

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 490 OF 2021

JOSEPHINE MANGALA MSEMA (As Legal and

Personal Representative of REV. SADOCK

YAKOBO MLONGECHA, the deceased) APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF PEFA, KIGOMA RESPONDENT

**[Appeal from the Decision of the High Court of Tanzania (Land
Division) at Tabora]**

(Rumanyika, J.)

dated the 13th day of July, 2015

in

Land Appeal No. 25 of 2014

.....

JUDGMENT OF THE COURT

24th & 31st October, 2022

GALEBA, J.A.:

This matter started in the District Land and Housing Tribunal for Kigoma (DLHT) as Land Application No. 56 of 2012. In the application, Rev. Sadock Yakobo Mlongeche, now deceased, and whose administratrix of estate is the appellant in this appeal, was praying for several reliefs including eviction of any agents of, or persons acting on behalf of the Registered Trustees of PEFA Kigoma, the respondent, from occupancy of Plot No. 168 Lumumba Road, located in Kigoma/Ujiji Municipality (the land in dispute). According to the application in the DLHT, the applicant was the registered owner of the land in dispute, for

he had bought it on 25th July, 1972 from its previous owner, one Kassamali G. Remtullah. According to the respondent, she was the lawful owner of the land in dispute since the applicant was given the money to buy it for and on her behalf from one Kassamali G. Remtullah on 25th July, 1972. She maintained the position that the applicant being her District Overseer, Supervisor and Administrator of the Diocese of Kigoma, advanced him TZS. 25,000.00 to buy the house on her behalf, as indicated above, in 1972.

After hearing the parties on the merits of the case, on 25th March, 2014, the DLHT aided by assessors dismissed the application in favour of the present respondent. Aggrieved, the deceased appealed to the High Court, but his appeal was not successful, for it was dismissed on 25th July, 2015. Still the appellant was aggrieved by the decision of the High Court, hence this appeal.

In the meantime, however, it transpired that the deceased passed away on 16th January 2020. Consequently, vide Probate and Administration Cause No. 76 of 2020 at Ujiji Primary Court, his wife, Josephine Mangala Msema was appointed administratrix of the deceased's estate, hence her name in the caption to this appeal.

In this appeal the appellant raised three grounds of appeal, but for reasons that will become clearer as we proceed with this judgment, we will start with ground 1 (ii) which is to the effect that:

"1. That the Honourable High Court Judge, grossly erred in law and fact for failing to hold that the judgment, decree and proceedings of the trial District Land and Housing Tribunal for Kigoma in the said Application No. 56 of 2012 are fatally defective and hence nullities due to the fact that:

(i) N/A

(ii) The proceedings of the District Land and Housing Tribunal were presided over by one V. Ling'wentu (Hon. Chairman) and then one Waziri M. H. (Hon. Chairman) succeeded the same, composed the impugned judgment and delivered it to the parties without giving reasons for such succession as the law enjoins."

At the hearing of this appeal, Messrs. Method Raymond Gabriel Kabuguzi and Leonard Sylvanus Joseph, both learned advocates, appeared for the appellant and the respondent, respectively. As learned counsel had lodged their respective written submissions in compliance with rule 106 (1) and 106 (7) of the Rules, they both took advantage of

the proviso to rule 106 (12) of the Rules, to clarify their submissions on record.

In respect of the above stated ground of appeal, Mr. Kabuguzi submitted that from page 41 to 66 of the record of appeal, the proceedings were presided over by Hon. Ling'wentu, Chairman who received the evidence for both parties, however, the judgement was composed and delivered to the parties by Hon. Waziri, M. H., Chairman, without assigning reasons for his taking over the proceedings which had been commenced by a fellow Chairperson. According to him, that offended the provisions of Order XVIII rule 10 of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC). He invited us, in the circumstances, to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019) (the AJA), to nullify the entire proceedings of the DLHT, which would entail the same eventuality to the proceedings, judgment and all orders of the High Court. To bolster his submission and ultimate prayer, he referred us to an order of this Court in **Yassin Said Selemba v. RUMAKO Agricultural and Marketing Cooperative Society**, Civil Appeal No. 92 of 2017 (unreported).

In reply to the above submissions, in both the written submissions and orally before us, Mr. Joseph's contention was that recording of the reasons for taking over the proceedings by a successor Chairperson was

not a mandatory requirement under Order XVIII rule 10 of the CPC. In any event, he argued, the omission did not occasion any injustice to the appellant. Before he was to rest his case, Mr. Joseph, in responding to a query from the Court, as to whether there is any court record demonstrating that assessors gave their opinion to the Chairman in the presence of parties and if so, before which of the two Chairmen, he submitted that the opinion of assessors was filed in the DLHT, which to him was sufficient and everything was perfectly procedural and lawful. Essentially, to him there was nothing alarming in the proceedings of the DLHT to merit intervention of the Court as suggested by his counterpart, Mr. Kabuguzi. Consequently, he moved the Court to dismiss the appellant's ground of appeal number 1 (ii).

Mr. Kabuguzi had no rejoinder because, he said, Mr. Joseph did not make any material reply to his submissions to merit or deserve his reaction.

