IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

MISCELLANEOUS LAND CASE APPEAL NO. 16 OF 2015

(From the Decision of the District Land and Housing Tribunal for Iringa at Iringa in Land Case Appeal No. 6 of 2015 and Original Ward Tribunal of Mkwawa Ward in Application No. .. of 2014)

ASHURA MASENGO ---------- APPELLANT

VERSUS

SELINA SANGA ---------- RESPONDENT

23/02/2016 & 12/04/2016

JUDGMENT

KIHWELO, J.

The appellant ASHURA MASENGO has moved this Court by way of appeal seeking to quash and set aside the decision of the District Land and Housing Tribunal for Iringa in Land Case Appeal No. 6 of 2015 which set aside the decision of the Mkwawa Ward Tribunal.

The background to the instant appeal briefly is that the respondent Selina Sanga on 5th November, 2014 filed a complaint against the appellant before the Mkwawa Ward Tribunal complaining that the appellant has built house in the respondent's suit plot. Upon full trial which involved taking testimonies of the parties, their witnesses and following the *locus in quo* of the suit land by the Ward Tribunal the trial Ward Tribunal decided that each party shall keep her house as the two houses that is the front house and the rear house were built in the same suit premise which belonged to the late husband who built for his two wives.

Dissatisfied by the said decision the respondent filed an appeal before the District Land and Housing Tribunal which upon hearing the parties on 5th June, 2015 set aside the decision of the Mkwawa Ward Tribunal. Aggrieved by the said decision the appellant filed the instant appeal. In support of the said decision the appellant filed a Petition of Appeal with the following grounds:-

1. *That, the appellate tribunal erred in law by determining the appeal before it without taking into account that Mkwawa Ward Tribunal was constituted with an improper member at the judgment date.*
2. *That, the appellate tribunal erred in law by hearing and determining the appeal before it without taking into account that Mkwawa Ward Tribunal never recorded the names of members and failed to observing (sic) the coram of members required by land laws.*
3. *That, the appellate tribunal erred in law and fact by nullifying the decision of Mkwawa Ward Tribunal which analysed and evaluated well the evidence of the parties and their witnesses hence reached a fair decision.*
4. *That, the appellate tribunal erred in law by failing to record properly the proceedings of the appeal hence reached to unfair decision against the Appellant.*

Before this Court as at the two lower tribunals parties appeared in person and fended for themselves. In order to afford them a fair hearing the Court directed the appeal to be disposed through written submissions

which were dully filed as per the schedule set by the court on the 20th October, 2015.

While arguing in support of the appeal the appellant first of all abandoned ground number 3 and 4 hence she merely argued the first two grounds namely ground number 1 and 2. The appellant was very brief and to the point. She submitted in support of the first ground of appeal that when the matter came for hearing o 5th November, 2014 before the trial ward tribunal the same was composed of three members namely Inslaeli Mwalikilame as a Chairman, Leonard Chungunge as Secretary and Enestelina Nyaulingo as a member.

According to the appellant it is surprising to note that on the date when the matter came for pronouncement of judgment on 10th December, 2014 three members were in attendance but the chairman this time around was one Zacharia Kalinga who was a stranger to the case. The rest namely the secretary and the other member were the same as the one who presided on the first day when the matter came. She alluded that in view of that the

judgment was a nullity hence even the decision of the District Land and Housing Tribunal which emanated from the illegal proceedings are a nullity too.

The appellant further strenuously argued that on the second ground of appeal the trial tribunal failed to record the names of the members who sat, heard and decided the dispute on 26th November, 2014 as well as on 3rd December, 2014 contrary to the mandatory requirement of Section 24(1) and (2) of the Ward Tribunals Act, Cap 206 RE 2002. She further argued that the defect was incurable in view of the requirement of Section 14(1) of the Land Disputes Courts Act, Cap 216 RE 2002. To further buttress her argument she invited this Court to refer to the case of **Julius S. Mshai V Daudi Mlumba**, Miscellaneus Land Case Appeal No. 41 of 2008, High Court of Tanzania at Dodoma (unreported) and **Gerald Kazimoto Lupembe V Mihael Kihundo**, Miscellaneous Land Case Appeal No. 12 of 2012, High Court of Tanzania at Iringa (unreported).

She finally prayed that the appeal should be allowed and the decision of the appellate tribunal should be set aside.

In response to the appellant's submission the respondent was equally brief. She emphasized that as the cited decisions are of the same level in the judicial hierarchy this court is not bound by the decision of the High Court. The respondent fought a spirited fight by arguing that courts should not be bound by technicalities in dispensing justice and referred to Article 107(2) (e) of the Constitution of the United Republic of Tanzania of 1977 as amended and requested the court to disregard the appellant's submission and dispense justice in disregard of technicalities and focus on substantive justice. She also invited this court to the decision by the late Francis Nyalali (former Chief Justice) of Tanzania in **A. G V Marwa Magari**, Criminal Appeal No. 95 of 1988, Court of Appeal of Tanzania at Mwanza (unreported).

She finally prayed that the appeal should be dismissed as there is no guarantee that if the matter is tried *de novo* it will change the decision.

I have carefully considered the submissions by the appellant and the respondent and in my opinion there remains to be only one issue for consideration and that is whether or not the present appeal is meritorious.

