**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: WAMBALI, J.A., KOROSSO,J.A., And FIKIRINI, J.A.)**

**CIVIL APPEAL NO. 164 OF 2018**

**KARORI CHOGORO.....APPELLANT**

**VERSUS**

**WAITIHACHE MERENGO.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Mwanza)**

**(Gwae, J.)**

**dated the 6th day of September, 2017**

**in**

**Land Appeal No. 70 of 2016**

.....

## JUDGMENT OF THE COURT

21st February & 1st March, 2022.

**FIKIRINI, J.A.:**

On 29th November, 2021, when this appeal was called for hearing, the appellant, Karori Chogoro, appeared in person unrepresented, whereas Dr. Chacha Murungu, learned counsel appeared for the respondent, Waitihache Merengo. During the hearing, the Court noted the following: *one*, the existence of a decision by the District Land and Housing Tribunal for Mara at Musoma (the Tribunal) in Appeal No. 236 of 2014, which ordered this case to be retried *de novo* before the Buswahili Ward Tribunal.

*Two*, despite the revelation, there was no record supporting the discoveries made by Court. And three, the appeal before the Court emanated from the High Court decision in Land Appeal No. 70 of 2016, which originated from the Tribunal's decision in Land Case No. 93 of 2015. The Court noted further that there were two decisions, one ordering trial *de novo* before the Buswahili Ward Tribunal and Civil Appeal No. 164 of 2018, originating from the Tribunal, involving the same parties and subject matter. This detection solidified the Court's concern. To assure itself on the integrity and compliance with the order made, the Court ordered filing of supplementary record of appeal within thirty (30) days. The rationale was to enable the Court to determine the propriety of Land Case No. 93 of 2015 lodged before the Tribunal resulting in the present appeal.

On 21st December, 2021, the appellant complying with the Court order, filed the supplementary record of appeal as ordered by the Court on 29th November, 2021.

At this hearing, the appellant appeared in person unrepresented, whereas Dr. Murungu appeared on behalf of the respondent, who was also in attendance.

Engaging the appellant and Dr. Murungu, we posed two questions on the propriety of this appeal which originated from the Tribunal, and whether there compliance to the Tribunal order remitting the record back to the Buswahili Ward Tribunal for hearing afresh and if not what is the consequence.

The appellant, a layperson, did not have much to say other than informing us that the one who assisted him in preparing his documents told him that the Tribunal has confused itself. As such, the Land Case before the Tribunal was *res- subjudice*. He thus urged us to decide on what is legally correct.

Dr. Murungu, on his part, supported the principle stated by the appellant that it was not correct for the Tribunal to proceed with the hearing of the case while there was an order for retrial before the Ward Tribunal. Notwithstanding, submitting so, he still criticized the decision of the Tribunal to remit the case for retrial before the Ward Tribunal. He considered the decision by the Tribunal as flawed. Dr. Murungu referred us to page 19 of the supplementary record of appeal, and contended that the decision of the Ward Tribunal was, in fact, correct. What's more, he

stressed that Ward Tribunals no longer have jurisdiction on adjudicating land matters after the Land Disputes Courts Act amendment, as per the Written Laws (Miscellaneous Amendment) (No. 3) Act of 2021. Dr. Murungu therefore discouraged us from ordering retrial before the Ward Tribunal.

Probed by us, if there was an appeal preferred to challenge the Tribunal decision on the retrial order, his answer was there was none. Due to the existing predicament, he implores parties to be ordered to go back to the Tribunal to seek an extension of time to appeal the Tribunal's decision. After thoughtful consideration, he finally conceded that the situation was inept. He thus urged us in the interest of justice to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), nullify and quash the proceedings before the Tribunal and the High Court and set aside orders emanating therefrom. As for the costs, he urged us not to order costs but for each party to bear its own costs. In rebuttal, the appellant had nothing to add.

We have duly considered the submissions and examined the records of appeal and its supplementary record. In quenching our quest on the

propriety of the Land Case No. 93 of 2015 before the Tribunal culminating into the present appeal, we had to go back to the history as availed in the record of appeal before us. The storyline is, it all started at Buswahili Ward Tribunal when the appellant, Karori Chogoro, lodged a complaint against the respondent, Waitihache Merengo, in Application No. 9 of 2014. After hearing parties and their witnesses. The Ward Tribunal entered a decision favoring the respondent. Aggrieved, the appellant preferred an appeal to the Tribunal in Appeal No. 236 of 2014. Again after hearing from the parties, on 28th May, 2015, in the presence of the parties, the Chairman pronounced a judgment nullifying the proceedings, quashing the decision, and setting aside the orders. He also ordered a trial *de novo* before the same Ward Tribunal.

