

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

LAND APPEAL NO. 71 OF 2019

*(From the Decision of the District Land & Housing Tribunal for Dodoma at
Dodoma, Land Application No. 97/2014)*

AYUBU OMARY MANKA.....APPELLANT

VERSUS

1. DODOMA CITY COUNCIL

2. FRANK KENETH

3. GEORGE JULIUS MAGONYOZI

4. DOROTH MAGONYOZI

.....RESPONDENTS

JUDGMENT

Date of Judgment 14.09.2021

Dr. Mambi, J.

This Judgment emanates from appeal filed by the appellant challenging the Decision of the District Land and Housing Tribunal (DLHT) for Dodoma in Dodoma. The Trial Tribunal made the decision in favour of the respondents. This resulted from Land application No 97 of 2014. The appellant was unsatisfied with the

decision of the DLHT and filed this appeal basing on three grounds as follows:

1. **THAT;** the trial chairman erred in law and in fact for failure to reflect the opinion of the assessors in the judgment.
2. **THAT;** the trial chairman erred in law and in fact for failure to consider and evaluate the strong evidence of the Appellant.
3. **THAT;** the trial chairman erred in law and in fact for failure to consider circumstances of the case.

During hearing, the appellant was represented by the learned Counsel Mr John Dandu, the respondent was represented by Learned State Attorney Dastan.

The appellant Counsel briefly submitted that he has discovered some irregularities whereby this Honourable Court is vested with powers to determine. He argued that the records show that the Honourable Chairman failed to record and consider the opinions of the assessors. In response, the respondents' Learned State Attorney, briefly submitted that, he has no objection since he has also observed some irregularities as observed by the appellant Counsel on the first ground of appeal.

I have keenly considered brief submissions by the parties who have prayed this court to consider the issue of assessors. I have also thoroughly gone through the records. There is no doubt that this court have been moved by both parties through their counsels that there is immense irregularities that they have observed from the proceedings and judgment of the Trial Tribunal. Basing on

submissions by both parties, this court needs to address key issues raised. One of the key issue is whether the trial tribunal was tainted by irregularities as addressed by both parties. I have gone through the records from the Trial Tribunal and observed that the proceedings and judgment of the Tribunal was tainted by irregularities which jeopardized justice to all parties. My perusal from the records of the DLHT show that The Trial Tribunal Chairman failed to properly address himself to the legal principles governing assessors. This means that the Chairman neither recrafted nor considered the opinion of the assessors contrary to the provisions of the law.

It should be noted that the composition of assessors and how to deal with their opinion are envisaged under 23(1) and (2) of the Land Disputes Courts Act, [Cap. 216 R.E. 2019] which 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.**”*

The provisions of the laws as cited above are clear that the involvement of assessors as required under the law are mandated to give their opinion at the conclusion of the hearing and before the Chairman composes his Judgment. In my considered view, the role of assessors becomes more meaningful if they actively and effectively participate in the proceedings before giving their opinion during trial and before judgment is delivered.

Indeed the Trial Tribunal records do not show if the Chairperson recorded and considered the assessors' opinion. 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. In my considered view, failure to record and consider the assessors' opinion makes both the proceedings and judgment fatally defective and invalid. 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 did not contain the opinion of assessors who were present during the conclusion of the hearing. The records also show that, the opinion of assessors were not put in writing at the conclusion of the hearing. 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 and 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...”

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 key object of the above provision of the law is 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 the 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 District Land and Housing Tribunal.

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 any party...***"

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's 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 Tribunal to properly deal with the matter immediately. The Tribunal should consider this matter as priority 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 97 of 2014 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 matter be heard *de novo* by the same the District Land and Housing Tribunal but chaired by a different Chairperson. 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.



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Dr. A.J. MAMBI

JUDGE

14.09.2021

Judgment delivered in Chambers this 14th day of September, 2021
in presence of both parties.



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Dr. A.J. MAMBI

JUDGE

14.09.2021

Right of appeal explained.



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Dr. A.J. MAMBI

JUDGE

14.09.2021