IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND CASE APPEAL NO. 76 OF 2020

(Originating from Land Application No. 175/2018 of the District Land and Housing Tribunal for Singida)

MWANAHAMISI SELEMANI .....APPELLANT

VERSUS

1. JOHN MOHMAED HONGOA

2. IBRAHIMU GHAMBI .....RESPONDENT

3. JUMANNE ISSA AND 3 OTHERS

JUDGMENT

Date of Last Order: 28/07/2022

Date of Judgment: 28/07/2022

Mambi, J.

In the District Land and Housing Tribunal (The DLHT) the appellant (Mwanahamisi Selemani) sued the respondents herein vide Land Application No. 76/2017. This application was dismissed by the DLHT for non-appearance of the appellant (applicant) and her advocate. The

appellant later applied for restoration vide Misc. Land Application No. 175/2018, the DLHT dismissed it, hence this appeal before this court.

The appellant lodged this appeal basing on three grounds of appeal, which in summary she is disputing the unjust decision of the DLHT for holding that there was no sufficient reasons for non appearance of the appellant or her counsel in Land Application No. 76/2017. The appellant counsel Misc. Zahara Chima in her submissions briefly contended that on the hearing day the DLHT was not properly constituted and that she was not present as she was nursing her ailing sister after being notified shortly of her sickness. The appellant counsel finally prayed for this court to refer the matter to the DLHT for trial denovo.

Opposing the appeal Mr. Kalonga for the respondents contended that the DLHT was right in its decision on ground that if there was no proof for the reasons of the absence of the counsel when the case was coming for hearing, them it was right for the DLHT to dismiss the said application.

As alluded earlier one of the appellant's grounds of appeal (the second ground) was that the DLHT erred in law by proceeding with matter ex-parte without reasons; and the appellant counsel prayed the matter be referred back to the tribunal for retrial.

Before I consider all grounds of appeal, It is on the record that in Land Application No. 76/2017 the appellant counsel had an emergency but the tribunal just proceeded with the matter in the absence of the appellant Counsel. This in my view denied the appellant right to be heard. One should have expected that the DLHT should have adjourned the matter to

another day to give room for the appellant to communicate with her counsel or find another counsel for her representation.

In this regard, the appellant was not properly availed with right to be heard. Apart from the existing laws there a number of court authorities that have clearly addressed this issue. This is indeed is contrary to the law as it might occasion to the miscarriage of justice to the appellant. In my view such omission (denial for right to be heard) was in violation of the cardinal principles of Natural Justice. The importance of fully availing an accused right to be heard was re-emphasized by **Lord Denning L.J**. (as he then was) who made clarification in the case of ***Kanda v. Government of Malaya [1962]2 WLR 1153*** at page 1162. **Lord Denning L.J** observed and stated that:

> *"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him.* ***He must know what evidence has been given and what statements have been made affecting him****; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

In my firm view, this implies that the right to be heard was not fully availed to the appellant. Reference can also be made to the decision the Court of Appeal by the Court of Appeal in ***DPP VS.SABINIS INYASI TESHA AND RAPHAEL J.TESHA [1993] T.L.R 237*** where the court observed the consequences of failure to avail a party fair opportunity to be heard. In

that case the court held that such denial would definitely vitiate the proceedings. The similar position was made by the Court in ***MEYYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where it was 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".***

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."*

Now that the DLHT dismissed the Misc. Land Application No. 175/2018 despite the fact that there was an illegality of improper constitution of the tribunal and the good reasons for non appearance that was advanced by the applicant and her counsel. On this, the DLHT was wrong; it was supposed to restore the said application.

Having established such irregulaties at the DLHT this court is empowered to re-visit or review the judgment of the tribunal and make any order. 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 provision 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 Section 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 *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 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 trite law that before any appellate court or tribunal 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 mark case 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 Tribunal to properly deal with the matter immediately. I thus in the interest of justice order for remittal of the file

back to the trial Tribunal to properly deal with the matter. 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 District Land and Housing 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 DLHT and any order made thereto. This matter is remitted to the DLHT 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 Chairman. 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

28/07/2022

Judgment delivered in Chambers this 28th day of July, 2022 in presence of both parties.

A.J. MAMBI

JUDGE

28/07/2022

Right of appeal explained.

A.J. MAMBI

JUDGE

28/07/202