with Mrs. Martha Bukuku and Mrs. Hellen Joseph as assessors. This was a completely new set of assessors. The respondent closed its case. On 27/8/2014, Ndika J. (as he then was) recorded part of the evidence of Bole Raphael Shindika (DW1). This time there was change of one assessor as one Philip Kimaro joined in place of Mrs. Hellen Joseph. The hearing was adjourned and thereafter suffered several adjournments. Mkuye, J. (as she then was) took over the conduct of the case on 31/3/2015.

She recorded part of DW1's evidence and that of Samson Enock Luliga (DW2) and later composed and delivered the judgment on 24/11/2015. She did not sit with assessors.

As stated earlier, learned counsel are at one that, as the law then stood, it was irregular for the assessors to change in the course of the trial of the same case and also to completely abandon them. Like the learned counsel of the parties, we could also not lay hands on any decided case on the point. We shall therefore be guided by the law and where necessary seek inspiration from other decisions of the Court related to assessor-assisted trials.

It is plain truth that the suit the subject matter of this appeal was instituted on 7/10/2005. Then the High Court (Land Division) was fully operational following its establishment by the Chief Justice by promulgating the High Court Registries (Amendment) Rules, 2001, Government Notice No. 63 of 2001 which was published on 4/5/2001 to amend the High Court Registries Rules, 1984 which were made under section 4 of the Judicature and application of Laws Ordinance, Cap. 453 now styled as the Judicature and Application of Laws Act, Cap. 358 R. E. 2019. Rule 3 of GN. No. 63 of

2001 added Rule 5E to the High Court Registries Rules, 1984 which established the Land Division of the High Court within the registry at Dar es Salaam now termed as the High Court of Tanzania (Land Division) [See **FUNDAMENTAL ISSUES IN THE LAND DISPUTE SETTLEMENT MECHANISM** by The Hon. Justice Richard Mziray (as he then was), Judge In-charge, Land Division, High Court of Tanzania, A paper presented at the induction course of the newly appointed judges, Institute of Judicial administration, Lushoto (IJA) on 12th September, 2014].

Further to the above, Rule 5F and 5G of GN. No. 63 enacted a mandatory requirement, respectively, that the court shall be properly constituted by a judge sitting with two assessors and that the judge shall take into account the opinion of assessors and, although he will not be bound by such opinion, he should assign reasons for departing from the opinion. The two Rules state: -

> *"5F. The Land Division of the High Court shall be properly constituted when presided over by a judge sitting with two assessors.*
>
> *5G. In reaching decisions of the court in the Land Division of the High Court, the judge shall take into*

account the opinion of the assessors but shall not be bound by it, save that the judge shall in the judgment give reasons for differing with such opinion."

The High Court Registries (Amendment) Rules 2001 underwent another amendment through GN. No. 364 of 2005 which was published on 11/11/2005 which revoked and replaced Rule 5F with the following: -

"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 conclude the trial with the remaining assessor or assessors as the case may be."

At least two things come out clearly from the above amendment. **One;** the Rule maintained that it was imperative to involve assessors in the trial unless the parties agree otherwise. And**, two**; that, closely examined, that Rule is significantly similar with the stipulations of sections 23(1)(3) and 24 of the Land Disputes Courts Act Cap. 216 R. E. 2019 (the Act) on matters

concerning involvement of assessors in trials of land matters. The two provisions stipulate: -

> *"23-(1) the District Land and Housing Tribunal established under section 22 shall be composed of at least a chairman and not less than two assessors.*
> *(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.*
> *24. In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

It is plain, in the instant case, that the requirements under Rule 5F of the High Court Registries (Amendment) Rules 2001 were not complied with. Since the trial began with Kimolo and Mtumba as assessors when PW1

testified, then in terms of the law applicable at that time, the trial court was bound to proceed with them till finalization of the case and in the event either of them was unable to attend court, the trial court was obligated to proceed with the remaining assessor. And, in the event both assessors could not turn up, obviously the trial judge was bound to proceed alone to the conclusion of the case instead of sitting with a new set of assessors as it happened in this case. Mrs. Martha Bukuku and Mrs. Hellen Joseph, who were a new set of assessors, wrongly took over the place of the former set of assessors. Likewise, Mkuye J. (as she then was), could not arbitrarily dispense with the requirement to involve assessors for, that was a total violation of the mandatory requirements of Rule 5F. There ought to have been an explanation. The only justifiable cause would only be that either the members of the initial set of the assessors are not available or the parties had agreed to dispense with the involvement of assessors in the trial. We should, however, quickly state that the parties can only agree to dispense with assessors at the commencement of the trial and not in the course of the trial. Furthermore, 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. Change of the law, in our view, does not affect the

involvement of assessors if the trial of that case commenced with assessors unless the amending law expressly states so. 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.

Admittedly, Rule 5F does not provide for the consequences in the event of any violation. Neither, as stated above, is there an authority on which we can rely which filled up the gap. However, we have earlier on demonstrated that the wordings of Rule 5F of the High Court Registries (Amendments) Rules 2001 are materially similar to sections 23 and 24 of the Act. For that reason, we entertain no doubt that they attract similar consequences in the event of violations. That justifies our resort to the legal consequences obtaining in those provisions of the Act to which we can seek inspiration. There is unbroken chain of the Court's decisions but to mention one, in **Ameir Mbarak and Another vs Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported), the Court was confronted with a situation where the assessors were not involved throughout the conduct of the trial and each of the two sets of assessors were in attendance at different stages of the trial. The Court, after referring to section 23(1)(2) of the Act, stated that: -

"... a duly constituted Tribunal is that which is composed by the Chairman and a minimum of two assessors. The Chairman alone does not constitute the Tribunal. The involvement of assessors as required under the law also gives them mandate to give opinion before the Chairman composes the decision of the Tribunal."

The court went further to state that: -

"In *case of absence of the assessors, the law gives the following direction as specified under section 23(3) of the Land Disputes Courts Act [CAP 216 RE.2002] which states:*

"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".***

[Emphasis supplied].

In respect of the obtaining legal consequences, the Court stated that: -

> *"The consequences of unclear involvement of assessors in the trial renders such trial a nullity.* ***(SEE AWINIEL MTUI AND 3 OTHERS VS STANLEY EPHATA KIMAMBO AND ANOTHER, CIVIL APPEAL NO. 97 OF 2015 AND SAMSON NJARAI AND ANOTHER VS JACOB MESOVIRO, and CIVIL APPEAL NO. 98 OF 2015*** *(all unreported)."*

Inspired by the above legal position to which we fully subscribe, we hasten to hold that the irregularities discussed in this case are fatal and render the proceedings and judgment of the trial court a nullity.

The above finding sufficiently disposes of the appeal. Consideration of other complaints raised will not affect the above finding. We according refrain from delving on them.

In the event, we accept the invitation extended to us by the learned counsel of the parties and hereby invoke our power of revision bestowed upon us under section 4(2) of the appellate Jurisdiction Act, cap. 141 of the Revised edition 2019 and nullify and quash the proceedings from where Rumanyika J. ended onwards and judgment of the High Court and set aside the orders thereof. And, we order the record of the trial court be remitted

back and the hearing should proceed according to law before another judge from where Rumanyika, J. ended. Mindful of the long time the matter has taken in court, we direct the trial be expedited. Each party shall bear its own costs.

DATED at **DAR ES SALAAM this** 20th day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 16th day June, 2021, in the presence of Ms. Ida Rugakingira, learned counsel for the appellant, and Mr. Erasmus Buberwa, learned counsel for the Respondent is hereby, certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL