

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**(IN THE DISTRICT REGISTRY OF TANGA)**

**AT TANGA**

**MISC. LAND APPEAL NO. 12 OF 2021**

*(Emanating from Land Case No. 09 /2021 at Mazingara Ward Tribunal and Appeal No. 124 of 2019 at Korogwe District Land and Housing Tribunal)*

**CHIMILE MBAIGWA SEMBOGA.....1<sup>st</sup> APPELLANT**

**MICHAEL YANAI MOLLEL.....2<sup>nd</sup> APPELLANT**

***-VERSUS-***

**THECLA F.B. MWINGWA.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 31/08/2021*

*Date of Judgment: 15/10/2021*

**AGATHO, J.:**

The Appellants in this matter are dissatisfied with the decision of the District Land and Housing Tribunal for Korogwe at Korogwe in Land Appeal No. 124 of 2019 and therefore they preferred an appeal before this Court. In the Petition of Appeal, the Appellants raised the following grounds;

1. That, the Honourable Appellate Tribunal erred in law and fact for entertaining the matter with changes of assessors therein.

2. That, the Honourable Appellate Tribunal erred in law and fact for upholding the decision of the Ward Tribunal which was delivered in favour of a stranger person i.e. Helen Makoni and Dorothea Makoni.
3. That the Honourable Appellate Tribunal erred in law and fact for holding that the Ward Tribunal had pecuniary jurisdiction to entertain the matter to its finality of which the subject matter worth more than three million.
4. That, the Honourable Appellate Tribunal grossly erred in law and fact for upholding the decision of the lower Tribunal of which it's contradictory thereof.
5. That both the Ward Tribunal and the District Land and Housing Tribunal grossly erred in law and fact for delivering the judgment in favour of the Respondent while there was non-joinder of the necessary party.
6. That the Honourable District Land and Housing Tribunal erred in law and fact for failure to consider that the coram of the Ward Tribunal was not properly constituted therein.
7. That both the Ward Tribunal and District Tribunal grossly erred in law and fact for failure to consider the documentary evidence tendered by the 2<sup>nd</sup> Appellant therein.

Before considering the grounds of appeal, briefly the facts of the case are as follows; the Respondent instituted a matter before the Ward Tribunal of Mazingara situated within Handeni District against the Appellants complaining that the Appellants had encroached her piece of land contrary to the law. The tribunal having heard the parties entered a decision in favour of the Respondents. At the trial tribunal, the Respondent sued one Mbelwa Rajabu, Chimile Mbaigwa Semboga and Michael Yanai Molel. The first Appellant was found guilty of the offence of forcible detainer contrary to Section 86 of the Penal Code, Cap 16 RE 2002 and was ordered to compensate the Complainant/Respondent for uprooting the beacons installed on the land and to vacate the land in dispute whereas the second and third Respondents' ownership with respect to the lands that they alleged to acquire which was considered to be 20 acres each was revoked. They were aggrieved with the decision of the Ward Tribunal and hence they decided to appeal to the District Land and Housing Tribunal for Korogwe at Korogwe. The appeal was not in their favour, the decision of the trial Tribunal was upheld. The second and the third Respondents now as Appellants decided to appeal to this Court unlike the first Respondent who did not appeal.



On the 31<sup>st</sup> of August 2021, the Court ordered that the matter be disposed by way of written submissions. A schedule for filing submissions was set and complied with. The Appellants were represented by Ms. Grace Ntambi while the Respondent was represented by Ms. Lucy. P. Nambuo, (Advocates).

Considering the grounds of appeal, I prefer to start determining the third ground on the issue of pecuniary jurisdiction of the trial Tribunal. In his submission, the counsel for the Appellant submitted that the trial Tribunal had no pecuniary jurisdiction to determine the matter since at the Tribunal the Respondent claimed a total of 150 acres which were awarded and was of the view that the land in dispute was estimated to be above three million. The counsel further submitted that the agreement for revocation between Mazingara Village Council is worth more than 40 million and that the suit land value is more than three million. She further added that during the visiting of the locus in quo, the exhibits tendered by the Appellants indicated that the Ward Tribunal awarded to the Respondent more than 300 acres. The counsel for the Respondent on her side submitted that the Respondent was allocated 50 acres only by the Village Council and that the allegation that the land in dispute was 300 acres or 150 acres as alleged by the counsel for the Appellant has not been

established and by even a valuation report. It is an established principle under the law of evidence that he who alleges must prove. This is according to Section 110 of the Evidence Act [Cap 6 R.E 2019]. The Section provides;

*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

It is noted that there is nowhere in the proceedings that the value of the subject matter has been indicated, however this Court has observed that the Respondent was allocated 50 acres of the land by the Village Council, this is according to the minutes of the Village Council dated 04/04/2014 and the letter of the Respondent requesting for land dated 15/02/2014 directed to "Ofisi ya Serikali ya Kijiji " those were annexed to the list of exhibits that were submitted before the Tribunal on the 19<sup>th</sup> of September, 2019 and in the complaint before the Tribunal, the Respondent stated that;

*Nawalalamikia watajwa hapo juu kwa kosa la kuvamia eneo la shamba langu kinyume na taratibu za kisheria.*

Further, the locus in quo proceedings of 28/08/2019 sketch map of the trial Tribunal indicated that the Respondent had 46.3 acres and one Thecla Makoni also Dorophe Makoni whom the Respondent alleged to be his sisters and that each possess 46.3 acres. Again, although the letter addressed to the Ward Tribunal by the Village Chairman dated 16/05/2019 indicated that the Respondent was allocated 150 acres for three of them, in her testimony at the trial Tribunal, page 2 of the proceedings she stated that;

*Nawashitaki na kuwalalamikia watajwa hapo juu kwa kosa la kuvamia eneo la shamba langu kinyume na taratibu za kisheria.*

Also, there is no substantive evidence to prove the alleged revocation agreement worth 40 million. On page 82 of the judgment of the trial Tribunal indicated that 20 acres unlawfully acquired by the second Respondent and 20 acres acquired by the first Respondent were revoked, that means the revocation did not cover the land which exceeded 50 acres. From the above position it is now established that the Respondent claimed for ownership of 50 a piece of land not exceeding 50 acres. Now, the question is are the 50 acres of the land in dispute exceed the pecuniary jurisdiction of the trial Tribunal which is 3,000,000/= as per Section 15 of



the Courts Land Dispute Settlement Act Cap 206? Indeed, this fact requires evidence and since the Appellants have not proved such fact then the ground is considered as of no merit and it is therefore dismissed.

The counsel for the Appellants did not submit on the fourth ground and this Court therefore considers the ground as abandoned.

With respect to the fifth ground, that the trial Tribunal delivered the decision in favour of the stranger persons namely Helen Makoni and Dorothea Makoni. The counsel for the Appellants argued that such persons allegedly to be the Respondent's sisters were neither called by the Respondent nor the Ward Tribunal to testify before it and still the Tribunal revoked ownership of land from the Appellants and awarded the same to the Respondent and her sisters. The counsel for the Respondent argued that the Respondent merely narrated the background that they applied for the allocation of the land while they were three of them and each was allocated 50 acres of the land, also they contributed 1,000,000/= Tshs for development activities. The counsel further submitted that it was the Respondent's land that was encroached and that there is no pleading that shows that the land in dispute was owned by other persons. Considering the judgment of the Ward Tribunal, at page 80 and page 81, it is clear that

the Tribunal's decision covered the Respondent and the other two fellows (sisters) without assigning reasons thereto considering the fact that the other two fellows were not parties to the dispute and they were not joined whatsoever and the Respondent was not representing them in any manner as she sued the Appellants to protect her piece of land. The relevant part of the judgment reads;

*"Baraza la Kata la Mazingara limetoa haki kwa mlalamikaji Thecla F.B. Mwingwa na wenzake Helen Makon `na Dorothea Makon kwamba eneo la ardhi ya shamba lenye mgogoro la ekari ia moja na hamsini ni haki yao."*

That establishes the fact that the Ward Tribunal delivered the decision in favour of three persons while it was only the Respondent who complained to protect her piece of land.

