IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

MISC. LAND APPEAL NO. 34 OF 2020

(C/F the District Land and Housing Tribunal for Arusha at Arusha in Misc. Application No. 270 of 2019, Originating from Nduruma Ward Tribunal Land Application No. 1 of 2019)

NOLARI SINYAKWA ..... 1ST APPELLANT

ZAKAYO SINYAKWA ..... 2ND APPELLANT

Versus

ESTER SINYAKWA ..... 1ST RESPONDENT

JENISTINA SINYAKWA ..... 2ND RESPONDENT

NAOMI SINYAKWA ..... 3RD RESPONDENT

JUDGMENT

4th & 17th December, 2020.

Masara, J.

The Respondents successfully sued the Appellants before Nduruma Ward Tribunal (the Trial Tribunal) claiming for a piece of land measuring seven acres (the suit land). The trial Tribunal declared the Respondents the lawful owners of that land. The Appellants were aggrieved, they approached the District Land and Housing Tribunal for Arusha (the District Tribunal) in Misc. Application No. 270 of 2019 by a way of Revision seeking to challenge the trial Tribunal decision but the Application was dismissed. The Appellants have preferred this appeal against the decision of the District Tribunal on the grounds hereinbelow reproduced verbatim:

a) *That, the Honourable Chairman erred in law and fact by not making any finding on the legality, propriety of the trial Tribunal using only facts and opinions given during mediation meeting as only reasons to decide who was the owner of the disputed land rather than considering the evidence given during trial;*

b) *That, the Honourable chairman erred in law and fact by holding that the Appellants were given right to be heard during trial while only facts and opinions in the mediation meeting in which the Appellants could cross not cross examine were used by the trial Tribunal as the basis of deciding the application before the trial Tribunal;*
c) *That, the Honourable chairman erred in law and fact by not making any finding on the legality of the trial Tribunal using facts and opinion arising during mediation in judgment although the same was raised as an issue of illegality and submitted by both counsel during revision;*
d) *That, the Honourable Chairman erred in law and fact in holding that the matter was a land matter while it was purely a probate matter;*
e) *That, the Honourable chairman erred in law and fact in holding that the Ward Tribunal of Nduruma had jurisdiction to entertain the application while the application was time barred;*
f) *That, the Honourabble Tribunal Chairman erred in law and fact by deciding that the Respondents had locus standi to prosecute the matter while they were not; and*
g) *That, the Honourable Tribunal erred in law and fact by not making a finding that the trial Tribunal was not properly constituted as the gender of the members of the Tribunal was not clearly given.*

Facts leading to the dispute at hand are as follows: The Appellants and the Respondents are blood relatives sharing the same father, the late Sinyakwa Lemikooi. The Appellants are children of the elder wife while the Respondents are children of the younger wife who has since died. In the 1970's, prior to his death, the late Sinyakwa Lemikooi divided his farm into two parts. The elder wife and his children were given the upper side and the younger wife and her children were given the lower side. The suit land is located at Olodenderiti Hamlet, Nduruma Village and Ward.

The Respondents in the trial Tribunal complained against the Appellants that the Appellants trespassed in the suit land measuring 7 acres which belonged

to their mother. According to their testimonies, the first Appellant trespassed into 3 acres, the second Appellant trespassed on a piece of land above ¼ an acre and Naigisa Sinyakwa who was the third Respondent in the trial Tribunal trespassed on 2 acres. According to the trial court records, the Respondents were uncertain over the piece of land they were claiming stating that they had not measured it out.

In 2005, the Respondents approached the Appellants claiming for their land but they were told that they had no land in their father's estate. On 6/2/2008, the land was divided among the Respondents in a family meeting which was convened by the clan elders. It is not clear as to whether the land allocated to the Respondents was the one trespassed by the Appellants.

On 12/2/2019, the Respondents filed Land Case No. 1 of 2019 at the trial Tribunal. On 30/3/2019, there was convened another family meeting in which the members of the Ward Tribunal also participated. In that meeting, the Respondents placed their claims before the clan elders, and it was resolved that a piece of land which belonged to their elder brother Naigisa be allocated to the Respondents. They were also given a path leading to the land that was given to them.

