IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND APPEAL NO. 82 OF 2020

(Originating from Land Application No 14 of 2018 of the District Land and Housing Tribunal for Manyoni at Manyoni)

MRISHO IDDI & 12 OTHERS.....APPELLANT

VERSUS

SEIF IDD .....RESPONDENT

JUDGMENT

Date of Last Order: 29/04/2022

Date of Judgment: 17/05/2022

Mambi, J.

In the District Land and Housing Tribunal of Manyoni at Manyoni the respondent (SEIF IDDI) successfully sued the respondents in land application No.14 of 2018. The District Land and Housing Tribunal declared the respondent to be the lawfully owner of the disputed land.

Aggrieved, the appellant lodged this appeal basing on six grounds of appeal as follows:

1. **That,** the District Land and Housing Tribunal for Manyoni at Manyoni erred in law and facts to pronounce decision without

considering the fact that the pieces of land in dispute belong to the Appellants herein thereof.

2. **That,** the District Land and Housing Tribunal for Manyoni at Manyoni erred in law and facts to pronounce decision without considering the principle of Res Judicata thereto.
3. **That,** the District Land and Housing Tribunal for Manyoni at Manyoni erred in law and facts to pronouncing Judgment without considering the principles of natural justice since the Appellant's right to be heard were completely infringed thereto.
4. **That,** the District Land and Housing Tribunal for Manyoni at Manyoni erred in law and facts by not considering the weight of the credible evidence adduced by the Appellant's side instead considered the evidences adduced by Respondent's side which was weak and contradictory thereto.
5. **That,** the District Land and Housing Tribunal for Manyoni at Manyoni erred in law and facts to pronouncing Judgment without taking into account the opinions of assessors thereof..
6. **That,** the District Land and Housing Tribunal for Manyoni at Manyoni erred in law and facts since pronounced irrationally judgment thereto.

During hearing the appellants were represented by the learned Counsel Nchimbi while the respondent appeared under the service of the learned counsel Mr John Chigongo.

Before I considered all grounds of appeal and reply, I wish to start with the fifth ground on the opinion of the assessors. The appellant in his ground of appeal complained that the tribunal composed the

judgment without considering the opinion of the assessors. My perusal from the proceedings show that the tribunal was composed of the chairman and assessors but there is nowhere to show if the opinion of the assessors were recorded or considered. Additionally, the judgment of the chairman does not show if he considered the opinion of the assessors before making his decision. 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. I have gone through the records from the Trial Tribunal and observed that the proceedings and judgment of the Tribunal was tainted by irregularities that 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. The records does not show if the assessors gave their opinion and if they did, their opinion were neither recorded nor considered by the chairman.

It should be noted that the question of the opinion of the assessors is the matter of law. Before I address the importance of the opinion of the assessors I wish to highlight the relevant provisions of the law that deal with the opinion of the assessors. 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 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."*

Reading between the lines on the above cited provisions of the laws it is clear that the involvement of assessors are necessary and they must give 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

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 own 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. The Court in ***TUMBONE 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.

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 records also show that, the opinion of assessors were not put in writing at the conclusion of the hearing. 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 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..."*
>
> *fatal and usually vitiates the conviction."* [Emphasis added].

I have also observed that the appellants were not fully availed with the right to be heard as also indicated under the third ground of appeal. This implies that the right to be heard was not fully availed to the appellant. The consequences for the failure to avail a party fair opportunity to be heard was underscored by the Court of Appeal in ***DPP VS.SABINIS INYASI TESHA AND RAPHAEL J.TESHA [1993] T.L.R 237*** where the court held that such denial would definitely vitiate the proceedings. See also ***EMANUEL NAISIKE VS. LOITUS NANGOONYA, MISC. LAND CASE APPEAL NO.22 OF 2011*** High Court at Arusha.

The position of the law with regard to the importance of right to be heard was also underscored in the case of ***MBEYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where the court held that:

> *"In this country, natural justice is not merely principle of common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part"*
>
> *"Wakati haki na Wajibu wa mtu yeyote vinahitaji kufanyiwa*
>
> *uamuzi wa mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na* ***haki ya kupewa fursa ya kusikilizwa***
>
> ***kwa ukamilifu".***

As the right to be heard is the fundamental constitutional right this court finds the importance of referring more cases in this issue. As there are so many authorities that have addressed similar issues, suffices to refer the case of ***ABBAS SHERALLY & ANOTHER VS. ABDUL S.H.FAZALBOY Civil Application No.33 of 2002*** which was also referred in ***EMANUEL NAISIKE VS. LOITUS NANGOONYA, MISC. LAND CASE APPEAL NO.22 Of 2011 (supra).*** The Court of Appeal in ***ABBAS SHERALLY & ANOTHER VS. ABDUL (supra)*** reiterated that:

> ***"....That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard,*** *because the violation is concerned to be a breach of natural justice."*

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. 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 and 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 ***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 *sua 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 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 Tribunal.

It is clear that failure to involve the opinion of the assessors by the Chairman in his decision and proceedings caused miscarriage of justice. 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***.."

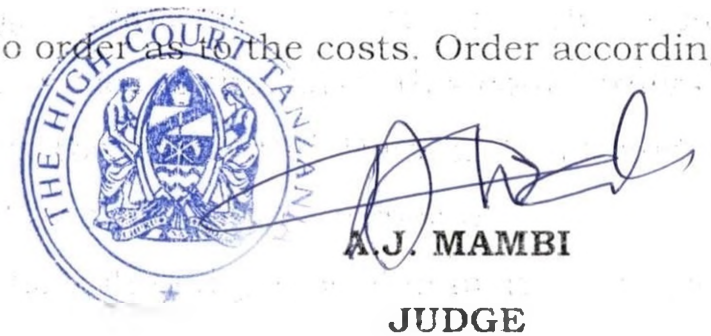
I am well aware that an order for retrial should only be made where the interests of justice require it. In my considered view, there is no any likelihood of causing an injustice to any party if this court

orders the remittal of the file for the 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. 14 of 2018 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.

All parties should all be summoned to appear within reasonable time.

No order as to the costs. Order accordingly.



A.J. MAMBI

JUDGE

17/05/2022

Judgment delivered in Chambers this 17th day of May, 2022 in presence of both parties.

A.J. MAMBI

JUDGE

17/05/2022

Right of appeal explained.

A.J. MAMBI

JUDGE

17/05/2022