IN THE HIGH COURT OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

LAND APPEAL

REF NO. 20231127000026199

(Arising from the decision of the District Land & Housing Tribunal for Tarime at Tarime in Application for Revision No. 90 of 2023 originated from 2020 Kemambo Ward Tribunal in Case No. 28 of 2023)

BARRICK GOLD MINE LIMITED..... APPELLANT

VERSUS

AUGUSTINO NESTORY SASI..... RESPONDENT

JUDGMENT

16th & 26 February, 2024

M. L. KOMBA, J.:

The appeal at hand emanates from the decision of the District Land and Housing Tribunal for Tarime (the DLHT) in Miscellaneous Application No. 90 of 2023 where the appellant herein applied for revision of the mediation conducted and concluded at Kemambo Ward Tribunal (the Tribunal) in Case No. 28 of 2023. The main issue of the appellant (then applicant) at the Tribunal was procedure irregularity during mediation.

In Revision, Chairman uphold what has been done at the Tribunal basing on nature of the process which was mediation, and parties signed what was agreed between them, he found no need to disturb their agreement while escaping legal technicalities forwarded by appellant herein. Decision by the Chairman dissatisfied the appellant hence this appeal with five (5) grounds and additional two (2) grounds which reads;

1. *The District Land and Housing Tribunal erred in law and in fact for failure to hold that the Ward Tribunal of Kemambo was not properly constituted.*
2. *The District Land and Housing Tribunal erred in law for holding that mediation is conducted by whole Ward Tribunal.*
3. *The District Land and Housing Tribunal erred in law in holding that section 11 of Cap 216 R.E 2019 is not in force or is not applicable.*
4. *The District Land and Housing Tribunal erred in law and in fact in holding that section 36 (1) (a), (b) and (2) of the Land Disputes Court Act [Cap 2016 R.E 2019] is not applicable to the revision against the proceedings and mediation order of the Ward Tribunal of Kemambo.*
5. *The Tribunal erred in law and in fact in holding that the parties reached a settlement before the Ward Tribunal.*
6. *The DLHT errored in law in failing to hold that Land Dispute No. 28 of 2023 mediated by Kemambo Ward tribunal was logged beyond the prescribed statutory period.*

7. *The DLHT errored in law in failing to hold that the Kemambo Tribunal was not seized with pecuniary jurisdiction in entertain Land Dispute number 28 of 2023 on account of complainant compensation of Tshs. 100,000,000,000/ against the respondent.*

When the appeal was placed before me for hearing, the appellant was represented by Mr. Faustine Malongo, Mr. Renatus Lubango and Ms. Caroline Kivuyo, while the respondent had a legal service of Mr. Mdimi Ilanga all being advocates. Hearing was preferred after disposition of the Preliminary Objection raised by Mr. Ilanga on competence of this appeal.

The appeal was argued by all three counsels hired by the appellant and it was Mr. Malongo who pulled the curtain by providing historical back ground that the respondent via his advocate sent to applicant a letter on 20/5/2023 claiming Tsh. 100 Billion for use of his land and in Case No. 28/2023 at the Ward Tribunal where appellant agreed to pay that amount. He said the disputed land has 2276.72 square meter; the area is too small but respondent claimed for such huge amount of money. Appellant applied for revision but the application was dismissed hence this appeal.

On the 1st and 2nd ground it was his submission that section 14 of Land Dispute Courts Act, Cap 216 is to the effect that the ward tribunal in

mediating parties must have three members and one of them should be a woman. He said the section does not use word 'at least' and to him means members must be three. In the complained settlement done at ward tribunal subject of this case it seems mediation was conducted by eight 8 members. Mr. Malongo was of the opinion that members exceed the number directed by the law and it was deponed in affidavit filed in revision. It was his further submission that the chairman of DLHT did not discuss section 14 instead he analysed section 11 which is irrelevant in determining the coram of mediation. He complained that the coram was not adhered to the law because members who constitute the coram was eight (8) and among them two were women while section 11 requires eight (8) members and 3 must be women. He supports his argument by citing the case of **Joseph Siagi Singwe vs Boniphace Marwa Wang'anya,** Misc Land Appeal No 111 of 2021 HC Musoma and **Edward Kubingwa vs Matrida Pima,** Civil Appeal No 107 of 2018 CAT about composition at ward tribunal that entertain nullification of the decision when composition is compromised. For that irregularity he prayed the decision to be nullified and 1st and 2nd grounds to be found with merit.

Ground no. 3 was submitted by Ms. Kivuyo that chairman of DLHT misdirected himself by declaring section 11 is of no use as seen at page 5 of the judgment. She said there is no amendment so far on Section 11 of Cap 216 and the section set coram of the tribunal and was supposed to be honored but record show there was only two women. It was her submission that chairman has not mandate to pronounce section 11 is inapplicable as it is not the duty of the court to select provisions of law to be applicable. She referred this court to **Adelina Koku Anifa and Another vs Byarugaba Alex**, Civil Appeal No. 46 of 2019 that the duty of the court is to apply the law and interpret and not to amend the law. Ms. Kivuyo insisted that the law is clear at Section 14 while mediating, tribunal to be presided with 3 members one being a woman and prayed 3 grounds to be found with merit.

Arguing for the 4th ground on applicability of Section 36 of Cap 216 as featured at page 4 of the judgment, she submitted that Chairman denied to exercise powers bestowed by the law by ascertaining that during mediation ward tribunal is not providing decision and the cited provision is not about mediation. Ms. Kivuyo clarified that the section empowers the DLHT to call and examine proceedings in order to prove the ward tribunal

is working properly. It was her submission that Section 36 is in operation and chairman was supposed to examine proceedings and discover that s. 36 (a) require him to satisfy if the laws are abided. Counsel insisted that ward tribunal actually violate the law as enacted by the parliament because ward tribunal was improperly constituted and disputed the fact that it was mediation and therefore there is no decision. For her the decision was made because the ward tribunal made formal expression of the settlement order which pronounced the dispute was mediated.

Arguing further on this ground Ms. Kivuyo referred the definition of word order to includes any other formal expression of the tribunal and therefore the purported settlement order was eligible for revision. She said the law require chairman to cross check even the proceedings and the chairman of the DLHT did not deny to have that power rather, he said there is no decision and therefore no need to call the record.

Ms. Kivuyo proceeded that in cap 216 proceedings has been defined to include revision whether final or interlocutory and weather between the parties or otherwise. It was her submission that so far as there was a case No. 28 of 2023, then the DLHT was supposed to call proceedings of the said case from Kemambo ward tribunal. She cited the case of **Adelina**

Koku Anifa and Another vs Byarugaba Alex (supra) that CAT said court has a duty to ensure proper application of laws. Referring to the appeal at hand, counsel submitted that the DLHT had a duty to supervise and make sure that ward tribunal operates as required by the law. She prayed this court to quash the proceedings of ward tribunal as was made contrary to section 11 of Cap 216.

Mr. Lubango submitted on the 5th ground of appeal about settlement order. He disputes it claiming that at ward tribunal there were no agreement of amount of money to be paid by the appellant rather the appellant promised to pay gratuity *(kifuta machozi)* without mentioning amount. It was his further submission that in hand written proceedings the respondent was complaining for late payment while the appellant confirm that the land is not acquired and the amount of compensation was not agreed. Citing the case of **Oysterbay Properties Ltd & Another vs Kinondoni Municipal Council & Others (Civil Revision 4 of 2011) [2011] TZCA 167 (18 November 2011)** counsel disputed on assertion that parties agreed while proceedings and the settlement order are not compatible and therefore it was his opinion that the DLHT was supposed to say there was no

settlement. They prayed this court to read through and find there was no settlement between the parties.