The Respondents were not happy with the resolution made by the clan elders. They decided to prosecute their case which was pending before the Ward Tribunal. The Appellants entered appearance, but as soon as the Respondents closed their evidence, the Appellants defaulted appearance

despite being served several times. On that account, the Tribunal decided to enter an ex-parte judgment on 20/6/2019 declaring the Respondents lawful owners of the suit land.

The Appellants were dissatisfied, they challenged the decision of the trial Tribunal by a way of Revision in the District Tribunal Vide Misc. Application No. 270 of 2019 moving the Tribunal to examine the propriety of the record of the trial Tribunal. In its ruling, the District Tribunal dismissed the application for being devoid of merits. It is against that decision the Appellants seek to challenge in this Court.

At the hearing of the appeal, the Appellants were represented by Mr. Deogratius Njau, learned advocate, while the Respondents engaged the services of Mr. Severine Lawena, learned advocate. The appeal was argued through filing of written submissions.

Before submitting on the merits of the appeal, Mr. Njau brought to the attention of the Court a complaint regarding the competency of the Ward Tribunal which determined the case. He stated that the trial Tribunal that determined the suit was named "Baraza la Ardhi Kata ya Nduruma" which is Nduruma Land Ward Tribunal, contrary to what is required of the law. According to Mr. Njau, section 3(2) of the Land Disputes Courts Act and section 10 of the Ward Tribunals Act, establish Ward Tribunal and not Ward Land Tribunals as the one that determined the suit. In Mr. Njau's view, the Ward Land Tribunal which determined the claim is non-existent. Therefore,

the judgment emanating there from and that of the District Tribunal are a nullity, he says.

In response, Mr. Lawena stated that the proceedings of the trial Tribunal are in Kiswahili so it would be absurd for the name of the Tribunal to be written in English.

I deem it appropriate to address the complaint raised by Mr. Njau regarding the competency of the trial Tribunal which determined the suit before outlining what he submitted on the substance of the appeal. According to Mr. Njau, the Tribunal which presided over the suit was named *'Baraza la Ardhi Kata ya Nduruma'* which if unofficially translated it would be equivalent to *'Nduruma Ward Land Tribunal'* and not the Ward Tribunal as dictated by the law. In my considered opinion, this was highly misconceived. This Court does not expect to hear such trivial matters being raised by an advocate thereby consuming unnecessarily the precious little time available in determining the rights of the parties. It is high time now that courts are left to determine substantive issues touching on the rights of the parties, as that is the spirit behind the introduction of the overriding objective in our legal system. The spirit behind the overriding objective principle is that courts shall administer substantive justice without undue regard to technicalities. I am guided by the decisions of the Court of Appeal in ***Yakobo Magoiga Kichere Vs. Peninah Yusuph***, Civil Appeal No. 55 of 2017 and ***Puma Energy Tanzania Limited Vs. Ruby Roadways (T) Limited***, Civil Appeal No. 3 of 2018 (both unreported).

Mr. Njau has not shown any prejudice suffered by the Appellants by the name styled in the trial Tribunal. I say so because, Ward Tribunals preside over numerous matters, including Marriage Conciliation Boards resolving matrimonial disputes, they also adjudicate civil and criminal matters whose appeals are determined by Primary Courts. This is provided under sections 8, 9 and 10 of the Ward Tribunals Act. In the course of distinguishing the function before the trial Tribunal at that particular moment and its other functions, it was not unusual for the Tribunal to designate itself as Nduruma Land Ward Tribunal showing that it was presiding over a land dispute. After all, that was only nomenclature, which has not affected the rights of the parties. I therefore dismiss that claim.

Submitting on the substance of the appeal, Mr. Njau covered the first, second and third grounds of appeal combined, stating that in the District Tribunal the Appellants raised an illegality in the trial Tribunal decision as it based on the mediation minutes. He averred that the judgment of the trial Tribunal was made out of statements of people who never testified in the Tribunal and who were not cross examined by the Appellants. This denied the Appellants the right to be heard as they were denied the right to hear the evidence of those witnesses and counter the same. Mr. Njau added that such irregularity itself was sufficient to nullify the judgment and proceedings of the trial Tribunal but the District Tribunal did not make any finding on such illegality.

