

TANZANIA / JUDGMENT

# TWAIBU MAGHEMBE SAFII

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28 August 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO 401 OF 2023 (Originating from the Judgement and Decree of the District Land and Housing Tribunal for Mwananyamaia at Mwananyamaia in the Land Application No. 324/2016 delivered on 28 August 2023 by the Hon. J. W Silas) BETWEEN TWAIB ABDALLA MAGHEMBE..... 1st APPELLANT ABDALLA JUMANNE MAGHEMBE..... 2nd APPELLANT VERSUS MONICA LYAYUKA..... 1stRESPONDENT ATLAS PRE AND PRIMARY SCHOOL..... 2ndRESPONDENT MWITA MARWA KISIBOYE..... 3rdRESPONDENT

## JUDGEMENT

Date of last order; 29/02/2024 Date of judgement; 30/04/2024 MWAIPOPO, J This is an Appeal filed by Twaib Abdalla Maghembe against Monica Lyayuka and two others against the decision of the District Land and Housing Tribunal (DLHT) in Land Application no. 324/ 2016 at DLHT for Mwananyamaia at Mwananyamaia delivered by Hon Chairman J.W. Silas on the 28th August 2024. The Appellants were the 1st and 2nd Respondents before the Tribunal in an Application that was filed by the 1st Respondent herein who was the Applicant therein. The 2nd and 3rd Respondents herein were also the 3rd and 4th Respondents before the Tribunal. The Applicant before the Tribunal, one Monica Lyayuka Mbale filed an Application claiming for the following reliefs;

- i. A Declaration that the suit unsurveyed piece of land at Mivumoni area Wazo ward in Kinondoni Municipality, Dar es salaam belong to the Applicant; ii. Declaration that the Respondents are trespassers into the suit unsurveyed piece of land located at Mivumoni area Wazo Ward in Kinondoni Municipality, Dar es salaam; iii. Demolition order to demolish whatever development done on the suit piece of land by the Respondents or their agents or workmen or servants or assignees iv. Permanent injunction to restrain the Respondents or their agents or workmen or servants or assignees from trespassing into the suit property and from constructing any structure on the suit premises - »
- v. General damage of Tshs. 30,000,000/= be paid to the Applicant by the Respondents vi. Interests of 20% per month of the decretal sum be paid to the Applicant by the Respondents from judgement date to the execution date vii. Costs of this Application be borne by the Respondents viii. Any other relief(s) or orders this Hon. Tribunal may deem appropriate to

grant The Appellants who were among the Defendants including the 3rd and 4th Respondents herein objected to the Application by filing a Written Statement of Defence. Following determination of the matter the 2 Tribunal pronounce the 1st Respondent the lawful owner of the suit land and granted costs in her favour. Aggrieved with the decision, the Appellants herein who were the 1st and 2nd Respondents therein appellant filed a Petition of Appeal cohtaihTng“4” grounds of Appeal as follows;

1. That the Honourable Chairperson erred in law and fact for closing the 1st Respondent's case
2. That the Honourable Trial Chairperson erred in law and fact by its failure to consider the principle of natural justice of the right to heard by denying the prayer of the Appellants counsel of adjournment on the ground of sickness of witness
3. That all the Honorable Trial Chairperson heard the matter erred in law and fact by failure to record the assessors name in the Coram as there was no any Assessors who heard the matter hence the Honourable Tribunal was incomplete.
4. That the Honourable Trial Chairperson who heard this matter erred in law and fact by not assigned a reason for taking over the matter from the first Chairperson to another contrary to the requirement of the law. Based on the above grounds the Appellants prayed for the Court to grant' the following reliefs;
  - a. Set aside the proceedings and decision of the Tribunal in Land Application no. 324/2016 and order retrial;
  - b. To allow the Appellants to heard
  - c. Any order for the Costs of this suit. 3
  - d. Any other relief(s) that this Hon. Court may deem fit and just to grant. The hearing of the Appeal proceeded by way of written submissions pursuant to the timetable ordered by the Court. At the commencement of hearing the Appellants submissions were prepared by learned counsel Salha Ramadhani Hamis while the Respondents enjoyed the services of learned counsel Vedastus Majura Submitting in support of the Appeal, the Appellant submitted that That, the honourable trial chairperson erred in law and fact for closing We Respondent case. He referred the court to page no 5 first paragraph of the typed and the case of David Mushi Vs. Abdallah Masham Kimwanga Civil Application No. 286 of 2016 where the Court of Appeal of Tanzania at Dar es Salaam page No. 19 stated as follows; "We therefore proceed to quash and set aside the closing of the plaintiff's case proceeding of the high court from 5th May 2015 to the end and set aside the Judgement decree emanating therefrom" From the above one may note that the Appellants were denied their right to be heard and fair hearing per the Article 13 of the Constitution. Therefore, the Tribunal violated the rights of the Appellants. With regard to the second ground of appeal, the Appellants contended that the honourable trial chairperson erred in law and fact by failing to consider the principle of natural justice of the right to be heard by denying the prayer at the Applicant's counsel of adjournment on the ground of sickness of witness while they had an evidence to

