IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND APPEAL NO.38 OF 2020

(Arising from the decision of the District Land and Housing Tribunal for Dodoma at Dodoma in Application No 177 of 2019)

AMSABI JEREMIAH MRIMI.....APPELLANT

VERSUS

HAWA NICHOLOUS GONDWE .....RESPONDENT

JUDGMENT

Date of Last Order: 18/05/2022

Date of Judgment: 20/05/2022

A. Mambi, J.:

The appellant herein referred as **AMSABI JEREMIAH MRIMI** lodged his memorandum of appeal challenging the decision of the District Land and Housing Tribunal resulted from land Application No 177 of 2019. In the District Land and Housing Tribunal of Dodoma at Dodoma, the Tribunal made the decision in favour of the respondent. The District Land and Housing declared the respondent to be the lawfully owner of the disputed land.

Aggrieved, the appellant lodged this appeal basing on one ground.

During the hearing the appellant was represented by the learned Counsel Mr. Ezekiel Amon while the respondent appeared under the service of the learned counsel Mr. Christopher Malinga.

The appellant abandoned his earlier ground and in terms of order 39 Rule 2 of the Civil Procedure Code, Cap 33 [R.E.2019] prayed to add the new ground of appeal. The respondent Counsel had no objection and the appellant counsel proceeded to argue his ground based on the opinion of the assessors. He argued that the proceedings of the tribunal show that the opinion of the assessors were not read to the parties and the Chairman did not record those opinions. He referred this court to the decision of the Court of Appeal in **EDINA ADAM KIBONA vs ABSOLOM SWEBE (SHELI) Civil Appeal No.286 of 2017**.

In response, the respondent briefly opposed the appellant submission by arguing that the opinions of the assessors were read before the parties and tribunal was right in its decision. He averred that at the tribunal the tribunal chairman recorded and considered the opinion of the assessors.

Having considered submissions by both parties in line with thorough perusal from the records of the District Land and Housing Tribunal (DLHT) I now wish to address and determine the key issue. I am of the view that the main issue is whether there were any irregularities related to the opinion of the assessors at the DLHT. The appellant in his ground of appeal complained that the tribunal proceeding's did not show if the opinion of the assessors were read before the parties. My perusal from the proceedings show that the tribunal was composed of the chairman and assessors. However,

there is nowhere to show if the opinions of the assessors were recorded or read before the parties. In other words, the tribunal proceedings were tainted by incurable irregularities. In my view the key issue is whether the trial tribunal was tainted by irregularities. As I alluded that, I have gone through the records from the Trial Tribunal and observed that the proceedings and judgment of the Tribunal was tainted by irregularities. The irregularities and omissions at the tribunal in my view jeopardized justice to the appellant and even the respondent. My perusal from the records of the District Land and Housing Tribunal show that The Trial Tribunal Chairman failed to properly address himself to the legal principles governing assessors.

It should be noted that the question of the opinions of the assessors is the matter of law. Indeed, the composition of assessors and how to deal with their opinions are clearly reflected under 23(1) and (2) of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] 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****."*

I also wish to refer Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 that are made under the main Act. That regulation 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 plain meaning of the above cited provisions of the laws is clear that the involvement of assessors are mandatory. Where the assessors are present through the proceedings they are required to give their opinion at the conclusion of the hearing and before the Chairman composes his Judgment. The opinions of the assessors must be made in writing and read to the parties. On top of that, the chairman must record the opinions of the assessors under the proceeding. In my considered view, the role of assessors will be meaningful if they actively and effectively participate in the proceedings before and after giving their opinions during trial and before judgment is delivered. Worth referring the decision of the Court of Appeal in ***TUMBONE MWAMBETA vs. MBEYA CITY COUNCIL, Land Appeal No. 25 of 2015 CAT.*** In addressing the importance of reading the opinion of the assessors to the parties including recording those opinion, the court observed that;

> *"Since Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 requires every assessors 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 verdict". (Emphasis supplied with)

It is clear that the Trial Tribunal records do not show if the Chairpersons recorded the assessors' opinion apart from just writing his judgment and making his decision. Indeed, 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 under the proceedings did not show if he recorded the opinion of the assessors or if the opinion were read to the parties. I wish to refer the decision of the court in **EDINA ADAM KIBONA vs ABSOLOM SWEBE (SHELI) Civil Appeal No.286 of 2017** as correctly cited by the appellant counsel. The court in this case at page 5 and 6 observed that:

"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgement. However, in view of the fact that ***the record does not show that the assessors were required to give them, we fail to understand*** *how and at what stage they found their way in the court record. And in further view of the fact that* ***they were not read in the presence*** *of the parties before the judgement was composed, the same have no useful purpose".*

Similarly, the Court in ***TUMBONE MWAMBETA vs. MBEYA CITY COUNCIL,*** (supra) 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"

It is trite law that the chairman of the 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. The proceedings must reflect that the opinion of the assessors were read before the parties and subsequently recorded. However, in the purported proceedings the Tribunal did not show if the opinion of assessors who were present during the conclusion of the hearing were read and recorded. The implication of such omission (non-involvement of the assessor) 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....." [Emphasis added].

Having observed those irregularities as moved by the parties, this court needs to use its discretionary powers vested under the legal provisions of the law. The powers of this court are vested under section 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. More specifically section 43 (1) (b) the Land Disputes Courts Act provides that;

"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".

The underlying object of the above provisions 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 ***Baldevads v. Filmistan Distributors (India) (P) Ltd., (1969) 2 SCC 201: AIR 1970 SC 406.*** The provisions of the law enables the High Court to use its powers to oversee and make sure 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.

From the legal point of view, it is clear 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 in this matter at hand.

Looking at the records, I am of the settled view 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.

As indicated under the records that failure to involve the opinion of the assessors by the Chairman in his decision and proceedings caused miscarriage of justice which needs urgent intervention of this court. 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 am well aware 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 District Land and Housing 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 with 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 177 of 2019 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 and different set of assessors.
All parties should all be summoned to appear within reasonable time. No order as to the costs. Order accordingly.

A.J. MAMBI

JUDGE

20/05/2022

Judgment delivered in Chambers this 20th day of May, 2022 in presence of both parties.

A.J. MAMBI

JUDGE

20/05/2022

Right of appeal explained.

A.J. MAMBI

JUDGE

20/05/2022