Submitting on the fourth ground of appeal, Mr. Njau contended that the suit land was inherited from the parents of the parties herein. According to Mr. Njau, there was no evidence that the land was distributed to the Respondents nor was there any proof that there was appointed an administrator of the deceased's estate.

Mr. Njau dropped the fifth ground of appeal. His submission regarding the sixth ground of appeal was that all the Respondents' testimonies at the trial Tribunal was a claim that they were claiming their mother's land but none proved that she was the appointed administratrix of her deceased mother. Mr. Njau's submission on the seventh ground of appeal was that the trial Tribunal was not properly constituted basing on gender. He argued that the Tribunal was presided by only 2 women contrary to what is stated under section 11 of the Ward Tribunal's Act which provides that the Tribunal shall have not less than four members nor more than 8 out of which 3 must be women. To buttress his argument, he cited ***Lomnyaki Leketia Vs. Dominic Leketia***, Misc Land Appeal No. 10 of 2013 and ***Perpetua Lema Vs. Rose Abia***, Misc Land Appeal No. 44 of 2016 (both unreported). Basing on his submission, Mr. Njau prays that the decisions of the lower Tribunals be quashed and set aside.

Submitting in response to the first, second and third grounds of appeal, Mr. Lawena contended that the Respondents gave their evidence in the trial Tribunal and were cross examined by the Appellants. The Appellants on their own accord defaulted appearance when they were required to give their

defence. That they did not contest the evidence that was given by the Respondents. Mr. Lawena further contended that it was the Appellants who had a duty to move the District Tribunal on that aspect but it was never raised in the revision; therefore, in his view, it is an afterthought. He maintained that there was no provision that was violated.

Responding to the fourth and sixth grounds of appeal, Mr. Lawena submitted that the Trial Tribunal directed itself rightly basing on the statement of complaint that was made by the Respondents which showed that it was a land dispute and not a probate matter as alleged. According to Mr. Lawena, this was rightly ruled out at page 9 of the typed ruling of the District Land Tribunal. Therefore, since the Respondents were claiming that the Appellants had trespassed on their own land the question of *locus standi* was resolved.

Encountering the seventh ground of appeal, Mr. Lawena fortified that the quorum of the trial Tribunal was properly constituted. The Tribunal sat with not less than four members and not more than eight and three were women. He added that all the parties were accorded the right to be heard but the Appellants decided to waive their right by defaulting appearance in the Tribunal where they could adduce the story of their side. According to Mr. Lawena, section 16(2)(b) of Cap 216 directs that objection should be levelled against individual member and not the whole Tribunal. The learned advocate also averred that the Appellants were to seek redress by a way of appeal and not revision as they preferred. On that argument he cited the decision of the Court of Appeal in the case of ***Abdallah Hassan Vs. Juma Hamis***

Sekiboko, Civil Appeal No. 22 of 2007 (unreported). Basing on the submission made, Mr. Lawena implored the court to dismiss the appeal with costs for being devoid of merits.

In a rejoinder submission, Mr. Njau contended that in the revision application counsels for both parties raised illegality regarding the use of mediation minutes in the trial Tribunal decision but the District Tribunal did not consider the same. He maintained that since the parties are the children of the same father, there must have been an administrator of the estate of their deceased father's estate. Mr. Njau maintained that the Respondent's counsel failed to give out the names of the female members who participated in the determination of the suit in the trial Tribunal. He thus reiterated his earlier prayers.

I have given considerable weight to the submissions by the counsel for the parties as well as the record of the lower tribunals. I will deal with the grounds of appeal as submitted by the learned counsels. Regarding the first, second and third grounds of appeal, Mr. Njau submitted that the trial Tribunal judgment was tainted with illegalities in that the basis of its decision emanated from the family meeting minutes rather than evidence adduced by the parties at the trial. On his part, Mr. Lawena was of the view that the trial Tribunal rightly arrived at its decision after considering the evidence of the Respondents in the trial Tribunal.

