

TANZANIA / JUDGMENT

mwigisho nyamhanga vs magori nyitiki and another 2020 tzhc 477 31 march 2020

COURT
TZHCDECIDED
31 March 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF MUSOMA AT MUSOMA LAND APPEAL NO 09 OF 2019 (Arising from the Land Application No
176/2017 of the District Land and Housing Tribunal for Mara at Musoma) MWIGISHO
NYAMHANGA..... APPELLANT Versus MAGORI NYITIKI
A 1st RESPONDENTS MAKONGO NYAM HANGA..... 2nd
RESPONDENT

RULING

23rd & 31 March, 2020 Kahyoza, J. Magori Nyitika sued Mwita Mwigisho Nyamhanga and Makongo Nyamhanga praying for a declaration that he is the lawful owner of the suit land. Magori Nyitika won the case in the District Land and Housing Tribunal (DLHT). Mwigisho, who enjoys the services of Mr. Sanya advocate appealed to this Court. I perused the record and found that the Chairman of the DLHT heard the appeal with aid of two assessors, Mr John Maliage Bakere and Mr. A.R Swagarya as required by the law. However, the Chairman fixed, at the conclusion of the hearing on 22nd November 2018, a date of judgment without requiring the assessors to give opinion. Further, the chairman did not fix a date for the assessors to read out their written opinion in the presence of the parties. The assessors filed their written opinion on various dates i.e. on 28th November 2018 and 15th January

2019. The Chairman referred to the opinion of the assessors in his judgment. He concurred with the opinion of one of the assessors. Based, on the above record and the clear position of the law, I called upon the parties to address me on the issue whether the omission to read the opinion of the assessor affected the trial of the dispute of the parties. The appellant's learned advocate, Mr Sanya reacted promptly that the chairman of the tribunal skipped to read the opinion of the assessors to the parties and that omission vitiated the trial and that the proceedings must be quashed and the judgment set aside. He requested this Court to order trial de novo. The respondent who was unrepresented submitted that the chairman read out the opinion of assessors on the 7/03/2020 before judgment. He contended obviously so, that he doesn't know the consequences of the chairman's failure to read the opinion of the assessors to the parties. In his rejoinder, Mr. Sanya, the appellant's advocate emphatically reiterated that the chairman did not read out the opinion of the assessors. It is

now settled position of the law that omission to read the opinion of the assessors after the conclusion of the hearing is a fundamental defect which vitiates to the proceedings. That stance was taken by the Court of Appeal in *Tubone M w am beta v. Mbeya City Council*, Civil Appeal No.287 of 2017(unreported) where it held that it was very important for the Chairman to call upon the assessors to give their opinion in writing and read the same to the parties. The Court of Appeal stated as follows: - "In view o f the settled position o f the law where the trial has to be conducted with the aid o f the assessors/ ...they must actively and effectively participate in the proceedings so as to make meaningful their role o f giving their opinion before the judgment is composed...since Regulation! 9 (2) o f the Regulations requires every assessor present at the trial at the conclusion o f the hearing to give his opinion in writing/such opinion m ust be availed in the presence o f the parties so as to enable them to know the nature o f the opinion and whether or not such opinion has been considered by the Chairman in the fin al verdict. " The above position was recapitulated by the Court of Appeal in *Edina Adam Kibona V Absolom Swebe* C iv il Appeal No. 286 OF 2017 CAT (Unreported) where it stated thus,- "We wish to recap at this stage that the trials before the District Land and Housing Tribunal, as a matter o f law, assessors must fully participate and at the conclusion o f evidence, it terms o f Regulation 19(2) o f the Regulations, the Chairman o f the District Land and Housing Tribunal must require every one o f them to give his opinion in writing. I t may be in Kiswahill That opinion must be in the record and must be read to the parties before the judgment is composed . For the avoidance o f doubt, we are aware that in the instant case the original record has the opinion o f assessors in writing which the Chairman o f the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view o f the fa ct that the record does not show that the assessors were required to give them, we fa il to understand how and at what stage they found their way in the court record. And in further view o f the fa ct that they were not read in the presence o f the parties before the judgment was composed, the same have no useful purpose. " The issue for determination is whether the chairman requested the assessors to give opinion and read their opinion to the parties. The respondent submitted that the chairman read the opinion of the assessors to them before he delivered the

judgment.

The record of the tribunal bears testimony. The respondent concluded their case on the 23rd November, 2018. The Chairman fixed a judgment on the 18th January, 2019. He did not require the assessors to give their opinion. He adjourned the delivery of the judgment to 7th March, 2019 on the ground that he had not composed it. The chairman delivered the judgment on the 7th March,

2019. It is nowhere recorded that the chairman read out the opinion of the assessors to the parties. It is therefore, the findings of this Court that the chairman omitted to call upon the assessors to give their opinion in writing. And that despite the fact that, the assessors gave their opinion in writing, the chairman did not read the them to the parties. Given the

position of the law and the findings stated above, the District Land and Housing Tribunal failed to actively involve the assessors in the hearing of the application, in violation of the clear provisions of the section 23 of the Land Disputes Courts Act, Cap 216 (R.E. 2002) and regulation 19 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations G. N. 174/2003. The omission is fatal and vitiates the proceedings, rendering it trial without assessors. Consequently, the proceedings are quashed and the judgment set aside. I direct the appeal to be heard afresh before another Chairman and new assessors. Each party shall bear its costs as there is no party to blame but the District Land and Housing Tribunal. It is ordered accordingly. J. R. Kahyoza JUDGE 31/3/2020 Court: Ruling delivered at 03.00 pm. Mr. Mwigisho Nyamuhanga, the appellant and his advocate Mr. Sanya and Mr. Magori Nyitika, the respondent, all were present and discharged at 09.00am before the ruling was delivered. Copies of the Ruling should be dispatched to them. B/C Mr. Charles present. J. R. Kahyoza JUDGE 31/3/2020

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