Submitting for the 6th ground counsel succumbed that on 05/5/2023 when respondent filed land dispute, he complained that since 2013 to 2023 he was not paid by the appellant and according to the Law of limitation Act, Cap 89 the limitation on claims for compensation is 12 months and other claims is 6 years; and basing on the law the respondent was supposed to file his claims by 2014 or by 2019 if it was about other claims. Informing this court that they aware of the amendment of Cap 216 which was done in year 2021 specifically at section 13 where the ward tribunal is mandated to mediate parties, he further submitted that section 52(1) of Cap 216 on laws to be applicable should not be used as in the case at hand there was mediation and therefore limitation of action must be based in Cap 89. He was of firm argument that respondent filed a dispute out of time and supplied a case of **M/S P & O International vs The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal Number 265 of 2022 insisting on 12 months only even when there is out of court negotiation. He supplied further the case of **Tanzania Road Agency & Another vs Jonas Kinyagula** (Civil Appeal 471 of 2020) [2021] TZCA 310 (16 July

2021) and **Elias Mwita Mrimi vs North Mara Gold Mine Ltd** (Civil Case 8 of 2020) [2022] TZHC 1149 (28 February 2022).

On the 7th ground Mr. Lubango submitted that basing on amendment of Cap 216 in 2021 which prohibit the DLHT to entertain matter without first be mediated, he said the ward tribunal is not mandated to mediate parties whose value of the land is beyond that of the DLHT which according to Sec 33 (2) (a) and (b) is Tsh.200,000,000 and insisting it is only the high court which under section 37 has unlimited pecuniary jurisdiction. He said in Case No. 23 of 2023 which is the source of this appeal the respondent was claiming Ts.100 billion which was above the stated pecuniary limitation of the DLHT. If it could happen that mediation has failed, the DLHT could not entertain the matter that's why he said ward tribunal exceed its jurisdiction. Referring the case of **Tanzania China Friendship Textile Company Ltd vs Our Lady of the Usambara Sisters**, 2006 TLR, he submitted that in the case at hand the respondent was claiming for substantive claim and therefore the tribunal had no jurisdiction.

That being not enough, Mr. Lubango was of the submission that the presence and participation of the appellant in mediation should not be considered that parties confer the ward tribunal with pecuniary jurisdiction

as parties cannot confer any court with jurisdiction which does not have as was in **Scova Engineering S.P.A & Another vs Mtibwa Estates Ltd & Others (Civil Appeal 133 of 2017) [2021] TZCA 74 (12 March 2021)**. So, the trial counsel was of the position that ward tribunal had no pecuniary jurisdiction. They prayed if their appeal succeeds, this court to order dispute to be mediated with proper coram at Kemambo ward tribunal, if again the appeal succeeds, they prayed this court to nullify everything done so far. They prayed all these with costs.

Responding to counsels for appellants' issues, On the 1 and 2 grounds Mr. Ilanga posed that that it was the function of ward tribunal which made the parties in court and the ward tribunal in this country has only duty, to mediate parties. If agreed during mediation the matter end there. This is after the amendment of S. 13 of cap 216 that the ward tribunal cannot proceed with hearing it only mediates parties. He insisted that the dispute at Kemambo ward tribunal was for mediation only and it is impossible to invoke section 14 of cap 216 after amendment as it was used in the event the mediation fail ward tribunal proceed to entertain the matter and decide.

Referring the case of **Issa Iddi Kauzu vs Ally Abdalla Mkoko & Another (Land Appeal 8 of 2022) [2022] TZHC 11910 (24 August 2022)** he submitted that after amendment of section 13 that DLHT shall not hear any dispute till first be mediated and the ward has the duty to certify they failed mediation so as the DLHT to start with the hearing. In the matter at hand, he said it happens the mediation succeeded that why ward Tribunal did not give certification. To him, the DLHT of Tarime was correct to uphold the mediation as it was successful. Mr. Ilanga did not end there, he said he is aware that Minister is yet to provide regulations to regulate mediation under section 45 (5) of the amended law but parties must be mediated. He was of the position that it was not possible for chairman to turn over the agreed terms of parties.

Responding to Mr. Malongo's submission about affidavit which we noted he submitted that he noted because that is the position of the law and that because there is no trial by ward so coram is not an issue while distinguishing the case citing of **Joseph Siagi Singwe vs Boniphace Marwa Wang'anya** (supra) and **Edward Kubingwa vs Matrida Pima** (supra) because the mediation succeeded and here was no decision at ward tribunal. He prayed the two grounds to be dismissed.

Responding to 3rd ground, Mr. Ilanga said the root of this appeal is revision No. 90 of 2023 and the application was filed under s. 36 (1) and (2) and not section 11 of cap 216. He was of the firm submission in the ward tribunal there was no proceedings neither decision so chairman was correct but section 36 is applicable when there is decision. He said the case of **Adelina Koku Anifa and another vs Byarugaba Alex** (supra) is distinguishable because if there was irregularity, he said the law is clear for a person who is not satisfied have to file a suit because parties agreed on their own terms. He prayed this court to dismiss this ground.

The chairman was correct in deciding that there was no decision and it is true ward tribunal did not decide on anything. This is how counsel for respondent argue on ground no. 4. While noting that section 36 was not repealed he was of the submission that the law is silent on revision arising from the settlement made by parties. For revision to be made under S. 36 there must be decision, he insisted. If the mediation succeeds, there is no dispute that's why the law is silent. In **Air Tanzania Co. Ltd vs Capt. Msami Mmari & Another (Revision Application No. 364 of 2020) [2022] TZHCLD 1011 (14 March 2022)** it refers the case of **Karatta Ernest D.O & Others vs The Attorney General (Civil Appeal 73 of**

2014) [2016] TZCA 734 (29 January 2016) it was said there was no evidence taken but parties agreed and the court record what parties agreed. Even in the case at hand he said parties agreed and Kemambo ward tribunal record what parties agreed. Still referring the cited case he submitted that Judge invoked section 70 (3) of Cap 33 by saying no decree shall lie from consent of parties. There is no appeal in settlement and if at all there was illegality, there is no revision. The remedy is to apply to set aside the award. In **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasser (Civil Application 33 of 2012) [2012] TZCA 67 (23 August 2012)** it was said consent decree cannot be revised but the remedy is to file a suit and Mr. Ilanga defined not to include an appeal or application. He insisted this appeal is incompetent as it is not a suit. He further refers this court to **Joseph Geofrey Jimbika vs Elizabeth James Mchai (Civil Revision 14 of 2020) [2021] TZHC 7703 (3 December 2021)** that the court assist parties to reach justice and consent judgment bind parties. He urged the ground is devoid of merit.

He said ground no 5 is more worse claiming that there was no agreement as from record it shows that on 16/05/2023 parties mediate and reached the agreement and both parties agreed. It was his submission that what

was done by Kemambo ward tribunal was correct and s 70 (3) of Cap 33 prohibit an appeal rather a suit and prayed this ground to be dismissed.

About limitation counsel submitted that the matter was not time barred because since 2013 when the appellant surveyed the land owned by the respondent there was a direct communication with intention to settle the matter amicably. In **Faraji Ali Rukwanja vs Lindi Town Council,** Land Appeal No. 2009 HC Mtwara this court at page 14 and 15 said live communication is a shield to time limitation where intention is to solve the matter amicably. It was the appellant who delayed the process. The case of **P&O International ltd vs TANAPA** (supra), **TANROAD vs AG** (supra) and **Elias Mwita Mrimi vs North Mara** (supra) all these cases are irrelevant due to live communication of parties and delay in fulfilling the promise by the appellant.

Counsel for respondent submitted that section 13 of Cap 216 has no provision of pecuniary jurisdiction of ward tribunal as parties went for mediation and procedures was listed in the cited provision on what to be considered. That is its mandate in mediation and S. 15 is amended. He requested this court to read the case of **Air Tanzania Co Ltd vs Capt. Msami Mmari** (supra). He insisted that the agreed amount was not

disputed and it was recorded in the settlement. He prayed this ground to be found with less merit.

In finalizing he submitted that generally, there is no dispute that respondent own a piece of land which was surveyed and appellant promised to pay but she delayed. It is undisputed that there was agreement at ward tribunal. It is undisputed that there is no provision in Cap 216 for appeal arise form deed of settlement and therefore this appeal contravenes section 70(3) of Cap 33 because everything originates from settlement and there is no appeal on decree with consent of the parties. He prayed the appeal be dismissed with costs.

During rejoinder Mr. Malongo submitted that this appeal is not against the ward tribunal decision, rather it is against the DLHT decision as it is filed under section 38(1) of Cap 216. He said argument that appellants were supposed to file suit is irrelevant at this stage as it was supposed to be raised during review where counsel for respondent had option to file cross review. He further insisted that the coram is provided in the law and so far as section 14 was not amended and therefore mediation must be conducted as per law.

Counsel Malongo subscribed to principle in the case of **Issa Iddi Kauzu vs Ally Abdala Mkono** (supra) on mediation and Section 45 (5) of the Misc Amendment and insisted that the major issue of the appellant is procedure and coram. He said if ground number 1, 2 and 3 will be accepted, he prayed the file to be remitted to ward tribunal for re-mediation with proper coram. As there is no amendment on coram and there was no valid settlement.

Ms. Kivuyo rejoined on 4th ground that proceedings were prepared and under section 36 of Cap 216 the DLHT had powers to call and examine records of any proceedings. She insisted that there was decision in ward tribunal which was subject to revision and the appeal is against the decision of DLHT as there was no settlement at Kemambo ward due to coram. Basing on the case of **Adelina Koku Anifa and Another vs Byarugaba Alex (supra),** this decision of the DLHT should not be left to stand.

Mr. Lubango linked the pecuniary jurisdiction of the DLHT and certification done by the ward tribunal to move this court to believe that if the DLHT lacks pecuniary jurisdiction then, even the ward tribunal lacks jurisdiction as when mediation fails the case is entertained by DLHT. To him, ward

tribunal had no jurisdiction. He insisted that dispute was rooted in valuation which was conducted in 2013 and the respondent had only six years to claim. Distinguishing the case of **Faraji Ali Rukwanja vs Lindi Town Council,** (supra) he said in that case there is two things communication and negotiations, and to him negotiation cannot stop the time. Referring the case of **Oysterbay Properties vs Kinondoni Municipal Council and Patrick Mutabanzibwa,** (supra) he insists things must be certain but limitation and jurisdiction was not proved and that means the agreement was vitiated and pray this court to order re-mediation or nullify everything with costs.

I heard parties on their long scholarly submission on grounds. I also read record from case file. What I gather from petition and submission is that, respondent had a piece of land and appellant intended to acquire the same and some preliminaries activities towards acquisition began. Later on appellant loose interest without communicating to land owner who is the respondent herein. The later refer the matter to Kemambo ward tribunal where, appellant and respondent had a settlement. Appellant dispute the settlement. Here they are to be heard on whether there was a settlement

at ward tribunal or not. That will be answered by analysing all seven (7) grounds of appeal.

It is undisputed that the law regulating ward tribunal was amended in the year 2021 to vest the tribunal with powers to only mediate parties. It is also undisputed that under section 45 of Cap 216 regulations are yet to be made by the Minister. That is to say, there is no legislated procedures to guide ward tribunal in mediation and that includes coram of members and pecuniary jurisdiction. So far as parties went for mediation and they agree, number of member present witnessing parties agreeing on their issues is irrelevant bearing in mind that ward tribunal did not conduct hearing. So far as regulations are yet to be formed, parties are free to negotiate at any time. All cited cases on this aspect, limitation was calculated in a suit but in this appeal, there was negotiation not a suit. That is the position of this court and therefore ground no 1 and 2 and 3 and 6 grounds of appeal are of no merit.

While submitting on Ground no. 5 Counsel for the appellant was of the submission that parties did not agree each other so deed of settlement is nullity as proceedings and agreement are incompatible. During submission Mr. Lubango agreed that in negotiation appellant denied to acquire

respondent land though he surveyed and had a plan to acquire. When he changed his mind, appellant promised to pay. On that basis respondent mentioned the amount he needs and it was not disputed. In the cited case of **Oysterbay Properties vs Kinondoni Municipal Council and Patrick Mutabanzibwa (supra)** the court analysed deed of settlement and concluded that it was uncertain and incomplete because its execution was dependent upon future actions. In that cited case no terms in form of the conditions were attached to it to make it certain. In the case at hand, execution of the deed of settlement signed by the appellant and respondent herein is certain on account that appellant promised to pay gratuity and the respondent mentioned the amount, they signed to notify each party agreed. Therefore, the case of **Oysterbay Properties** (supra) is distinguishable. Negotiation resulted to signing of deed of settlement which was recorded by members who witnessed it. Wordings as shown in the settlement indicate parties agreed and each signed; the deed of settlement is certain. So far as parties agreed on their issue and each signed, that document is binding to parties. I find no room for the appellant to repudiate what was agreed and settled previous, and therefore the 5th ground is less merit.

In the 7th ground the appellant is complaining of the pecuniary jurisdiction of the ward tribunal. Mr. Lubango related the pecuniary jurisdiction of the DLHT with the ward tribunal. I find that was fallacy as these are two difference tribunals and in the year 2021 Parliament passed the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021 which repealed section 15 of the Cap 216 on pecuniary jurisdiction. I need not to stretch much and I join hand with the submission by the counsel for respondent that provision of the law is clear on pecuniary jurisdiction of ward tribunal.

The 4th ground was whether section 36 (1) (a) (b) and (2) of Cap 216 is applicable in suits of this nature. It was appellants submission that that Chairman denied to exercise powers bestowed by the law insisting that section empowers the DLHT to call and examine proceedings in order to prove the ward tribunal is working properly. To the contrary, Mr. Ilanga said the law is silent on revision arising from the settlement made by parties while noting that section 36 of Cap 216 was not repealed. His major issue was that, there was no decision made by ward tribunal to allow revision. Record shows parties negotiated and agreed on terms. What the ward tribunal did was to record what parties agreed. In **Karatta Ernest and Others vs AG (supra)** the Court had this to say;

'It was an agreement between the parties alone. How they arrive to the term of settlement is a matter known to them alone. It was not a case in which evidence was given. What the court was requested to do was to record what the parties had agreed upon. It is therefore wrong for the appellants to come to the court to fault the learned judge for refusing to issue a certificate'.

As argued by Mr. Ilanga, the deed of settlement is a result of negotiation done by parties themselves and it is best known to them on how they arrive to what they agree. It is finding of this court that Kemambo ward tribunal did not conduct hearing rather it records what parties agreed. From the circumstances of this case, neither party has a room to appeal on what he consented. (Read section 70 (3) of Civil Procedure Code Cap 33 R.E 2019) Since the principle apply in applications for revision, then no party can apply for revision of an award originating from a settlement agreement. See **Air Tanzania case.**

Generally, this court finds there was no decision made by Kemambo ward tribunal, further, once agreed party cannot apply for neither appeal nor revision. It is in record that appellant filed Application for Revision No. 90 of 2023 at DLHT Tarime. Considering my analysis in the 4th ground of appeal, I cannot hesitate to say revision No. 90 was wrongly filed and

wrongly entertained. Am saying so because this court is incumbent to ensure that the law is complied with and it is not safe to leave pointed irregularities in court record. See**; Marwa Mahende vs Republic [1998] T. L.R 249**, **Adinardi Iddy Salim & Another vs Republic (Criminal Appeal 298 of 2018) [2022] TZCA 9 (11 February 2022)** and **Adelina Koku Anifa & Another vs Byarugaba Alex (Civil Appeal 46 of 2019) [2019] TZCA 416 (4 December 2019).**

For that matter, proceedings in Application for Revision No. 90 of 2023 in Tarime District Land and Housing Tribunal are hereby nullified due to irregularity pointed. As this appeal emanates from the nullity proceedings, I hereby dismiss it entirely. Costs awarded to respondent.

It is so ordered.

DATED at **MUSOMA** on this 26th day of February 2024.

THE HIGH COURT OF TANZANIA
MUSOMA

M. L. KOMBA

Judge

Right of appeal is full explained.

Judgement Delivered in chamber in the presence of Mr. Mr. Renatus Lubango and Mr. Castory Peja counsel for the appellant while Mr. Thomas Ilanga appeared for respondent.

M. L. KOMBA

Judge

26 February, 2024