A quick scan of the above submissions from both counsel reveals one fact which was not disputed; the point that Hon. Vincent. A. Ling'wentu, Chairman (the predecessor Chairman), heard the whole case from inception on 2nd October, 2012 to 29th January, 2014 when he recorded the final submissions of parties after closing their respective cases, while Hon. Waziri M. H. also Chairman, (the successor Chairman),

composed the judgment in the same case and delivered it on 23rd May 2014. The successor Chairman took up the matter without assigning reasons for his preparing a judgment in a case he did not hear. The issue at hand is therefore whether, the omission by the successor Chairman constituted a breach of any law, and if yes what is the consequences to the proceedings and naturally, what is the way forward.

In seeking to resolve the above issue, we have taken quite some time to study the record of the DLHT which is part of the record of appeal with due care and patience. To deliberate on learned counsels' contest, we will start with the orders of the DLHT recorded at page 66 of the record of appeal. At that page, after advocates for parties had made closing submissions, the following is what is on record:

"ORDER: Judgment on 29th January 2014.

*Signed
Vincent A. L.
Chairman
28.11.2013*

DATE: 29.1.2014

CORAM: V. Ling'wentu- Chairman

APPLICANT: Absent without notice

RESPONDENT: Represented by Alex

T/C: Erica

Assessors: 1. Present

2. Present.

TRIBUNAL: The assessors' opinion not yet filed let give (sic).

ORDER: Judgment on 28.02.2014.

*Signed
Vincent A. L.
Chairman
29.01.2014."*

Although the matter was adjourned to 28th February, 2014 for judgment, there is nothing on record until four months later on 23rd May, 2014, when it is indicated in the judgment that it was delivered by the successor Chairman. There is however, no record of attendance of parties or coram for that date, that is, it is not known even who actually attended the DLHT to receive the judgment, though it indicates that parties were present.

For appreciation of the procedure to be followed before composition of a DLHT judgment and its delivery, we will discuss briefly the provisions of Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2002 G. N. 174 of 2003 (the Regulations). That Regulation provides to the following effect;

"(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.”

As for how the assessors should give opinion, it has been clarified by this Court in several decisions. In **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017, **Y. S. Chawala & Co. Ltd v. Dr. Abbas Teherali**, Civil Appeal No. 70 of 2017, and **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (all unreported), this Court has persistently held that the opinion of assessors has to be given to the Chairman in the presence of parties to the land matter. For instance, in **Edina Adam Kibona** (supra), this Court stated:

*"We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate 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 Kiswahili. That opinion must be in the record **and must be read to the parties before the judgment is composed.**"*

[Emphasis Added]

In this case, there is not only the date that was set by any Chairman for receiving opinion but also, there is no any proceedings demonstrating that the assessors gave their opinion to either of the Chairmen in the presence of both parties. At the moment, we will end that point at that, but will come back to it most preferably at the conclusion of this judgment.

For now, we will cross over to the major point subject of this judgment; the issue of one Chairman presiding over the proceedings of the tribunal from the beginning of the case through to receiving evidence and final submissions but suddenly another Chairman stepping into the proceedings and preparing the judgment without any apparent reassignment of the case to him or any recorded reasons.

To discuss this aspect, we will be guided by the provisions of Order XVIII rule 10 (1) of the CPC which was alleged by Mr. Kabuguzi to have been violated, although Mr. Joseph was of a completely different position. As to the interpretation of the above provision we will, also, be guided by decided cases of this Court. That rule provides as follows:

"10-(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or

memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."

In the case of **Hamza Byarushengo v. Fulgence Manya And Four Others**, Civil Appeal No. 33 of 2017 (unreported), as regards the import of Order XVIII rule 10 (1) of the CPC, this Court observed as follows:

*"We are aware that the Court has in its numerous decisions stated that reasons for taking over must be stated by the successor Judge. However, the reasons which prevent the trial Judge to continue with the trial include death, transfer or other causes **and this is what must be brought to the attention of the parties before continuation of hearing.**"*

[Emphasis added]

With the above authority, we must state at this juncture that performance of the obligation under Order XVIII rule 10 (1) of the CPC, by a successor judicial officer is mandatory. It is not discretionary or optional for the successor judicial officer to take over proceedings which have been presided over by a predecessor judicial officer, without assigning reasons accounting for his predecessor's inability to proceed with the judicial proceedings, he is now taking over. Thus, we do not

agree with Mr. Joseph that, the requirement for a successor Chairman to give reasons when taking over the proceedings from another Chairman, is not a mandatory requirement of the law. It is a must, and it is not a matter that may be cured by the principle of overriding objective.

In **Leticia Mwombeki v. Faraja Safarali and Two Others**, Civil Appeal No. 133 of 2019 (unreported), we observed that the silence of the record as to how the court file found its way from the predecessor Judge to the successor Judge puts to test the integrity and transparency of the proceedings in question. It was also observed that where the successor judicial officer takes over the proceedings without assigning reasons, whatever he does in the case he does it without jurisdiction and the omission goes to the root of the matter. In that respect we stated:

"In view of the unknown circumstances, in which the case file found its way to the successor Judge, she had no jurisdiction to proceed with the partly heard case. Thus, we decline Mr. Mrindoko's invitation to invoke the overriding objective principle to remedy a fatal omission which cannot be glossed over as it goes to the root of the matter and occasioned failure of justice."

