THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPEAL NO. 7 OF 2019.

(Arising from District Land and Housing Tribunal for Mbeya, at Mbeya, in Land Appeal No. 189 of 2017, Originating from

Itumba Ward Tribunal).

ANYEKIWE SHIMWELA.....APPELLANT

VERSUS

BROWN MBUKWA.....RESPONDENT

JUDGMENT

06/05 & 29/07/ 2020.

UTAMWA, J:

The appellant in this appeal is one ANYEKIWE SHIMWELA. He appeals against the decision of the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT) in Land Appeal No. 189 of 2017. The matter originated in Itumba Ward Tribunal (the trial Tribunal).

The brief background of this matter according to the record goes thus: the appellant initiated proceedings before the trial Tribunal against the respondent, BROWN MBUKWA for a piece of land. The trial Tribunal decided in favour of the respondent. Aggrieved by that decision, the

appellant appealed to the DLHT. The appeal was registered as Land Appeal No. 189 of 2017. The DLHT dismissed the appeal with costs through a judgement dated 24/10/2018 (hereinafter called the impugned ruling). The appellant was not contented by that dismissal of the appeal. He is now appealing against the impugned judgment.

The petition of appeal is based on the following three grounds of appeal which I reproduce verbatim for a readymade reference:

"PETITION OF APPEAL

...

1. That, the trial tribunal erred both in points of law and facts by failure to consider the evidence on record tendered at the ward tribunal.
2. That, the trial tribunal erred in law and fact by disregarding the evidence adduced by the appellant that he had been using the said disputed land for more than 12 years.
3. That, the trial tribunal erred in law and fact in determining the matter without considering that the ward tribunal was not duly composed in terms of its quoram."

Owing to the above grounds of appeal, the appellant urged this court to grant him the following reliefs; to allow the appeal, and quash the whole decision of the trial tribunal with costs. The respondent resisted the appeal at hand.

When the appeal was called upon for hearing, the appellant was represented by Mr. Osia Adam, learned counsel. The respondent appeared in person without any legal representation. It was heard orally.

In supporting the first and second grounds of appeal cumulatively, the learned counsel for the appellant submitted that, the DLHT erred in not considering the evidence adduced by the parties. The appellant testified before the trial tribunal that, he had used the land for more than 40 years

without adverse interference, which said evidence was not disputed by the respondent. On the other side, the respondent testified that, the suit land had no boundaries. Nonetheless, when the trial tribunal visited the *locus in quo,* the respondent said, his land was bordering that of one Anthony Makondya. The respondents' witness, one Lusubilo Kayinga also testified in cross examination that, he did not know if the land had boundaries. The other witness for the respondent (Fredson Mwampashi) however, testified that, the respondent had been allocated the suit land, but did not disclose when and by who.

Owing to the above reasons, the appellant's counsel contended that, the respondent's evidence was contradictory. The law, i. e. section 110 (1) of the Evidence Act, Cap. 6 R. E. 2019 wants a party to court proceedings to prove his allegations. The respondent's evidence did not meet the requirements of that law for being weak. The appellant's evidence was therefore, heavier than that of the respondent. The law further guides that, the party who adduces a heavier evidence wins the case. The appellant's counsel supported this stance of the law by the case of **Hemed Said v. Mhamed Mbillu [1984] TLR. 113.** The appellant thus, proved to be the owner of the suit land. Nonetheless, the DLHT did not consider that evidence. It thus, erred in upholding the decision of the trial tribunal.

Regarding the third ground of appeal, the appellant's advocated submitted that, the DLHT erred in not holding that the trial tribunal was not properly constituted. This is because, the coram of members for a Ward Tribunal, according to section 11 of the Land Disputes Courts Act, Cap. 216, R. E. 2019 is not less than four and not more than eight. Women

in that coram must not be less than three. However, in the matter at hand, members who sat in the trial tribunal were five and the record did not show the gender of the members. It is however, apparent that, there was only a single lady-member (one Nilukege Kibona). The judgment of the trial tribunal thus, offended the law. It is thus, clear that, the DLHT erred in not holding so.

On his part, the layman respondent contended briefly that, the trial tribunal was properly constituted. He further argued that, the submissions by the appellant's counsel that the appellant had occupied the land for more than 40 years without adverse interference was false.

When prompted by the court, the learned counsel for the appellant contended that, according to the record, it is not possible to determine which members of the trial tribunal were male and which were female. But, his client had told him that there was only one lady-member in the coram. He also argued that, the error regarding the coram was only procedural and did not prejudice any party.

In deciding this appeal, I will firstly consider the third ground of appeal for purposes of convenience. Besides, it touches the jurisdiction of the trial tribunal. It is also the law that, an issue of jurisdiction if fundamental and must be determined before a court tests any other issue. It follows thus that, the third ground of appeal is forceful enough to dispose of the entire appeal if it will be upheld. This will be so even without considering the rest of the grounds.

I now pose to test the third ground of appeal. The major issues regarding this ground is *whether or not the DLHT erred in not finding that the trial tribunal (ward tribunal) was not duly composed in terms of its coram*. Before I decide this major issue, I must firstly decide a sub-issue of *whether or not the trial tribunal was duly composed according to the record*. The answer to the sub-issue can be found in the record of the trial tribunal. In my view, the complaint by the appellant's counsel highlighted above was a result of a misconception of the law. Section 11 of Cap. 216 he cited only guides on the general composition of the members of a ward tribunal. It does not cater for a coram of a specific sitting of the tribunal in performing its function. It is section 14 (1) of the same legislation which caters for a specific caram of members per siting. This one provides that, a tribunal shall, in all matters consist of three members at least one of whom shall be a woman. This means that, it is not a legal requirement for all the members of a ward tribunal to sit for a single case.

In the case at hand and according to the record of the trial tribunal, five (and not three), members sat in deciding the case on the last date of the trial. It is also true that, the coram did not show gender. The appellant's counsel submitted that his client had informed him that there was only one lady in the coram. However, it must be born in mind that, only court records, and not memory of parties which should be relied upon in determining what had transpired in court. This views is based on the understanding that, court records are presumed to be serious and genuine documents that cannot be easily impeached, unless there is evidence to the contrary (which is not the case in the matter at hand). This was the

position underscored by the Court of Appeal of Tanzania (CAT) in the case of **Halfani Sudi v. Abieza Chichili, [1998] TLR. 527**. It is thus, considered that, the record of the trial tribunal does not show the gender of the members. This irregularity in my view is not fatal. The proceedings could be saved by section 45 of Cap. 216 since the appellant's counsel conceded as shown above, that it did not prejudice any party.

The provisions of section 45 of Cap. 216 just mentioned above, requires this court to consider only substantial justice and ignore procedural technicalities in deciding appeals of this nature. The provisions of law were underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported). In that precedent, the CAT underlined the principle of "Overriding Objective." The principle has been accentuated recently in the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. The principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice.

The above observations however, do not make the answer to the sub-issue posed above affirmative. My scanning for the record of the trial tribunal tells loudly that, the matter before it was heard for first time when both parties' evidence was record. The matter was adjourned for the second sitting to 16/10/2017. In that second siting only witnesses for both sides were heard. The matter was again adjourned to 20/10/2017 for the third sitting that had to be held at the *locus in quo*. The trial tribunal accordingly, heard the matter and made its verdict on that said third sitting. The names of the five members discussed earlier appear at the

bottom of the record on that third sitting. They do not feature anywhere in the first and second sitting. This means that, the record do not show which members had sat in the first and second sessions. It only shows those five members who sat and decided the matter at the last (third) sitting. In my view, for this omission committed by the trial tribunal, it cannot be said that the tribunal was duly composed. This is because, without showing the names of the members for each sitting of the trial tribunal, one cannot say that the mandatory provisions of section 14 (1) of Cap. 216 were complied with.

Due to the above reasons, and though for different grounds from those submitted by the appellant's counsel, I answer the sub-issue posed above negatively that, the trial tribunal was not duly composed according to the record.

As to the major issue posed above, I am of the view that, in fact, the DLHT held that, the trial tribunal had been properly constituted. Now, since I have held the sub-issue negatively, I hereby, for the reasons shown in considering the sub-issue, fault the DLHT. Had it bothered to scan the record of the trial tribunal as I did, it could have come out with a different view. I therefore, though for different reasons from those adduced by the appellant's counsel, answer the major issue affirmatively that, *the DLHT erred in not finding that the trial tribunal (ward tribunal) was not duly composed in terms of its coram*. I therefore, uphold the third ground of appeal.

The effect of the omission committed by the trial tribunal was fatal and goes to its jurisdiction. This is because, it is not certain if the members who sat in deciding the matter at the third session were the same who had heard the parties and their witnesses in the first and second meetings. It is also not clear thus, if their decision was founded on the evidence adduced by the parties. There was thus, no transparency in deciding the matter before the trial tribunal. 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). It cannot further, be said that the parties were afforded a fair trial which is a fundamental right. The right to fair trial (fair hearing) is well enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002. The CAT described the right to fair trial as one of the cornerstones of any just society which enables the effective functioning of the administration of justice; see in **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported). That, right cannot thus, be easily violated by any court or institution charged with judicial duties like the trial tribunal.

Owing to the reasons shown above, the entire proceedings of the trial tribunal are liable to be declared a nullity and to be quashed. Its decision is also liable to be set aside. The same applies to the proceedings and the impugned judgment of the DLHT for basing of the nullity proceedings and verdict of the trial tribunal.

The findings I have just made above are capable of disposing of the entire appeal at hand without considering the rest of the grounds of

appeal. I therefore, make the following orders: the proceedings of both the trial tribunal and the DLHT are hereby declared a nullity and quashed. Their respective verdicts are also set aside. Each party shall bear his own costs since none of them bears the blameworthiness for the abnormalities committed by the trial tribunal. If parties still wish, the matter may be tried *denovo* by different set of members. It is so ordered.

J.H.K. Utamwa

JUDGE

29/07/2020.

29/07/2020.
CORAM; HON. JHK. Utamwa, Judge.
Appellant: present in person and Mr. Osia Adam, advocate.
Respondent; present in person.
BC; Mr. Patric Nundwe, RMA.

Court: Judgment delivered in the presence of the parties in person and Mr. Osia Adam, learned advocate for the appellant, in court, this 29th July, 2020.

J.H.K. UTAMWA

JUDGE

29/07/2020.