IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A., LEVIRA, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 197 OF 2018

1. SIKUZANI SAIDI MAGAMBO
2. KIRIONI RICHARD } **.....APPELLANTS**

VERSUS

MOHAMED ROBLE .....RESPONDENT

(Appeal from the Judgement and Decree of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

Dated the 23rd day of June, 2017
in
Land Appeal No. 59 of 2016

JUDGMENT OF THE COURT

27th September & 2nd October, 2019

KEREFU, J.A.:

In the District Land and Housing Tribunal for Dodoma at Dodoma (the Tribunal), the respondent sued the appellants claiming that they have trespassed into his farmland located at Plots Nos. 23 and 24 Matuli area within Dodoma Municipality. After full trial, the Tribunal decided the matter in the favour of the appellants. Aggrieved, the respondent successfully challenged the decision of the Tribunal before the High Court vide Land Appeal No. 59 of 2016. The appellants were aggrieved hence,

this appeal. In the Memorandum of Appeal, the appellants have raised two (2) grounds of appeal which for reasons that will shortly come to light, we need not recite them herein.

When the appeal was placed before us for hearing, the appellants were represented by Mr. Cheapson Luponelo Kidumage, learned counsel, whereas, the respondent was represented by Mr. Sostenes Peter Mselingwa, learned counsel.

From the very outset, we prompted the counsel for the parties to address us as whether the suit was appropriately handled and decided by the Tribunal. More particularly, it is noteworthy that, on 3rd June, 2016 the Tribunal conducted a visit at the *locus in quo* to verify the evidence adduced by the parties during the trial. However, the proceedings of the Tribunal are silent on what exactly was observed and transpired during the said visit.

Again, it is on record that, from 21st October, 2015 to the completion of the trial on 3rd June, 2016, the chairperson sat with two assessors, namely, Mrs. v. Maile and Mr. L. Mwaibale, but he did not invite the said assessors, who assisted him throughout the trial, to give their opinion as required by section 23 (2) of the Land Disputes Courts Act,

Cap. 216 R.E. 2002 (the Act) and Regulation 19 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (the Regulations). The said chairperson only proceeded to schedule a date on which the judgement would be pronounced. However, while composing his judgement he made reference to the opinion of the said assessors. As such, we invited the counsel for the parties to address us on the following issues, as whether:-

(i) the procedures governing visit at the *locus in quo* were properly observed by the Tribunal;

(ii) the opinion of assessors were sought and properly recorded in the Tribunal's proceedings in terms of Regulation 19 (2) of the Regulations; and

(i) it was appropriate for the Tribunal to dismiss the respondent's suit by declaring the appellants lawful owners of the disputed plots and at the same held that the respondent's ownership over the said plots shall be effectual upon payment of fair compensation on the improvements effected by the appellants.

Mr. Kidumage readily conceded to the pointed out anomalies and submitted that the proceedings of the Tribunal were incurably defective

and even its judgement is confusing. He elaborated that, it is true that, the Tribunal visited the *locus in quo*, but the proceedings of the said visit are nowhere reflected in the Tribunal's proceedings, which, he said, is a fatal irregularity.

On the issue of assessors' opinion, Mr. Kidumage submitted that the said opinion were not indicated anywhere in the Tribunal's proceedings, despite of being reflected in the Tribunal's judgement. He further argued that, it is not clear as to whether the said assessors gave the said opinion on the matter.

On the Tribunal's judgment and decree, Mr. Kidumage referred us to page 78 of the record of the appeal and argued that, the decree is non-executable, because the Tribunal dismissed the respondent's suit, but at the same time ordered him to pay compensation to the appellants for the developments they effected on their own land. Due to those anomalies and irregularities, Mr. Kidumage urged us to invoke the revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and nullify the entire proceedings of the Tribunal and quash its decision because, he said, it is nothing, but a nullity.

In response, Mr. Mselingwa went along and supported the submission made by Mr. Kidumage. He also urged us to nullify the entire proceedings of the Tribunal as well as those of the first appellate court.

On our part, having examined the record of the appeal and considered the submissions made by the counsel for the parties, we are satisfied that there was a gross mishandling of the suit by the trial Tribunal.

As for the first issue, we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the *locus in quo,* as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the court or the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial. Some of the said guidelines and procedures were clearly articulated by this Court in the case of **Nizar M.H. v. Gulamali Fazal Janmohamed** [1980] TLR 29, where the Court, inter alia stated that:-

> "***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 witnesses as may have to testify in that particular matter...****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 witnesses. We trust that this procedure will be adopted by the courts in future."* [Emphasis added].

See also the recent decision of this Court in **Avit Thadeus Massawe v. Isidory Assenga,** Civil Appeal No. 6 of 2017 (unreported) where the above guidelines and procedures were reinstated.

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. It is therefore

not clear as who participated in the said visit and whether witnesses were re-called to testify, examined and/or cross examined, as no notes were taken and the 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.

As regards the second issue on the failure by the chairperson of the Tribunal to accord the opportunity to the assessors to make their opinion, we find it apposite to reproduce the contents of provisions of section 23 (1) and (2) of the Act. The said section provides that:

> "23(1) ***The District Land and Housing Tribunal*** *established under section 22* ***shall be composed of one Chairman and not less than two assessors****; and*
>
> (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.

[Emphasis supplied].

In addition, Regulation 19 (1) and (2) of the Regulations impose a duty on a chairperson to require every assessor present at the conclusion of the trial of the suit to give his or her opinion in writing before making his final judgement on the matter. The said Regulations 19 (1) and (2) provides that:-

> *(1) " The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgement on the spot or reserve the judgement to be pronounced later;*
>
> (2) *Notwithstanding sub-regulation (1)* ***the chairman shall, before making his judgement, require every assessor present at the conclusion of hearing to give his opinion in writing*** *and the assessor may give his opinion in Kiswahili."*
>
> [Emphasis added].

The above provisions have been considered and interpreted by this Court in several occasions. See for instance cases of **General Manager Kiwengwa Stand Hotel v. Abdallah Said Mussa,** Civil Appeal No. 13 of 2012; **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar**

Kahwili, Civil Appeal No. 154 of 2015; **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017; **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 and **Y.S. Chawalla & Co. Ltd v. Dr. Abbas Teherali**, Civil Appeal No. 70 of 2017. Specifically in **Ameir Mbarak and Azania Bank Corp** (supra) when the Court noted that the record of the trial proceedings did not show if the assessors were accorded the opportunity to give their opinion as required by the law, but the chairperson only made reference to them in his judgment as in the current case, observed that:-

> *"Therefore, in our own considered view,* ***it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the Chairman in the judgement.*** *In the circumstances, we are of a 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." [Emphasis added].***

Likewise, in **Tubone Mwambeta** (supra) in underscoring the need to require every assessor to give his opinion and the same recorded and be part of the trial proceedings, this Court observed that:-

> *"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."***
> *[Emphasis supplied]*

In the matter at hand, as we have vividly demonstrated above and also alluded to by both counsel for the parties, when the chairperson of the Tribunal closed the defence case, he did not require the assessors to give their opinion as required by the law. It is also on record that, though, the opinion of the assessors were 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 judgement. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgement 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 errors 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. In our view, these points suffice to dispose of the matter and we find that it is not necessary to dwell on discussing the remaining irregularities found in the Tribunal's judgement. Suffice, to point out that even the decree emanated from the said judgement is non–executable for being contradictory.

In the event, we are constrained to invoke our revisional jurisdiction under section 4(2) of the AJA and we hereby nullify the entire proceedings and quash the judgements of both lower courts and subsequent orders thereto. If parties are still interested are at liberty to institute a fresh suit

before the Tribunal, subject to the law of limitation. We order that the said suit should be instituted before another chairperson with a new set of assessors. Since the anomalies and irregularities giving rise to the nullification were raised by the Court, *suo motu*, we make no order as to costs. Order accordingly.

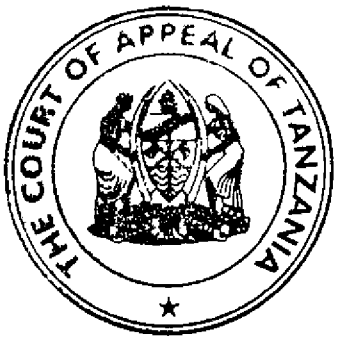
DATED at **DODOMA** this 1st day of October, 2019.

K.M. MUSSA
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

R.J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 2nd day of September, 2019 in the presence of Mr. Matimbwi Joseph, counsel for the appellants and Mr. Sosthenes Mselingwa counsel for the respondent is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL