IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT MDODOMA

LAND APPEAL NO. 74 OF 2020

(Originating from the District Land and Housing Tribunal for Manyoni at Manyoni in Land Application No17 of 2018)

GEOFREY NYANGUSI .....APPELLANT

VERSUS

YESE AINE MALUGU .....RESPONDENT

JUDGMENT

Date of Last Order: 06/4/2022

Date of Judgment: 12/05/2022

A.J. Mambi, J

In the District Land and Housing Tribunal of Manyoni at Manyoni the Appellant **(GEOFREY NYANGUSI)** unsuccessfully sued the respondent *in Land Application No17 of 2018*. This means that the District Land and Housing Tribunal made the decision in favour of the respondent. The dispute involved the land measuring ten acres.

Aggrieved, the appellant lodged this appeal basing on three similar grounds of appeal.

During hearing, the appellant was represented by the learned Counsel Mr. Salehe Makunga while the respondent appeared under the service of Mr. Charles Simon. The appellant counsel briefly submitted that the District Land and Housing Tribunal erred in fact by not considering the evidence (Exhibit P1) adduced by the appellant. He averred that the DLHT also made its decision without reasons.

In response, the respondent briefly submitted that, the matter at the District Land and Housing Tribunal was properly determined. He argued that all grounds of appeal has no merit and the respondent was lawfully declared the owner of the disputed land by the DLHT.

Before I considered all grounds of appeal and submission by both parties, I have realized some irregularities at the trial Tribunal. I have also gone through the trial records and observed that those irregularities are indeed incurable. I have carefully gone through the submissions from both parties including the records from the trial tribunal. My close perusal revealed that the Hon Chairman for the District Land and Housing Tribunal departed from assessors' opinion without giving his reasons as required by the law. There is no doubt that as indicted under the records that the chairman recorded the opinion of the assessors but he did not give his clear reason for his departure. I went through the Judgment of the District Land Housing Tribunal and noted at page 2 of the judgment that is composed of three pages the chairman had this to say;

"I have considered the wise assessors' opinion. And with the evidence advanced by the applicant I differ from their opinion. The reasons are stated above. The application is dismissed with costs."

My perusal from the very brief judgment of the Tribunal has not seen those reason stated by the chairman that were in the judgment. Indeed the judgment has neither reasons for the decision nor reasons from departing from the opinion of the assessors' apart from just summarizing the evidence of one defence witness.

that assessors observed that there were actual irregularities at the Ward Tribunal but the appellate Tribunal Chairperson just ignored their opinion. Indeed the assessors narrated a long story on what transpired at the trial Ward Tribunal and gave their opinion in detail but he just departed from their opinion without reason. This in my view is contrary to the provisions of the laws. Indeed 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] 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 opinionbefore the Chairman reaches the judgment****."*

Having gone through the records of the District Land Housing Tribunal, I observed irregularities that are incurable. My perusal

from the records show that the Tribunal proceedings and judgment were tainted with irregularities. One of the serious omission or irregularity is the appellate Tribunal Chairperson to differ with the assessors without giving his reasons. It is trite law 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 his reasons for his departure from the assessors opinion. It is on the records that the chairman in his judgment at page 2 made the following observation:

> ***"I have considered the wise assessors' opinion. And with the evidence advanced by the applicant I differ from their opinion. The reasons are stated above. The application is dismissed with costs."***

The above paragraph extracted from the judgment shows the Chairman departed from the assessors' opinion without giving reasons. He even not recorded the assessors opinion under the proceedings. Section 24 *the Land Disputes Courts Act, Cap 216 [R.E.2019]* clearly provides the requirements for considering the opinion of assessors' and reasons in case of departure from the opinion. The law under section 24 clearly provides that:

> *"In reaching the decision the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give* ***reasons*** *for differing with such opinion".*

The simple interpretation of the above provision of the law implies that though the law does not oblige the Chairman to be bound by the opinion of assessors' but according to that provision where he differs with their opinion he must give reasons for differing with such opinion. The word **"shall"** under the last paragraph implies mandatory.

It is clear from the judgment the Tribunal Chairman did not give his reasons for departure all the assessors who gave their opinions with reasons that were put into writing.

The chairman is also mandatory bound to comply with both sections 23 and 24 of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] before making his/her decision. For instance section 23(1) and (2) of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] provides that;

> *"23 (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 above provisions of the laws are clear that the involvement of assessors as required under the law are mandated to gives their opinion at the conclusion of the hearing and before the Chairman composes his judgment. In my considered view, the role of assessors will be 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"*

I have no doubt whatsoever 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. However, in the purported Judgment of this appeal at page 6 the chairman did not give any reasons for his

departure from the assessors as per 24 of the Land Disputes Courts Act, Cap. 216 [R.E. 2019]. The consequences of such omission was clearly addressed by the court in **TUBONE 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..."*

My perusal from the judgment of the District Land and Housing Tribunal also reveals that the Chairman made the decision without reasons contrary to the principles of the law. It is trite law that the judgment must show how the evidence has been evaluated with reasons. It is a well settled principle of the law that every judgment must contain the **point or points for determination, the decision thereon and the reasons for the decision**. The decision maker such as the chairman in our case is bound to give reasons before making his decision. Failure to do so left a lot of questions to be desired. The guiding principles for making decision and writing

judgment are found under Order XXXIX rule 31 of the Civil Procedure Code, Cap 33 [R.E2019]. The provision states that:

> *"The judgment of the Court shall be in writing and shall state–*
>
> *(a)* ***the points for determination****;*
>
> *(b) the decision thereon;*
>
> *(c)* ***the reasons*** *for the decisions; and*
>
> *(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the judge or by the judges concurring therein".*

Under that section the word "**shall"** according to the law of Interpretation Act, Cap1 [R.E.2019] implies mandatory and not option. This means that any judgment must contain point or points for determination, the decision thereon and the reasons for the decision. See also the decision of the court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,***

In my readings and perusal of the judgment of the tribunal, I did not find any reason made by the chairman for his decision.

Having observed those irregularities, I find pertinent fir this curt to exercise its power enshrined under the provisions of the relevant laws. 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 object of the above provisions of the law are 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 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 mottu*. The court can also do if it is moved by any party.

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 Chairperson has failed to follow the legal principles that renders the judgment incompetent, the question is, has such omission or irregularity occasioned into injustice to any party?. In my considered view since the appellant was denied the right to be heard, the best way and for the interest of justice is consider whether the matter 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; 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****..."*

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 court 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 Tribunal (DLHT) to proper order. 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 a reasonable time. Having observed that the proceedings at the Trial 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 order of the Trial Tribunal and any order made thereto. This matter is remitted to the Trial Tribunal to be freshly determined. Given the circumstances of this case, this court orders the mater be heard *de novo* by the same Tribunal but chaired by a different Chairperson

and different set of assessors. 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

JUDGE

12/5/2022

Judgment delivered in Chambers this 12th day of May, 2022 in presence of both parties.

A.J. MAMBI

JUDGE

12/5/2022

Right of appeal explained.

A.J. MAMBI

JUDGE

12/5/2022