that effect and the other advocates had not objected. They contended that is 4 against the principles of natural justice as outlined under Article 13(6) of the Constitution and emphasized in the case of Mbeya Rukwa Auto Parts & Transport Limited Case Civil Appeal No. 45 of 200 (unreported). Regarding the 3rd ground of Appeal, the Appellants contended that the honourable chairperson erred in law and in fact for failure to record the assessors name in the Coram as there was no any assessors who heard the matter hence honourable tribunal was incomplete. The Appellants submitted the Chairperson failed to record the name of the sitting assessors at the stage of the hearing meaning that there was no any assessor sitting while it was the requirement of the tribunal to record their names in the Coram of the court. This is saying failure comply with the provisions of the law the remedy available is nullify the proceedings to aside any order emanating from the judgement. The Appellants referred the court to the case of Agnery Fiberth Mlenge Vs. Ndulu Nsulwa, Land Appeal No. 270 of 2019, High Court of Tanzania, Land Division Dar es Salaam at page 9,10 and 11. Where the court held as follows; "I quash all the proceedings therein and set judgement and decree resulting therefore in the circumstances whoever is interested may approach the appropriate forum subject to the rules of limitation. Should either of the parties refile the matter before the tribunal, I make an order that the matter be retried before another Chairman and new set of assessors." Therefore, based on this ground the Appellants prayed for the court to set aside the whole proceedings and decision and order trial before another chairperson. 5 As for the 4th ground of Appeal, the Appellants submitted that, the honourable trial chairperson who heard this matter erred in law and fact by not assigning a reason for taking over the matter from the first chairperson to another contrary to the requirement of the law. They argued that at the beginning was matter was handled by Hon. Lung'wecha thereafter was it was taken by Hon. Rugarabanu and then by Hon. Sillas. All the chairpersons did not give any reason as to why they were taking / proceeding with the matter. This defect can lead the matter to be nullified and returned to District Tribunal for a retrial before another Chairperson. As per the Civil Procedure Code Cap 33 R.E 2022 by the provision of order XVIII Rule 10 (1) state that; " where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit his successors may deal with any evidence or memorandum taken down or made under the 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 a which his predecessor left in " This provision of the law requires the chairperson to give reason after taking over the matter from the other chairperson and failure to do so the matter has to be nullified and order the re trial. They cited the cases of Ms. George Centre Ltd Vs. the Attorney General and another Civil PPEAL No. 25/2026, Lajoka Masanga Vs. The Attorney General and another Civil Appeal No. 153/2026 where it was held that; "the general premise that can be gathered from the above provision is that once a trial of the case has begun before judicial 6 officer that judicial officer has to bring it to completion unless for some reason, heshe is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he or she has taken up case that is partly heard by another". Therefore, they prayed for the court to quash and set aside

judgement and order retrial as the Trial chairperson who handled the matter failed to comply with the requirements of the law above. The Appellants prayed for the Court to quash and set aside the proceedings and judgement and order re trial with costs. The Respondents did not file their submissions online. Therefore, the determination of the matter proceeded exparte. There was also no rejoinder from the Appellants which was filed online as per the procedure. Having heard the rival submissions of the parties, the broad question to be determined is whether this Appeal has merit. In dealing with the appeal I will begin with ground 3 which is to the effect that; all the honourable Trial Chairpersons who heard the matter erred in law and in fact for failing to record the assessors in the coram, therefore it is as if there was no any assessors who heard the matter hence the honourable Tribunal was incomplete. The Appellants in theirs submissions have submitted that the Chairperson failed to record the names of the assessors at the sittings or sessions of the Tribunal during the hearing of the matter meaning that there was no anyone sitting while it is the requirement of the Tribunal to record 7 their names in the coram of the Court. Therefore, failure to comply with the provisions of the law renders the proceedings a nullity and the remedy is to set aside any order emanating from the judgement. In determining this ground of appeal, I have taken time to peruse the proceedings of the Tribunal with regard to the issue of recording names of the assessors in the corams for each session and observed that this requirement was not complied with by the Tribunal. Throughout the proceedings the file has changed hands from different chairpersons and each one of them was not keen in recording the names of the assessors who were sitting with a particular chairperson. If one reads the corams of the Tribunal in this matter will have noticed that the names of the Assessors were not being inserted in the corams. This can also be seen when the matter had not progressed into hearing and at the hearing stage as well. The matter was determined by various Chairpersons as it appears in the record of proceedings, who on several occasions did not record the names of the assessors in the corams before the matter was finalized by Hon. Silas see the record of the proceedings before Hon Ngonyani K.S, Hon. Mlyambina, Hon. Lingwecha, Hon. Rugarabamu, Hon. Wambili and J.W Sillas the Trial Chairperson who was seized with the matter on 15/2/2023 and was the last chairperson to handle the matter to its finality. The trial Chairperson in his proceedings, he was not consistent as well in recording the names of the assessors in the coram and he did it in an irregular manner or was not consistent so to speak. See proceedings from the date he was seized with the matter to the date of