Following the judgment, and almost two months later, precisely on the 22nd July, 2015, the same Tribunal Chairman admitted the application lodged by Waitihache Merengo, the respondent in Application No. 9 of 2014. This time around the Land Application No. 93 of 2015, had Waitihache Merengo as the applicant and Karori Chogoro as the respondent. The complaint lodged before the Tribunal pertained to the same suit land that found the parties before the Buswahili Ward Tribunal.

Upon service, the respondent filed a written statement of defence on 17th August, 2015, and at the same time raised a preliminary objection (PO).

It is further revealed that both parties were present on 05th October, 2015, when the matter was called on. The Tribunal acknowledged the respondent filing his written statement of defense and raising a PO. A hearing date of the PO was fixed for 11th November, 2015. On the date set for hearing, the Chairman dismissed two of the three objections raised and urged the respondent to submit on the remaining point. In protest, the respondent raised with the Chairman that there was an order to remit the matter for retrial at the Ward Tribunal. The respondent presumably wondered why the applicant has filed a new case before the Tribunal. On his part reacting to the concern raised, the applicant submitted that he did so, as the value of the subject matter exceeded Tzs. Three Million (Tzs. 3,000,000/=), the fact contested by the respondent, who disputed that the value exceeded Tzs. Three Million, as reflected on page 9 of the record of appeal.

Ultimately the Chairman overruled the PO and ordered a hearing of the case to proceed on the latter date, which it did as reflected on pages 9-

19 of the record of appeal. Following hearing of the parties and their witnesses, judgment was pronounced on 15th April, 2016, in the presence of the parties. The case was dismissed, and the respondent declared the lawful owner of the suit land.

With due respect to the Chairman, what he did was incorrect as his pending order of 28th May, 2015 in Appeal No. 236 of 2014 was still valid and has not been complied with. Compliance with the order is essential and in the circumstance what was expected from him, was to make sure the record has been remitted back to the Ward Tribunal, and his order has been complied with. This Court has time without number underscored compliance to Court orders. In its persuasive decision, the High Court, in **TBL v. Edson Dhobe**, Miscellaneous Civil Application No. 96 of 2006, stressing on compliance to a court order, stated:

> "*Court orders should be respected and complied with. Courts should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur....*"

Like any lawful court order, including Tribunal are equally to be complied with. This was not observed by the Chairman, who opted to entertain a

new suit on the pretext of pecuniary jurisdiction, as shown on page 9 of the records of appeal.

After the order was made on 28th May, 2015, the Chairman automatically became *functus officio.* It is trite law when the court finally determines the matter; it ceases to have jurisdiction. At this juncture, we will let the record speak for itself as reflected on page 20 of the supplementary records of appeal:

> *"I, therefore, nullify the decision of the Ward Tribunal's proceedings. I also quash its decision and set aside its orders. I order a trial de novo at the same Ward Tribunal. There are no orders to costs."*

In the case of **Miburo Cosmas v. R**, Criminal Appeal No. 519 of 2016, the Court had an opportunity to discuss when the court becomes *functus officio.* Citing the case of **Tanzania Telecommunication Company Limited and Others v. Tri-Telecommunications Tanzania Limited** [2006] 1 E.A. 393, which referred to the decision in the case of **Kamundi v. R** [1973] E.A. 540, where the Court of Appeal of Eastern Africa had this to say:

> *"A further question arises, when does magistrate's court becomes functus officio, and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by a verdict of not guilty or passing sentence or* ***some orders finally disposing of the case."*** [Emphasis Added]

See: **Zee Hotel Management Group & Others v. Minister of Finance & Others** [1997] T.L.R. 265, **Chief Abdallah Said Fundikira v. Hillal L. Hillal,** Civil Application No. 72 of 2002, and **Yusuf Ali Yusuf @Shehe@Mpemba & 5 Others v. R,** Criminal Application No. 81 of 2019.

We are certain that the order made on 28th May, 2015, was final in disposing of the case, as it nullified the proceedings, quashed the decision, set aside the order, and ordered retrial *de novo*. This inevitably made the Chairman *functus officio*, meaning he could not entertain the same parties over the same subject matter. At the same time, there was his own pending order, waiting compliance, the order which has not been challenged to date. We are of the considered view that the step taken by the Chairman of reviewing his own order *suo motu*, and overruling himself, unfortunately without commenting on the order of retrial which he issued

earlier in Appeal No. 236 of 2014, was without mincing words flawed. The filing of Land Case No. 93 of 2015, that followed in spite of the pending order to be complied with in Appeal No. 236 of 2014, with due respect to the Tribunal Chairman, we find was illegal and improper.

Furthermore, since the decision in Appeal 236 of 2014 is still valid as it has not been challenged and overturned by any superior court, the existence and decision in Land Case No. 93 of 2015, was undeniably *res-sub judice*, the fact admitted by both the appellant and Dr. Murungu.

The Doctrine of *res-sub judice* prevents a court or Tribunal from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. In our case the parties and the subject matter are the same, despite the two cases having different numbers. In Ward Tribunal, it was Application No. 9 of 2014, ordered for retrial, while in the Tribunal, it was Land Case No. 93 of 2015, filed after the order issued on 28th May, 2015. In both instances, the same Chairman presided over the matter. In our view, this is an irregularity, which renders the proceedings and the decision

of the Tribunal in Land Case No. 93 of 2015, a nullity. The High Court decision in Land Appeal No. 70 of 2016, an appeal germinating from an illegal decision of the Tribunal, suffers the like blow as well.

Not sharing our view, Dr. Murungu argued that ordering the matter to go back to the Ward Tribunal is undesirable because the Ward Tribunal is no longer ceased with jurisdiction to hear and adjudicate land matters. Discussing on the recent amendment, the counsel contended that the Ward Tribunal's role has changed. After the amendment the Ward Tribunal has remained with task of mediating parties and issuing a certificate that the mediation has failed. Therefore, by remitting the record in Appeal No. 236 of 2014, back to the Ward Tribunal, it would be unfavourable, argued the counsel. In reinforcing his stance, he referred us to the case of **Edward Kubingwa** (supra). We are aware of the amendments; however, we find the decision distinguishable. In **Kubingwa's,** there was no order for retrial. The Court acknowledged that the Ward Tribunal has been stripped of its powers to deal with land matters aside from operating as a mediation body, hence did not find any logic in ordering parties to go back to the Ward Tribunal, but for anyone desirous of doing so should abide by the law currently in place after the amendments. Unlike in the case before

us, there is a pending order for a retrial. We think and firmly believe that the sanctity of court or Tribunal orders demands that those orders must be complied with. In the instant situation, it could simply be going to the Ward Tribunal for mediation, which would still be compliance. Once that has failed, then with the certificate issued by the Ward Tribunal, parties can still file their case in the Tribunal, ceased with jurisdiction. The route taken by the Chairman is, with due respect, absurd, leaving more questions than answers.

Had the Chairman been careful, the proceedings in Land Case No. 93 of 2015 would not have taken off, nor would Land Appeal No. 70 of 2016 resulted. The propriety of proceedings and decisions in Land Case No. 93 of 2015, Land Appeal No. 70 of 2016, and the instant appeal are all tainted with impropriety

Therefore, under the circumstances, we invoke the provision on section 4 (2) of AJA to revise and nullify the proceedings in Land Case No. 93 of 2015 and Land Appeal No. 70 of 2016, quash the decisions, and set aside the orders. We order records in Application No. 9 of 2014 be remitted back to Buswahili Ward Tribunal to facilitate compliance to the Tribunal

order dated 28th May, 2015 in Appeal No. 236 of 2014. The same be dealt with in accordance with the law. Based on the nature of the appeal, we order each party to bear its costs.

It is so ordered.

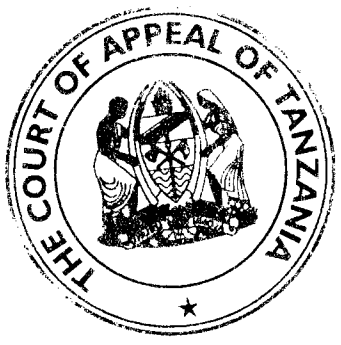
**DATED** at **MWANZA** this 25th day of February, 2022.

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

The Judgment delivered this 1st day of March, 2022 in the absence of appellant and Presence of Dr. Chacha Murungu, counsel for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**