THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPEAL NO. 20 OF 2019.

(Arising from Land Appeal No. 69 of 2018, in the District Land and Housing Tribunal for Mbeya, at Mbeya, Originating from Land Case No. 42 of 2018, before the Mbebe Ward Tribunal).

1. MAIKO MTAFYA.....1ST APPELLANT
2. ISSA KIBONA.....2ND APPELLANT
3. BASALELGHE KANDONGA.....3RD APPELLANT
4. DAUDI SHILINDE.....4TH APPELLANT

VERSUS

ECKSONI MTAFYA.....RESPONDENT

JUDGMENT

02/04 & 01/ 07/ 2020.

UTAMWA, J:

In this second appeal, the appellants are four, namely: MAIKO MTAFYA, ISSA KIBONA, BASALELGHE KANDONGA and DAUDI SHILINDE. They are challenging the judgment (impugned judgement) of the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT) in Land Appeal No. 69 of 2018. The same originated in Land Case No. 42 of 2018 before the Ward Tribunal of Mbebe (the Ward Tribunal). Their petition of appeal

was initially based on six grounds of appeal. However, in arguing the appeal, their counsel opted to drop four grounds. He thus, retained only the following two grounds which were initially grounds No. 1 and 5:

1. That, the appellate tribunal (the DLHT) erred in law and fact by delivering the judgment inn favour of the respondent though the ward tribunal heard the matter while the Coram of members was nine members contrary to the law.

2. That, the appellate tribunal erred in law and facts by delivering the judgment in favour of the respondent while the evidence was not analysed and evaluated properly.

Owing to these grounds of appeal, the appellants urged this court to do the following: to allow the appeal, pronounce that the appellants are the lawful owners of the disputed land, condemn the respondent to pay costs and grant any other relief it (the court) will deem fit. The respondent resisted the appeal.

The appeal was argued by way of written submissions. The appellants were represented by Mr. Philip Mwakilima, learned counsel while the respondent was advocated for by Mr. Moses Mwampashe, learned advocate.

I have considered the arguments by both sides of the appeal, the record and the law. I will thus, test the first ground of appeal. In case need will arise, I will also test the rest. I give priority to this ground since it touches the jurisdiction of the ward tribunal.

In supporting the first ground of appeal, the learned counsel for the appellant essentially argued that, in deciding the matter, the ward tribunal sat with nine members. This was against the law since section 40 (a) of the Ward Tribunal Act, Cap. 206 R. E. 2010 (the WTA) requires members of a ward tribunal to be not less than four and not more than eight. The same requirement is underscored under section 11 of the Land Disputes Courts Act, Cap. 216 R. E. 2010 (the LADCA). He further argued that, section 4 (3) of the WTA also requires the quorum of the tribunal to be only four members. Furthermore, he contended that, women members according to law need be only three and not four as it was in the matter at hand. He thus, urged this court to find that the proceedings before the ward tribunal were a nullity.

In his replying submissions, the learned counsel for the respondent contended that, the first ground of appeal is a new matter that was not raised before the DLHT. The appellant could not thus, raise it at this second appeal. He supported this contention by the decisions of the Court of Appeal of Tanzania (CAT) in **Melita Naikiminjal and Loishilaari Nakiminjal v. Sailevo Loibanguti [1998] TLR. 120, Abdul Athumani v. R. [2004] TLR. 151** and **Simon Godson Macha v. Mary Kimambo, Civil Appeal No. 393 of 2019, CAT at Tanga** (unreported).

The learned counsel for the respondent thus, argued that, this court lacks jurisdiction to entertain the first ground of appeal. He thus, pressed the court to strike out this ground of appeal.

Alternatively, the learned counsel for the respondent contended that, the appellants' counsel wrongly cited the provisions of the WTA and the LADCA. The wrongly cited provisions do not exist in the body of our laws. He further argued that, it will be unfair to declare the proceedings of the ward tribunal a nullity since the appellants did not explain how the irregularity under discussion prejudiced them by including the name of the secretary of the tribunal. The proceedings are protected by section 45 of the LADCA which requires courts to avoid being overwhelmed by minor irregularities that result to injustice. The courts are enjoined to dispense substantive justice to parties. He supported this particular stance of the law by the decision of the CAT in **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

The issues regarding this ground of appeal are two as follows:

i. Whether or not the proceedings of the ward tribunal show that nine members sat in making the decision of the ward tribunal.
ii. If the answer in the first issue is affirmative, then what is the legal effect of the scenario?

As to the first issue, I am of the view that, the arguments advanced by the appellants' counsel are supported by the record. It is clear from the original (handwritten) proceedings of the ward tribunal that, on 13/10/2018 the matter was heard by nine persons who signed against their names. Their names appear at the fourth page of the proceedings. This was after they had heard the parties. The title under which the names were listed reads in Kiswahili thus: "Wajumbe Waliosiliza" which literally means, members who

had heard the matter. The first name in the list is of the chairman and the second is of the secretary. However, he is listed as one of the members who had heard the matter. The same names appear at page five as members who had made a decision. Their names are under the heading of "Waliosikiliza kesi hii" meaning that, persons who had heard the matter.

It is thus clear according to the proceedings of the ward tribunal that, the matter before it was heard by nine persons and decided by the same individuals. Though one of the names is shown to be of the secretary of the ward tribunal, the trend shows that he also sat as a member of the tribunal and made the decision. I thus, answer the first issue affirmatively.

