

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

LAND APPEAL NO. 8 OF 2020

*(Arising from the decision of District Land and Housing Tribunal for Maswa at Maswa Land
Appeal No. 35/2018 Original of Kalemela Ward Tribunal, in Land Case No 9 of 2018)*

LUCIA MASENGWA.....APPELLANT

VERSUS

JOSEPH LUTAMBI.....RESPONDENT

JUDGMENT

Date of Last order:26-10-2020

Judgement Date: 11-12-2020

MKWIZU J:

This is a second appeal, it emanates from the Maswa Land and Housing tribunal decision in Land Appeal No 35 of 2018 originating from Kalemela Ward Tribunal in Land case No 9 of 2018. At the Ward Tribunal (the trial tribunal) the respondent herein sued the appellant over trespass on the disputed land measured seven (7) acres. The dispute was determined in favour of the respondent. Aggrieved by such decision the appellant unsuccessfully appealed to the District Land and Housing Tribunal for Maswa. Discontented, the appellant has lodged this appeal to this court with a petition of appeal comprised of four (4) grounds of appeal that:

1. That, the Appellate Land and Housing tribunal erred in law and fact to entertain the decision/judgement of the trial Ward Tribunal of Kalemela, which in itself was a nullity. For want of proper constituted Tribunal

2. That, the Appellate Land and Housing tribunal misdirected itself in law and fact to confirm the decision of the trial Tribunal which in the eyes of the law, was not a judgement at all being that it was given without assigning reason(s) for the decision

3. That, the Appellate Land and Housing tribunal erred in law and fact when it failed, being a first appellate Tribunal to revisit the trial tribunals record and the purported evidence and for such error confirmed the trial tribunals decision notwithstanding that the Tribunal dealt with the matter as an appeal from the village Council.

4. That, the person purportedly to be witnesses at the trial Ward Tribunal were not sworn

When the appeal was called on for hearing the appellant had the services of Mr. Masige Robert Advocate while the respondent was in person, unrepresented.

Submitting for the appeal, Mr. Masige argued grounds 1 and 3 together. He stated that the Ward Tribunal was not properly constituted. He raised four issues., **one** that the matter originated from Nyamugasa Village Council before it was taken to Kalemela Ward Tribunal which heard it as an appeal contrary to the law. He referred the court to the last page of the Ward tribunal's decision. **Secondly**, that the Kalemela Ward Tribunal constituted itself as a land Tribunal. Mr. Masige argued that there is no Kalemela Land tribunal in law but rather Ward tribunal and therefore the Land Tribunal that determined the matter is not in existence. **Thirdly**, that there was an improper constitution of the Ward tribunal .On this point, Mr Masige enumerated that the Composition of the Ward Tribunal did not consider gender as per section 11 of the Land Disputes Court Act, that secretary of the Ward Tribunal participated in the proceedings and decision making contrary to the law and that the corum of the Ward Tribunal wasn't reflected in both the proceedings and the decision. He

cited the case of **Paulo Leonard Masahu V. Mohamed Daudi**, Misc. Land Appeal No 124 of 2019 (unreported) to bolster his argument.

Lastly argued Mr. Masige, the trial tribunal's decision do not show whether members gave their vote. He said, the decision of the ward tribunal is a majority decision as per section 4 of the Ward Tribunal Act Cap 206 R.E 2019. What is indicated in the decision is the list of the members and their signature and thus uncertain as to whether they participated in the decision or not and therefore fatal. Mr Masige cited to the court the case of **Maria Aly Ponda V Kherry Kissinga Hassan** (1983) TLR 226 to support his position.

The learned counsel argued further that the 1st appellate Tribunal did not consider these issues in its judgement, but being points of law they can be raised at any point even on appellate stage.

In his second ground of appeal, Mr. Masige complained that, the Kalemela Ward Tribunal did not assign reasons for its decision. It quashed the decision of the Village council without more leaving the appellant unaware of the reasons for the decision. His contention was that, a decision without reasons is not a decision in law. He referred the court to Rule 20 of the

Land Disputes Court (The District and Housing Tribunal) Regulation 2003 and stressed that the omission is fatal. He finally requested the court to allow the appeal with costs.

