IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND REVISION NO. 10 OF 2019

(Arising from decision of the district Land and Housing Tribunal for Mara at Musoma in Application No the application No. 99 of 2018)

GABRIEL NGOWI..... APPLICANT

Versus

DEO JAMES KURANDA..... RESPONDENTS

JUDGMENT

23rd & 30th April, 2020

Kahyoza, J.

Mr. Gabriel Ngowi sued Mr. Deo James Kuranda in the District Land and Housing Tribunal (**the DLHT**) praying to be declared the legal owner of the disputed land located at Mwisenge Area within Musoma Municipal Council. Mr. Gabriel Ngowi also requested **the DLHT** to restrain Mr. Deo James Kuranda from disturbing him.

The **DLHT** heard the evidence from both sides and set a date to visit the *locus in quo*. However, there is no record taken at the *locus in quo*, which raises doubt if the Tribunal ever paid a visit as ordered. At the conclusion of the hearing, the assessors prepared their opinion despite the fact that the record does not depict that the Chairman invited them to do so. The Chairman composed and delivered the judgment.

Before there were two issues for determination: **One,** who is the rightful owner of the suit land. **Two,** to what reliefs are the parties entitled

to. The Chairman reviewed the evidence on record without considering the opinion of the assessors or inviting the parties to address him on the issue of non-joinder of a necessary party, struck out the case for non-joinder of a necessary party. For the sake of clarity let me produce the relevant part of the judgment I refer to:-

> *"Moreover, it cannot be gainsaid that the applicant Gabriel Ngowi possesses in his hands a certificate of occupancy over the suit land, with title No. 11814, granted by the then Musoma Town Council, now the Musoma Municipal Council.*
>
> *In my considered view, the Musoma Municipal Council should be joined in this case so as all issues arising from this case are resolved finally and conclusively.*
>
> *That said, I hereby strike out the case before me so as all I have tried to explain herein above is followed".*

Aggrieved by the decision of **DLHT,** the Mr. Ngowi, the applicant through the services of Mr. Mligo advocate instituted the instant application for revision. The applicant invited this Court to call and examine the decision of the **DLHT** for the purpose of satisfying itself as to the correctness, legality or propriety of such proceedings.

The applicant deponed and submitted through his advocate that he instituted a suit against the respondent only as he had no cause of action against Musoma Municipal council, as a necessary party. Mr. Mligo emphatically submitted that the applicant's ground of application was basically one that the **DLHT** wrongly struck out the application on the ground of non-joinder of a necessary part, Musoma Municipal council. He added that the applicant had no claim against Musoma Municipal council.

In support of his submission he cited cases of **Suryakant D. Ramji v Savings and Finance Limited and Others** [2002] TRL 121 and the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another,** Civ Application No. 6/2017. In the former case the High Court stated that-

> *"...in litigation a necessary party is one against whom the relief is sought or without whom an effective decree cannot be passed by the court, and all those whom the law requires to be impleaded and, on the other hand, proper parties are those whose presence enables the court to decide effectively and finally the dispute presented before it, and these include those who in one way or another are interested in or connected with the relief sought against others. "*

The Court of Appeal also, in the latter case provided the criterion of of a necessary party by quoting the test in applied in the Indian case of **Benares Bank Ltd v. Bhagwandas**, A.I.R. (1947) All 18. In that case, the full bench of the High Court of Allahabad laid down two tests for determining the question whether a particular party is necessary party to the proceedings: **First,** there has to be a right of relief against such a party in respect of the matters involved in the suit and; **Second,** the court must not be in position to pass an effective decree in the absence of such a party. The Court of Appeal added that the foregoing benchmarks were described as true test by Supreme Court of India in the case of **Deputy Comr.,Hardoi v. Rama Krishna**, A.I.R (1953) S.C. 521. The Court of Appeal Concluded that-

"We, in turn adopt the two tests and, thus, on a parity of reasoning, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed."

The applicant's advocate concluded that the applicant had no claim against Musoma Municipal Council and the non-joinder of that party could not have prohibited the DLHT to make a decision. He added that it is the position of the law that no suit shall be defeated by reason of misjoinder or non-joinder of parties.

