THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 4 OF 2021

(Originating from Application No. 179 of 2016 of the District Land and Housing Tribunal for Mbeya at Mbeya)

MARAN-ATHA ENGINEERING &

TRADING CO. LTD ..... APPELLANT

VERSUS

TAZANIA POSTAL BANK MBEYA .....RESPONDENT

JUDGMENT

Date of Judgment 23.06.2021

Dr. Mambi, J.

This Judgment emanates from appeal filed by the appellant challenging the Decision of the District Land and Housing Tribunal for Mbeya. The District Land and Housing Tribunal made the decision in favour of the respondent. The appellant was unsatisfied with the decision of the District Land and Housing Tribunal in Land Application No 179 of 2016 and filed here appeal basing on two

grounds of appeal. One the key grounds of appeal was based on the failure of the Chairman to properly involve the assessors to give their opinion.

The appellant preferred the following grounds of appeal:-

1. That the Chairman erred in law by not availing the assessors with an opportunity to give their opinions before the parties after the conclusion of the hearing and did not give reason to that effect.
2. That the Chairman erred in law and fact when it failed to analyze properly the evidence on record tendered by the Appellant and as a result it reached at a wrong decision.

During hearing, the respondent Counsel Mr. Mwakyembe addressed the court that they concede with the second ground of appeal number two on the point of assessors. The appellant was represented by Ms. Juliana Marunda. The appellant's Counsel briefly submitted that she had discovered some irregularities from the trial Tribunal decision. He contended that the records show that the Honourable Chairman neither invited nor recorded the opinions of the assessors. She argued that since the respondent Counsel admitted such irregularities, it will be more justice if the matter is remitted back to the trial tribunal for retrial.

Before going through all grounds of appeal, my perusal from the trial records has also revealed that the proceedings at the Tribunal were tainted by irregularities with regard to the involvement of the assessors. The proceedings and Judgment do not show if the assessors were given an opportunity to give their opinion before the

parties and before the tribunal made the decision. The records also do not show if the chairman recorded the opinion of the assessors. The law is clear that when the assessors are giving their opinion the chairman must record the name of each assessors and his opinion thereof. It is also on the Judgment that the chairman just said that he agrees with that the assessors' opinion but those opinion of the assessors are not on the records and do not form part of the proceedings. I thus agree with the Counsels for both parties that the District Land and Housing Tribunal did not properly involve assessors and consider their opinion. Indeed the respondent in her submission did not respond on the second and third grounds of appeal that involve the issue of asses apart from just responding to other grounds of appeal. I have gone through the records from the Tribunal (DLHT) and observed that the proceedings and judgment of the Tribunal was tainted by irregularities that in my view jeopardized justice to all parties. My perusal from the records of the District Land and Housing Tribunal show that The Trial Tribunal Chairman failed to properly addressed himself to the legal principles governing assessors.

The Law clearly provides for the composition of the District Land and Housing Tribunal. More specifically, the composition of The District Land and Housing Tribunal and how to deal with the opinion of the assessors are envisaged under 23(1) and (2) of the Land Disputes Courts Act, [Cap. 216 R.E. 2002] provides that;

> *"23 (1) The District Land and Housing Tribunal established under section 22* ***shall be composed of one Chairman and not less than two assessors.***
>
> *(2) The District Land and Housing Tribunal* ***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 judgment.****"*

Similarly, Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides that;

> *"Notwithstanding sub-regulation (1)* ***the Chairman shall, before making this judgment****, require every assessor* ***present at the conclusion of hearing to give his opinion in writing*** *and the assessor may give his opinion in Kiswahili."*

Reading of the above the provisions of the laws, it is as clear that the involvement of assessors is mandatory. The law mandates assessors to give their opinion at the conclusion of the hearing and their opinion must be recorded on the proceedings and reflected on Judgment. In my considered view, the role of assessors is meaningful if they actively and effectively participate in the proceedings by giving their opinion during trial and before judgment is delivered.

Indeed the Trial Tribunal records do not show if the Chairperson recorded the assessors' opinion apart from just saying that the

assessors opined that the respondent was the lawful owner. The position of the law is clear that the Tribunal Chairman must record and consider the assessors' opinion and in case of departure from the assessors' opinion he/she must give reasons. The records show that the Hon Chairman in his judgment did not show if he considered the assessors' opinion and he even did not properly evaluate the evidence and give the reasons for his decision. It follows that, the role of assessors is more meaningful if they actively and effectively participate in the proceedings before giving their opinion during trial and before judgment is delivered. The Court in ***TUBONE MWAMBETA vs. MBEYA CITY COUNCIL, Land Appeal No. 25 of 2015 CAT*** at Mbeya (unreported) which cited the case of ***SAMSONNJARAI AND ANOTHER vs. JACOB MESOVORO, Civil Appeal No. 98 of 2015*** (unreported) had this to say:

