IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

MISC. LAND APPEAL NO. 30 OF 2020

(Arising from Land Application No 335 of 2020 of the District Land and Housing Tribunal for Dodoma at Dodoma)

SELEMAN M.MAHADHI...APPELLANT

VERSUS

JAMES N. KIMWAGA ....RESPONDENT

(As administration of the estate

of the late Mary Kimwaga)

JUDGMENT

Date of Last Order: 16/05/2022

Date of Judgment: 19/05/2022

A. Mambi, J.:

This judgment emanates from an appeal lodged by the appellant(**SELEMAN M.MAHADHI**). The District Land and Housing Tribunal of Dodoma at Dodoma (DLHT) made the decision in favour of the respondent.

The appellant was dissatisfied by the decision of the DLHT and lodged this appeal basing on three grounds of appeal.

During hearing, the appellant was represented by the learned Counsel Mr. Kalonga while the respondent appeared under the service the learned Counsel Mr. Kesanta.

Before I considered all grounds of appeal and reply, I perused the entire records of the District Land and Housing Tribunal (DLHT) and discovered some irregularities 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 to be received from them although they are physically in the file. Additionally, the judgement and proceedings of the tribunal do not show if the opinion of the assessors were read before the parties, before the judgment was composed. This implies the tribunal proceedings were tainted by irregularities for noncompliance of legal requirements. I have gone through the records from the DLHT and observed that the proceedings and judgment of the Tribunal was tainted by irregularities that in my view jeopardized justice to both parties. Indeed, 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 opinion of the assessors is the matter of law. 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****."*

Additionally, 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 his 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. It goes without saying that, the role of assessors is more meaningful if they actively and effectively participate in the proceedings before giving their opinion during the trial and before judgment is delivered. This means apart from making sure that the opinions of the assessors are put into writing, the chairman must make sure that those opinion are read to the parties and the proceedings must reflect that he recorded

that the opinion were read to the parties. The chairman must also record on the proceedings on what the assessors opined.

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 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"*

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, as I have stated earlier, reflect that the opinion of the assessors were read before the parties and subsequently recorded. Failure to do so, 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..."*

On the other hand, I would like to point out that the tribunal chairman neither properly analyzed the evidence nor gave his reasons for his decision as claimed by the appellant's counsel. The Chairman just summarized the evidence and stated that he agrees with the assessors without making proper analysis of the evidence of both parties. My perusal from the judgment of the District Land and Housing Tribunal 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 as moved by this Court *Suo mottu*, 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 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. 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 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 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. Having observed those irregularities, the issue to be determined by this court is whether the matter is to be referred back to the DLHT to be re-determined or not. 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 DLHT to properly deal with the matter immediately. In this regard, it could be wise for this matter to be referred back to the tribunal for any chairman at the tribunal to read the opinion of the assessors to the parties. The chairman

should also record under the proceedings that the opinion of the assessors were read to the parties. Additionally, the chairman (DLHT) should record the opinion of the assessors on the proceedings before composition the new judgment. This court also orders the chairman to compose the new judgment basing on the opinion of the assessors that were already considered. The Tribunal should consider this matter as priority on and deal with it immediately within a reasonable time to avoid any injustice to the parties resulting from any delay. It should be noted that all appeals that are remitted back for retrial or correction need to be dealt expeditiously within a reasonable time. Having observed that the proceedings at the Tribunal were tainted by irregularities, I find no need of addressing other grounds of appeal. I order the Tribunal to properly compose the new Judgment as per the directives under this judgment.

This matter is remitted to the District Land and Housing Tribunal to comply with the orders of this court. Any party will be at liberty to appeal against the judgment to be made by the tribunal in accordance to the relevant provision of the law.

No order as to the costs.

A.J. MAMBI

JUDGE

19/05/2022

Judgment delivered in Chambers this 19th day of May, 2022 in presence of both parties.

A.J. MAMBI

JUDGE

19/05/2022

Right of appeal explained.

A.J. MAMBI

JUDGE

19/05/2022