Regarding the second issue, I am of the following views: in the first place, it is true, as rightly argued by the appellants' counsel that, section 4 (1) (a) of the WTA (not section 40 (as) as cited by the appellants' counsel) requires the composition of the ward tribunal to be not less than four nor more than eight members. The position of the law is also underscored under section 11 of the LADCA. Indeed, these two legislations are properly cited as Cap. 206 R. E. 2002 and Cap. 216 R. E. 2002 (now R. E. 2019) respectively. The appellants' counsel thus, slightly cited them wrongly as correctly submitted by the respondent's counsel. However, I do not consider that the said wrong citation renders the legal guidance underscored above non-existent. This is because, the law is there irrespective of the erroneous citation.

Again, according to the wording of section 4 (1) and (2) of the WTA and sections 11 and 14 of the LADCA, it cannot be said that the secretary

of the ward tribunal is among the members who can take part in the hearing of matters before the ward tribunal and make its decisions. It follows thus that, in the matter at hand, in which it is shown that the secretary was also considered as a member, heard the case and made the decision with the members, it could not be said that the tribunal conducted its business according to the law. It is more so considering the fact that, section 14 (1) of the LADCA requires a ward tribunal to conduct its affairs with the Coram of only three members and at least one of whom shall be a woman. There was thus, no need why the tribunal in the matter at hand had to decide the matter under discussion with all such nine persons including the secretary.

In this matter, there was also no reason in the proceedings of the ward tribunal as to why it took the course discussed above which was against the law. There was thus, no transparency in that course. This was incompatible with the due process of justice. In law, transparency and justice are inseparable; see the prudence of this court (Moshi, J. as he then was) in **Gilbert Nzunda v. Watson Salale, (PC) Civil Appeal No. 29 of 1997, at Mbeya** (unreported).

The course taken by the ward tribunal therefore, vitiated the proceedings before it for want of jurisdiction. The issue of jurisdiction is a fundamental issue that must be determined before the court tries any matter; see **Richard Julius Rukambura v. Issack Ntwa Mwakajila and another, CAT Civil Application No. 3 of 2004, at Mwanza** (unreported) following its previous decision in **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and 20 others, CAT Civil Appeal No. 8 of**

1995 (unreported). Moreover, an issue of jurisdiction, being an issue of law, can also be raised at any stage of the proceedings even on appeal. The arguments by the learned counsel for the respondent that this court lacks jurisdiction to entertain the first ground of appeal because the appellants did not raised it before the DLHT is not supported by any law.

Furthermore, the contention by the respondent's counsel that the appellants did not explain how they were prejudiced by the course taken by the ward tribunal is weightless. This is because, once a court or an adjudicating body acts without jurisdiction, its decision cannot stand whether or not it prejudices a party. This stance of the law is based on an understanding that, a decision made without jurisdiction is not a decision at all in the eyes of the law, it must thus, not be left to breath and bind any party to court proceedings.

This court is further of the view that, in the matter at hand, section 45 of the LADCA cited by the respondent's counsel above cannot protect the proceedings of the ward tribunal for the blunder discussed above. This is because, the same was fatal as demonstrated earlier. The **Yakobo Magoiga case** (supra) is thus, distinguishable from the instant case. This precedent in fact, underscored the principle of overriding objective. In effect, this principle requires courts to decide cases justly, speedily and without being overwhelmed by legalism. However, as I have shown previously, I do not take the irregularity committed by the ward tribunal as a minor one.

It must also be born in mind that, the principal of overriding objective is not a broad spectrum remedy for each and every error in court

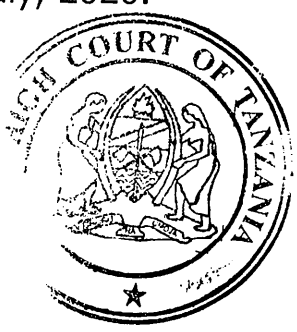
proceedings. It cannot therefore, be applied mechanically to suppress or bulldoze significant procedural rules or other legal principles the purposes of which are also to promote justice and fair trials. This is the envisaging that was recently articulated by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

Having observed as above, I answer the second issue as follows, that: the irregularity committed by the ward tribunal was legally fatal to the proceedings before it. Having made this finding, I hereby uphold the first ground of appeal. This finding makes it unnecessary to examine the second ground of appeal because it is capable enough to dispose of the entire appeal. I will not thus, test the second ground of appeal.

Owing to the reasons shown above, I find that the following orders will meet the justice of the case at hand, and I accordingly order that: the proceedings of the ward tribunal are hereby nullified and quashed. Its judgment is also set aside. The proceedings of the DLHT are also nullified for basing on the nullity proceedings of the ward tribunal. The impugned judgment of the DLHT is thus, also set aside. If parties still wish, the matter shall be tried afresh. Each party shall bear his own costs since it was the ward tribunal which committed the blunder that has resulted to this judgment. It is so ordered.

J.H.K. Utamwa
JUDGE
01/07/2020

Court; Judgment delivered in the presence of appellants No. 2 - 4 and Mr. Moses Mwampashe, learned advocated for the respondent, in court this 1st day of July, 2020.



J.H.K. Utamwa

JUDGE

01/07/2020