

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

(CORAM: MMILLA, J.A, MZIRAY, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 46 OF 2019

**1. ADELINA KOKU ANIFA
2. JOANITHA SIKUDHANI ANIFA APPELLANTS**

VERSUS

BYARUGABA ALEX RESPONDENT

**(Appeal from the judgment of the High of Court of Tanzania
at Bukoba)**

(Khaday, J.)

**Dated the 29th day of October, 2015
in**

Misc. Land Appeal No. 61 of 2012

JUDGMENT OF THE COURT

29th November & 4th December, 2019

MMILLA, J.A.:

This is a third appeal by Adelina Koku Anifa and Jonitha Sikudhani Anifa (the first and second appellants respectively). It stems from a matter which came all the way from Muhutwe Ward Tribunal in Muleba District in the Region of Kagera, through the District Land and Housing Tribunal for Kagera at Bukoba (the DLHT), and the High Court of Tanzania at Bukoba.

Before the Muhutwe Ward Tribunal, one Byarugaba Alexanda (respondent) was claiming ownership of a parcel of land at Karehe area within Muleba District which the latter claimed to have inherited from their mother, the late Anifa Mustafa Kassimu.

At the trial before the Ward Tribunal, the respondent asserted that he was given that piece of land as a gift by his late grandfather one Alex Norbert before he died. He alleged that his grandfather showed him the boundaries on all sides of the said land. One of the respondent's witnesses, Gosbert Paulo, informed the tribunal that a tree locally known as *Omukulonto* formed the boundary between the appellants' mother's land and that of the respondent.

On the other hand, the appellants claimed that after inheriting that land from their late mother (Anifa Mustafa Kassimu), they used it without any interruptions and/or disturbance until when the respondent began laying claim over it. They called one Emil Selestine, a witness who backed-up their claim that the said land belonged to their late mother.

The Muhutwe Ward Tribunal found and held that the evidence before it established that the respondent was the lawful owner of that land which it said, was given to him by his late grand-father. That decision aggrieved the appellants who appealed to the DLHT for Kagera at Bukoba. That Tribunal upheld the decision of the Ward Tribunal. Once again, that dissatisfied the appellants. They unsuccessfully appealed to the High Court of Tanzania at Bukoba, hence this third appeal to the Court.

Before us, the appellants were represented by Mr. Al-Muswadiku Chamani, learned advocate; whereas the respondent appeared in person and undefended.

The learned advocate for the appellants filed a four (4) point memorandum of appeal on behalf of the appellants. Those grounds are as follows:-

- 1. That, the respondent had no **locus standi** to appear and file the suit before the tribunal where the said property was the estate of his late grandfather.*

2. That, the trial tribunal was not properly constituted in law to determine the suit.

3. That, the legal requirement of acquiring the land by gift as claimed by the respondent was not complied with.

4. That, the trial tribunal did not assure itself the pecuniary jurisdiction to adjudicate the suit.

In the course of our deliberations, we resolved to address the second ground of appeal which we think is capable of disposing of this appeal in its entirety. As such, we have no intention of summarizing the entire submissions of the parties, except in so far as the said summary may relate to the second ground.

As already pointed out, the second ground of appeal complains of an irregularity that the trial tribunal was not properly constituted in law to determine the suit. Submitting in support of this ground, Mr. Chamani queried that throughout during the hearing of that matter, the Muhutwe Ward Tribunal consisted of three members namely; Adelina Clavery, Albentina Myaka and Aloys Kikarugaa A. Mutta, and their secretary one Archard Mushema (not a member). He contended therefore that a quorum

of only three members was contrary to the demands of section 11 of the Land Disputes Courts Act Cap. 216 of the Revised Edition, 2002 (the LDCA) which directs that a trial before the ward tribunal shall consist not less than four (4) members and not more than eight (8) of them. Mr. Chamani submitted further that the irregularity was grave, therefore that it vitiated the trial and rendered the proceedings before the Muhutwe Ward Tribunal null and void. He urged the Court to quash those proceedings, as well as the proceedings before the DLHT and the High Court, set aside the judgments and order a trial de novo.

In response to Mr. Chamani's submission on the second ground, the respondent contended that the High Court had rejected that ground on account that it was a new one since it was not raised on first appeal before the DLHT. He urged us to likewise dismiss this ground.

We have ardently considered the competing arguments of the parties in respect of the ground under discussion. We wish to initially appreciate the respondent's argument that this ground was not raised on a first appeal to the DLHT, but was raised for the first time before the

High Court as shown at page 100 of the Record of Appeal. Unfortunately, the second appellate court did not address it, but ignored it.

As can readily be appreciated, that ground hinged on a point of law. As such, the second appellate court ought to have addressed and determined it on merit. The justification was succinctly given in the case of **B. 9532 Cpl. Edward Malima v. Republic**, Criminal Appeal No. 15 of 1989 (unreported).

The facts in **Edward Malima's** case (supra) were that, the appellant was charged with murder contrary to section 196 of the Penal Code, but was convicted for a lesser offence of manslaughter on his own plea of guilty. He was sentenced to four years' imprisonment. Feeling aggrieved by that sentence, he appealed to the Court. At the hearing of that appeal the Court found that the facts did not disclose any offence committed by the appellant. Since the appellant did not appeal against conviction, the issue became whether or not it was proper for the Court to consider the propriety of the conviction. The Court said it had power to do so and reasoned that:-

*"Firstly, we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case **even if such matters are not raised in the notice of appeal or in the memorandum of appeal.** This is so because such court is a court of law and not a court of the parties."* [The emphasis is ours].

See also the case of **Marwa Mahende v. Republic** [1998] T.L.R. 249 in which it was stated that:-

*"We think . . . the duty of the Court is to apply and interpret the laws of the country. **The superior courts have the additional duty of ensuring proper application of the laws by the courts below.**"* [The emphasis is ours]

It is certain therefore, that where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals. Since the second appellate court in the present case did not address the anomaly which was pointed out by the advocate

for the appellant, we have duty to address and determine that point as raised.

As earlier on pointed out, Mr. Chamani's concern is that during the trial of this case, apart from the secretary of the tribunal who is not a member; the Muhutwe Ward Tribunal consisted of three members namely; Adelina Clavery, Albentina Myaka and Aloys Kikarugaa A. Mutta. *Ipsa dure*, that was contrary to the directives under section 11 of the LDCA which governs the composition of the Ward Tribunals, requiring them to be not less than four in any particular sitting. That section provides that:-

"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."[The emphasis is ours].

See also section 4 (1) (a) of the Ward Tribunal Act Cap. 206 of the Revised Edition, 2002 (the WTA) which has expressed almost similar requirement.

As already pointed out, the secretary of a ward tribunal is not a member because he is not a person elected from amongst a list of names of persons resident in the ward, but in terms of section 4 (2) of the WTA, he is appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee, and his duty is merely to record the proceedings of that tribunal. That section provides that:-

"(2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee."

Since only three members participated in the trial of the matter subject of this appeal at the level of the Ward Tribunal, the proceedings were marred with irregularity, thus null and void. Hence, because of that ailment which we consider to be grave, we are constrained to, and we hereby quash those proceedings, as well as those in the DLHT and the High Court, and set aside the judgments in both tribunals and the High

Court. We direct for the suit to be tried anew by that tribunal. Each party to bear own costs.

Order accordingly.

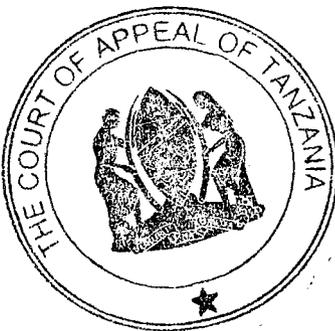
DATED at **BUKOB**A this 3rd day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of December, 2019 in the presence of Mr. Al-Muswadiku Chamani, learned advocate for the Appellants and Respondent appeared in person is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL