IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A, And FIKIRINI, J.A.)

CIVIL APPEAL NO. 38 OF 2018

MOHAMED ISMAIL MURUDKER.....APPELLANT

VERSUS

FATHIA BOMANI.....1st RESPONDENT

THE COMMISSIONER FOR LANDS.....2nd RESPONDENT

THE ATTORNEY GENERAL.....3rd RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, (Land Division) at Dar es Salaam.

(Mkuye, J.)

dated the 7th day of August, 2016
in
Land Case No. 152 of 2008

.....

RULING OF THE COURT

16th August & 2nd September, 2021

FIKIRINI, J.A.:

In the High Court of Tanzania, Land Division at Dar es Salaam, the 1st respondent, Fathia Bomani successfully sued the appellant, Mohamed Ismail Murudker, the Commissioner for Lands and the Attorney General, (hereafter referred to as the 2nd and 3rd respondents) over ownership of a

piece of land, on Plot No. 277 situated at Mbezi Beach in Dar es Salaam City (the suit property).

It was her claim before the trial court that she was consistently been the lawful owner of the same, having been given by Dr. Johnson Gabriel Haule, out of love and affection. She refuted the claim that at some point there was a transfer of the suit property to the appellant. She also contended that she was issued a no notice with regard to the transfer claimed to have been made on 18th May, 2007 in favour of the appellant by the 2nd respondent.

She thus prayed for the following reliefs and order:

(a) *Declaration that the plaintiff is still the lawful owner of Plot No. 277 Mbezi Beach, Kinondoni area in Dar es Salaam.*

(b) *Declaration that the invalidation of the plaintiff's title made in favour of the 2nd defendant without the plaintiff's notice is unlawful.*

(c) *General damages of Tzs. 50,000,000/=*

(d) *Costs of the suit.*

(e) *Any further relief (s) this court shall deem fit to grant.*

The appellant and both the 2nd and 3rd respondents denied the claims. As shown earlier, the High Court entered judgment in favour of the 1st respondent. The learned trial Judge found that the transfer was unlawful and proceeded to nullify the grant of the title to the appellant dated 18th March, 2007. The trial Judge also ordered payment of compensation to the 1st respondent to the tune of Tzs. 30,000,000.00 for inconvenience and disturbance caused to her, interest at 20% on the awarded amount and costs.

Aggrieved, the appellant preferred this appeal complaining of the following:

1. *That the trial court erred in law and fact in holding that the 1st respondent had title of Plot No. 277 Mbezi Beach, in Dar es Salaam and that the 2nd respondent should issue letters of offer of the plot to her.*
2. *That the trial Judge erred in law in holding that the revocation of Dr. Johnson Gabriel Haule's title to Plot No. 277 Mbezi Beach was not proper and did not extinguish his title on the plot.*
3. *That the learned trial judge erred in law and fact in holding that the 1st respondent had the capacity in law to institute Land Case No. 152 of 2008 against the appellant to recover her title on Plot No. 277 Mbezi Beach.*

4. *That the trial court erred in law in holding that the 1st respondent had title on Plot No. 277 Mbezi Beach Dar es Salaam.*
5. *That the trial court erred in law in awarding the 1st respondent compensating (sic!) of Tzs. 30,000,000/= and interest at 20% which was not pleaded.*
6. *That the court erred in law and fact in holding that the court was satisfied that the 1st respondent had made developments on Plot No. 277 Mbezi Beach.*
7. *That the trial court erred in law and fact in recording non-existing issues to determine the suit.*

The appeal came for hearing on 16th August, 2021. Ms. Crescensia Rwechungura, learned advocate assisted by Captain Ibrahim Bendera, learned advocate appeared for the appellant while Mr. Roman Selasini Lamwai, learned advocate appeared for the 1st respondent. On their part, the 2nd and 3rd respondents were represented by Mr. Gallus Lupogo and Ms. Kause Kilonzo, both learned State Attorneys.

Mr. Lamwai who had earlier on filed a notice of preliminary objection raising two points of objection prayed to withdraw it. The prayer was not objected to by Mrs. Rwechungura and Mr. Lupogo. Accordingly, the same was marked withdrawn.