> *"in determining an appeal which originated from the District Land and Housing Tribunal whereby, the Court said, even if the assessor had no question to ask, the proceedings should show his name and mark "NIL" or else it will be concluded that he/she was not offered the opportunity to ask questions and did not actively participate in the conduct of the trial. The failure of actively and effectively participation of assessors during the proceedings it was declared by the court that the trial a nullity for miscarriage of justice and ordered a trial de novo"*

See also **ABDALLAH BAZAMIYE AND OTHERS vs. THE REPUBLIC, [1990] TLR 44.**

There is no doubt that the chairman of the trial Tribunal is bound to observe Regulation 19 (2) of the Regulations (supra) which require the assessors present at the conclusion of the hearing to give their opinion in writing. However, in the purported proceeding and Judgment of the Tribunal there is nowhere to show if the assessors' opinion were recorded which in my view their opinion did not form part of the proceedings and judgment. The consequences of such omission was clearly addressed by the court in ***TUMBONE MWAMBETA case (supra)*** at page 16 where it was held that;

> *"...the omission to comply with the mandatory dictates of the law cannot be glossed over as mere technicalities....the law was contravened an neither were the assessors actively involved in the trial nor were they called upon to give their opinion before the Chairman composed the judgment. This cannot be validated by assuming what is contained in the judgment authored by the Chairman as he alone does not constitute a Tribunal. Besides, the lack of the opinions of the assessors rendered the decision a nullity and it cannot be resuscitated at this juncture by seeking the opinion of the Chairman as to how he received opinions of assessors..."*

See also the decisions of the Court in ***DORA TWISA MWAKIKOSA VS ANAMARY TWISA MWAKIKOSA Land Appeal No.44 of 2015, CAT at Mbeya and SIKUZANI SAIDI MAGAMBO & Another vs Mohamed Roble Civil Appeal No.197 of 2018*** respectively.

Having observed those irregularities as moved by the parties, this court needs to use its powers vested under the legal provisions of the law. Indeed this court is empowered to exercise its powers under section 42 and 43 of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] to revise the proceedings of the District Land and Housing Tribunals if it appears that there has been an error material to the merits. Indeed section 43 (1) (b) the Land Disputes Courts Act provides that;

> *"In addition to any other powers in that behalf conferred upon Supervisory and the High Court, the High Court (Land Division) (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".*

The underlying object of the above provisions of the two laws are to prevent subordinate courts or tribunals from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. See ***Major S.S Khanna v. Vrig. F. J. Dillon, Air 1964 Sc 497 at p. 505: (1964) 4 SCR 409; Baldevads v. Filmistan Distributors (India) (P) Ltd., (1969) 2 SCC 201: AIR 1970 SC 406.*** The provisions cloth the High court with the powers to see that the proceedings of the subordinate courts are conducted in accordance with law within the bounds of their jurisdiction and in furtherance of justice. This enables the High Court to correct, when

necessary, errors of jurisdiction committed by subordinate courts and provides the means to an aggrieved party to obtain rectification of non-appealable order. Looking at our law there is no dispute that this court has power to entail a revision on its own motion or *suo moto*. The court can also do if it is moved by any party as done by both parties in this matter at hand.

Looking at the records, I am of the settled mind that this court has satisfied itself that there is a need of revising the legality, irregularity, correctness and propriety of the decision made by the trial and appellate Tribunals.

Having established that in this case the trial Tribunal has failed to follow the legal principles that renders the proceedings and judgment incompetent, the question is, has such omission or irregularity occasioned into injustice to any party?. I wish to refer the decision of court in ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013.*** The Court of Appeal of East Africa restated the principles upon which court should order retrial. The court observed 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 insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be*

ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

I subscribe the above position by the court which started that an order for retrial should only be made where the interests of justice require it. In my considered view, there is no any likelihood of causing an injustice to any party if this court orders the remittal of the file for the trial court to properly deal with the matter immediately. The Tribunal should consider this matter as priority on and deal with it immediately within a reasonable time to avoid any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for retrial or trial de novo need to be dealt expeditiously within a reasonable time. Having observed that the proceedings at the Tribunal was tainted by irregularities, I find no need of addressing other grounds of appeal.

For the reasons given above, I nullify the proceedings and judgment of the Tribunal in Land Application No 179 of 2016 and the decree made thereto. This matter is remitted to the District Land and Housing Tribunal to be freshly determined. Given the circumstances of this case, this court orders the mater be heard *de novo* by the same the District Land and Housing Tribunal but chaired by a different Chairperson with different set of assessors. Where it appears the Same Tribunal has no more than one

Chairperson, the chairperson from other nearest Tribunal within Mbeya region should be assigned this case. If the parties are interested to proceed prosecuting their case, they should all be summoned to appear within reasonable time.

No order as to the costs.

Order accordingly.

A.J.MAMBI, J
JUDGE
23.06. 2021

Judgment delivered in Chambers this 23rd day of June 2021 in presence of both parties.

A.J.MAMBI, J
JUDGE
23.06. 2021

Right of appeal explained.

A.J.MAMBI, J
JUDGE
23.06. 2021