IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
HC LAND APPEAL NO.26 OF 2020

(Arising from District Land and Housing Tribunal for Mwanza at Mwanza in Misc. Application No. 125 of 2018 Originating from Mkuyuni Ward Tribunal in Land Case No. 10 of 2018)

ALLY HASSAN ILUNGULU ..... APPELLANT

VERSUS

NEEMA MKWAIYA ..... RESPONDENT

JUDGMENT

Last order: 27.08.2020

Judgment Date: 31.08.2020

A.Z.MGEYEKWA, J

The appellant is appealing against the decision of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Misc. Application No.125 of 2018 whereas, the trial tribunal quashed the decision of the trial tribunal. Being aggrieved the appellant preferred the instant appeal and raised three grounds of appeal:-

1. *That, the tribunal erred in law and fact for quashing the decision of the ward tribunal without affording the appellant the right to be heard.*

2. *That, the tribunal erred in law and fact for invoking revision powers while there was no grounds for invoking the same.*

3. *That, the tribunal erred in law and in fact on deciding that the demarcations were identified while in fact according to the evidence on record the respondent trespassed to the appellant's land.*

When the matter was called for hearing on 27th day of August, 2020, the appellant had the legal service of Ms. Dorothea Method, learned counsel and the respondent enjoyed the service of Ms. Nzaniye Karubutse, learned counsel.

Submitting on the first ground of appeal, Ms. Dorothea faulted the District Land and Housing Tribunal for quashing the decision of the Ward Tribunal. She argued that the matter originated from the Application for Execution No. 125 of 2018 whereas, the appellant filed the said application praying the District Land and Housing Tribunal to execute the trial tribunal order. Ms. Dorothea went on to submit that the Chairman on 12th day of March, 2020 decided to visit *locus in quo* the disputed land. She added that thereafter the records are silent as to what transpired

instead he formed an opinion which is found on page 2 of the trial tribunal decision that there was a clear demarcation.

It was Ms. Dorothea's further submission that the Chairman was required to call parties to address them what transpired during the said visit instead of deciding the matter without affording parties right to be heard. She went on to argue that the law is settled that a party must be heard before the court issues a decision. Ms. Dorothea fortified his argumentation by referring this court to the case of **Arcopar (O.M) SA v Harbert Marwa & Family & 3 others**, Civil Application No. 94 of 2013. She urged this court to quash the District Land and Housing Tribunal decision for failure to afford parties right to be heard.

As to the second ground of appeal, Ms. Dorothea submitted that the trial tribunal invoked the power of revision. She referred this court to section 36 of the Land Disputes Court Act Cap. 216 [R.E 2019] and that stated that section 36 of the Act requires the Chairman after forming an opinion that there was no fence to be demolished was supposed to remit the file to the trial court since the same requires the tribunal to gather evidence, it is not a matter of revision. She went on to submit that revision

could be revoked only where there was an issue of injustice but the issue of boundaries and demarcation is not covered under revision. To support her submission she cited the case of **Desai Walsama 1967** Vol. 1 EALR 351 whereas the Court of Appeal of East Africa held that:-

" No court can confer jurisdiction upon itself."

She insisted that the boundaries invoke the power was not on injustice criteria therefore the District Land and Housing Tribunal was wrong to invoke the revisionary powers.

On the 3rd ground of appeal, Ms. Dorothea faulted the District Land and Housing Tribunal for deciding that the demarcation were identified while in fact accordingly to the evidence on record it is nowhere stated the Chairman of District Land and Housing Tribunal evaluated evidence which was before the tribunal to find out if the Ward Tribunal was right instead the Chairman proceeded to decide on his own. She went on to submit that the Ward Tribunal had righty decided unless the same could have been challenged through an appeal or revision and afford both parties' right to be heard.

In conclusion, Ms. Dorothea urged this court to allow the appeal, set aside the District Land and Housing Tribunal decision, and issue another order to allow the appellant to proceed with execution.

Responding, Ms. Nzaniye objected the grounds of appeal. She argued that the appeal originates from the Application No.125 of 2018 involving the same parties. She argued that before the District Land and Housing Tribunal the appellant prayed for the following reliefs; 1st the judgment debtor to make a demarcation, 2nd to demolish the fence built into the land of Decree holder, and costs of the case. She went on to submit that on 5th day of September, 2020 the District Land and Housing Tribunal was tasked to issue an order of execution but during the hearing, one party denied to demolish the fence.

She went on, claiming that the District Land and Housing Tribunal afforded parties right to be heard although during the hearing, the tribunal found that there was something which was not right thus it decided to visit the disputed land. To buttress her submission he cited the case of **Mizar Ladak v Gulamal Fazal Jamal Named**, Civil Appeal No. 9 of 1980.

On the second ground of appeal, Ms. Nzaniye refuted that the District Land and Housing Tribunal revoked revisionary power. She went on arguing that in accordance with the circumstances of the case the tribunal visited the disputed area to find oy what hinders the execution process.

As to the third ground of appeal, she submitted that the District Land and Housing Tribunal was in dilemma after hearing the parties thus it visited locus in quo and found that none of the parties invaded the other party's boundary. Ms. Nzaniye urged this court to exercise its jurisdiction power conferred on it under section 42 of the Land Disputed Court Act Cap. 216 and order the tribunal to collect additional evidence in order to reach a fair and just decision.

In conclusion, Ms. Nzaniye urged this court to dismiss the appeal and uphold the District Land and Housing Tribunal decision in Misc. Application No. 125 of 2018 with costs.

Rejoining, Mr. Dorothea, reiterated her submission in chief and stated that the respondent's Advocate misinterpreted her submission since she did not mean that on 5th day of September, 2019 parties were not

afforded rights to be heard. She stated that parties were required to be heard on 12th day of March, 2020, the day when the tribunal visited the disputed area but the records are silent; the carom is not recorded and what transpired is unknown.

Ms. Dorothea went on, the respondent's request for gathering additional evidence while the order of the tribunal is not executable. Ms. Dorothea argued that the prayer was to demolish the fence and she refused to demolish the fence. She was on her view that the tribunal could have recorded that the order is not executable instead of revoking revisional powers. She insisted that the tribunal was required to afford parties' right to be heard.

Ms. Dorothea further argued that additional evidence is taken where the following conditions are fulfilled; first, where the evidence was not there or could not be obtained. Second; where the evidence could render the court to reach a different decision and third; where the said evidence is believed or credible. To bolster her submission she cited the case of **Tal Mohamed and another v Lakan & Company**, Civil Appeal EALR 567 OF 1958.

Finally, the learned counsel for the appellant urged this court to allow the appeal with costs.

After having gone through the records and the submissions made by both learned Advocates for the appellant and respondent, I now turn to the first ground of appeal, that the Chairman did not afford the parties right to be heard before he reached his decision. The records show that after the tribunal visited the disputed area, the Chairman proceeded to compose a ruling based on his own opinion/ findings without involving the parties. As rightly pointed out by Ms. Dorothea, the Chairman erred in law for failure to afford the parties' right to be heard.

It is trite law that a party must be afforded with a right to be heard failure to afford a hearing before any decision affecting the rights of any person. In the case of **Tan Gas Distributor Ltd v Mohamed Salim Said** Civil Application for Revision No. 68 of 2011, the Court of Appeal held that:-

> *"No decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."*

The consequences of a breach of this principle is to the effect that, its breach or violation, unless expressly or impliedly authorised by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard as it was held in the case of **Patrobert D Ishengoma v Kahama Mining Corporation Ltd and 2 others** Civil Application No. 172 of 2016 which was delivered on 2nd day of October 2018. **Abbas Sherally and Another v Abdul S/H.M Fazalboy**, Civil Application No.33 of 2002 (unreported). Therefore, I am in accord with the learned counsel for the appellant that failure to accords the appellant and respondent opportunity to be heard was a breach of natural justice and a violation of fundamental right to be heard under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

The learned counsel for the respondent urged this court invoke its power conferred to it under section 42 of the Land Disputed Court Act Mwanza at Mwanza to collect additional evidence in order to reach a fair and just decision. In my considered view, the respondent's prayer does not apply in the circumstances of this matter at hand because in the stay

of execution, there is no forum which allows the Chairman to record new evidence.

It is therefore my respectful view that there is considerable merit in the submission by the learned counsel for the appellant that the District Court was wrong to proceed to determine the matter *suo mottu* without affording the parties right to be heard. In my view, this ground of appeal alone suffices to dispose of the matter and I feel that it is not necessary to dwell on discussing the remaining two grounds of appeal.

In the circumstances and based on the above findings, I allow the appeal. Consequently, I proceed to nullify and quash the decision and proceedings of the District Land and Housing Tribunal for Mwanza. The matter to proceed where it ended. No order as to costs.

Order accordingly.

DATED at Mwanza this 31st day of August, 2020.

A.Z.MGEYEKWA

JUDGE

31.08.2020

Judgment delivered in Chamber on 31st day of August, 2020 in the presence of Ms. Nzaniye, learned counsel for the respondent.

A.Z.MGEYEKWA

JUDGE

31.08.2020

Right of Appeal is fully explained.