Before the hearing commenced, we wanted to satisfy ourselves on propriety or otherwise of the record of proceedings before the trial court. We were so prompted by the fact that while at some stages of the proceedings the trial court sat with the aid of assessors, at other stages the proceedings were conducted with their absence.

Ms. Rwechungura admitted that there was an irregularity. However, her stance was that the irregularity had no effect, as it would have, had it been before the District Land and Housing Tribunal. This being the High Court proceedings, she argued none of the parties was prejudiced. However, after giving a thorough thought to the incongruity, she admitted that the proceedings were a nullity contending that uniformity in conducting the hearing either with or without the aid of assessors was important particularly on a matter like this which was handled by three different Judges. The hearing started with Ngwalla, J, followed by Ndika, J (as he then was) and finally Mkuye, J (as she then was) who pronounced the judgment on 7th August, 2016.

As stated above the record of the trial court, at some stages of the proceedings, the hearing proceeded with the aid of assessors while at

other stages, none of the assessors appear on record as to have participated in the hearing. Furthermore, the impugned judgment rendered by the trial court did not incorporate the opinion of the assessors.

On his part, Mr. Lamwai, contended that the anomaly had no effect on the proceedings, assigning three reasons: (i) that, from the proceedings it shows that whenever the assessors were not present, parties through their counsel agreed for the hearing to continue, (ii) that, since assessors' opinion was not considered in the judgment, and nowhere it is reflected in the said judgment, the proceedings could not be affected, and (iii) that, the most affected party would be the one to be considered and in this case was the 1st respondent. He stressed that since the anomaly did not affect the 1st respondent for the assessors coming midway the proceedings, he urged the proceedings conducted with the aid of assessors be expunged and the remaining proceedings be relied on. He did not, however, support his argument with any authority.

On the other side, in response to the point of law raised by the Court, Mr. Lupogo submitted that the proceedings have to be consistent so as to create certainty. Since that did not exist in the proceedings of the

High Court and because no reason was advanced as to why it was so, according to him, that is enough reason to conclude that the proceedings before the High Court were a nullity thus deserving to be nullified from where the court sat without the aid of assessors.

The Court further prompted the learned counsel on whether or not there was a decision made during the proceedings, that the court should sit with the aid of assessors. Mr. Lupogo's response was that, the procedure is for the parties to agree well before the commencement of the proceedings if the court would sit with the aid of assessors or not, and that agreement should be reflected in the record of proceedings. He referred us to the Land Disputes Courts Act, [Cap. 216 R.E. 2019]. He concluded that the proceedings were a nullity for having been tainted with procedural irregularity.

Ms. Rwechungura, sealed her submission urging that the proceedings in the Land Case No. 152 of 2008 were a nullity as well as its judgment and the decree stemming from those proceedings.

Having heard the submissions from the counsel, we wish to begin by giving the legal position as regards involvement of assessors in a trial before the High Court.

In certain situations the court is required to conduct its proceedings with the aid of assessors. Under section 265 of the Criminal Procedure Act 1985, [Cap. 20 R.E. 2019] (the CPA), for example, it is stipulated that all criminal trials before the High Court shall be with the aid of two or more assessors as the court thinks fit.

In the High Court Commercial division sitting with the aid of assessors is an option bestowed upon the parties under Rule 51 (1) (2) & (3) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. No. 107 of 2019. The assessors in this instance are mostly experts in areas such as tax, insurance, and construction, to mention a few.

As for the High Court (Land Division), the governing law is the High Court Registries (Amendment) Rules, 2001 G.N. No. 63 of 2001, which amended the High Court Registries Rules, 1984. Rule 5F and 5G, specifically endorsed as a mandatory requirement that a properly

constituted High Court (Land Division) should be a Judge sitting with two assessors whose opinion will nonetheless not bind the Judge, but the Judge will be required to assign reasons for the departure from the opinion of the assessors. Through GN. No. 364 of 2005, the High Court Registries was once again amended. In the later amendment, Rule 5F described more, the role of assessors and limitation thereof. For ease of reference the Rule is reproduced herein below:

> "5F (1) *Except where both parties agree otherwise the trial of a suit in the Land Division of the High Court shall be with the aid of assessors.*
>
> *(2) Where in the course of the trial one or more of the assessors is absent the Court may proceed and conclude the trial with the remaining assessor or assessors as the case may be."*

What can be deduced from the provision, in our view, is that sitting with the aid of assessors is an obligation which should take place at the commencement of the hearing and not midway, as it was in the case before us. And the names of the selected assessors have to be reflected in

the record of proceedings. In additlon, in the event one or both assessors or as the case may be is not available to continue sitting as an assessor or assessors, the trial should proceed till the end. Nowhere has it been indicated or suggested that change of assessors can occur at any stage of the proceedings. The sanctity of the High Court proceedings sitting with assessors when hearing land cases is well illustrated in the case of **B. R. Shindika t/a Stella Secondary School v Kihonda Pitsa Makaroni Industries Ltd,** Civil Appeal No. 128 of 2017 (unreported), where the court nullified the proceedings in the Land Case No. 197 of 2005. When referring to Rule 5F of GN. No. 63 of 2001, the Court concluded that the rule was not complied with after the change of assessors occurred. The court sitting with the aid of assessors ought to have continued without assessors if those who initially sat in could no longer continue as dictated by the Rule, and not to select a new set of assessors to sit in.

Besides, the Court underscored that the trial court could not randomly dispense with the requirement of assessors unless from the beginning of the proceedings, parties opted for the court not to sit with the aid of assessors and not otherwise or in the middle of the proceedings.

Now turning to the appeal before us. After having considered the submissions of the learned counsel for parties and perused the record of proceedings, it is evident that the suit before the High Court was handled by three different Judges. When the hearing commenced on the 19th June, 2012, there was no indication on record that the court sat with the aid of assessors. Therefore, PW1, Fathia Mohamed testified, as reflected in the record of appeal from pages 174 -303, without assessors sitting in. This was different when PW2, E2912 D/SSGT Johanes Joseph Mugendi, PW3, Masisanga Herma Edward and DW1, Rahel Kilasi, testified as shown at pages 307 -337 and 342 – 353 of the record of appeal. The two assessors namely: Mrs. Martha Bukuku and Ms. Hellen Joseph, sat in and even had opportunity to ask questions. The hearing of the remaining witnesses that is; DW2, DW3, DW4 and DW5 proceeded without the aid of assessors.

It is our considered opinion that failure to commence the trial with the aid of two assessors at the commencement of the trial without any reason and irregular participation at the latter stages of the proceedings was fatal. In the case of **Ameir Mbarak & Another v Edgar Kahwili,** Civil Appeal No. 154 of 2015 (unreported) which was cited in **B.R.**

Shindika (supra), two sets of assessors sat in at different stages of the trial. Taking inspiration from section 23 (1) (2) (3) of the Land Disputes Courts Act, Cap. 216 R.E. 2019, which is similar to Rule 5F (1) (2) of GN. No. 63 of 2001, the Court stressed on the pertinence of a Judge or Chairman sitting with a minimum of two assessors for a duly constituted panel to exist and the applicable procedure in the event one of the assessors or both are absent.

It was therefore undoubtedly wrong for the trial Judge to commence trial without assessors and later allowing them to sit. The mixed grill in the said proceedings definitely vitiated the High Court proceedings and rendered them a nullity. **See: Awiniel Mtui & 3 Others v Stanley Ephata Kimambo & Another,** Civil Appeal No. 97 of 2015 and **Samson Njarai & Another v Jacob Mesoviro**, Civil Appeal No. 98 of 2015 (both unreported) cited in **B.R. Shindika** (supra). Guided by these authorities, we equally find that the incongruities illustrated and discussed are fatal and render the proceedings, judgment and the decree of the trial court a nullity.

In view of our conclusion, we hereby invoke the revisional power conferred upon us by section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] and proceed to nullify and quash the whole proceedings of the High Court in Land Case No. 197 of 2005 and set aside all orders emanating thereof. We accordingly order a retrial of the matter. Since this case has been in court for about twelve years now, we direct that the retrial be expedited. Each party has to bear its own costs.

DATED at **DAR ES SALAAM** this 30th day of August, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 2nd day of September, 2021 in the presence of Ms. Cresencia Rwechungura, learned counsel for the Appellant and Mr. Roman Celasini Lamwai, learned counsel for the 1st Respondent, Mr. Felix Chakila, learned State Attorney for the 2nd and 3rd Respondents is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL