IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND APPEAL NO. 68 OF 2020

(Originating from decision of the District Land and Housing Tribunal for Singida, Land dispute Application No. 104 of 2018)

SAIDI SALUM NYUHA & 50 OTHERS .....APPELLANTS

VERSUS

THE NUREYN ISLAMIC FOUNDATIN (DIF) .....RESPONDENT

JUDGMENT

Date of Last Order: 12/5/2022
Date of Judgment: 21/07/2022

Mambi, J.:

In the District Land and Housing Tribunal of Singida at Singida the respondent successfully sued the appellants on the ownership of mosque. The records show that the land where the mosque was built originated from waqf. The records show that the mosque was built by the respondent but when the building was ready for worship services the dispute arose on the ownership and administration of the mosque including the imam

(worship leader). The respondent thereafter sued the appellants where the Trial Tribunal made the decision in favour of the respondent.

Aggrieved, the appellants lodged this appeal basing on four grounds of as follows:.

1. **That,** trial Tribunal erred in law and in fact to reach to unjust decision by relying on weak evidence adduced by the respondent and his witnesses which failed to prove at the balance of probability on the claim filed.
2. **That,** trial Tribunal erred in law and in fact to reach to unjust decision and decided in favour of the respondent without considering, strong evidence of appellants and their witnesses.
3. **That,** trial Tribunal erred in law and in fact to reach to unjust decision by deciding in favour of the respondent and failed to assess well evidence adduced before it.
4. **That,** trial Tribunal erred in law and in fact to reach to unjust decision by deciding in favour of the respondent without regarding documentary evidence tendered by the appellants which proved that suit land owned by all Mamise Muslims not by the respondent herein.

During hearing the appellants was represented by the learned Counsel Ms Zahara while the respondent appeared under the service of Mr Komba, the learned Counsel

In their main ground the appellant Counsel claimed that the District Land and Housing Tribunal erred in fact by ignoring the evidence of the

appellants. In their second ground of appeal, the appellant counsel contended that the DLHT erred in law by dismissing an application without final determination. The appellant prayed the matter to be determined afresh.

In response, the respondent counsel briefly submitted that, the matter at the District Land and Housing Tribunal was properly determined. He argued that the matter was finally determined by the Tribunal by dismissing the application filed by the appellant.

I have carefully gone through the submissions from both parties and records from the trial court. In my considered view the main issue that need to be determined is whether the Chairman considered the evidence of both parties and whether he gave reasons in his decision or not. I have thoroughly gone through the judgment made by the Tribunal chairman. My perusal from the records such as judgment have raveled that the chairman mainly focused in summarizing and analyzing the evidence made by the prosecution (respondent) without considering and analyzing the defence (appellants) evidence. In my readings and perusal of the judgment of the trial Tribunal, I did not find the reason based on analysis and evaluation of submissions and evidence made by the chairman for his decision. The judgment at page 12 and 13 shows that the tribunal chairman mainly focused in dealing with prosecution evidence while merely disregarding the evidence on the ground that the evidence was week without giving reasons. I wish to quote the third paragraph of the judgment at page 12 as follows:

"With regard to the first issue I find that ***evidence tendered on prosecution before this tribunal has proved on balance of probability*** *that the land in dispute was handed to the applicant herein by the late Shabani Misake Msaghaa for building mosque and it is the applicant who built the said mosque.....*

Defence allegation that the applicant agreed to build the said mosque without conditions is not proved by any documentary evidence. Also defence witnesses allegation that the land in dispute is the property of Misake family hence Shabani Misake Msaghaa had no right to give the same to the applicant as wakf has no base as ***evidence tendered from prosecution side*** *has proved the land to be the property of Shabani Misake.*

With regard to the second issue I find that this does not detain me as having found the land in dispute to be the property of ***the applicant*** *herein then it follows as day follows nights that the applicant's application has merit and the same is hereby granted together with reliefs prayed therein".*

Reading between the lines on the above quoted paragraphs it is clear that the tribunal chairman focused on considering and analyzing prosecution evidence and ignoring defence evidence without reasons. Indeed the appellants in their second and fourth ground have complained that their evidence was not considered. Looking at the records, there is nowhere to find where the Chairman have analyzed the grounds as he stated in the

above quoted paragraph if one look at the judgment it is clear that the Chairman did not consider the defence evidence apart from just basing on the prosecution evidence. This according to the law is fatal as it can occasioned to injustice to the other party that is the defence or the appellants in our case. I wish to refer the decision of the court in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

See also ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015, the court at Page 16*** which underscored the importance of without considering the defence evidence. It is also imperative to refer the decision of the court that in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned that considering the defence was not about summarising it because:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not*

to consider the evidence at all in the evaluation or analysis."

The Court in Leonard Mwanashoka (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too****. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction".* [Emphasis added]

One would have expected that the judgment to contain analysis and evaluation of evidence supported by the provisions of the laws and cases he cited, but the chairman at pages 12 and 13 just ended up by saying that the prosecution proved their case on balance of probabilities and the appellants' evidence is weak without giving his reasons. The position of the

law is clear that that the judgment must show how the evidence of both parties has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment. I am of the settled view that the trial tribunal did not subject to any evaluation of evidence and reasoning. The court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,*** observed and held that:-

> *"By merely making plain references to the evidence adduced* ***without even showing how the said evidence is acceptable as true or correct,*** *the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires a trial court to single out in the judgment* ***the points for determination, evaluate the evidence and make findings of fact thereon".***

It was therefore expected of the Trial tribunal, to not only summarize but also to objectively evaluate the gist and value of the evidence of both parties, weigh it and give reasons for its decision on the judgment. The position was further clarified and underscored by the Court of Appeal in ***LEONARD MWANASHOKA V Republic Cri(supra)*** (unreported) where the court observed that:

"first appellate court's failure to reevaluate the evidence of both the prosecution and the defence constituted an error of law".

It is trait law that every judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the point or points for determination, the decision thereon and the reasons for the decision. The laws is clear that the judge or magistrate must show the reasons for the decision in his judgment. The law is also clear on the contents of the Judgment which is facts, analysis and evaluation of evidence and decision thereof. The judgment of the Tribunal at page 3 did clearly indicated who is the owner of the disputed area of land. See ***LEONARD MWANASHOKA V Republic (supra).***

In this regard, the trial tribunal ought to have properly considered the appellants' evidence and weight that evidence vis-à-vis the respondent evidence to satisfy itself if the respondent proved its claim on the balance of probabilities.

In my view, failure to consider defence (appellants) evidence meant that the appellants were not fully availed with right to be heard as also indicated under the fifth ground of the appeal. This implies that the right to be heard was not fully availed to the appellant. The consequences for the failure to avail a party fair opportunity to be heard was underscored by the Court of Appeal in ***DPP VS.SABINIS INYASI TESHA AND RAPHAEL J.TESHA [1993] T.L.R 237*** where the court held that such denial would definitely vitiate the proceedings. See also ***EMANUEL NAISIKE VS.***

LOITUS NANGOONYA, MISC.LAND CASE APPEAL NO.22 OF 2011 High Court at Arusha.

The position of the law with regard to the importance of right to be heard was also underscored in the case of ***MEYYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where the court 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".***

As the right to be heard is the fundamental constitutional right this court finds the importance of referring more cases in this issue. As there are so many authorities that have addressed similar issues, suffices to refer the case of ***ABBAS SHERALLY & ANOTHER VS. ABDUL S.H.FAZALBOY Civil Application No.33 of 2002*** which was also referred in ***EMANUEL NAISIKE VS. LOITUS NANGOONYA, MISC. LAND CASE APPEAL***

NO.22 Of 2011 (supra). 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."*

My perusal from the judgment of the trial tribunal also reveals that the Chairman made the decision without reasons contrary to the principles of the law. It is trite law that the judgment must show how the evidence of both parties has been analyzed and evaluated with reasons. It is a well settled principle of the law that every judgment must contain the **point or points for determination, the decision thereon and the reasons for the decision**. The decision maker such as the chairman in our case is bound to give reasons before making his decision. Failure to do so left a lot of questions to be desired. The guiding principles for making decision and writing judgment are found under Order XXXIX rule 31 of the Civil Procedure Code, Cap 33 [R.E2019]. The provision states that:

> *"The judgment of the Court shall be in writing and shall state–*
>
> *(a)* ***the points for determination;***
>
> *(b) the decision thereon;*
>
> *(c)* ***the reasons*** *for the decisions; and*

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the judge or by the judges concurring therein".

Under that section the word **"shall"** according to the law of Interpretation Act, Cap1 [R.E.2019] implies mandatory and not option. This means that any judgment must contain point or points for determination, the decision thereon and the reasons for the decision. See also the decision of the court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,***

Having observed those irregularities as moved by the parties, this court needs to use its discretionary powers vested under the legal provisions of the law. Indeed this court is empowered 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 if it appears that there has been an error material to the merits. Indeed section 43 (1) (b) the Land Disputes Courts Act provides that;

"In addition to any other powers in that behalf conferred upon 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 object of the above provisions 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 *sua moto*. The court can also do if it is moved by any part as done in this matter at hand.

As I ailuded that, the position of law is clear that that before any court or tribunal makes its decision and judgment the evidence of both parties must be considered, analyzed, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. Failure to comply with the principles of writing judgment is bad in law is as it can lead to injustice to the other party that is the appellants in our case.

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 trial Tribunal. I wish

to refer the decision of court 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 Court of Appeal of East Africa restated the principles upon which court should order retrial. The court 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****..."*

I am well aware 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 court to properly deal with the matter immediately. The Tribunal should consider this matter as priority and deal with it immediately within a reasonable time to avoid any injustice to the appellant 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 decision at the Tribunal was tainted by irregularities, I find no need of addressing other grounds of appeal.

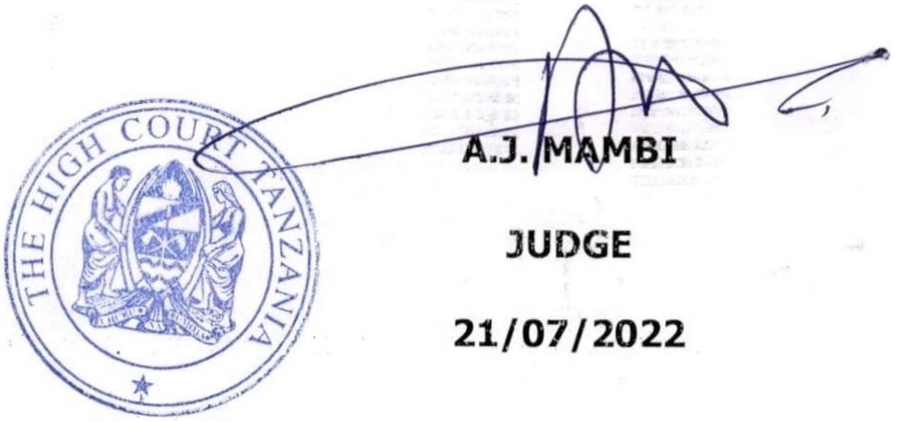
For the reasons given above, I nullify the proceedings and judgment of the Tribunal in Land Application No 46 of 2019 and the decree made thereto. This matter is remitted to the District Land and Housing Tribunal to be freshly determined. Given the circumstances of this case, this court orders the mater be heard *de novo* by the same District Land and Housing Tribunal but chaired by a different Chairperson.

Given the fact that the subject matter in dispute is related to the faith of the community which is the constitutional right, I find it more justice to state the position and status of the worshipers pending the determination of this matter. With regard to the status of the mosque that is the subject matter of dispute and in the interest of justice, I advise the mosque building to be continuously used for worship by all Muslims who are residing around that mosque(within the ward) or any Muslim pending the determination of this matter. The Muslims within the ward will be at liberty to take care of the mosque basing on their own arrangements.

Additionally, given the nature of the dispute, the parties will be at liberty to decide if they wish to settle their dispute amicably or appear to the District Land and Housing Tribunal.

All parties should be summoned to appear at the District Land and housing Tribunal within reasonable time.

No order as to the costs. Order accordingly.

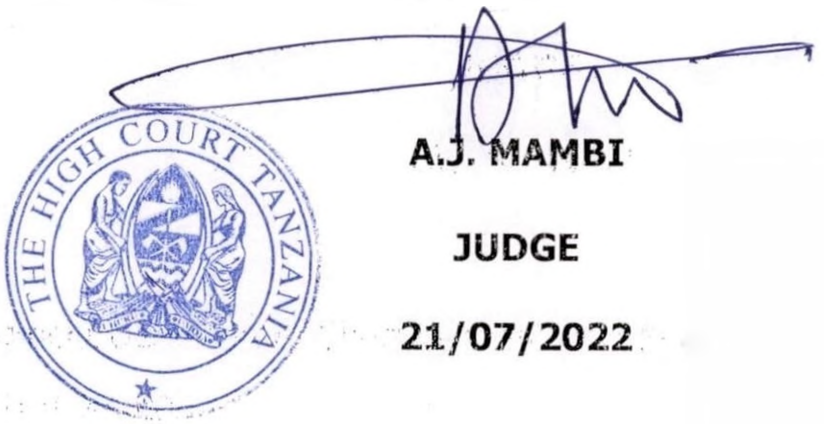


A.J. MAMBI

JUDGE

21/07/2022

Judgment delivered in Chambers this 21st day of July, 2022 in presence of the respondent.

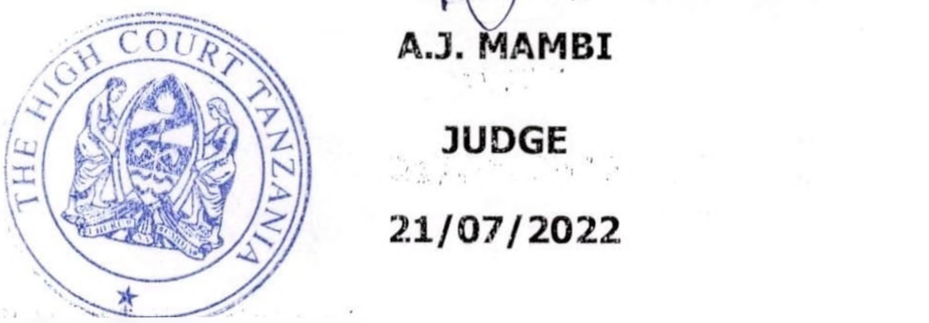


A.J. MAMBI

JUDGE

21/07/2022

Right of appeal explained.



A.J. MAMBI

JUDGE

21/07/2022