

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TANGA DISTRICT REGISTRY)**

AT TANGA

LAND APPEAL NO. 38 OF 2020

(From the Judgment of the District Land and Housing Tribunal for Tanga in Land Appeal No. 83 of 2019, dated 09th day of October, 2020, also originating from the decision of Tingeni Ward Tribunal in Application No. 5 of 2019 dated 22th day of November 2019)

ABDI TWALIB.....APPELLANT

-VERSUS-

SOPHIA MOHAMEDI.....RESPONDENT

JUDGMENT

Date of Last Order:-27/09/2021

Date of Judgment:- 20/10/2021

AGATHO, J.:

This is an Appeal against the decision of the District Land and Housing Tribunal for Tanga at Tanga in Land Appeal No. 83 of 2019 arising from the decision of the Tingeni Ward Tribunal in Application No. 5 of 2019. The facts that gave rise to this Appeal are that on the 4th of September 2019, the Respondent instituted a matter at the Ward Tribunal against the Appellant complaining that the Appellant had trespassed into his farm which he inherited from his deceased mother. The complaint was vehemently disputed by the Appellant who on his part also argued that the land in dispute belonged to his deceased father and that they had previously referred the matter to the Village Land Council where upon resolution of the dispute, they were ordered to remain to their respective parts of the land. The Ward Tribunal decided the matter in favour of the Respondent and confirmed the

division of the land in dispute as it had already been done by the Village Government with respect to the complaint referred before the Village Land Council. The Appellant was dissatisfied with the decision of the Ward Tribunal and therefore appealed to the District Land and Housing Tribunal where upon determination, the decision of the Ward Tribunal was upheld. Again, aggrieved with the decision, the Appellant has appealed to this Court basing on the following grounds;

- (1) That the first appellate Tribunal erred in law and on facts by completely misapprehending the substance, nature and quality of the evidence on record, resulting in unfair findings and miscarriage of justice on the part of the Appellant.
- (2) That the first appellate Tribunal erred in law and on facts in failing to re-evaluate the evidence on record so as to make its own finding on the contested facts in issue, hence leaving the contested material facts and law unresolved.
- (3) That the trial Ward Tribunal erred in law and on facts on upholding the judgment of the trial Tribunal and thereby converting a nullity into validity while irregularities of the tribunal.

From the above grounds, the Appellant prayed that the Appeal be allowed and the proceedings and judgments of the first appellate Tribunal and the trial Ward Tribunal declared null and void.

The Court ordered the matter be disposed by way of written submissions, the same were filed in Court as it was so ordered. In determining this appeal, the Appellant was represented by Mr. Abdallah Hassan Kilule (Advocate) whereas the Respondent was not under legal representation. This Court has observed the grounds of appeal and preferably the third ground will first be determined as it is based on the validity of the decision of the Ward Tribunal.

Submitting for the Appellant, Mr. Kilule argued that despite the fact that the Chairman of the Ward Tribunal noted irregularities in the proceedings of the trial Tribunal that it was not properly constituted and stated that the proper remedy was of the view that the proper remedy was to return the case to before the trial Tribunal, the counsel was of the view that the Chairperson misapprehended the position of the law in reaching to the decision. He argued that the moment the trial tribunal was improperly composed, the jurisdiction of the Ward Tribunal was destroyed, however the Chairperson did not declare the judgment of the trial Tribunal a nullity, instead made speculative remarks that on what will transpire during a fresh trial of the matter at the Ward Tribunal if an order for re trial will be issued. To strengthen his argument, he referred the case of **Mariam Ally Ponda vs Kherry Kissinger Hassan [1983] TLR 223** where it was held that absence of jurisdiction means absence of lawful trial and that the Court

destroys its jurisdiction the moment it is unlawfully constituted. The counsel further argued that Section 45 of the Land Disputes Courts Act, Cap 216 R.E. 2019 as referred by the Chairperson of the District Land and Housing Tribunal cannot cure irregularities regarding unlawful composition of the Ward Tribunal. He argued that the provision refers to procedural irregularities and not irregularities that go to the root of the jurisdiction of the Tribunal. He added that the Chairperson failed to state lack of failure of justice in reaching to the decision.

Regarding the irregularities, the Respondent referred to Section 45 of the Land Disputes Courts Act [CAP 216 RE 2019] which was also referred by the Chairperson of the District Land and Housing Tribunal which provides that no decision or order of the Ward Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during hearing or in such decision or order or on account of improper admission or rejection of evidence has in fact occasioned a failure of justice and was therefore of the view that the decision of the District Land and Housing Tribunal was proper. The Respondent also referred the case of **Yacobo Magoiga Gichere vs Peninah Yusuph, Civil Appeal No. 55 of 2017 CAT (unreported)** and the case of **John S/Mgawe vs Aneth D/O Adam and Another, Misc. Land Appeal No.25 of 2020, High Court of Tanzania at Sumbawanga (Unreported)** where the

Courts invoked the overriding objective principle which requires Courts to deal with cases justly and to have regard to substantive justice and refrain from procedural irregularities.

This Court has considered submission from both sides and observed that it is clear there were irregularities regarding the composition of the Ward Tribunal. The decision of the Tribunal was signed by the Chairperson and the Secretary, there are no opinions of members of the Tribunal in reaching to the decision as other members only signed as participants and signed on a separate paper. That creates a doubt if such members participated in decision making. Under that circumstance the Court has established that the relevant issue with respect to the third ground is whether the fact that the Ward Tribunal being not properly composed has not occasioned failure of justice and whether under the principle of overriding objective is applicable.

In the matter at hand, the Court has considered that at page 3 of the judgment of the District Land and Housing Tribunal, the Chairperson made it clear that the Ward Tribunal was not properly constituted contrary to Section 4(3) of the Ward Tribunal Act, CAP 206 R.E. 2019 which requires a quorum at a sitting of a tribunal to be one half of total number of members which is four members. As from the judgment of the Ward Tribunal it appeared that only the Chairman and the Secretary of the Ward Tribunal heard and determined the matter. The Chairperson further referred to Section 4(4) of the same Act

which provides inter alia that at any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal. The Chairperson added that all members of the Ward Tribunal are required to write down their opinions so as to satisfy how the decision was reached and that in the case at hand there were no opinions that were recorded and that the Secretary of the Tribunal was not allowed to participate in decision making. From the above position, I concur with the counsel for the Appellant that since the Tribunal was not properly constituted then it automatically lost the jurisdiction to determine the matter before it. See the case of **Mariam Madali vs Hadija Kihemba ,Misc. Land Appeal No. 16 of 2019, High Court Land Division at Dar es Salaam.** Jurisdiction is a very fundamental issue which in my view, before the Court or Tribunal starting determining the matter, it has to ensure that it is properly composed and members to participate fully in the course of determination of the matter and decision making. Section 4(4) of the Ward Tribunal Act considers the decision of the majority of members to have force of law. That means that where the quorum is not proper then there is no decision as such. According to Black's Law Dictionary (1999), 7th Edition at page 855 the word jurisdiction has been defined as the power of the Court to decide a case or issue a decree. In the instant matter, since the Ward Tribunal's jurisdiction is imposed by the law, then it had no power to make the decision while not

properly been composed as per the requirement of the law. Also, considering the case of **Magoiga Gichere** and the case of **John S. Mgawe** (supra), the former was about failure to identify in proceedings a member who presided over the Ward Tribunal when the Chairman was absent and that did not occasion a failure of justice since the Ward Tribunal was properly constituted, the later was about failure of the Ward Tribunal to cite a proper provision of the law which was also considered not to occasion failure of justice. The above two cases are therefore distinguished from the instant matter where the Ward Tribunal was improperly constituted. When the Ward Tribunal is improperly constituted, it has no authority to participate in decision making. In the case of **Mariam Madali vs Hadija Kihemba (supra) at page 6** it was held that composition of the Tribunal is not a mere procedural issue, it is in fact a determining factor as whether the institution that adjudicated the matter was really a Ward Tribunal within the meaning of Section 11 of Cap 216.

From the above circumstances, this Court finds that the fact that the Ward Tribunal was not properly composed as the decision was signed by only the Chairperson and the Secretary and that there were no opinions of the members in reaching to the decision then that rendered a decision pronounced a nullity and that has occasioned a failure of justice as it is contrary to Article 13(6) (a) of the Constitution of the United Republic of

Tanzania which requires that whenever the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing. In my view, fair hearing is not restricted to hearing the parties only but also participation of the decision makers in decision making. And at that juncture, since the irregularity led to injustice to the parties, then the decision of the Ward Tribunal is improper as the irregularities are not cured by Section 45 of the Land Dispute Courts Act [Cap 219 R.E 2019]. And they are not curable under the principle of overriding objective because Section 11 of Cap 219 mandatorily requires the Ward Tribunal to be composed of not less than four members and nor more than eight members and Section 4(4) of the Ward Tribunal Act, Cap 206 recognises decision of the majority members as the decision of the Ward Tribunal. In the case of **Njake Enterprises Limited vs Blue Rock Limited and another, Civil Appeal No. 69 of 2017, CAT at Arusha at page 11** it was held that the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. From the above analysis, this ground in my view is capable of disposing the whole matter, I therefore find it just not to proceed determining the other grounds. I have held that since the irregularities go to the root of the matter then this Court finds that the decision of the Ward Tribunal a nullity and I have so declared. Consequently, the decision of the

District Land and Housing Tribunal is quashed. The Court further orders for re trial at the Ward Tribunal to be conducted with new Chairperson and new set of members.

It is so ordered.



DATED at **TANGA** this 20th day of October, 2021.


U. J. AGATHO

JUDGE

20/10/2021

Date: 20/10/2021

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

Appellant: Present

Respondent: Present

C/C: Zayumba

Court: The judgment is delivered today this 20th day of October, 2021 in the presence of the Appellant and the Respondent.




U. J. AGATHO

JUDGE

20/10/2021

Right of appeal explained.




U. J. AGATHO

JUDGE

20/10/2021