With respect to the 5<sup>th</sup> ground, the counsel for the Appellant argued that the District Land and Housing Tribunal grossly erred in in law and fact for non-joinder of the necessary party. The counsel argued that since the second Appellant tendered copies of the sale agreement, then the sellers ought to be joined as parties to the suit, the counsel further argued that the Ward Tribunal's order that required the sellers to pay back the



Appellants while they were not called to testify or defend themselves was manifestly wrong and as such, the Tribunal's decision deserves to be nullified. She referred the case of **Stanslaus Juma B. Kadala vs Laurent Mkande (1993), TLR 103** where it was held that in a suit for the seller as a necessary party defendant, non-joinder will be fatal to the proceedings. The counsel for the Respondent argued that the party ought to be joined was not disclosed and that it is not the obligation of the Court to remind the parties to add more parties. Considering the Appellant's submissions, the counsel for the Appellant mentioned the sellers as one Athumani Abdallah Salehe, Bakari Zuberi Gumbo and Ahamada Mohamedi Ndege who were to be joined in the suit. At that juncture I concur with the counsel for the Appellant that the sellers ought to be joined in the suit and that in the absence of the sellers then that was an irregularity.

Regarding the seventh ground on the Ward Tribunal's failure to consider the documentary evidence tendered by the second Appellant, the counsel for the Appellant submitted that the trial Tribunal failed to consider the sale agreement tendered by the second Appellant, the counsel for the Respondent does not dispute the fact that the second Appellant tendered documentary evidence but did not explain as to whether the evidence was considered. The Court has read the judgment of the trial Tribunal and

observed that it only stated that the first Appellant did not tender documentary evidence even the Appellate Tribunal noted that the 1<sup>st</sup> Appellant did not tender documentary evidence [see page 5 of the District Land and Housing Tribunal ruling] with regard to the documentary evidence tendered by the second Appellant, the same were considered by the District Land and Housing Tribunal at page 4 where the Chairman at the appeal stage when he observed that while the second Appellant tendered documentary evidence dated between 18<sup>th</sup> day of September, 2017 and 11<sup>th</sup> day of November, 2018 the Respondent tendered documents dated 2014 and therefore considered the Respondent as the rightful owner of the land in dispute since she possessed the same earlier than the Appellants. In my view, it was proper for the Appellate Tribunal to consider such evidence at the appeal level. Therefore, this ground has no merit.

On the first ground, regarding the change of assessors at the appellate Tribunal, the counsel for the Appellant submitted that the assessors who sat for the case on 11/08/2020 were one Mrs. Wasiwasi and Nampesya however the Tribunal only adopted the opinion of the assessor one Mrs. Kiondo who opined in the Respondent's favour and that the opinion of one assessor Mr. Mkwazu has not been considered. The counsel further submitted that the chairperson did not let the assessor give their

opinion contrary to Regulation 2 of the Land Dispute Courts (The District Land and Housing Tribunal) Regulation of 2003 which provides that the chairman before making his judgment shall require every assessor to present at the conclusion of hearing to give his opinion in writing and that the assessor may give his opinion in Kiswahili. The counsel referred the case of **Edina Adam Kibona V Absolom Swebe (Sheli) Civil Appeal No. 286 of 2017, CAT at Mbeya (Unreported) at page 5** where it was inter alia held that;

*".....since regulation 19 (2) of the regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in final verdict."*

The counsel for the Respondent on his side argued that Regulation 19 (2) is not applicable at the appellate stage but rather during hearing of the Application and where the appeal is disposed by way of written submissions. Having read the proceedings of the Appellate Tribunal, it is clear that there was change of assessors. As a matter of practice,



assessors are supposed to be present from the first day that they have been assigned to assist in determination of the matter. Change or absence of the assessor is supposed to be disclosed and to be recorded in the proceedings. The fact that the matter was disposed by way of written submissions and that it is an appeal is immaterial because even at the appeal stage, hearing is conducted and the submissions are considered to be the same as the evidence and that is why if parties do not file their submissions, the matter is supposed to be dismissed for want of prosecution. From the above position, the Chairman is supposed to read the contents of the submissions to the assessors who have been appointed to assist in the matter. In the proceedings of the appellant Tribunal, there are no reasons assigned on change of assessors and there is no record indicating that the contents of the submissions were read before the assessors. I am of the view that the chairperson of the District Land and Housing Tribunal should on appeal read over to the assessors the evidence on record. The record of the present case shows that one assessor (Mr. Kiondo) was absent in the tribunal on 16/09/2020. Meaning that he did not know what transpired on that day. In the case of **Joseph Kabul vs Reginam [1954-55] EACA Vol. XX-2** as referred in the case of **Mbarak and Another vs Kahwili, Civil Appeal No.154 of 2015 CAT of**

**Tanzania at Iringa** it was held that where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity. Again, in the proceedings of the Appellate Tribunal, assessor's opinions were annexed in a case file but the Chairman did not indicate whether the opinions of assessors were read and he just adopted the opinion of one assessor leaving the other opinion of the assessor intact. That is an irregularity that vitiates justice. This situation resembles with the facts in the case of **Edina Adam Kibona (supra)** and from such irregularity the Court nullified the proceedings. In the case at hand, it is also observed that while one assessor Mr. Kiondo submitted his opinion to the tribunal on 13/11/2020, another assessor (Mkwazu Hamisi) brought his opinion on 12/12/2020 that is four (4) days after the judgment which was delivered on 08/12/2020. This is apparent irregularity.

Lastly, is about the issue of the coram of the Ward Tribunal allegedly not to be properly constituted as per ground six of the Petition of Appeal. The counsel for the Appellants argued that assessors which I think was supposed to be termed as members were not revealed in the proceedings of the Tribunal and that the Secretary of the Tribunal participated as a member of the Tribunal which is contrary to the law. On her part, the counsel for the Respondent argued that the coram was properly

constituted and that since the document is the judgment and not proceedings then it is not necessary to indicate the coram of assessors. The Court having observed the document entitled as "*YAH: MAAMUZI/HUKUMU YA BARAZA LA KATA YA MAZINGARA YA SHAURI LA MADAI YA ARDHI (SHAMBA) NA. 09/2019 KATI YA MDAI.....*" that document appears to be the proceedings of the Ward Tribunal; however, page 78 is the judgment of the Tribunal. Also, there is another document entitled as *YAH: "LALAMIKO LA MADAI YA ARDHI SHAMBA NA. 09/2019....."* That also seems to be the proceedings of the Ward Tribunal. The two documents are contradictory and to some of the dates such as on 11/07/2021 members of the Tribunal have not been indicated in the coram which is fatal. Also, on 28/08/2019 and on 04/09/2019 there happened to be change of the members of the Tribunal which is fatal. Regarding the participation of the Secretary of the Tribunal, I concur that the Secretary is not a member of the Tribunal, however under Section 24 (2) of the Ward Tribunal Act, Cap 206 the Secretary is 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. Under that position of the law, a Secretary of the Tribunal has been lawfully appointed to discharge his or her duties and



that cannot affect the proceedings of the Ward Tribunal. This ground therefore is partly dismissed.

The Court having considered submissions from both sides along with the records of the trial Tribunal and the Appellate Tribunal finds that apart from the fourth ground which was abandoned and the seventh ground which is considered not to have been established, the rest of the grounds have merits and that due to the improper composition of the coram of the trial Tribunal, non-joinder of the necessary parties (sellers of the land in dispute), also this Court also considers that as there were irregularities with respect to involvement of the assessors at the Appellate Tribunal and the process of delivery of the opinions then there are the reasons sufficing this court to quash the decision of the Appellate Tribunal and nullify the proceedings and the judgment of the Ward Tribunal and further order for retrial be conducted before a new set of members for the interest of justice.

It is so ordered.

**DATED at TANGA 15<sup>th</sup> day of October, 2021.**



  
**U. J. AGATHO**  
**JUDGE**  
**15/10/2021**

Date: 15/10/2021

Coram: Hon. Dr. U. J. Agatho, J

Appellant: Grace Ntambi Advocate

Respondent: Present and Grace Ntambi holding brief of Nambano Advocate

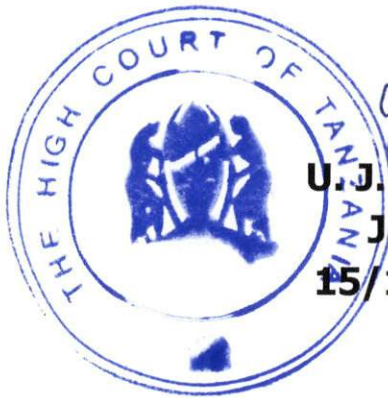
C/C: Zayumba

**Court:** The judgment is delivered in the presence of the Respondent and Grace Ntambi Advocate for the Appellant.



**U. J. AGATHO**  
**JUDGE**  
**15/10/2021**

**Court:** Right of Appeal explained.



**U. J. AGATHO**  
**JUDGE**  
**15/10/2021**