IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 16 OF 2019

(C/F District Land and Housing Tribunal for Moshi in Land Appeal No. 72 of 2018, Original- Shauri Na. 17 of 2017 at Keni Mengeni Ward Tribunal)

ARETAS W. MOSHI..... APPELLANT

Versus

BIBIANA W. TENGIA.....RESPONDENT

JUDGMENT

Last Order: 22nd April, 2020

Date of Judgment: 10th July, 2020

MWENEMPAZI, J.

The Appellant Aretas Moshi was sued by the respondent Bibiana Tengia at the Ward Tribunal of Keni Mengeni in Application No. 3 of 2018 for uprooting boarder marks made of local trees (mfifina and mkuyu). After hearing the Ward tribunal decided in favour of the respondent and ordered the replacement of the trees that marked the boundary. The appellant was aggrieved by the decision and decided to appeal to the District Land and

Housing Tribunal for Moshi where the appeal was dismissed hence this second appeal.

In the present appeal the appellant raised four grounds namely:

1. That, the honorable Chairman for the District Land and Housing Tribunal erred in law and in fact for failure to give out reasons for differing with opinion of the assessors.
2. That the honorable tribunal erred both in law and in fact for dismissing the appeal and uphold a defective Ward Tribunal's decision.
3. That the honorable tribunal erred in law and in fact for failure to evaluate and consider properly the issue of Ward Tribunal's jurisdiction to entertain the matter as evidenced on the records.
4. That the honorable District Land and Housing Tribunal erred in Law and in fact for failure to properly evaluate the evidence on record.

On hearing of the appeal parties prayed to dispose the hearing by way of written submission and the leave was granted. In her brief submission the appellant argued her first ground of appeal to the effect that the Chairman of the District Land and Housing Tribunal erred for not giving reasons for

differing with the opinion of the assessors' contrary to the provision of section 24 of the ***Land Disputes Courts Act [Cap. 216 R.E.2002]***. He argued further that lack of stamp on the judgment of the Ward Tribunal also rendered the same incurably defective. It was his view that the effect is as if there was no formal decision by the Ward Tribunal from which right of parties would have been declared.

The appellant submitted on the second ground of appeal by stating that since there was no formal document evidencing decision of the Ward Tribunal as argued in ground number one then the Honourable Chairman of the District Land and Housing Tribunal had no decision to uphold. He stated further that the correct approach by the Chairman would have been to allow the appeal and order retrial not dismissing the same.

Arguing ground number 3 and 4 together the appellant submitted that an estimate value of the disputed piece of land exceeded three million which is the limit of pecuniary jurisdiction of the Ward Tribunal. He also submitted that the respondent did not in her evidence indicate that her mother owned the said piece of land for her to be able to dispose it.

On the other hand, the respondent through her advocate Mr. Martin Kilasara submitted that with respect to the first ground of appeal the fact that the decision of the Ward Tribunal lacked stamp does not vitiate the decision as none of the parties was prejudiced by that fact. The learned counsel further avers that the assertion that the decision could be altered is a mere speculation which was not proved. Supporting his argument, the learned counsel cited the case of ***Mwalifrunga v. Mwankinga*** **(1971) HCD 109** where it was held that: -

> "the *appellate court will not interfere with the finding of the trial court on grounds of pure speculation*".

On the same ground the learned counsel submitted that stamping of the decision is matter of formality which did not go to the root of the case. It was his view that the rights of parties were duly determined through the decision which was written and signed by the members thus it was formal.

With respect to the issue of the appellate tribunal not giving reasons for dissenting from assessors' opinion, the learned counsel submitted that the contention is misconceived because the Chairman duly considered the opinion of assessors and gave sufficient reasons for deferring with them as

it appears on page 2 and 3 of the judgment. Mr. Kilasara went on stating the reasons that the chairman gave was that the tribunal was dully constituted and secondly there was no valuation report tendered to establish the actual value. Furthermore, the counsel submitted that according to section 24 of the Land Disputes Court Act, 2002 the opinion of assessors is not binding upon the chairman.

Responding to the second ground of appeal the learned counsel submitted that at trial there was ample and credible evidence pointing to the conclusion that the appellant illegally trespassed the suit land and uprooted the boarder marks. He argued further that the lower tribunals were justified in their unanimous findings of facts. On this argument the learned counsel justified the same by relying on the case of ***Amrathlar Damadar and Another v. A.H.Jariwalla*** [1980] TLR 31 where it was held that:-

> *"where there are concurrent findings of facts by two courts below, the court of appeal, as a wise rule of practice should not disturb them."*

Finally on the third and fourth grounds of appeal Mr. Kilasara responded that the records clearly show that there was no dispute over ownership of the respondent's block, residential house or any structure developed by

either party but the dispute between parties was over boarder marks which separates their respective lands and which were illegally uprooted by the appellant. Therefore, the said uprooted boarder marks cannot be said to have a value of over three million shillings. Moreover, he stated that at the trial court no valuation report was tendered showing the value of the disputed boundary exceeded three million. In light of his submission he urged the Court to dismiss the appeal with costs as it was lacking in merit.

