

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: JUMA, C.J., MWARIJA, J.A. And NDIKA, J.A.)

CIVIL APPEAL NO. 55 OF 2017

YAKOBO MAGOIGA GICHERE.....APPELLANT

VERSUS

PENINAH YUSUPH.....RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Mwanza)**

(Hon. Mwangesi J.)

**dated the 23rd day of May, & 29th August, 2013
in
Land Appeal No. 25 of 2012**

JUDGMENT OF THE COURT

5th & 10th October, 2018

JUMA, C.J.:

On 16th May 2011 Yakobo Magoiga Kichere, who is the appellant in this appeal, appeared before the Ward Tribunal for Turwa Ward in Tarime District to complain that Penina Yusuph Werema, who is the respondent, had invaded his family's three-acres parcel of land in the village of Nkende where his father, one Mzee Magoiga Gichere and his family, had once lived since 1970; and where they had planted mangoes, guavas and other trees. The appellant asserted that his father did not surrender his claim over the

disputed land when he and the family relocated from the village of Nkende to a neighbouring village of Rebu in 1995. The appellant added that his family still owned the disputed land up to sometime in 2005 when he left the village to engage in the trading of hides and skins elsewhere, but he left its supervision to his neighbour, one Mzee Matiko Gicheine. He complained that it was in 2006 when the respondent trespassed and began farming and putting foundations for houses on the disputed land. His attempt in 2010 to prevent the respondent from building a permanent house did not succeed.

Respondent, on the other hand, traced her claim back to 1986 when the appellant's father relocated to a neighbouring village of Rebu. That same year the Village Land Committee for Nkende village formally allocated the disputed land to her late husband, one Yusuph Weremi Wang'era. At the time of the hand-over, the disputed land had eucalyptus trees, two mango trees and local trees known as "IMIRIBHA". The respondent staked a claim that her family became the owner of the disputed land from 1986. It was in 1995 when she finally relocated to the disputed land, which belonged to her family. And that she remained on the disputed land right

up to 03/05/2011 when she was summoned to appear before the Ward Tribunal.

In its decision, the Ward Tribunal found in favour of the appellant, whose family, the Tribunal found; was living in the disputed land until 2006 when the respondent began to build a house and dividing up some of the land for sale.

Aggrieved by the decision of the Ward Tribunal, the respondent preferred an appeal (Appeal No. 49 of 2011) to the District Land and Housing Tribunal for Tarime (District Land Tribunal) based on six grounds of appeal. Through these grounds, the respondent claimed that the appellant's claim is not supported by any evidence and faulted the Ward Tribunal for failing to evaluate evidence before reaching its decision in favour of the appellant. The respondent was also unsuccessful, the District Land Tribunal supported the Ward Tribunal's earlier decision.

Being dissatisfied with the decision of the District Land Tribunal the respondent filed a second appeal in the High Court at Mwanza (Land Appeal No. 25 of 2012) which she based on five grounds, which may be paraphrased as follows:

- 1) The District Land Tribunal had relied on facts which were not part of evidence on record.*
- 2) The respondent had no letters of administration to sue on behalf of the estate of his late father.*
- 3) The respondent's claim at the trial Ward Tribunal over disputed land was time barred because the appellant was already in occupation for more than twenty years.*
- 4) The District Land Tribunal had relied on speculative evidence that the appellant's witness (SU2) unlawfully allocated the land while the owner was still on the same land.*
- 5) The District Land Tribunal delivering a conflicting decision, on one hand finding that the disputed belonged to the respondent's family, while also saying that the land belonged to the respondent.*

The decision of the High Court turned the tide against the appellant. Mwangesi, J. (as he then was) was convinced he should interfere with concurrent finding of facts reached earlier by the Ward Tribunal and the District Land Tribunal. He found that the evidence in favour of the respondent outweighed that presented in support of the appellant. The learned Judge was convinced that the respondent's husband, Yusufu

Werema, was actually assigned the disputed plot by the Village Council of Nkende in 1986, and that there was no proof that the respondent encroached the disputed land much later in 2006. Thus, he found that the respondent's family had been in occupation of the disputed land without interference from 1986 to 2011 when the appellant lodged his complaint in the Ward Tribunal of Turwa. On the weight of this evidence, Mwangesi, J. (as he then was) allowed the respondent's appeal.

Before coming to this Court; the appellant first applied for, and obtained under section 47 (2) of the Land Disputes Act, a Certificate from the High Court certifying that there is point of law involved in this appeal. In his memorandum of appeal the appellant has raised three grounds of appeal:

1. That, the High Court judge erred in law to hold that the dispute arose in 1986 basing his decision on:-

(i) Exhibit D1 which exhibit was tendered in contravention of laid down legal procedures and as such denied the appellant rights to be heard contrary to the rules of natural justice before the same was admitted to form part of the record.

(ii) Erroneously failing to appraise evidence in record by holding that the testimony of Chacha Marwa Nsiage (DW2) and with the testimony of Rhobi Mugosi (DW3) corroborated exhibit D1 contrary to evidence on record hence occasioned failure of justice.

2. That the learned High Court judge erred in law to disturb the concurrent findings of the two lower courts without demonstrating which principle was violated by the two courts below hence occasioned failure of justice.

3. That the learned High Court judge erred in law for failure to see and hold that the Ward Tribunal of Turwa was not properly constituted.

When the appeal came up for hearing on 5th October, 2018, Mr. Mashaka Fadhili Tuguta the learned counsel appeared for the appellant, and Mr. Anthony Nasimire the learned counsel for the respondent. Both counsel confirmed that the parties had filed respective written submissions.

Before we allowed Mr. Tuguta to address the Court, we asked him whether the three grounds of appeal he had preferred substantially reflect

what the High Court had certified to be points of law involved in this appeal. After reflecting on each of the three grounds of appeal, Mr. Tuguta abandoned grounds one and two of appeal, which he conceded were not certified by the High Court. He remained with only the third ground of appeal which faulted the second appellate Judge for failing to hold that the Ward Tribunal of Turwa was not properly constituted.

In our opinion, the learned counsel for the appellant properly abandoned the two grounds of appeal for lack of certification by the High Court. Certificate from the High Court is mandatory for appeals originating from Ward Tribunals, and should not be taken perfunctorily or lightly by the certifying High Court and by the parties to the impending appeal. A Certificate of the High Court predicates the jurisdiction of the Court in land matters, so much so, this Court has oftentimes stated that a decision of the High Court refusing to grant a certificate on a point of law under section 47(2) of Land Disputes Courts Act, is final and no appeal against it lies to this Court: (~~see~~—**TIMOTHY ALVIN KAHOHO V. SALUM ADAM MFIKIRWA**, CIVIL APPLICATION NO. 215 OF 2013 (unreported). To underscore the significance of the Certificate, we may add that where the

High Court has certified points of law in appeals originating from Ward Tribunals, the grounds of appeal filed in the Court must substantially conform to the points of law which the High Court has certified.

In retrospect, the High Court (De-Mello, J.) certified the following three points of law:

(a)- The Ward Tribunal of Turwa in Tarime District was not properly constituted.

(b)-The Ward Tribunal of Turwa had two judgments with two different versions hence constituting the abuse of justice in the said Turwa Ward Tribunal.

(c) That the appellate High Court erred in law for failure to properly compute the limitation to institute and application in the Wards Tribunal by the applicant even failed to impute the applicant's age of his trees he developed on the disputed land and this is just to mention a few.

As it is obvious from the paragraphs above, only the third ground of appeal substantially conforms to the issue of law which De-Mello, J certified under paragraph (a), i.e. whether the Ward Tribunal for Turwa in Tarime District was properly constituted.

On the certified ground of appeal Mr. Tuguta premised his submission by acknowledging that composition of Ward Tribunals is provided for under two Statutes: the Ward Tribunals Act, Cap 206 and the Land Disputes Courts Act, Cap 216. He further submitted that section 4(1) (a) of Cap 206 and section 11 of Cap 216 provide that every Ward Tribunal shall consist of not less than four and not more than eight members, section 11 of Cap 216 provides that three of the members of the Ward Tribunal should be women.

The learned counsel believed that the Ward Tribunal lacked jurisdiction because the record shows that on several occasions, neither the Chairman nor any member appointed to preside, presided over the proceedings of the Tribunal. This gap made vitiated the proceedings and the resulting decision of the Tribunal. He illustrated his point by referring us to what transpired in the Ward Tribunal on 16/05/2011 appearing on page 97 of the record of appeal. On this day, one Juma Michael Ghati who was supposed to preside as Chairman is marked absent on account of being ill. Neither the Chairman nor any member appointed to be a presiding member appears in the proceedings on 24/05/2011 on page 102 of the

record of appeal. He submitted that it was only in the later proceedings of the Ward Tribunal when one Catherine Gabriel, appears as Chairperson of the proceedings to make those chaired proceedings valid.

Mr. Tuguta referred us to section 4 (4) of Cap 206 to underscore his point that proceedings of the Tribunal which were neither presided by the Chairman nor by a presiding member appointed for that purpose, were a nullity and no appeal can in law come from such vitiated proceedings. He submitted that the significance of recording the presence of the Chairman or presiding member comes out if one looks at section 4 (4) of Cap 206 which states that in the event of equality of votes; the Chairman retains a casting vote in addition to his original vote. He submitted that because the Chairman did not preside any sitting of the Tribunal, and did not take part in the final decision of the Tribunal, the entire proceedings are a nullity.

When the Court asked the learned counsel whether the provisions of section 45 of the Land Disputes Courts Act prescribing substantive justice will save the errors he has pointed out, he stood his ground to insist that the proceedings and the decision of the Ward Tribunal for Turwa were a

nullity; and subsequent first, second and this third appeals are all incompetent.

In response, Mr. Nasimire submitted that this is one of the appeals which have confused him. He cannot figure out how the appellant can attack the jurisdiction of the Ward Tribunal whose decision was in his favour by declaring him the owner of the disputed land. The learned counsel for the respondent surmised that the appellant must have raised this ground of appeal inadvertently.

Having said above, Mr. Nasimire submitted that the failure of the record to mention who chaired or presided over the proceedings of the Ward Tribunal did not occasion injustice to the appellant or to the respondent. He urged the Court to find that as long as the Tribunal had the quorum of members, its decision is lawful. He pointed out that neither the Ward Tribunal Act, Cap 206 nor the Land Disputes Courts Act, Cap 216 has specifically stated that the record of proceedings should mention the attendance of either the Chairman or in his absence, attendance of any member appointed by the members to preside in the absence of the Chairman. He submitted that as long as the composition of the Ward

Tribunal complied with the threshold of not less than four members and not more than eight members provided under section 11 of the Land Disputes Courts Act, the proceedings of the Tribunal should not be annulled.

Mr. Nasimire went further and submitted that justice was served and parties were heard by the Ward Tribunal. For the sake of argument, he submitted that even if there was any provision directing the mention of a presiding member, section 45 of the Land Disputes Courts Act governing substantial justice would save the anomaly on the basis of overriding needs for attaining the substantive justice.

In conclusion, the learned counsel for the respondent urged us to dismiss the appeal. He did not press for costs.

In rejoinder, Mr. Tuguta for the appellant reiterated his earlier stand, that the failure of the record of proceedings to show which member presided in the absence of the Chairman, denied the Ward Tribunal any semblance of jurisdiction.

After hearing the submissions of the two learned counsel, we are of the decided view that the Court should not read additional procedural

technicalities into the simple and accessible way Ward Tribunals in Tanzania conduct their daily businesses. The learned counsel for the appellant has conceded, rightly so, that section 4(4) of the Wards Tribunal Act upon which he staked his proposition that the Ward Tribunal for Turwa was not properly constituted, does not prescribe that the record of the proceedings must show the member who presided the proceedings when the Chairman was marked absent. The learned counsel further conceded that throughout its sessions the Ward Tribunal had maintained the composition of members as is prescribed under section 11 of the Land Disputes Courts Act, which states:

"11. Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act."

With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice; section 45 of the Land Disputes Courts Act

should be given more prominence to cut back on over-reliance on procedural technicalities. Section 45 provides:

*"S. 45. - **No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.**" [Emphasis].*

Section 13 of the Land Disputes Courts Act underscores the spirit of simplicity and accessibility of Ward Tribunals, by reminding all and sundry that the primary functions of each Ward Tribunal is to secure peace and harmony, mediating between and assisting the parties to reach amicable settlements. That harmonious spirit cannot be attained if this Court accedes to the prayer of the appellant's learned counsel to prescribe judicially that record of proceedings should mention the member who presided the proceedings of the Ward Tribunal when the Chairman is absent for any reason.

In the upshot, failure to identify the member who presided over the proceedings of the Ward Tribunal when the Chairman was absent, did not occasion any failure of justice to the appellant. If anything, it was the appellant who benefitted from the proceedings.

The final order of the Court is that this Appeal is dismissed in its entirety. Each party shall bear its own costs.

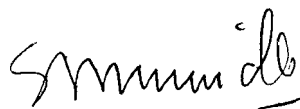
DATED at **MWANZA** this 9th day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

G. A.M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL