

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY OF ARUSHA]
AT ARUSHA

LAND APPEAL NO. 67 OF 2022

(Originating from District Land and Housing Tribunal of Babati, Application No. 61/2016)

MARTIN TARMO.....APPELLANT

VERSUS

MICHAEL JOHN.....1ST RESPONDENT

NADA NARIYA.....2ND RESPONDENT

DEIRA ENGLISH MEDIUM SCHOOL.....3RD RESPONDENT

JUDGMENT

Date of last order 28th November 2022

Date of Judgment 07th December 2022

BADE, J

In this appeal, the appellant Martin Tarmo had appealed against the judgment and decree of the District Land and Housing Tribunal, which declared the 2nd and 3rd Respondents as the lawful owners of the suit property described to measure 30 feet by 30 feet located in Sawe area of Maisaka ward in Babati. The appellant having been aggrieved, raised three grounds of appeal, viz

1. THAT, the learned Chairman of the trial tribunal erred in law and fact by deciding the case in Respondent's favor, he hopelessly failed to subject the overall evidence to an objective scrutiny henceforth the indistinct finding that led to miscarriage of justice.
2. THAT, the learned Chairman of the trial tribunal erred in law and fact by ignoring the merit of evidence adduced by the appellant, that proved on balance of probability that he was the legal owner of the suit land;

3. THAT, the learned Chairman of the trial tribunal erred in law by ignoring the fatal irregularities regarding the change of hands of chairpersons and irregularities touching to assessors that goes to the root of the matter henceforth the impugned decision.

Both parties enjoyed the services of learned counsel - the appellant through Mr. Yoyo Asubuhi; and all the Respondents through Mr. Ephraim Koisenge. When the matter was called for hearing, the learned counsel for the Appellant Mr. Yoyo Asubuhi proposed to the Court to start with the third ground of appeal, which he indicated that if allowed, might dispose of the matter wholly without having to consider the other remaining ground as he thought it enough to dispose off the matter. This prayer found no objection from the respondent and it was so granted.

The learned counsel submitted that this ground hinges on gross irregularity evidenced on the record of the trial tribunal. He maintains that the said record of trial tribunal reveals serious irregularities that vitiate the proceedings to the extent of making them a nullity, and proceeded to elaborate on it basing on the main point that there were change of hands of the Chairpersons of the trial tribunal severally and inexplicably.

He urged in narration that the Chairperson who had never had the conduct of the matter Hon. Chairman one H.E. Mwihava, delivered the judgment on 10th May, 2022 without ever hearing the case. It seems he only came to deliver it, and it was recorded as if he was the one who decided the matter, as opposed to delivering it for someone else.

It is not explained why he had to chirp in the way he did or why his predecessor never accomplished issuance of judgment. At page 3, 6 and 9 of proceedings, the chairperson was Hon. Kamugisha who heard the case except for one witness. At page 16 its recorded Hon. Kamugisha was

transferred and there was requisitioned for his successor to proceed one Hon. Mussa Mahelele, who agreed to proceed with the single remaining witness. At page 20, it is noted that the original chairperson came back, and the matter was fixed for hearing so he could finish with the remaining one witness. But just before he proceeded, he noted that the assessors' time of appointment to serve as assessors had lapsed; he thus declined to continue with hearing of the single remaining testimony, and ordered the trial *denovo*.

Yet this never took effect as at page 23 of the proceedings, it is recorded that another chairperson came in - this time Hon. F. Mdachi who vacated the order for trial *denovo* that was made by Hon. Kamugisha, and ordered that he will proceed without assessors having considered the issue of not having them since their time had expired. He relied on section 23(3) of Land Disputes Courts Act R.E. 2019.

After Hon F. Mdachi had ordered the matter to proceed, he did not see it to completion, and it is not explained why he never accomplished what he ordered.

In the next session, the Respondent's side for whose witness was yet to be closed, he made a prayer to have his defence closed and waived his right to hear further witnesses, including the one that remained unheard. So, the chairperson thus ordered that the matter be set for judgment.

When Judgment came, it is found that another chairperson was delivering the judgment without any explanation as to why Hon. Kamugisha or Hon. Mdachi are not the one who are delivering the judgment, while Hon. Mwiwaha never explained why it is him delivering the judgment either.

This irregularity Mr. Asubuhi argues is fatal, as guided by the Court of Appeal of Tanzania- **Leticia Mwombeki vs Faraja Safarali and 2 Others in Civil Appeal No. 133 of 2019** where it was held (page 9-10) where no known circumstances were recorded for change of the judges who heard the case partly and without any explanation as to why it had to be moved to a successor judge and why it had to be moved from a predecessor judge or why she was unable to continue with the trial of a partly heard case. The Court was firm that such circumstances put to test and brings to question the issue of integrity and transparency of the proceedings in question.

Mr. Asubuhi reasons that the irregularity on this matter is on the same grounds, and it goes to the very jurisdiction of this matter. He thus urges the Court and pray for the appeal to be allowed.

At this point both the Court and the learned counsel for the Respondents Mr. Ephraim Koisenge agreed that it is most prudent for the Respondents to be heard in response to this ground of appeal rather than proceed to hear the other remaining grounds of appeal. Having been allowed to respond as proposed, he proceeded to concede on the matters put forth by the learned counsel. He registered his noting of the submissions as made on the 3rd ground of appeal; and on clear reflections of the proceedings, he conceded on the grave irregularities which affect the validity of the proceedings and the decision of the trial tribunal.

The learned counsel acknowledged the tone of events of the proceedings where one chairman is setting aside an order of another without any party's application, and how strange it is that the tribunal allows parties to give jurisdiction to the tribunal while the same had none. He brought the Court's attention to page 23 of the proceedings, while

Hon. F. Mdachi sitting, where parties confer jurisdiction on the trial tribunal and allowed the order of the tribunal to stand uncontested. He readily concede that the proceedings of the trial tribunal are in fact invalid.

He reasons further that the real question becomes what is the fate of such proceedings. He urges that this Court should nullify the entire proceedings, so that whoever wishes to file the case should file it again. He is cautious that they should not be condemned to costs and ask that each party bear its own costs; as the irregularities is of the trial tribunal itself, and none of the parties is actually responsible for this state of affairs, and thus concludes his submission that the said burden should not be borne by any of the parties.

The learned counsel for the appellant rejoins briefly in putting it on record that whenever the proceedings are nullified, the trial should be ordered to start de-novo.

I have taken due consideration of the facts of this appeal and how the irregularity have been demonstrated. The change of hands which had no explanation and /or revert of the matter to the previous chairperson which was also unexplained is unfortunate and a fatal omission as submitted by the counsel of the appellant and admitted by the learned counsel for the respondents. This I must add is in tandem with the requirement of the provisions of Order XVIII Rule 10(1) of the Civil Procedure Code Cap 33 RE 2019 as explained by further reasoning by the Court as they brought the requirement of this provision in perspective to the effect that:

"Where a judge or Magistrate is prevented by death, transfer or other cause from conducting the trial of a suit, his successor may deal with any evidence or memorandum taken down or

made under 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”

And the reason for needing to stick to such practice is the noble intention to ensure transparency and integrity of the whole judicial proceedings and the process of dispensation of justice. Confer High Court decisions in Omary Fundi Kondo Humbwanga vs Said Mwinjuma Humbwanga and Another Land Appeal No 27 of 2019; Oysterbay Villas Limited vs Kinondoni Municipal Council Civil Appeal No 173 of 2017; Saada January Nyambibo vs Debora January Nyambibo Civil Appeal No 140 of 2020 as well as M/s George Centre Ltd vs The Honorable Attorney General in Civil Appeal No 29 of 2016 while considering an issue similar to this one. This has been the position of the Court of Appeal as it held

“The general premise that can be gathered from the above provision is that, once a trial of a case has begun, before one judicial officer that officer has to bring it to completion unless for some reason, he or 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 the case that is partly heard by another. There are a number of reasons why its is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing the one who sees and hears the witnesses is in the best position to assess the witness’s credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law.

Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised"

On further observation, it is important to emphasize that reasons for reassignment are mostly relevant when the case is partly heard; and that the succeeding judicial officer is the one to record the reason for reassignment as is the one currently sitting in, not the one who is no longer there as the prevention for his not being there could be for reasons that are out of their control, and could not humanly be recorded by the preceding officer such as death. On this particular aspect, the Court of Appeal stated in Hamza Byarushengo vs Fulgence Manya & 4 others in Civil Appeal No. 33 of 2017:

"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 cause and thus is what must be brought to the attention of the parties before the continuation of the hearing"

In the case at hand, the change of hands were not recorded and as such, I agree with both counsel that it's a no-brainer that it has occasioned a miscarriage of justice as justice should not only be done, but seen to be done. As was explained, judgment was composed by a judicial officer who did not hear the case, nor had he had the chance to hear and assess all the witnesses, which could be termed to have occasioned miscarriage of justice leading to a flawed conclusion. The said irregularity is an omission vitiating the whole proceeding making the judgment ineffectual, and as such cannot be glossed over.

On the final analysis, I find the ground of appeal meritorious and thus allow the appeal. This one ground is enough and it sufficiently disposes the whole matter. As a result, I nullify the entire proceedings before the District Land and Housing Tribunal, with its respective judgment and order. The case file is returned to the District Land and Housing Tribunal of Babati for the case to be heard de novo before another Chairperson with another set of assessors. I further order that because the matter had been long standing in court as it commenced in 2016, the re trial be expedited. I make no order to costs as prayed by respondents' counsel and conceded by the appellant's counsel.

It is so ordered.



A.Z. BADE

JUDGE

07/12/2022

The judgment delivered this 7th day of December in the presence of Mr. Moffat Seth holding brief for Mr. Yoyo Asubuhi learned counsel for the Appellant and in the absence of the Respondents and their Counsel.



A.Z. BADE

JUDGE

07/12/2022