

TANZANIA / JUDGMENT

neema upendo and 2 others vs eliewaha m mfinanga 2021 tzhclandd 496 8 september 2021

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 269 OF 2019 (Appeal from the Judgement and Decree of Kinondoni District Land and Housing Tribunal, Hon. R.L. Chenya in Consolidated Application No. 116 of 2011, 117 of 2011 & 294 of 2012 delivered on 31st October, 2019) NEEMA UPENDO..... 1st APPELLANT
CATHERINE NGEHU..... 2nd APPELLANT MARY
SYLVESTER..... 3rd APPELLANT VERSUS ELIEWAHA M.
MFINANGA.....RESPONDENT JUDGMENT ON APPEAL Date of Last Order:
19/8/2021 Date of Ruting: 08/9/2021 A. MSAFIRI, J The appellants Neema Upendo (1st appellant), Catherine Ngehu (2nd appellant) and Mary Sylvester (3rd appellant) have instituted this appeal after having been aggrieved by the judgement and decree of Kinondoni District Land and Housing Tribunal whereby the trial Chairman Hon. R.L. Chenya decided in the favour of now respondent Eliawaha Mfinanga. In their grievances, the appellants filed six grounds of appeal which for now, I need not recite them herein. When the appeal was placed before me for hearing, the appellants were represented by Joseph Kipeche, learned counsel while the respondent was represented by Rajab Mrindoko, learned counsel. While going through the trial Tribunal records, in preparation of hearing of an appeal, I noted some irregularity in the proceedings of the trial Tribunal. The irregularity relates to compliance with section 23 (3) of the Land Disputes Courts Act, Cap 216. The records shows that the tribunal commenced the trial with two assessors who at one stage were absent and were later allowed to rejoin and prepare opinions. On that, I invited the counsels for both parties to address me on the apparent irregularity and the implication to the proceedings, findings and the judgment of the trial Tribunal. Mr. Kipeche, addressing on the irregularity, submitting before the Court, he conceded that, it is reflected on the record that, during the trial, the hearing commenced with two assessors, who were absent at some time, and were allowed to rejoin later and give out their opinion. That, none of the assessors heard the evidence of all witnesses. Out of the 9 witnesses who testified, the 1st assessor Mr. Kinyondo heard the evidence of 3 witness i.e. PW1, PW2 and DW2. The 2nd assessor Mrs. Mbakileki heard the evidence of 4 witnesses out of 9 witnesses i.e. PW1, PW2. PW5 and DW2. Mr. Kipeche submitted further that, section 23(3) of Cap 216 allows the Chairman to proceed and conclude the

proceedings in absence of one or two assessors who were present at the commencement of the hearing. He argued that once the Chairman decides to continue with the hearing without 2 assessors, then he has to conclude the proceedings and give judgement without the opinion of the assessors. Mr. Kipeche cited the case of Sikudhani Saidi Magambo and another Vs. Mohamed Roble, Civil Appeal No. 197 of 2018 at page 10. He argued that the assessor must hear the evidence of all witnesses. And where an assessor misses hearing the evidence of some of the witnesses, it lead to unclear involvement of an assessor and that renders a trial a nullity. The counsel cited the case of Ameir Mbarak vs. Edgar Kahwili, Civil Appeal No. 154 of 2015 CAT Iringa (unreported) where the Court addressed the consequence of allowing the assessors to give an opinion when they did not hear all the evidence. It renders the proceedings a nullity. Mr. Kipeche concluded by inviting the court to invoke its revisional powers under Section 43 (1) (b) of the Land Disputes Act, and nullify the entire proceedings and quash the judgement and subsequent orders thereto. Replying, Mr. Mrindoko submitted that Section 23 (1) of Cap 216 requires the trial before District and Housing Tribunal to commence with two assessors. The trial Tribunal is bound to proceed with them until finalization of the case until the circumstances stated under section 23(3) (supra), applies. As per Section 23, in the absence of one or both two assessors, trial Chairman is allowed to proceed alone with the trial to the conclusion. He submitted further that in the present matter, the trial commenced on 13/8/2013 with two assessors, Mr. Kinyondo and Mrs. Mbakileki. However, in the course of the trial, both assessors were on and off. On 13/11/2017 3 both assessors were absent. The chairman then invoked section 23(3) of Cap 216 and proceeded alone. Basing on that, the defence case started without assessors whereas DW1 testified and after that the matter was adjourned. When proceedings resumed on 30/8/2018, the two assessors seems to have been present and heard the evidence of DW2 and the defence closed its case. Mr. Mrindoko addressed the Court that after that, the Chairman allowed the assessors to give their opinion on the matter and they write a single opinion and they both signed. As per the record, the trial chairman considered their opinion in his judgment though he decided to differ with them in his decision. Mr. Mrindoko pointed that this was irregular as it went against Section 23(3) of Cap. 216 and it went against the chairman order made on 13/11/2017 where he decided to proceed with the matter alone under Section 23(3) of Cap. 216. However, Mr. Mrindoko argued that although there is irregularity, he does not see any consequences. He cited section 45 of Cap. 216 which provides that an irregular proceedings can be upheld if no failure of justice has been occasioned. Mr. Mrindoko was of the opinion that there was no failure of justice and the defectiveness is curable under the cited provision. He gave reasons for his opinion that; the law allows the trial Chairman to proceed and conclude the matter in the absence of assessors, which he has done as per his order of 13/11/2017; therefore, the assessors' opinion given after that order has no effect. 4 He argued further that, the chairman is not bound to follow the opinion of the assessors. It is on record that the trial Chairman did not conquered with the opinion of the assessors but he chose to differ with them; hence, the opinion by the assessors did not influence the result of the case at all. He maintained that the irregularity is curable under section 45 of Cap 216. He cited the case of Registrar of Buildings & Hawa Bayona vs. Keniz Abdullah (1989) TLR 71 and Arbogast Fundi vs. Masudi Zaidi (1980) TLR 125. Mr. Mrindoko argued vehemently that, the case cited by Mr. Kipeche, one of Sikuzani Saidi Magambo & Another vs. Mohamed Roble (supra) is distinguishable

to this matter before this Court. He prayed for this Court to hear this appeal on merit. He prayed further that if the Court finds that the irregularity cannot allow the appeal to be heard on merit, the order should be for the case file to be remitted back to the Chairman to write the judgment himself without involving assessors. In rejoinder, Mr. Kipeche reiterated what he has submitted in chief and added that the irregularity on the proceedings cannot be cured under Section 45 of Cap 216 as submitted by the Counsel for the respondent. This omission goes to the root of the matter. He added further that the Chairman cannot compose a judgement on the irregular proceedings. He concluded that the whole proceedings and judgment should be quashed. I have considered the submissions by the learned counsels and I am grateful for their analysis on the matter. From the said submissions and apparent from the records, it is not disputed that there was irregularity in the 5 proceedings of the trial Tribunal. The issue then to be determined is whether the said irregularity can be cured under section 45 of Cap 216. Section 45 provides that; "No decision or Order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing unless such error, omission or irregularity has in fact occasioned a failure of justice.(emphasis mine)" As per the proceedings of the trial tribunal, the assessors were on and off during the whole time of the hearing. Mr. Mrindoko argued that on the commencement of the trial on 13/8/2013, both assessors were present. In the course of the trial, both assessors were on and off. On 13/11/2017 both assessors were absent so the chairman invoked Section 23(3) of Cap 216 and proceeded alone. Citing section 45, Mr. Mrindoko admitted that there was irregularity but there was no failure of justice. He contended that since the law allows the trial chairman to proceed and conclude without assessors, which the chairman has done as per his order of 13/11/2017, the opinion of assessors given after that order has no effect. Furthermore, the Chairman is not bound to follow the opinion of the assessors. I beg to differ with the observation and analysis of Mr. Mrindoko learned counsel for the respondent. 6 Although the trial Chairman made an order on 13/11/2017 under Section 23

- (3) of Cap 216 which allows him to proceed with the trial without the assessors, I would like to point out this Order was made after the applicants' case has closed. So, the defence case started without assessors except for DW2. However, during the applicants' case, the assessors were on and off. On 24/4/2014 when PW3 who is the 1st appellant Neema Upendo was giving her testimony, there was no attendance of assessors and the trial chairman did not invoke Section 23(3) of Cap 216 but he nevertheless, proceed alone. On 05/3/2015, PW4 was giving testimony. However, the coram was not clear on whether there was attendance of the assessors, this is shown at page 60 of the handwritten proceedings of the trial Tribunal. However, at page 66 of the same, the records show the witness being questioned by the unnamed assessor. Furthermore, on 22/11/2016, when PW5 who is the 3rd appellant Mary Sylvester was testifying, it seems there was one assessor, at page 71 of the proceedings. On 28/11/2016 and 16/12/2016 when PW6 and PW7 were testifying, there was no assessors and trial chairman did not invoke section 23(3) of Cap 216. In his judgement, the trial chairman made findings as follows; "Now I embark on the assessor's opinions. As stated above, both assessors have opined in favour of the applicants but as reasoned above, I partly concur with

them as they particularly favour the 3rd applicant but I partly differ with them on the part of the 1st and 2nd applicants as reasoned above. 7 On the above circumstances we partly allow Applicationby declaring the 3rd applicant the lawful owner of plot No. 486 Block E Salasala Kinondoni Dar es Salaam." Here, the trial Chairman is concurring with the opinion of assessors, although partly and made a decision basing on that opinion. I find this is a miscarriage of justice as the assessors did not participate fully during the hearing. Their opinion hence, could not have done justice to both parties and worse, the trial Chairman has partly based on it in his findings and decision. In this regard, the irregularity of the proceedings in this matter can not be cured as it was argued by Mr. Mrindoko. There is a set of precedent cases in the circumstances where there is apparent irregularity on the record, pertaining the attendance and involvement of the assessors as per the law. The principle in the case of Ameir Mbarak & Another vs. Edgar Kahwili (supra) is to the effect that unclear involvement of assessors in proceedings renders such proceedings a nullity. Furthermore, in the same case of Ameir Mbaraka & Another, the Court of Appeal after being invited to consider on whether the omission/irregularity was curable under Section 45, it was of the firm view that, the omission goes to the root of the matter and it occasioned failure of justice and there was no fair trial. The Court of Appeal went on to assert that the law was contravened as Tribunal was not properly constituted which cannot be validated by the Chairman as he alone does not constitute a Tribunal. 8 In another current case of Erica Christostom Vs. Christostom Fabian & Another, Civil Appeal No. 137 of 2020, CAT at Bukoba (unreported), the Court of Appeal cited with the approval its decision in the cases of Awiniel Mtui & 3 Others vs. Stanley Ephata Kimambo & Another, Civil Appeal No. 97 of 2015 and Samson Njarai and Another vs. Jacob Mesoviro, Civil Appeal No. 98 of 2015 whereby it articulated that; " The consequences of unclear involvement of assessors in the trial renders such trial a nullity". In the cited cases, the Court of Appeal then proceeded to nullify the proceedings and judgement of the District Land and Housing Tribunal as well as those of the High Court on first appeal. In view of the above analysis, I find and hold that the irregularity on the proceedings concerning the attendance and involvement of the assessors in the course of the trial was fatal and vitiated the proceedings of the Tribunal. Mr. Mrindoko, counsel for the respondent made a prayer before this Court that, in the circumstances this court finds that the irregularity cannot allow the appeal to be heard on merit, then the order should not be to quash and set aside the proceedings but to remit the file back to the Chairman to write the judgement himself without involving assessors because he has made an order previously to continue without assessors. With due respect, I don't agree with Mr. Mrindoko. As I have analyzed earlier, the order which is being pointed out by Mr. Mrindoko was done on 13/11/2017, this was after the applicant's witnesses has testified and some 9 of them questioned by the assessors. The only part which the Chairman presided alone was during the defence hearing even with that, at some time, there was attendance of assessors during the evidence of DW2. Therefore, basing on that, the trial Chairman cannot compose a judgment basing on the defence case alone. That would be irregular and impossible. Therefore, for the reasons I have endeavored to assign herein above, I invoke my revisional jurisdiction under Section 43(1) (b) of the Land Disputes Act, Cap 216 and hereby nullify the

entire proceedings, judgment and decree of the District Land and Housing Tribunal for Kinondoni. I hereby order that the matter be remitted to the trial Tribunal for the trial to be conducted afresh before another Chairman and new set of assessors. Since the irregularities giving rise to the nullification was raised by the Court suo motu, I make no order as to costs. Order accordingly. COURT: Ruling delivered this 8th day September 8, 2021 in the presence of Ms. Rahel Sarumbo, Advocate for Respondent. JUDGE io

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