

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**AT MOSHI**

**LAND CASE REVISION NO. 2 OF 2021**

*(C/F Land Appeal No.37 of 2020 District Land and Housing Tribunal for Moshi;  
Originating from Shauri la Ardhi Na.1/2020 Baraza la Kata Katangara)*

**DEMETRIA BEDA ..... APPLICANT**

**VERSUS**

**YUSTA MKWAI ..... RESPONDENT**

**RULING**

*14/2/2022 & 22/3/2022*

**SIMFUKWE, J**

The Applicant Demetria Beda filed this application under **section 79 (1) (c) of the Civil Procedure Code Act, Cap 33 R.E 2002** (CPC) seeking the following *ex parte* and *inter parties'* orders:

- 1. That, this Honorable court be pleased to revise the whole proceedings, Ruling and order in Land Appeal No.37 of 2020 District Land and Housing Tribunal Moshi. (sic)*
- 2. This Honorable court be pleased to grant costs of this application and;*
- 3. Any other reliefs deems (sic) fit and just to be granted.*

The application was made by way of chamber summons supported by reasons and grounds contained in the affidavit sworn by Advocate Gabriel M. Shayo. It was opposed by the counter affidavit of the respondent Yusta Mkwai.



The matter was ordered to be argued by way of written submissions since the respondent was unrepresented. The Applicant was represented by Mr. Ulirock Shayo- Learned counsel.

In support of paragraph 6 of the affidavit, Mr. Shayo submitted to the effect that, it is apparent on the face of court's records that on 6<sup>th</sup> April 2021 when Land appeal No. 37/2020 was called on for orders, the DLHT Chairman issued a call which was assigned to the Chairman of Katangara Ward Tribunal with his secretary to bring the file to the DLHT. He averred that, the Order in Land Appeal No.37 of 2020 which is the subject of this application dismissed Land Appeal No.37 of 2020 for the reasons that the applicant herein had failed to send a letter and bring the case file of Land Case No.1/2020 of Katangara Ward Tribunal so that the first appellate Court could proceed with the hearing in Land Appeal Case No.37 of 2020. Mr. Shayo thus argued that in law, such order was misconceived and bad since it is unprocedural as it was not the applicant's duty to bring before the District Tribunal chairman the case file No.1/2020 of Katangara Ward Tribunal. Such fundamental duty lies on Tribunal's clerk as they are custodian of all records of the land Tribunal. He thus argued that the dismissal of Land Appeal No.37 of 2020 by the chairman of the DLHT basing on such reason renders the dismissal unprocedural and prejudicial to the rights of the applicant considering that the call was made by the chairman of the District Land and Housing Tribunal in vain.

Submitting to the contents of paragraph 7, 8 and 9 of the applicant's affidavit, it was stated that the dismissal order with costs in Land appeal No.37 of 2020 by the Chairman of the DLHT is grossly misconceived and bad in law as it offends the provisions of **section 30 of the Land Disputes Courts Act Cap 216 R.E 2019** which provides that:



*"Proceedings of the District Land and Housing Tribunal shall be held in public and a party to the proceedings may appear in person or by an advocate or any relative or any member of the household or authorized officer of a board Corporate".*

It was argued by applicant's counsel that through the proceedings in Land Appeal No.37/2020 it is apparent that on 22<sup>nd</sup> April 2021 when the matter was called on for hearing, the applicant's counsel, one G. M. Shayo was present before the Chairman of DLHT and had prepared to argue the grounds of appeal as set forth in the Memorandum of appeal. Mr. Shayo was of the view that it was unprocedural for the Chairman to dismiss the appeal for non-appearance of the appellant Demetria Beda aged 82 years while she was represented by an advocate who was present when the matter was called on for hearing.

Mr. Shayo was of the firm view that the dismissal order of Land Appeal No. 37 of 2020 DLHT denied the applicant's right to be heard since she was represented and enjoyed the legal service of her advocate. He invited the court to examine the question as to *Why the Chairman of the District Land and Housing Tribunal dismissed Land appeal No. 37 of 2020 for non-appearance of the appellant while she was represented and enjoyed the legal Service of her advocate*, taking into account that **Section 30 of the Land Disputes Court Act (supra)** allows an advocate to appear on behalf of her Client in any proceedings before the DLHT.

In that respect therefore, he commented that as much as the applicant was represented by her advocate in Land Appeal No.37 of 2020 when it was called for hearing the applicant's right to be heard was curtailed and such order by the Chairman contravened **Article 13(6)(a) of the**



**Constitution of the United Republic of Tanzania of 1977** which provides that when the rights and duties of any person are being determined by the Court that person shall be entitled to fair hearing. He argued that this position has been recently reaffirmed in the case of **MBEYA-RUKWA AND TRANSPORT LTD VS JESTINA GEORGE MWAKYOMA [2003] TLR 253** in which it was held that:

*"(V) The right of hearing is fundamental Constitutional in Tanzania by virtue of Article 13(6) (a) of the Constitution."*

Submitting on the contents of paragraph 10 of the applicant's affidavit, the applicant's advocate argued that, it is apparent that the order of the DLHT had no opinions of Tribunal assessors as required under **section 24 of the Land Disputes Court Act** (supra) which provides that:

*"In reaching the decisions 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 opinions."*

The learned advocate insisted that the Chairman of the DLHT wrongly dismissed Land Application No. 37 of 2020 for non-appearance of the applicant while her advocate was present and was prepared to argue the grounds of appeal set forth in the Memorandum of appeal. He opined that the Order by the Tribunal chairman curtailed the appellant/applicant herein right to be heard in Land Appeal No. 37 of 2020. He added that, the entire proceedings and Drawn Order in Land Appeal No. 37 of 2020 of the DLHT had no opinions of Tribunal assessors thus, vitiates the whole proceedings in Land Appeal No. 37 of 2020 as null and void. The learned



counsel prayed that the whole proceedings and drawn order in Land Appeal No. 37 of 2020 be revised and quashed.

Opposing the application, the respondent first prayed to withdraw the counter affidavit from the records since on 3/11/2021 he mistakenly filed it.

The respondent submitted in respect of paragraph 6,7,8,9,10,11 and 12 of the applicant's affidavit. She submitted to the effect that on 10<sup>th</sup> August 2020 when the applicant instituted Land Appeal No. 37 of 2020 before the DLHT, she was served with various summons to appear. Despite being an old poor woman, she appeared before the Tribunal for more than six times. Neither the applicant nor her legal representative appeared hence the appeal ended up on unusual adjournments. Following that situation, on 18<sup>th</sup> February 2021 she decided to lodge complaint through a written letter to the tribunal Chairman asking the status of the said appeal. On 22<sup>nd</sup> April 2021, the appeal was fixed for hearing and she was present in person while on the applicant's side no one was present, so the Chairman dismissed the appeal among other reasons for non-appearance.

She continued to submit that, the procedure for proceedings hearing established under **The Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2003** mandates that when the proceedings before the tribunal is fixed for hearing and the applicant is absent without good cause, the Chairman will proceed to dismiss such application for non-appearance. She referred the court to **Regulation 11 (1) (b) of The Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2003** which stipulates that:



*"On the day the application is fixed for hearing the Tribunal shall where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of applicant"*

She further stated that, despite the applicant being aware of the hearing dates still no one appeared before the Tribunal to show cause and even defend her appeal, this was wastage of time of the tribunal.

Basing on the above provision of the law, the respondent argued that, after the applicant being absent without any justifiable cause the chairman had no any other option other than dismissing the appeal. She opined that, what the Chairman did was in the interest of justice and avoiding wasting precious time of the tribunal.

It was the respondent's contention that, the applicant failed to exercise her right of being heard provided for in the above noted laws and regulations. She argued that, courts and tribunals are prohibited to spare persons of this nature as they set bad precedents. The only remedy the tribunal Chairman had, was to dismiss the appeal. She thus prayed this matter to be dismissed with costs in favor of the Respondent.

In rejoinder, the applicant's advocate insisted that the tribunal records showed that on 22/04/2021 the said land appeal was fixed for mention and the applicant's advocate addressed the tribunal that his client was sick and prayed for adjournment. The tribunal Chairman, J.W. Sillas then gave an order that:



*"Rufaa imefutwa kwa kigezo kuwa mleta Rufaa hajawahi kufika pia amri ya kupeleka notisi/Barua baraza la Kata haikuheshimiwa."*

He also reiterated that the order of dismissing the appeal is unprocedural and unjustifiable since the appeal was fixed for mention. He referred the court to the case of **Tanzania Harbours Authority vs Kader F. Mohamed, Misc. Civil Cause No.994/96** where it was stated that:

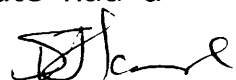
*"a suit can only be dismissed on grounds of default of appearance when the case is fixed for hearing and not merely for mention."*

He also referred to the case of **National Bank of Commerce vs Grave Sengela [1982] TLR 248** and the case of **George Shambwe vs Attorney General and Another [1997] TLR 176**.

Basing on these authorities the learned advocate commented that, in the present case it was illegal to dismiss the said appeal while the appellant's advocate was present when the said appeal was called for mention.

He added that, the tribunal's records were uncertain which renders mal-administration of justice for the reason that the records showed that the applicant's advocate was absent and at the same time marked present.

The learned advocate also reiterated the requirement of the law under **section 30 of Land Disputes Court Act(supra)** and commented that it was wrong for the Chairman to hold that the applicant was absent while he enjoyed the service of her advocate who was present on 5/4/2021 when the appeal was called for mention. In addition, he stated that the appeal contained legal grounds which the appellant's advocate had a



burden to argue and not his client. He also reiterated the prayer as submitted in chief. He added another prayer that the court to order retrial before another Tribunal's Chairman.

Having considered the parties' submissions for and against the application together with their affidavits, the issue which needs determination of this court is ***whether the application for revision deserves to be granted.***

Under **section 79(1)(c) of the CPC**, this court is vested with powers to call for the record of any case which has been decided by subordinate courts in which no appeal lies, and revise the same if it finds that, the same acted without jurisdiction or acted illegally or with material irregularities. In the case of **Abdal Hassan vs Mohamed Ahmed [1989] TLR 181** it was stated that:

*"The High Court revisional power under section 79 (1) of the Civil Procedure Code of 1966 are limited to cases where no appeal lies and issue such as whether the Subordinate Court has exercised jurisdiction not vested, if vested, whether it has failed to exercise the same or has acted illegally or with material irregularity."*

In the instant application, the applicant called upon this court to revise the order which dismissed the appeal for non-appearance while the appellant's advocate entered appearance. I have keenly gone through the impugned order. The Chairman of the DLHT had this to say:

*"Rufaa hii imeletwa katika Baraza hili tarehe 10/8/2021 tangu siku hiyo mleta Rufaa hajawahi kufika hapa na pia amri ya*






*kupeleka barua au notice ya wito wa kuitisha jalada la Baraza la Kata haikuheshimiwa.*

*Kutoonekana kwa mleta Rufaa kwa klpindi chote kama ambavyo mwenendo wa Shauri hili unavyoonyesha na kutopeleka barua ya kuitisha jalada la Baraza la Kata ni Ushahidi tosha kwamba amekosa umakini wa kuendesha Rufaa hii na anatumia pia muda wa Baraza kwa kuchelewesha usikilizwaji wa Rufaa kwa wakati na hii inamuumiza mjibu Rufaa ambaye mara nyingi amekuwa akihudhuria katika baraza. **Mjibu Rufaa amlipe mjibu Rufaa gharama.** (sic)*

*Ndivyo ilivyoamriwa.”*

The above quoted order did not mention openly and loudly if at all the appeal was dismissed. Even the order of paying the costs itself is not clear to whom shall the costs be paid. To the applicant, the appeal has been dismissed, something which I concur since the whole order suggests that the appeal has been dismissed for two reasons, **first**, for non-appearance of the appellant and **second**, for failure to send the letter to the Ward Tribunal so that the records could be brought to the DLHT. The respondent joined hands with the Chairman's reasons for dismissal.

On the outset, I am convinced not to agree with the respondent's side due to the fact that, the record speak itself. On 22/4/2021 the records shows that the applicant's advocate entered appearance since he addressed the Tribunal to that effect. However, the coram showed that he was absent. This irregularity suffices to revise the trial tribunal's proceedings on the reason that a party can appear in person or by an advocate or any relative or any member of the household or authorized



officer of a board Corporate. This is as per **section 30 of the Land Disputes Courts Act (supra)**. Thus, the fact that the applicant's advocate entered appearance, it was not correct for the Chairman to dismiss the appeal.

The second reason for dismissing the appeal is failure to send a letter for calling the case file of Land Case No. 1/2020 from Katangara Ward Tribunal. Again, this reason was not genuine on the reason that, the order which ordered the file to be brought before the DLHT is not certain. It is not known to whom the order was directed. For ease reference such order reads:

*"Ninaagiza jalada la Baraza la Kata liwasilishwe."*

This order is vague. The case could not be dismissed on such reason while the order is general and uncertain. This suffices to conclude that the learned Chairman acted illegally or with material irregularities in dismissing the appeal before him.

Moreover, the learned Chairman has curtailed the appellant/applicant's constitutional right of being heard as correctly submitted by the learned counsel of the applicant and as provided and guaranteed by **Article 13 (6) (a) of the Constitution (supra)**. This also has been emphasized in a number of cases. For instance, in the case of **Abbas Sherally and Another vs. Abdul Fazalboy, Civil Application No. 33 of 2002** (unreported) the Court of Appeal had this to say on right to be heard

*"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. 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 considered to be a breach of natural justice."*

It is on the basis of the above findings that, I invoke my revisionary powers under **section 79(1) (C) of the CPC**, to revise the whole proceedings, ruling and order in Land Appeal No. 37/2020 of the District Land and Housing Tribunal of Moshi. I hereby order the applicant's case (Appeal) to proceed on merit before another Chairman of the District Land and Housing Tribunal. I give no order as to costs since the anomaly was occasioned by the Tribunal.

It is so ordered.

Dated and delivered at Moshi this 22<sup>nd</sup> day of March, 2022.



A handwritten signature in black ink, appearing to read "S. H. Simfukwe".

**S. H. SIMFUKWE**

**JUDGE**

**22/3/2022**