The appellant has insistently argued the proceedings before the trial tribunal were marred by irregularities evident from the record. A cursory perusal of the records of the trial tribunal reveals clearly that the matter came before the tribunal on 5th November, 2014, 3rd December, 2014 and 10th December, 2014.

On 5th November, 2014 the matter came for the first time and the coram was as follows:-

"Mahudhurio

1. Israeli Mwarikilame - M/kiti

2. Leonard Sihungungeme - Katibu

3. Lenestelina Nyaulingo - Mjumbe".

On 3rd December, when the matter came for hearing and when the tribunal also visited the locus in quo the proceedings are conspicuously silent on the coram of members who presided.

On 10th December, 2014 when the trial tribunal pronounced the judgment the coram of the tribunal was as follows:-

"1. Zakaria Kalinga - Mwenyekiti

2. Estelina Nyaulingo - Mjumbe

3. Leonard Chungunge - Katibu".

I am inclined to agree with the submission by the appellant in that the proceedings before the trial tribunal were a nullity in that the composition of the tribunal was not consistent since the chairman of the tribunal on the first hearing date was one person and on the judgment date the chairman was another person strange to the proceedings hence making the exercise a mockery of justice. The wisdom behind the corum of members is to have the same coram from the beginning to the end and

that is the rationale behind recording the coram of the members at every seating of the tribunal. In the present appeal matters are even worse because the proceedings on the crucial date of hearing and visit of the *locus in quo* are conspicuously silent. Section 24(1) and (2) of the Ward Tribunals Act, Cap 206 RE 2002 makes it mandatory for the tribunal to record all the evidence and other matters hence recording the coram at every seating is a mandatory requirement. Time and again this Court has held as we shall see hence forth that where the proceedings of the ward tribunal does not show the composition or the composition is improper the entire proceedings is a nullity.

The respondent has sought to convince this court to disregard the alleged technicality on the basis of Article 107A (2) (e) of the Constitution. I am totally not in agreement with the interpretation of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania made by the respondent. This is because, taking into account the position made in the decision of the Court of Appeal of Tanzania in the case of **Zuberi Mussa V Shinyanga Town Council**, Civil Application No. 100 of 2004

(unreported), where the court of appeal had the following to say on the provisions of Article 107A (2) (e) of the Constitution:-

> *"---- Article 107A (2) (e) is couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered – one can not be said to be acting wrongly or unreasonably when he is executing the dictates of the law".*

The Court of Appeal of Tanzania in the case of **Elly Millinga V The Republic**, Criminal Appeal No. 268 of 2014, Court of Appeal of Tanzania at Iringa (unreported) held thus:-

> *"We are increasingly of the view that, Article 107A (2) (e) featured in our Constitution does not do away with all rules of procedure in the administration of justice in this country or that every*

procedural rule can be out lawed by that provision of the Constitution".

Furthermore the Court of Appeal of Tanzania in **China Henan International Cooperation Group V Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005 (unreported) while discussing the role of rules of procedures in the administration of justice it held that;

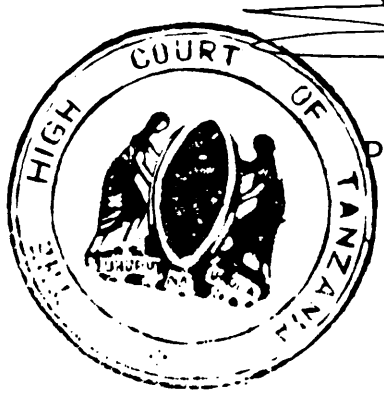
"The role of rules of procedure in the administration of justice is fundamental --- that is, their function is to facilitate the administration of justice ---"

Since the records of the trial tribunal are silent on the presence and actual participation of the members on the crucial date of the hearing and visit of the *locus in quo* and because the chairman on the first date was not the same chairman on the judgment date and there is no explanation at all to that effect this is a serious irregularity touching on the jurisdiction of the Ward Tribunal. In the words of Madam Shangali J in the case of **Gerald Kazimoto Lupembe V Mihael Kihundo** (supra) and Madam Kwariko J in

Julius S. Mshai V Daudi Mlumba (supra) the irregularity goes to the roots of the whole matter.

Consequently the decision of the trial tribunal is declared *null* and *void*. Since the decision of the District Land and Housing Tribunal is a product of the illegal decision of the trial tribunal (Ward Tribunal) the same is also declared a nullity.

In the upshot and for the reasons stated above, I order and direct that the case be tried *de novo*. Each party to bear own costs.

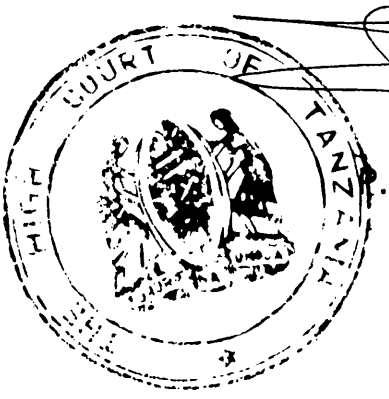


P.F. KIHWELO

JUDGE

06/04/2016

Judgment to be delivered by the Acting Deputy Registrar on 12th April, 2016.



R.F. KIHWELO

JUDGE

06/04/2016