The respondent filed a counter affidavit and submitted before this Court that the DLHT's judgment is a fair decision. He contended the applicant was entitled to Plots Nos. **305/60 and 305/62** though his right of occupancy showed that his Plots were numbers **305/61 and 305/62**. Thus, **the DLHT** was right to order the applicant to join Musoma Municipal Council.

The parties' submissions raised one issue whether it was proper to holder that Musoma Municipality was a necessary party. After the parties' submissions, I invited them to address the Court on three pertinent issues born by **the DLHT** proceedings as follows-

1. Whether it was proper to institute an application for revision instead of filing an appeal;

2. Whether the DLHT was justified to base its decision on the issue it raised *suo motu* and determined it without affording the parties a chance to address it; and

3. Whether the assessors read their opinion to the parties as required by law.

Is a party to the suit entitled to institute an application for revision?

I considered passionately the issue whether it was proper to institute an application for revision instead of filing an appeal. The applicant's advocate contended that the application for revision was properly filed as the DLHT did not determine the dispute conclusively. He contended that the rights of the parties were not determined.

The respondent had no substantive reply to this issue.

I examined the applicant's affidavit where the applicant stated under paragraph 5, that "*after hearing both parties and their witnesses including a land officer from Musoma Municipal council, the tribunal reached to the decision by striking out the application for non-joinder of necessary who is Musoma Municipal council whom the applicant had no dispute against her, also the respondent had an ooprtunity to cross examine her*". The contents of the quoted paragraph show that the applicant was aggrieved by the decision of the tribunal. I expected that the applicant would have appeared against that decision. The applicant resorted to an application for revision.

It is a settled law that except under special circumstances a party to proceedings cannot invoke the revisionary jurisdiction unless it was shown that the appellate process has been blocked by judicial process. See **Halais Pro-Chemie Industries Ltd. v Wella A. G** [1996] TLR 269 and **Chama cha Walimu Tanzania v. the Attorney General** E A L R [2008]2 EA 57. In the former case, the Court of Appeal pronounced itself as follows :-

"Except under exceptional circumstances, a party to proceedings in the High Court could not invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court ***where no right of appeal lies to this Court****, the reason being that the Sub-section should not be regarded as providing an alternative to appeal process."(emphasis added)*

In **Chama cha Walimu Tanzania v. the Attorney General,** *(supra)* the Court of Appeal retained its position stated above and added another situation under which a party to the proceedings may institute revisional proceedings. It stated thus-

"It is settled that except under special circumstances, a party to proceedings in the High Court could not invoke the revisional jurisdiction of the Court unless it is shown that ***appeal process has been blocked by judicial process****." (emphasis added)*

The applicant's advocate did not avail this Court any special circumstance, which prompted him to institute the application. The application for revision is not competent. The remedy for an incompetent application is to strike it out. I will not do so at this stage so that I remain seized with the record to discuss the remaining issues to avoid recurrence of the same mistakes.

Was it proper for the DLHT to raise the issue *suo motu* and determine it without inviting parties to submit regarding that issue?

As the record of **the DLHT** bears testimony, there were two issues for determination. Those issues were; **One,** who is the rightful owner of the suit land. **Two,** to what reliefs are the parties entitled to. The **DLHT**

heard the evidence from both sides and delivered its judgment, striking out the case for non-joinder of necessary party, Musoma Municipal council. The tribunal did not call upon the parties to address it on that issue of non-joinder of a necessary party.

I called upon the parties to address the Court on the issue whether the DLHT was justified to base its decision on the issue it raised *suo motu* and determined it without affording the parties a chance to address it. The applicant's advocate submitted that it was wrong for the the DLHT to raise an issue on its own and base its decision on that issue without summoning the parties to address that issue.

The respondent contended that he did not know the position of the law but he was of the view that the DLHT was right to order Musoma Municipal council to be joined in the case.

It is trite law that parties in a civil case are duty bound to adduce evidence to prove issues framed by the Court or tribunal. In **Ex-B.8356 S/Sgt Sylvester S. Nyanda vs The Inspector General of Police & The Attorney General**, CIVIL APPEAL NO. 64 OF 2014 (unreported) the High Court framed three issues for determination, while preparing its judgment, it abandoned all the three issues and framed a completely new issue upon which it based its decision. Before revising and quashing the proceedings of the trial High Court, the Court of Appeal stated :-

> *"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed **suo motu** which related to the jurisdiction of the court. On this again, we wish to say that **it is an elementary and fundamental principle of determination of***

disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings *as to act otherwise might well result in denying of the parties right to fair hearing.*

The Court of Appeal reiterated its stance in **Scan Tan Tours Ltd Vs the Registered Trustees of the Catholic Diocese of Mbulu** Civil Appeal No.78/2012 (unreported) where it found that the trial Judge had introduced a new issue *"Suo motu"* and decided on it without giving an opportunity to the parties to address the Court on the same. The Court stated: -

> *"We asked ourselves whether the parties, especially the appellant, were denied the right to be heard (audi alteram partem) thereby contravening the rules of natural justice. We insisted that cases must be decided on the issues on record and where new issues not founded on the pleadings are raised, the parties should be given the opportunity to address the Court."*

The above cases cover the current situation. It was therefore, not **proper for the DLHT to raise the issue of non-joinder of a necessary party *suo motu* and determine it without inviting parties to address it. Thus, its judgment is a nullity.**

Was the assessors' opinion read to the parties as required by law?

The law is clear. The **DLHT** is required after concluding the hearing to direct the assessors to prepare their opinion and set a date for reading their written opinion to the parties. This position is the position of the law as stated by the Court of Appeal in **Tubone Mwambeta v. Mbeya**

City Council, Civil Appeal No. 287 of 2017 (unreported). In that case the Court pronounced itself 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.** It stated as follows: -

> *"In view of the settled position of the law where the trial has to be conducted with the aid of the assessors/ ... they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed ... since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing/* ***such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict."***

In the instant case the defence concluded its case on the 26th July, 2019. On that very day, the Chairman ordered among other things to visit the *locus in quo* on the 29th July,2019. The record does not tell what happened on that date. Later on, the 17th August, 2019 the **DLHT** directed the visiting on *locus in quo* to be on the 19th September,2019. The record is still silent as to what took place on the 19th September,2019. However, on the 20th September, 2019 the DLHT directed that it will pay a visit to the *locus in quo* on the 5th November,2019.

Surprisingly, before the date fixed for visiting the *locus in quo,* which was the **5th of November, 2019** the **chairman** on the 10th October,2019 in the absence of the assessors and the parties and may be

in the presence of Mr. Mligo the applicant's advocate, recorded that *"the opinion of the assessors read was over"*. The assessors were absent. The applicant's advocate told this Court that the opinion of the assessors was read to the parties. He added that the only problem was the Chairman's failure to consider the assessors' opinion in his decision. The respondent contended that the **DLHT** clerk informed him that the opinion was read in his absence.

It is unclear if the opinion was ever read to the parties. The record shows that it was read in the absence of all parties. If that is true the parties are not to blame. The **DLHT** never set a date for reading the opinion. Parties could not have dreamt it. The record depicts that the opinion was read in the presence of the applicant's advocate, who told this Court that the same was read in his absence but in the presence of the parties.

It is a principle of practice governing court proceedings that the court record should speak for itself. The **DLHT's** record conveys a wrong message. I am unable to ascertain from the record if the assessor's opinion was read to the parties as the parties and the assessors were not in attendance. It is my considered determination that the **DLHT** did not read the assessors' opinion to the parties. Failure to read the opinion of the assessor renders the judgment of the **DLHT** a nullity. See the Court of Appeal decision in **Tubone Mwambeta v. Mbeya City Council** (supra).

What is the fate of the application?

In the end result, I pursuant to section 43(2) of the Land Courts Act, Cap.216 R.E. 2019, quash the proceedings and set aside the judgment of

the District Land and housing tribunal. I, further, **remit application No. 99/2018** back to the tribunal to be heard afresh by another Chairman with new set of assessors. Each party to bear its own costs.

It is ordered accordingly.

J. R. Kahyoza

JUDGE

30/4/2020

Court: Ruling delivered in the presence of the applicant's advocate Mr. Mligo and respondent in person. B/C Charles present

J. R. Kahyoza .,M

JUDGE

30/4/2020