

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA**

LAND APPEAL NO. 52 OF 2021

(Arising from the decision of the District Land and Housing Tribunal of Singida at Singida in Land Appeal No. 105/2018, Original from Msimbazi Ward Tribunal in Land Case No. 4 of 2018)

JOHN MWAHIAPPELLANT

VERSUS

MUKHANDI MUHULENDERESPONDENT

JUDGMENT

Date of last order: 14/07/2022

Date of Judgment: 14/07/2022

Mambi, J.

This Judgment emanates from an appeal filed by the Appellant challenging the decision of the District Land and Housing Tribunal (DLHT) which made the decision in favour of the respondent.

The DLHT reversed the decision of the Ward Tribunal. The ultimate decision was made in favour of the respondent on the ground that he was the legal owner of the disputed land.

Aggrieved, the appellant appealed to this court preferring four grounds of appeal

During hearing the appellant Counsel Mr Rober Owino prayed this matter to be referred to the Ward Tribunal for trial De novo. He argued that the proceedings at the Ward Tribunal do not show the involvement of the Members contrary to section 11 of the Land Dispute Act Cap 216. The respondent Counsel Mr Francis Komba supported the submission by the appellant counsel.

Before I proceed determining all grounds of appeal, I wish to first address the second ground of appeal which raises the key legal issue. Both parties have prayed the matter to be referred for retrial due to irregularities at the Ward Tribunal and they prayed this court to invoke its revisionary powers. Indeed my perusal from the trial tribunal records revealed that the names of members of the tribunal did not appear under the proceeding except on the Judgment. In this regard the court cannot just assume that the members were involved during hearing of the case.

The Tribunal Chairman was informed on those irregularities but he ignored addressing that point. Indeed even the proceedings of the District Land and Housing Tribunal do not show if he read the opinion of the assessors. On top of that, the appellate tribunal chairman did not give his reasons for departing from the assessors' opinion.

In my view what was done by the Ward Tribunal was contrary to section 4 of the Ward Tribunal Act, Cap 206 [R.E.2019] and Section 11 of the Land Disputes Courts (Land Dispute Settlement) Act, Cap 216 on the Composition of Ward Tribunal. For easy reference, I wish to reproduce the provision which deals with Composition of Tribunals as follows;

"(1) Every Tribunal shall consist of–

- (a) **not less than four nor more than eight other members elected by the Ward Committee** from amongst a list of names of persons resident in the ward compiled in the prescribed manner;*
 - (b) a Chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a).*
- (2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee.*
- (3) The **quorum** at a sitting of a Tribunal shall be **one half of the total number of members.***
- (4) At any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal, and in the event of an equality of votes the Chairman shall have a casting vote in addition to his original vote".*

More specifically to our case at hand, section 11 of the Land Disputes Courts Act, Cap 216 [R.E.2019] provides that:

*"Each Tribunal **shall** consist of **not less than four nor more than eight** members of whom three **shall be women** who **shall be elected by a Ward Committee** as provided for under **section 4 of the Ward Tribunals Act, 1985**".*

Reference can also be made to section 14 of the Land Disputes Courts Act, Cap 216 [R.E.2019]. That section which deals with consideration of gender at the Ward Tribunal provides that:

*"(1) The Tribunal **shall** in all matters of mediation consists of three members at least one of whom shall be a **woman**"*

Reading between the lines under the above provisions of Cap 216 it is clear that the determination of the land dispute at the Ward Tribunal must be made by the members (**not less than four nor more than eight**) from the hearing to the final decision that is the Judgment and their names must appear on the proceedings. On top of that the law requires that for the Ward Tribunal to be fully constituted it must be composed of both men and women. The word "**shall**" under the last paragraph implies mandatory as also provided under the Interpretation of Laws Act, Cap 1 [R.E.2019]. In other words, the provision of the law mandatorily requires that the composition shall at least be composed of three women out of eight members. Now if the names of the members of the tribunal did not appear on all days when the matter was being determined except at the final day of Judgment it is as saying there was no Ward Tribunal which was

composed to determine the matter at the Ward Tribunal. This means that both the entire proceedings and judgment of both the Ward Tribunal and DLHT were fatally defective and nullity.

Now, under these circumstance can it be said there was a fair trial on the appellant side at both the Ward Tribunal and the District Land and Housing Tribunal (DLHT)?. It appears the appellate Tribunal in this appeal has been beset by serious violations of some basic principles of administration of justice. I am certain in my mind that had the Appellate Tribunal properly directed its mind on all legal issues raised by the appellant, it would certainly have come to a different conclusion.

Having observed those irregularities that are incurable, I find it proper to exercise the revisionary powers of this Court to find the best way to deal with this matter in the interest of justice. 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 (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 objects 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 ***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.*** Indeed, the provisions of the laws cloth the High court with the powers of seeing that the proceedings of the subordinate courts or tribunals 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 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 both the trial and appellate Tribunal.

Having established that in this case the Trial Ward Tribunal was not properly constituted I find there was no proper appeal at the District Land and Housing Tribunal and I hold so. This means there is no need of considering the other grounds of appeal since the second ground suffices of disposing off this matter. The legal question is, has such omission or irregularity occasioned into injustice to any party?. In my considered view since both the proceedings and judgment of both Tribunals were nullity, the best way and for the interest of justice is to consider whether the matter can be tried *denovo* or not. It is trite 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) 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 mark in East Africa in ***Fatehali Manji V.R, [1966] EA 343***, cited by the case of ***Kanguza s/o Mchemba v. R Criminal Appeal NO. 157B OF 2013***. The former Court of Appeal of East Africa by then restated the principles upon which courts 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;

.....

*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 to 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 Ward Tribunal of Msisi to properly deal with the matter immediately. I thus, in the interest of justice, order for remittal of the file back to the trial Ward Tribunal and the tribunal should be fully constituted as required by the provisions of the laws. The Tribunal should consider this matter as priority 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 with expeditiously within a reasonable time.

For the reasons given above, I nullify the proceedings and orders of both tribunals and any order made thereto. This matter is remitted to the Trial Ward Tribunal to be freshly determined. Given the circumstances of this case, this court orders the matter be heard *de novo* by the same Ward Tribunal constituted of members as per the provisions of the law. 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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A.J. MAMBI
JUDGE
15/07/2022

Judgment delivered in Chambers this 14th day of July, 2022 in presence of both parties.



A handwritten signature in blue ink, appearing to be "A.J. Mambi".

A. J. MAMBI
JUDGE
14/07/2022

Right of appeal explained.



A handwritten signature in blue ink, appearing to be "A.J. Mambi".

A.J. MAMBI
JUDGE
14/07/2022