

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISC. LAND APPEAL No. 29 OF 2020**

*(Arising from Land Appeal No. 100/2017 District Land and Housing Tribunal Mwanza,  
original Land Case No. 3/2017, Ward Tribunal of Pamba)*

**ABDALLAH HAMIS ABDALLAH ----- APPELLANT**

**VERSUS**

**ZAGALUU RAJAB ----- RESPONDENT**

**RULING**

11<sup>th</sup> March, 2021

**TIGANGA, J**

Abdallah Hamis Abdallah, the appellant, through the service of Mr. Baraka Makowe, learned Advocate, filed four grounds of appeal challenging the decision of the District Land and Housing Tribunal for Mwanza in Appeal No. 100 of 2017. When this appeal was called for hearing, the counsel for the appellant addressed the court that, after a thorough reading of the judgment of the appellate tribunal, when he was preparing for hearing of this appeal, he discovered a point of law which he did not



apparently see before, which in his opinion needs to be addressed before hearing the appeal on merits.

He referred this court at page 8 of the typed copy of judgment at which, the chairperson when was preparing the judgment discovered that the Ward Tribunal was not well composed in accordance with the law, thus rendering the proceedings and judgment of the Ward Tribunal to be a nullity, thereby quashed the judgment of the Ward Tribunal together with the proceedings.

While doing that, he did not invite and address parties to appear before him and be heard on the point. What the chairman did renders the decision he reached to be null and void in law for not addressing the parties on the point, thus going against the rule of natural justice. This omission taints the decision of the District Land and Housing Tribunal for being not proper in law thus deserving to be quashed.

Mr. Baraka Makowe, submitted by way of advise that as the records of the Ward Tribunal was discovered to be tainted, then he prayed for the court in the interest of the parties and justice, to find the records and proceedings of the Ward Tribunal to be wrong as held by the District Land





and Housing Tribunal, and hold that, the same were tainted and therefore a nullity.

He prayed that having so found, the court, move itself under section 43(1) (c) of the Land Disputes Courts Act [Cap 216 R.E 2019] to revise the proceedings before the Ward Tribunal, and the judgment thereto. He also prayed for this court to revise and quash the decision of the District Land and Housing Tribunal and directs the parties, what to do in the interest of justice and in accordance with the law.

In the end Mr. Makowe prayed for the issue of costs to be determined by the court. These prayers were whole conceded by Mr. Paul Kipeja – learned Advocate, for the respondent. He also submitted that in the same premise, the judgment of the District Land and Housing Tribunal be quashed, and so is the judgment and proceedings of the Ward Tribunal, and asked for each party bear its costs.

After such an address this court adjourned the proceedings for three hours to prepare this decision. Having considered all the submission by the parties and passed through the records, I am entirely in agreement that, having raised the new issue at the judgment stage, discussed it and

decided an appeal solely basing on that raised issue without first calling the parties to address him or address them on that particular issue is a clear violation of the principle of natural justice, in particular the right to be heard. The law as properly articulated in a number of cases including those cited by the counsel for the appellant, which are **Jayant Kumar Chandurabhai Patel@ Jeetu Patel and 3 Others vs Attorney General & 2 Others**, Civil Application No.160 of 2016-CAT-DSM. **Mbeya Rukwa Autoparts Transport Ltd vs Jestina George Mwakyoma**, Civil Appeal No.45 of 2000, CAT- Mbeya, and many others which held to the effect that, once a new issue which was not raised and argued by the parties, has been raised by the court *suo motu* in the course of preparing the judgment, the court should and is required to open the hearing by re-summoning the parties to address the court on the new issue raised. Failure to do so is tantamount to depriving the parties their right to be heard and renders the decision to be a nullity even if the decision reached would have been the same, even after parties had addressed the court on the new issues raised.

That being the position of the law, it goes without saying that, the decision of the District Land and Housing Tribunal which based on the





issue of composition of the Ward Tribunal, though the same portrays the correct action to be taken, but since it has denied the parties the opportunity to be heard, then the decision is a nullity and is hereby quashed for the reasons given.

Having, so quashed the decision, I am mindful that the facts that the Ward Tribunal was not properly constituted in terms of section 11 of the Land Disputes Courts Act, [Cap 216 R.E 2019] which requires the tribunal to constitutes of not less than four or more than eight members of whom three shall be women. In the case before the Ward Tribunal, there was no evidence from the proceedings that the tribunal was properly constituted as the coram does not show that.

This as requested by Mr. Makowe entitles this court user the powers vested in it by the law that is section 43(1) provides that;

*"(1)In addition to any other powers in that behalf conferred upon the High Court, the High Court*

*(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if*



*it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.*

For that reasons I find this to be a fit case in which this court can exercise its powers under the above provision and quash the proceedings and the judgment of the Ward Tribunal for having been improperly conducted without proper coram. Under that authority the proceedings of the District Land and Housing Tribunal are hereby quashed for basing on the null proceedings of the Ward Tribunal.

Having so quashed the proceedings, now what is the right recourse? In this case, parties are still interested to pursue their right under the law, the proper remedy is in my considered view, to order retrial. Now the issue is whether this is a fit case for retrial?

In the case of **Rashid Kazimoto and Masudi Hamisi Vs Republic** Criminal Appeal No. 458 of 2016, which quoted with approval the authority in the case of **Sultan Mohamed Vs Republic Criminal Appeal No. 176 of 2003** (unreported) which also quoted with approval the decision in





**Fatehali Manji vs Republic** (1966) E.A 343, provides for the principles governing the situation in which a retrial can be ordered, it stated that:-

*"In general, a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where the conviction is set aside because of in sufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of Justice require it"*

Also see **Paschal Clement Branganza versus Republic**  
(1957) EA 152

Looking at the principle in the above cited authorities, it is a condition precedent that, the order for retrial can only be made where following conditions exists:

- i) when the original trial was illegal or defective;
- ii) where the findings was set aside not because of in sufficiency of evidence, or for the purpose of enabling the party benefiting from it to fill gaps in its evidence at the first trial,
- iii) Where the circumstances so demand,
- iv) where the interest of justice require it.

This means if the court finds that the circumstances described in the above authorities are established and where the interest of justice so requires may order retrial.

With all these shortcomings in the proceedings of the Ward Tribunal, it goes without saying that; retrial is a perfect remedy in the circumstances of this is case. This is because the fault leading to the nullification of the proceedings was not caused by the parties but by the tribunal itself. That said, I order the retrial of this dispute before the Ward Tribunal by a complete new set of members who shall observe the requirement of the law.

It is so ordered

**DATED at MWANZA, this 23<sup>th</sup> day of February, 2021**



  
**J. C. Tiganga**

**Judge**

**11/03/2021**