On his part, respondent had nothing substantially to say, infact he was supported the lower tribunals' decisions.

I have considered the grounds of appeal, parties submissions and the entire record of the appeal. As pointed out by Mr. Masige, the grounds of appeal brought before this court are all new. They were not brought before the 1st appellate tribunal and therefore they were not part of the impugned decision. In his submission, Mr. Masige said, and correctly so that being points of law the grounds can be brought even at an appellate state. That being the position therefore the issues for determination before this court are:

- i. Whether it was wrong for the ward tribunal to entertain a mater as an appeal from the Village Council*
- ii. Whether the ward tribunal constituted itself as a Land Tribunal, if yes again, whether it is fatal*
- iii. whether the Ward Tribunal was properly constituted*
- iv. Whether the reasons for the decisions were included, if not, what are the consequences.*

The decision of the Ward tribunal refers to an appeal meaning that the dispute was determined as an appeal from the Village council. Mr. Masige's complaint is that it was wrong for the Ward tribunal to determine an appeal from the Village Council. I have revisited the Ward tribunals Act as well as the Land Act, my collection from section 62 of the Village Land Act Cap 114 R.E 2019 read together with section 9 of the of the Land Disputes Court Act Cap 216 R.E 2019 it is clear that a person dissatisfied with the Village Councils conclusions of any mediation into a dispute or may refer the dispute to a court having jurisdiction over the subject matter of the dispute. In this matter, respondent utilized his right under the above provisions of the law. Titling it an appeal perse do not change the reality that parties were mediated at the Village council and the respondent found unsatisfied hence the landing of the matter at the trial tribunal.

The question to ask is, is the defect, citing the dispute/complaint as an appeal prejudicial to the appellant. Mr. Masige did not come clearly onto this. This also applies to the complaint that the Ward Tribunal constituted itself into "a land tribunal". It is not disputed that the Ward Tribunal had jurisdiction over the matter except that instead of naming the tribunal a

Ward Tribunal, in its decision, the Chairman refereed the tribunal as Land Tribunal. That is the only complaint. I think, the complaint is not a serous one. The complaint would have been valid and attracted the court's attention if it was directed into the tribunals failure to function properly by having so named. This is more so given the fact that nothing was put on the record to show how the appellant was bigoted. The records are clear that after the filing of the complaint, the tribunal called the parties who presented their case before the final decision. I find support on the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No 3) Act, 2018 [Act No. 8 of 2018], which requires courts to deal with cases justly and to have regards to substantive justice as decided in the case of **Yakobo Magoiga Gichere V. Peninah Yusuph** ,Civil Appeal No. 55 of 2017 (unreported).

I now move to the issue whether the Ward tribunal was properly constituted or not. As rightly submitted by Mr. Masige, Ward tribunal like any other tribunal are creatures of the statute and they derives its powers from the law in which they are established. The Ward tribunal are established under the Ward Tribunal Act Cap 206 R.E 2002. Section 4 of

the Ward Tribunal Act read together with section 11 of the Land Dispute Courts Act, Cap 216 R.E 2019 provide the minimum and maximum quorum of the Ward Tribunal. The sections read: -

"4 (1) Every Tribunal shall consist of-

a) Not less than four or more than eight member elected by the Ward Tribunal Committee from amongst a list of names of persons residing in the Ward compiled in the prescribed manner;

b) A chairman of the tribunal appointed by the appropriate authority from among the members elected under paragraph (a)

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 committee.

3. The quorum at a sitting of a Tribunal shall be one half of the total number of members.

4. At any sitting of the tribunal a decision of the majority of members present shall be deemed to be the decision of the tribunal, and in the event of equality of votes the chairman shall have a casting vote in addition to his original vote"

And section 11 of the Land Dispute's Court Act states:-

"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."

It is clear from the quoted provisions above that the composition of the Ward Tribunal is at least 4 but not more than eight members elected by the Ward Committee which includes the chairman. The quorum at a sitting of a Tribunal is one half of the total number of members and the decision of the majority is the decision of the Tribunal.

Indeed, the proceedings has no quorum and thus, it is not easy to know who sat as members. However, the names of members who participated in the proceedings is appended in a separate paper attached to the

proceedings and signed by all members. Again, the names of members involved during the trial were indicated in the judgment. Is this adopted procedure fatal? On this issue, I find guidance in the Ward Tribunal Act which regulates the proceedings before the Ward Tribunal. Section 15 categorically provided that the tribunal is not bound by the rules of evidence or procedure applicable to any court. The procedure adopted is therefore not fatal. The list of names of members who participated in the hearing and judgment well signed by the members and appended to the proceedings suffices to validate the proceedings.

Another issue pointed out by Mr. Masige is in relation to the taking part in the decision making by the tribunal's Secretary. Trial tribunals decision was signed by five members, Secretary of the Ward Tribunal inclusive. My perusal of the entire Ward Tribunals Act and the Land dispute Court Act, failed to find a provision allowing the tribunals secretary to take part in the decision making. Under section 6(3) of the Ward Tribunals Act, the Secretary of the Ward tribunal is a permanent employee of the Local Government. The provision reads:

“6(3). Appointment to the office of Secretary shall be permanent in the service of the Local Government Authority within the Tribunal to which he is appointed to be Secretary is situated.”

And his responsibilities are stipulated under section 24 (2) of the Ward Tribunal Act, Cap 206 R.E 2002 thus:

(2) The Secretary of a Tribunal shall be responsible for recording all the evidence adduced and other matters formally transpiring during the proceedings before the Tribunal and all other matters in connection with it.”

In the case of **Nada Qori versus Isaki Gilba**, Miscellaneous Land Appeal No. 2 of 2013, High Court of Tanzania, Arusha(unreported) Hon. S. E. Mugasha (as she then was) held that:

“A Secretary is not a member of the Ward Tribunal but an employee of the Local Government Authority. In the circumstances, as the decision is signed by the secretary, the same is tantamount to the disputed being determined by the Secretary who is not a member of the Ward Tribunal and such decision is illegal”

In the present case, the secretary signed the trial tribunals decision. The secretary of the trial Tribunal in this matter assumed jurisdiction which is not his. This alone vitiated the proceedings for want of jurisdiction. It is a settled principle that a decision made without jurisdiction is not a decision in the eyes of the law. See the case of Fanuel **Mantiri Ng'unda V. Herman M. Ng'unda**, Civil Appeal No. 8 of 1995(unreported). In **Tanzania Revenue Authority vs Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (unreported) the Court stated:

"Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests".

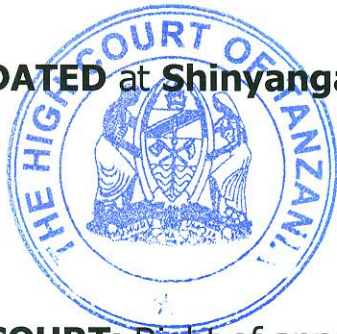
And the court in the same case above said, an issue questioning or addressing the jurisdiction of a court is paramount and can be raised at any time even at the stage of appeal.

Aided by the above case laws, I find merit in this ground. The trial tribunals decision is a nullity. This being the case, this court nullifies all proceedings of the trial tribunal and set aside its decision. The proceedings of the 1st appellate tribunal are also nullified for being rooted on a nullity. The

impugned judgment is as well set aside. Hearing of the matter de novo is hereby ordered. Since this ground has disposed of the appeal, I will refrain from determining the last issue.

Taking into account the general nature of the proceedings and the fact that the irregularity was committed by trial tribunal. I order each part to bear its own costs. It is so ordered.

DATED at **Shinyanga** this 11th day of **December**, 2020.




E.Y. MKWIZU
JUDGE
11/12/2020

COURT: Right of appeal explained.


E.Y. MKWIZU
JUDGE
11/12/2020