As rightly submitted by the respondent's counsel, this being the second appeal, this Court is restricted in interfering with the lower court decisions. However the second appellate court can only interfere in some circumstances such as when there is glaring error on the face of the record or when there is error on calculations or when there is mix up of evidence and so forth resulting into unfair decision can result into interference by the second appellate court as held in the case of **Amrathlar** cited above.

In his rejoinder submission the appellant reiterated his submission in chief and insisted that he was prejudiced by the findings of the two lower tribunals because the first appellate tribunal did not give reasons for dissenting from assessor's opinion and the trial tribunal did not enquire about jurisdiction.

Guided by the principle as laid down in the case of Amrathlar above cited, I shall now get on determining the merits and demerits of this appeal. In the 1st ground of appeal the appellant had raised the issue of failure by the honorable chairman of the District Land and Housing Tribunal to give out reasons for dissenting with the assessors' opinion. The law is very clear under section 24 of the ***Land Disputes Courts Act, Cap 216 R.E 2002*** that, '

> *"In reaching decisions the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion".*

As it can be clearly seen from this provision the word used is shall which connotes a mandatory requirement to do what is provided after the word. In Tanzania the meaning of the word shall is provided for under section 53(2) of the ***Interpretation of Laws Act***, Cap 1 R.E 2002 which states,

> *"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed"*

In light of this provision therefore the honorable chairman of the District Land and Housing Tribunal ought to have given reasons as to why he deferred with the opinion of assessors. Now the question is whether failure to give reasons by the chairman was fatal or occasioned failure of justice. In answering this question, one must look at the intention behind the provision of section 24 of the Land Disputes Courts Act (supra). In my view I think since the provision gives the chairman discretion to either agree or disagree with the opinion of assessors, it made sure that in the event the chairman deferred with the assessors' opinion then he must give reasons to avoid been seen biased and for the ends of justice as the old adage goes that justice must be manifestly seen to be done at all times. Since that was not done, it is evident that section 24 of the ***Land Disputes Courts Act***, Cap. 216 R.E. 2002 was not complied with. For this reason, the answer to the issue as to whether the omission was fatal is yes, it was a necessary requirement for the appellate tribunal to give reasons for differing with the opinion of assessors in order to reach just decision.

The 1st ground would have sufficed to dispose of the appeal but I decided to as well examine the 2nd, 3rd grounds due to their importance and may as well dispose the appeal on their own.

Referring to the 2nd ground, the issue is whether the decision of the Ward Tribunal was defective for not being stamped by the common seal of the tribunal. My observation is that official stamps are made to validate the document which bares the same. The official stamp is just as important as the signatures on the official document as it authenticates the same. Therefore, although the judgment of the Ward Tribunal was signed it was defective for lacking an official stamp of the tribunal.

The 3rd ground of appeal touched the issue of Ward Tribunal's jurisdiction. It is indeed correct that the issue of jurisdiction is not only important but fundamental as it goes to the core of the authority of the court/tribunal to determine cases of different nature before it.

With that in place, it is therefore important and as a matter of practice before proceeding in determining matter before it, the court/tribunal has to ascertain if it has jurisdiction or not to adjudicate on the matter. The Ward and District Land & Housing Tribunal are not exception when it comes to jurisdiction. As adjudicators they have a duty to ascertain their jurisdiction before proceeding to adjudicate on any matter before it. Although the duty has been placed upon the court/tribunal parties have a role of assistance by way of furnishing the court/tribunal with required information so that

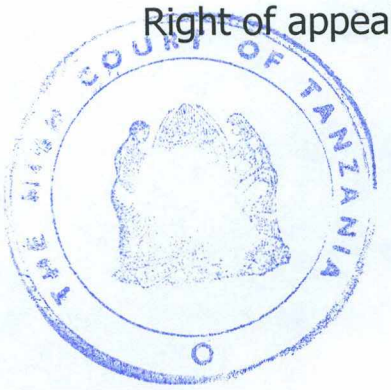
the duty conferred upon them can be fulfilled. This is more so, especially where the value of the subject matter involves monetary value. Under the circumstances it was therefore the duty of the respondent herein to furnish the tribunal with a valuation report for it to ascertain its jurisdiction. And, in that regard I agree with the appellant that the trial tribunal erred by proceeding with the mater without first ascertaining whether it had jurisdiction. Examining the Ward Tribunal records it was obvious there was no value given of the suit land. Therefore, the whole proceeding and decision of the trial tribunal was irregular and the irregularity goes to the root of the case and thus fatal.

In light of the above, I conclude that this appeal is with merits. I thus proceed to quash and nullify the proceedings of the Ward Tribunal in Application No. 3 of 2018 and the District Land & Housing Tribunal decision in Appeal No. 72 of 2018. Parties are at liberty to file a fresh suit before the tribunal with competent jurisdiction. It is so ordered.

T. MWENEMPAZI
JUDGE
10th JULY, 2020

Court: Judgement delivered in Court in the presence of the appellant and the Respondent.

Right of appeal explained.



T. MWENEMPAZI
JUDGE
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