## judgment.

8 I have taken time to peruse the said the said proceedings and observed that they are not clear on the date of receiving the opinions of assessors since it was ordered for them to be read on 20th March 2023. However, the proceedings are silent as to what transpired on the date stated, i.e. 20th March 2024. Then what follows are proceedings dated 13th April 2023 when the said opinions are recorded to have been read but the basis of the order for that date is not seen in the Proceedings. This begs the question as to whether there was justice done with the opinions of Assessors

considering that they were not part of proceedings of the Tribunal and could not get hold of the conduct of the matter. The Land disputes Courts Regulations requires the Tribunal to seat with assessors in the proceedings. Since there is no good record of the assessors sitting in the sessions of the Tribunal then the issue of composition of the Tribunal becomes questionable, more so the opinions of the assessors lack the basis upon which they originated from since they were not appearing or featuring or being recorded in the various corams in the proceedings. The High Court being the first appellate court has been denied the opportunity to confirm whether indeed the Assessors sat with the Chairman in every session since the corams are blank. The work of writing the opinions must preceded by assessors sitting with the chairperson in every session and hearing the arguments of the parties. That is also the essence of the law on composition of the Tribunal. If the names do not appear in the proceedings it can not be said that the Tribunal was fully composed. In the case of *Elisa Lwakatare Vs Joaz Zachwa Muganyizi Misc Land case Appeal No. 63 of 2021 HCT Bukoba Kilimajenga J* held that: 9 It is very unfortunate that this blantant error is becoming common in the records of the Tribunal. It is even worse because the irregularity vitiates proceedings and cannot be cured by the overriding principle. My duty is to raise an alarm for all the Tribunal chairmen to hear this most repeated default. Section 23(1) and 2) of the Lands disputes Court Act Cap 216 Re 2019 provides for the composition of the Tribunal in the following manner; 23.1 The DLHT established under section 22 shall be composed of one chairman and not less than two Assesors and

2. The DLHT shall be duly constituted when held by a chairman and two assessors who shall be required to give their opinion before the chairman reaches the Judgement. This position was also affirmed in the case of *Elilumba Ezekiel vs John Jaja Civil Appeal No 30 of 2020 CAT* It is my settled position that the principle gathered from the above provisions of the law is that the Chairman does not sit with assessors as luxury as it is a requirement of the law. They must participate and finally record their opinions before the chairman composes Judgment. As their sitting record was not indicated in the Coram it is as if the Tribunal was not duly constituted. The remedy for having a Tribunal which was not duly constituted in its sitting is to have the proceedings, Judgement and Decree which resulted therefrom to be nullified. I thus agree with the case of *Agnerry Fiberth Mlenge Vs ndulu Nsulwa land Appeal No. 270 of 2019 High Court Tanzania, land Division Dar es slaam* at page 9, 10 and 11 cited by the Appellant where the Court io quashe all the proceedings therein and set aside judgement and Decree resulting therefrom. In the case of *Propser Enel Mwalukisa Vs Benja Sanga PC Civil Appeal No. 20 of 2022 HCT Mbeya* the High Court held that; In the matter under consideration the proceedings bear to witness that the name of one assessor was written on 7/9/2021. The rest of the dates the case was called the names of assesors were not written anywhere apart from writing the word " washauri w followed by no. 1 and 2. the typed Judgement indicates that assesors space for signing was portioned but they never signed. This then is a good indicator that the decision of the trial court was unilateral. Meaning that the decision was reached by the trial Magistrate alone. It is also doubtful therefore, if the trial Magistrate sat with assesors during proceedings and whether she involved them in any findings. In the upshot I proceed to nullify the entire proceedings, quash the resultant

judgement of the trial court and the 1st appellate court and set aside all the orders thereto. Having nullified the proceedings and quashed the decision of the trial court and the 1st Appellated court in the interest of justice I remit the case file to the trial court for retrial before another magistrate and a new set of assessors. Finally, with regard to costs, since the parties have not occasioned the omission indicated above, I desist from awarding costs. Based on the above analysis which reflect the circumstances in the instant case, I proceed to allow the appeal and nullify the proceedings, 11 Judgement and Decree of the Tribunal in Land Application no 324 of 2016 and order the matter to be heard afresh by another Chairman with a different set of assesors in accordance with the law and legal procedures. The hearing of the matter should be expedited and completed within a span of 7 months from the date of this Judgement. This appeal coming for Judgment this 30th day of April, 2024 before Hon. M. Lukindo, DR in the Presence of only Ms. Salla Hamisi, learned advocate for the Appellant also hold brief for Advocate Abdallah Mohamed for the 3rd Respondent, also hold brief for Advocate Andrew for the 2nd Respondent is hereby certified as a true copy of the original. As the irregularity was caused by the Tribunal, I order each party to bear its own costs. Order accordingly. Dated at Dar es salaam this 30th Day of April 2024 12

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Prepared on 13 October 2026 · Esheria