In the circumstances, we do not agree with Mr. Joseph's argument that the omission occasioned no failure of justice.

The effect of noncompliance with the above provision of the law, is to nullify the proceedings of the successor judicial officer for want of jurisdiction. See **Georges Centre Limited v. Attorney General and Another**, Civil Appeal No. 29 of 2016 and **Kajoka Masanga v. Attorney General and Another**, Civil Appeal No. 153 of 2016 (both unreported).

Mr. Kabuguzi contended that if we will find that the successor Chairman's act of participating in the proceedings to which he was a stranger without any reasons, we should then nullify the proceedings, not only of the High Court but also those of the DLHT. It is at this point that he referred us to the order of this Court in **Yassin Said Selemba** (supra), in which the Court nullified all proceedings and orders from where the successor magistrate took over onwards, including the judgment of the High Court.

Briefly, going through the above authorities, the trend has invariably been to nullify the offending proceedings and orders of the successor judicial officer for want of jurisdiction. That, of course, we will certainly do. In this case however, doing that will not salvage us from a glaring dilemma we will soon be faced with; the quagmire that will set in immediately will necessarily be in respect of the directives to make in the aftermath of having made the above orders.

The predicament is born of the following scenarios constituting hard facts. **One**, as earlier observed, the assessors did not give opinion in the presence of parties to the case; at least there is no record to that effect. In other words, even if we were to order that a fresh judgment be composed, for that to happen, Regulation 19 (2) of the Regulations must be complied with, which means the two assessors, Mrs. Maria Katuku and Mzee Samson M. Nyingu must be called so that the omitted step can be rectified in order that a proper judgment may be composed. However, procurement of those assessors who participated in the trial in the years 2012 up to 2014 may not be easily guaranteed.

Two, likewise, availability of Hon. Vincent Ling'wentu, Chairman who was supposed to receive opinion of the assessors and compose the judgment, cannot be guaranteed with certainty, given the lapse of time. We take cognizance of the possibility of another chairman who may assign reason and proceed with matter, but still, guaranteeing procurement of the assessors as indicated in point number one above, is not short of a challenge.

The above two predicaments, have pushed us to a place where we would not otherwise have reached. Therefore, in order to get rid of any delays and unforeseeable stumbling blocks along the way in this matter, by the principle that each case must be decided in view of its unique

factual setting, in our firm view, the interests of justice and of the parties, dictate and require that a completely fresh trial be ordered in which case the entire proceedings in which the two assessors participated, must go.

Thus, based on the above reasons and the circumstances we have endeavoured to discuss in this judgment, the proceedings of the DLHT for Kigoma in Land Application No. 56 of 2012 spanning from 25th October 2012 when the application was called on for mention in the presence of assessors, for the first time through to 23rd May 2014 when the judgment was delivered, are hereby nullified. The judgment in that respect, is quashed and set aside. In the same breath, all the proceedings in High Court between the two parties to this appeal are all nullified, with further orders quashing all rulings made in that Court including the Judgment and Decree challenged in this Appeal which are both set aside. Consequently, we direct that the original record in Land Application No. 56 of 2012, be remitted to the District Land and Housing Tribunal at Kigoma, so that the case may be tried afresh before any Chairman other than Hon. Vincent Ling'wentu with a fresh set of assessors, according to law.

In view of the above, ground of appeal number 1 (ii) is allowed to that extent and the appeal succeeds. As the discussed ground has

disposed of the appeal, we find no point in venturing into discussing the other grounds, for the outcome thereof would be inconsequential.

Considering that neither of the parties is to blame for the cause that has led to the outcome in this appeal and the parties' status, one being an administratrix of estate of the original party to the matter and another a Church organization, we make no order as to costs.

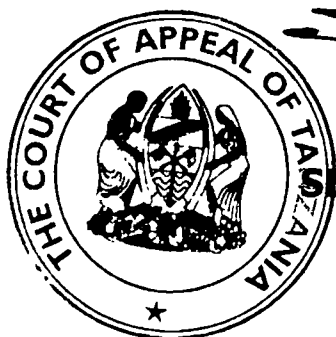
DATED at **TABORA**, this 29th day of October, 2022.

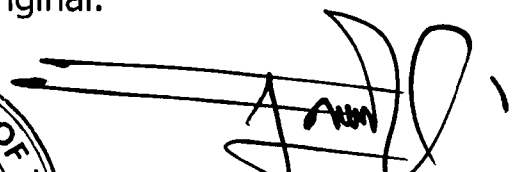
W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 31st day of October, 2022 in the presence of Mr. Amos Gahise holding brief for Mr. Raymond Kabuguzi, learned counsel for the Appellant and Rev. John Wakilongo (Secretary of PEFA KIGOMA), appeared for the Respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL