IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

REVISION NO. 61 OF 2022

EZROM MNYONGE .....APPLICANT

VERSUS

OMARY ABDALLAH ZAHORO..... 1ST RESPONDENT

RIZIKI PHILEMON..... 2ND RESPONDENT

RULING

Date of last Order: 26/09/2022
Date of Ruling: 7/10/2022

KHALFAN, J.

The applicant is calling for examining the record in the instant application No.43 of 2018 at the District Land and Housing Tribunal for Kinondoni at Mwananyamala to satisfy itself of the legality, regularity, procedural propriety and correctness of the decision entered on 24/06/2021 (Hon. Rugarabamu) and thereby quash the judgment and decree arising therefrom.

The applicant's affidavit paragraph 7 (i), (ii), and (iii)raises an allegation of illegality relating to denial of right to be heard. The respondents

have failed to deny such allegations. In their counter affidavits, the respondents have failed to challenge the applicant's alleged illegality. The second respondent made admission, vide paragraph 5 of his counter affidavit that, 'the applicant was a party to the counter claim raised by the second respondent.'

However, the second respondent failed to challenge the fact that the applicant was not a party to the so called **'HUKUMU YA MARIDHIANO/CONSENT JUDGMENT'** although his name was indicated in the said judgment. Accordingly, page 1 of the said Consent Judgment reads partly:

> *'Katika Maombi haya wajibu maombi EZROM MNYONGE na OMARY ABDALLAH ZAHORO wameshitakiwa na mwombaji RIZIKI PHILEMON ...'*

I am of the considered opinion that the applicant was denied the right to be heard, when the Trial Tribunal entertained the matter in his absence without notice purportedly discriminated him. The second respondent averred in his counter affidavit paragraph 6 that "the applicant had a chance to apply to be joined in the main suit to protect

or to state his right at the District Land & Housing Tribunal for Kinondoni at Mwananyamala."

With respect, such statement is a misconception. There is no dispute that the Trial Tribunal did recognize the applicant in the said CONSENT JUDGMENT but proceeded to conclude the same without regard to the applicant's right to be heard. By such reason, I find merit in the application. The denial of the applicant's right to be heard amounts to fundamental breach of natural justice which is enshrined under Article **13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended.**

The position of law as restated in the case of **Said Mohamed Said vs Muhusin Amiri and Another**, Civil Appeal No. 110 of 2020, Court of Appeal of Tanzania, (unreported) at page 6 is that:

> *'...As to what should a judge do in the event a new issue crops up in the due course of composing a judgment, settled law is to the effect that the new question or issue should be placed on record and the parties must be given opportunity to address the court on it.'*
> (unquote)

The right to be heard under Article 13 (6)(a) of the Constitution of the United Republic of Tanzania, (supra) was illustrated in the case of **Mbeya-Rukwa Auto parts and Transport Ltd vs. Jestina George Mwakyoma [2003] TLR 251** as referred in the case of **Hashi Energy (T) Limited vs. Khamis Maganga Civil Application No.200/16 of 2020,** Court of Appeal of Tanzania (unreported) at page 8, where the Court of Appeal of Tanzania observed that:

> '*In this country, natural justice is not merely a principle of Common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law and declares in part;*
>
> (a) *Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu.'*

In the present application, the record as examined establishes that, the issue of settlement out of Trial Tribunal cropped up as a new one. The Trial Tribunal, all along, recognized the applicant as a party as

manifested on the Consent Judgment itself. However, there is no dispute that the applicant was casually mentioned as one jointly sued with Riziki Philemon, the then applicant, who is now the second respondent.

It was emphasized in **Said Mohamed (supra)** at page 7 that:

> *'... a decision of the court should be based on the issues which are framed by the court in consultation with the parties and failure to do so results in a miscarriage of justice.'*

In the instant application, it is clearly manifested on the face of record that in the due course of determination of dispute in the Tribunal the idea of the settlement out of the Trial Tribunal arose. Definitely, this was a new issue. Again, when the Trial Tribunal was composing the Consent Judgment, it had in mind the importance of including the applicant but decided to ignore him. I find this to be a miscarriage of justice to detriment of the applicant. I recall the fact that the respondents did not dispute that the applicant was neither a party nor participated in the settlement.

In fine, I find the application to be meritorious and consequently, the record of the District Land and Housing Tribunal for Kinondoni is hereby revised and the Consent Judgment is set aside. Owing to the circumstances of this matter, I make no order as to costs. It is so ordered.

DATED at **DAR ES SALAAM** this 7th day of October, 2022.

F. R. KHALFAN
JUDGE
07.10.2022

Court

Ruling delivered this 7th day of October, 2022 in the presence of Ezrom Mnyonge, the applicant.

F. R. KHALFAN
JUDGE
07.10.2022