

IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. LAND APPEAL NO.66 OF 2018

(Arising from the decision of the Land District and Housing Tribunal of Dodoma at Dodoma Appeal No.157/2018, Original from Dodoma Ward Tribunal in Land Case No.3/2018)

MAGRTEETH MSUTAAPPELLANT

VERSUS

MASHAKA SABINI KIHAMA.....RESPONDENT

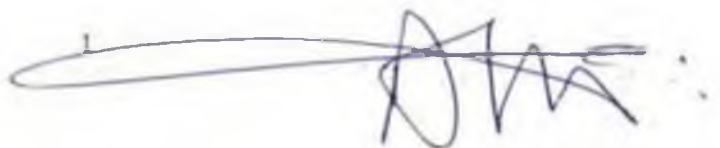
JUDGMENT

Date of last order: 01.08.2021

Date of Judgment: 09.08.2021

Dr. A.J. Mambi, J.

The appellant unsuccessfully appealed against the decision of the Ward Tribunal in the District Land and Housing Tribunal (DLHT) of Dodoma person. The DLHT sustained the decision of the Ward Tribunal. The ultimate decisions was made in favour of the



respondent on the ground that the appellant was not the legal owner of the disputed land.

Aggrieved, the appellant appealed to this court preferring five grounds of appeal as follows:

1. That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts to pronounce decision without considering the facts that the Appellant herein is the lawful owner of the plot of land thereto.
2. That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts by pronouncing judgment without considering that the trial tribunal failed to consider the quorum of members while adjudicating the dispute thereto.
3. That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts by not considering the weight of the credible evidence adduced by the Appellant's witness at the trial instead considered the evidences adduced by Respondent's which were weak and contradictory thereto.

4. That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts since pronounced irrational decision without considering that the Appellant herein returned and paid the whole amount of money used for transaction to the Respondent herein before the village government leaders thereto.
5. That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts since the trial tribunal pronounced irrationally Judgment thereto.

During hearing the appellant Counsel prayed this matter to proceed *ex parte* since the respondent has never appeared. My perusal from the records also reveals that the respondent has never appeared to this court for more than six times albeit summons duly served to him. In Terms of Order XIX and XXXIX Rule 17 of the Civil Procedure Cap 33 [R.E2019] I decided to determine the matter *ex parte*.

The learned Counsel for the appellant briefly submitted that the decision of both Ward Tribunal and DLHT were wrong since the appellant was not given right to be heard as the matter was decided basing in the argument of one side.

The learned Counsel further contended that the proceeding of the Ward Tribunal at page 2 show that the secretary of the Tribunal turned to be the witness for the respondent. He argued that it was improper for the secretary sit as the member of the Ward Tribunal and witness for the respondent.

The learned Counsel further submitted that the quorum of the Ward Tribunal was not properly composed since there was no female member contrary to 14 of the Land Dispute Courts Act, Cap 216. He referred the decision of the court in **Anyekiwe Samwel Vs. Brown Mbukwe, Misc. Land Appeal No. 7 of 2019.**

Before I proceed determining all grounds of appeal, I wish to first address the second ground of appeal which raises the key legal issue. It is on the records that appellant stated in one of her grounds of appeal raised the legal issue on the appointment of the quorum and composition of Members of the Ward Tribunal. The appellant argued that the District Land and Housing Tribunal erred in law and fact by pronouncing the judgment without considering that the proceedings at the ward tribunal were improper as the as the Tribunal was not fully constituted as per the provisions of the

law. Indeed my perusal from the trial tribunal records revealed that the members of tribunal did not have any woman as required by the law.

However, the Tribunal Chair misdirected herself by discussing the composition of members based on gender the point which was not raised by the appellants.

It is on the records that the appellants during hearing at the District Land and Housing Tribunal raised the key legal issue of the procedure for appointment of the Members of The Ward Tribunal the point that was neglected by the both the Trial Tribunal and even the appellate Tribunal. Indeed this is contrary to section 4 of the Ward Tribunal Act, Cap 206 [R.E.2019] and Section 11 of the Courts(Land Dispute Settlement) Act, Cap 216 on the Composition of Ward Tribunal. For easy reference, I wish to reproduce the provision which deals with Composition of Tribunals as follows;

“(1) Every Tribunal shall consist of-

*(a) not less than four nor more than eight
other members elected by the Ward Committee from*

amongst a list of names of persons resident in the ward compiled in the prescribed manner;

(b) a Chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a).

(2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee.

*(3) The **quorum** at a sitting of a Tribunal shall be **one half of the total number of members.***

(4) At any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal, and in the event of an equality of votes the Chairman shall have a casting vote in addition to his original vote'.

More specifically to our case hand, section 11 of the Land Disputes Courts Act, 2002 [R.E.2019] provides that:

*“Each Tribunal **shall** consist of not less than four nor more than*

*eight members of whom three **shall be women** who **shall be elected by a Ward Committee** as provided for under **section 4 of the Ward Tribunals Act, 1985**”.*

Reference can also be made to section 14 of the Land Disputes Courts Act, 2002 [R.E.2019]. That section which deals with consideration of gender at the Ward Tribunal provides that:

*“(1) The Tribunal **shall** in all matters of mediation consists of three members at least one of whom shall be a **woman**”*

Reading between the lines under the above provisions of Cap 216 it is clear that for the Ward Tribunal to be fully constituted it must be composed of both men and women. The word “**shall**” under the last paragraph implies mandatory as also provided under the Interpretation of Laws Act, Cap 1 [R.E.2019]. In other words, the provision of the law mandatorily requires that the Tribunal shall at least be composed of three women out of eight members. Now if the Members of the tribunal did not involve 3 women, it is as saying there was no Tribunal which was composed to determine the matter

at the Ward Tribunal. This means that the entire proceedings and judgment of the Ward Tribunal were fatally defective and nullity.

In my view it was also wrong for the secretary to compose the members of the Tribunal and at the same time became the witness.

Now, under these circumstances can it be said that there was a fair trial on the appellant side at both the Ward Tribunal and the District Land and Housing Tribunal (DLHT)? It appears the appellate Tribunal in this appeal has been beset by serious violations of some basic principles of administration of justice. I am certain in my minds that had the Tribunal properly directed its minds on all legal issues raised by the appellant, it would certainly have come to a different conclusion.

Having observed those irregularities that are incurable, I find it proper to exercise the revisionary discretionary powers of this court to find the best way to deal with this matter in the interest of justice. Indeed this court is empowered under the provisions of the laws 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 and even the Ward

Tribunal if it appears that there has been an error material to the merits. More specifically, 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 objects 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. Indeed, the provisions of the laws cloth the High court with the powers of seeing that the proceedings of the subordinate courts or tribunals 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 mottu*. The court can also do if it is moved by any part as done 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 appellate Tribunal.

Having established that in this case the Trial Ward Tribunal was not properly constituted I find there was no proper appeal at the District Land and Housing Tribunal and I hold so. This means there

is no need of considering the other grounds of appeal since the second ground suffices of disposing off this matter. The legal question is, has such omission or irregularity occasioned into injustice to any party?. In my considered view since the both the proceedings and judgment of both Tribunals were nullity, the best way and for the interest of justice is consider whether the matter can be tried *denovo* or not. It is trait law that before any appellate court makes an order for retrial or trial de novo, the court must find out as to whether the original trial order was illegal or defective and whether making such order (retrial or trial de novo) and will create more injustice to the accused person (if it is criminal) or any party (if civil matter like the matter at our hand). I wish to refer the land make in East Africa 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 former Court of Appeal of East Africa by then restated the principles upon which court should order retrial or trial de novo. The court in that case 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;,

*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...***"

Given the circumstances of the matter at hand, I subscribe the above position by the court which stated 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 Ward Tribunal of Dodoma to properly deal with the matter immediately. I thus in the interest of justice I order for remittal of the file back to the trial Ward Tribunal. 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 or any party 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 reasonable time.

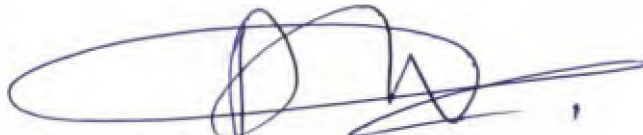
For the reasons given above, I nullify the proceedings and order of the both tribunals and any order made thereto. This matter is remitted to the Trial Ward Tribunal to be freshly determined. Given the circumstances of this case, this court orders the matter be heard *de novo* by the same Ward Tribunal constituted of members as per the provisions of the law. 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.

Dr. A.J. MAMBI

JUDGE

09/08/2021

Judgment delivered in Chambers this **09th** day of **August, 2021** in presence of both parties.

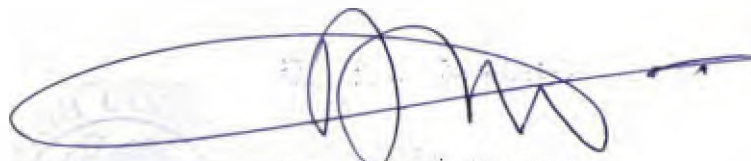
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Dr. A.J. MAMBI

JUDGE

09/08/2021

Right of appeal explained.

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Dr. A.J. MAMBI

JUDGE

09/08/2021