I have carefully revisited the trial Tribunal record as well as that of the District Tribunal. I agree with Mr. Njau that the decision of the trial Tribunal contained facts which were not adduced in evidence by the Respondents. I will point out some of those facts. In the trial Tribunal record, according to the testimonies of the Respondents, the first Appellant trespassed into a piece of land measuring 3 acres but in the judgment, it shows that he trespassed into a piece of land measuring 4.5 acres. The other facts are contained at page 2 of the typed judgment, in which the trial Tribunal stated inter alia:

> *"Kutokana na utaratibu wa kimila ambao mali ikiwemo ardhi hugawanywa kwa wake kama mume atakuwa na mke zaidi ya mmoja na baadae mali ikiwemo ardhi hugawanywa kwa idadi ya watoto wa mzee Sinyakwa Lemikoi (ambaye ni marehemu kwa sasa) kwa mujibu na maelezo na ushahidi wa upande wa mdai/wadaawa na kutokana na hali iliyojitokeza katika kikao cha usuluhishi nyumbani yenye dalili ya unyanyasaji wa kijinsia, kuwa wadai kwa mama yao hakuna mtoto wa kiume atakayekuwa mrithi kwa niaba ya dada zake na watoto hao wa kike wameshaolewa hivyo warizike na ardhi/sehemu ya ardhi walioachiwa na boma katika vikao vyake na kikao hicho kutawaliwa na matamko makali kuwa ndiyo lenye tamko la mwisho katika shauri hili, Baraza kwa ujumla wake limeamua kuwa:- ... "*

All the above passage was not part of the trial Tribunal's record although it formed the basis of the decision. As rightly submitted by Mr. Njau, that was not in order considering the fact that members of the trial Tribunal also participated in the family meeting which was convened on 30/3/2019 as the minutes of that meeting reveal. It defeats logic that such an obvious flaw of procedure was not discussed by the District Tribunal while determining the revision on the ground that it ought to have been referred there through an

appeal. This was an error. It is settled law that failure to afford a party a right to cross examine witnesses on a particular fact is tantamount to denying that party the fundamental right to be heard. This position was restated by the Court of appeal in the case of ***Mrema Vs. Kivuyo*** [1999] 1 EA 190, where it was held:

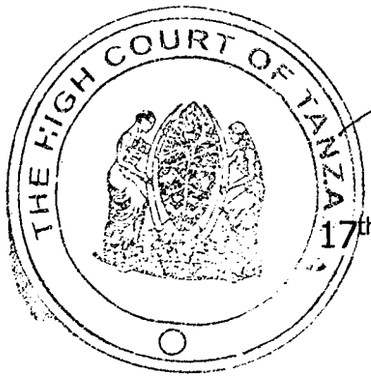
> *"However, as matter of natural justice, we think it was erroneous on the part of the Learned Judge not to give the Appellant the opportunity to cross-examine the Magistrate on the matter."*

See also ***Gift Mariki and 2 Others Vs. Republic***, Criminal Appeal No. 289 of 2018 (unreported). Failure to accord a party the right to cross examine vitiates the proceedings and decision thereon.

As it was held by the District Tribunal Chairman, factors upon which the District Tribunal can revise the proceedings of the Ward Tribunal and give its directions is section 36(1) of the Land Disputes Courts Act, Cap 216 [R.E 2019]. One of those factors is failure to abide to the rules of natural justice. Denying the Appellants the right to cross examine on the new facts, amounts to denying them the right to be heard. As intimated earlier on, the Appellants were denied the right to be heard as the decision of the trial Tribunal based on evidence that was not subjected to cross examination. Having so decided, this being breach of fundamental right to be heard, the proceedings of the trial Ward Tribunal were vitiated, therefore the judgment emanating there from was also a nullity.

For the reasons I have endeavoured to discuss, I am constrained to nullify the decisions of both tribunals below and set aside their respective decisions. I remit back the record to the trial Tribunal in order for it to compose a fresh judgment that will reflect the evidence adduced by the parties. Since the irregularity was not attributed by the parties, I make no order as to costs.

Order accordingly.



Y. B. Masara

JUDGE

17th December, 2020