

TANZANIA / JUDGMENT

martin opanga ogeda vs mkami michael kibageri 2022 tzhc 15843 15 december 2022

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA IN THE DISTRICT REGISTRY OF SHINYANGA AT SHINYANGA LAND APPEAL NO. 93 OF 2021 MARTIN OPANGA OGEDA APPELLANT VERSUS MKAMI MICHAEL KIBAGERI RESPONDENTS [Appeal from the Decision of District Land and Housing Tribunal for Maswa] (J.F. Kanyerinyeri, Chairman) dated the 15th day of November, 2021 in Land Application No. 63 of 2019

JUDGMENT

12th September & 15th December, 2022. S.M. KULITA, J. This is an appeal from the District Land and Housing Tribunal for Maswa in the Land Application No. 63 of 2019 delivered on 15th day of November,

2021. In a nut shell, the respondent sued the appellant in the District Land and Housing Tribunal for Maswa claiming over Plot No. 5 Block "Somanda". The respondent claimed to have found the appellant building 1 his house thereon. On his side the appellant claimed that, he was lawfully allocated with the said piece of land, he thus built his house thereon. At the conclusion, the trial tribunal declared the respondent the lawful owner of the suit land. That decision aggrieved the appellant, hence this appeal with 9 grounds which can be summarized as follows; one, the trial chairman failed to consider Exhibits and the adduced evidence regarding how the appellant acquired the suit land, two, the trial chairman erred not to take into consideration that by the time the respondent purchased the suit land the appellant had already built a house, three, respondent's . pleadings differ with her testimony regarding how the appellant invaded the suit land, four, the trial chairman failed to take into consideration that the testimony of PW3 corroborated the testimony of the appellant regarding the presence of appellant's house at the suit land, five, PW2 was allowed to testify as the seller of the suit land while the seller had already died, six, the trial chairman failed to note that there is a difference of names between the one who testified as the seller and that found in the exhibit P1, seven, the testimony of PW3 was questionable, eight, the trial chairman erred to deliver judgment without assessors giving their opinion and nine, trial tribunal erred to declare the respondent the winner while her evidence was weak and questionable. 2 On 17th May, 2022, this appeal was scheduled for hearing through written submissions. Both parties complied with the scheduling orders. Mr. Geoffrey Tuli,

Advocate represented the appellant whereas Mr. Godfrey Marobhe Murbba Advocate, represented the respondent. Submitting in support of the eighth ground of appeal Mr. Geoffrey Tuli told the court that, the assessors' opinions were neither given nor read out in court. To cement his argument, he made this court refer page 33 of the typed proceedings. Mr. Tuli called that omission as a fatal irregularity which is contrary to regulation 19(2) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003. To bolster his assertion, he cited the case of Sebastian Kudike vs. Mamlaka ya Maji Safi na Maji Taka, Civil Appeal No. 274 of 2018, CAT, Arusha and the case of Sikuzani Saidi Magambo and Another vs. Mohamed Roble, Civil Appeal No. 197 of 2018, CAT at Dodoma. On this, Mr. Tuli insisted that, the same opinion is missing in the record. In reply to that, Mr. Muroba stated that, the trial tribunal's chairman adhered to the cited regulation 19(2). He added that, the proceedings of the trial tribunal specifically that of 15th November, 2021 transpire that opinion of the assessors were read out before judgment was composed. 3 _1.

..... . ~ _ _-----_ -----" .. **..... Concerning the missing of the said opinion in records Mr. Muroba stated, that that might be the work of untrustworthy clerks of the tribunal. Both parties to the case agree that, it is a requirement of the law that opinion of assessors should be given first, before the delivery of the judgment. Section 23 of the Land Disputes Courts Act [Cap. 216 RE2002] provides; "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.

And Regulation 19(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (the Regulations) provides; - "19(1) The Tribunal may, after receiving evidence and submissions under Regulation 1~ pronounce 4 · ~- 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 edea]. On that premise, the issue is whether the trial chairman, before pronouncing judgment accorded assessors with a chance of giving out their opinion. The trial tribunal's proceedings provide as hereunder; 15.11.2021 CORAM J.F. Kanyerinyeri-Chairman Assessors pt -Ester Kulwa ;?7d - Zuhura Mageuza Applicant-Present Respondent- present in person T/Clerk-5. Allen Tribunal - assessors' opinions have been read to the parties. Sign 5 J.F. Kanyerinyeri Chairman 15.11.2021 Tribunal Judgment is passed Sign J.F. Kanyerinyeri Chairman 15.11.2021. Opinion is given for the trial tribunal to consider during the composition of its judgment. As quoted above, the records show that, the Assessors' opinion were given on the same session that the

Chairman delivered his 14 pages typed judgment. This is unrealistic, and the same adds up suspicion as to whether the assessors' opinion were given for consideration before judgment being delivered. Upon going through the trial tribunal's case file, I actually noticed it being true that the paper sheet with the assessor's opinion is missing. The missing of the opinion of assessors cements it all that, and makes me to conclude that the assessors' opinion were, not there, hence never read out before the judgment was pronounced, 6 II} the Court of Appeal case of Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015, CATat Iringa when confronted with the same issue held as follows; - "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] The act of trial tribunal of pronouncing judgment without first giving out and considering of assessors' opinion is a serious irregularity. Likewise, in the cited case of Sikuzani Said Magambo (supra) the Court of Appeal had the same comment by saying; "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 my view, this eighth ground of appeal suffices to dispose of the matter and I find it not necessary to dwell on discussing the remaining grounds of appeal as the same will just be an academic exercise. But before I wind up, I find it appropriate to briefly show another serious irregularity in the trial tribunal's proceedings. As for this, it is pertinent to start with the position of law on the mode of recording evidence during the trial. The District Land and Housing Tribunal exercises its duty in accordance with the Land Disputes Courts Act [Cap. 216 RE 2019] (the LDCA) and the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003. However, both legislations do not have provisions on the mode of recording evidence. Therefore, in terms of section 51(2) of the LOCA, the Civil Procedure Code [Cap. 33 RE 2019] (the CPC) applies. Now, looking at the CPC, the procedure for recording of evidence is provided for under Order XVIII, Rule 5 of which I hereby reproduce as hereunder; 8

- "There is my plot"
- "It is plot No. 3 Block No.5" In the events, I hereby nullify the entire proceedings and quash the judgement of the trial tribunal and its subsequent orders thereto. If the parties are still interested they are at liberty to institute a fresh suit before the Tribunal, subject to the law of limitation, and if filed, the suit should be entertained by another Chairperson with a new set of assessors. As the faults have been caused by the Tribunal, I make no order as to costs. if 1- S.M. KULITA JUDGE 15/12/2022 K S.M. KULITA JUDGE 15/12/2022 " c . " .x ~ . , . ' , 10 "The evidence of each witness shall be taken down in writing/ in the language of the court by or in the presence and under the personal direction and superintendence of the judge or magistrate/ not ordinarily in the form of question and answer; but in that of a narrative and the judge or magistrate shall sign the same." When you pass through the trial tribunal's

proceedings particularly at pages, 12, 17, 18, 19, 23 and 29 the witness statements were not recorded in a narrative form, but in questions and answers, just by putting the answer, contrary to the requirements of the above cited provision. This causes injustice, as this being the appellate court, cannot be in a position to know as to what were the question that led to the short answers seen in the record. This is also a serious irregularity. For easy of reference, I hereby quote some few recordings from page 12 of the tribunal's typed proceedings, of which the person who was not in court during trial cannot be in a position to know as to what was the question for the recorded reply; -"He did not show me"

- "They looked at file" 9

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