

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)**

**AT MWANZA  
LAND APPEAL NO. 40 OF 2020**

(Arising from Land Appeal No. 07 of 2020 of the District Land and Housing  
Originated from the decision of Nyakahura Ward Tribunal in Land Dispute No.  
10 of 2019)

**KALANDINGA BWANA ..... APPELLANT**

**VERSUS**

**KABIKA TILUKENZILE ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 04.03.2021*

*Date of Judgment: 05.03.2021*

**A.Z.MGEYEKWA, J**

This is a second appeal. It stems from the decision of the District Land and Housing Tribunal for Mwanza in Land Application No. 07 of 2020. Originating from the Nyakahura Ward Tribunal in Land Dispute No. 10 of 2019.

Brief facts relevant to the case at hand are that at Nyakahura Ward Tribunal in Land Case No. 10 of 2019, the respondent sued the appellant

for having exceeded the boundary of the land that he bought from the respondent. The trial tribunal decided the matter in favour of the respondent. Aggrieved, the appellant in 2020 unsuccessfully appealed to the District Land and Housing for Mwanza in Land Appeal No. 7 of 2020. The appellate tribunal determined the matter and decided in favour of the respondent and dismissed the appeal with costs.

Undeterred, he has come to this Court seeking to assail the decision of the High Court on four grounds of grievance; namely:-

1. *That the District Land and Housing Tribunal erred in law and in fact in deciding in favour of the respondent without considering that the dispute is being determined by the Secretary who is not a member of the Ward Tribunal.*
2. *That the District land and Housing Tribunal erred in law and in fact in deciding in favour of the respondent without considering that the tribunal was not properly constituted.*

When the appeal was called for hearing before this court on 04<sup>th</sup> March, 2021. Mr. Siwale, learned counsel, represented the appellant while the respondent appeared in person unrepresented.

It was the learned counsel for the appellant who started to submit. Mr. Siwale was brief and straight to the point. He argued that this is a second appeal arising from the District Land and Housing Tribunal in Land Appeal

No. 07 of 2020 and originating from the Nyakahura Ward Tribuna. He urged for this court to adopt the grounds of appeal and form part of his submission.

Arguing for the first ground, Mr. Siwale argued that the first Assessor, Odace Ildephonance is a Secretary but he was among the assessor. He argued that it was contrary to section 11 of the Ward Tribunal Act. He added that the law requires that during hearing several assessors to be not less than four members and not more than eight members. He went on to argue that section 4 (1) (a) of the Ward Tribunal Act Cap. 206 state that a Secretary is not among the members and section 4 (2) of the Ward Tribunal Act state that a Secretary is recruited by the Government, his duty is to record minutes of the meeting. To bolster his submission he referred this court to the case of **Adelina Koku Anifaa and Another v Byarugaba Alex**, Civil Appeal No. 46 of 2019.

Mr. Siwale did not end there, he went on to argue that the Court of Appeal of Tanzania in the same case of **Adelina** (supra) held that a point of law can be raised at any time. He added that the matter was not raised by the first appellate court but the duty of the court is to oversee records of the lower courts. He went on to state that the Court has a duty to observe the defect. He added that the District Land and Housing Tribunal did not observe the irregularities.



As to the second ground, Mr. Siwale stated that since the Secretary was not supposed to seat as a member then the tribunal remained with three members thus the tribunal corm was not properly constituted. Mr. Siwale went on to state that the Ward Tribunal erred in law because the corm was not met. Mr. Siwale fortified his position by referring this court to the case of **Mchobi v R** 2006 EA 206.

On the strength of the above submission, Mr. Siwale beckoned upon this court to quash the decision of both tribunals and order the matter to be remitted back to tried De Novo. He urged this court to allow the appeal with costs.

Responding, the respondent had not much to say rather he objected and argued that this is a new ground that was not raised at the District Land and Housing Tribunal. He added that the appellant did not submit that the Secretary was not required to be a member. In his view, the procedure was proper.

In conclusion, the respondent urged this court to dismiss the appeal with costs.

In rejoinder, Mr. Siwale reiterated his submission in chief and stated that he has already mentioned that the ground was not raised at the District Land and Housing Tribunal. He added that the law allows him to raise a point of law at any stage. He went on to state that the respondent

has not objected that the Secretary was among the members who participate in decision making and he did not state if the corm was not met.

In conclusion, the learned counsel for the appellant beckoned upon this court to quash the decisions and proceedings of both tribunals and allow the appeal with costs.

Having heard the submissions of both learned counsels for and against the appeal and after carefully going through the court records of the District Land and Housing Tribunal, I have to say that I will determine the issue *whether the appeal is meritorious*.

I have scrutinized the tribunal's records and I am in accord with the learned counsel for the appellant that the tribunal contravened the procedure for allowing the Secretary to seat as a member in the hearing of the case. Reading the tribunal's record, it is shown that the assessors took part in the hearing of the case. I am in accord with the learned counsel for the respondent that this ground was not raised at the appellate Tribunal. However, the ground is on point of law which can be raised at any time. In the case of **Adelina Koku Anifa** (supra), the Court of Appeal of Tanzania went on to state that:-



*" ..the court cannot justifiably close its eyes on such glaring illegality because it is his duty to ensure proper application of the laws by the subordinate courts and/or tribunals.."*

Applying the above authority, it is clear that the court had a duty to take judicial notice of matter relevant to the case even when the matter is not raised at the lower court or in the memorandum of appeal. Therefore, for that reason, this court could, even in the absence of the grounds of appeal would be obliged to address the vivid defect. Similarly, in the case of **Marwa Mahende v Republic** (1998) TLR 249 the court is reminded of its duty to ensure proper application of the laws by the courts below.

Guided by the above authorities of the law, I think it is forethought to address and determine this ground of appeal raised by the learned counsel for the appellant the same will save the time of the court and the time of the parties. I am saying this because in case the point of law could not have been raised now, the same could have been raised in later stages.

In my determination, I will consolidate both grounds because they are intertwined. The appellant's Advocate is complaining that the dispute is determined by the Secretary to the tribunal who is not a member of the Ward Tribunal. He also complained that the trial tribunal deciding in favour of the respondent without considering that the tribunal was not properly

constituted. I have perused the Nyakabura Ward Tribunal proceedings on the last page it shows the Ward Tribunal consisted of four members including the Secretary of tribunal one Odace Ildephonse who is not a member. That means the Secretary of the tribunal was among the members who participate in decision making.

The secretary of a Ward Tribunal is not a member because he is not a person elected from amongst a list of names of persons resident in the ward. In terms of section 4 (2) of the Ward Tribunal Act Cap. 206 [ R.E 2019] the Secretary is appointed by the Local Government Authority in which the ward in question is situated, upon recommendation by the Ward Committee, and his duty is to record the proceedings of that tribunal. Section 4 (2) Ward Tribunal Act Cap. 206 [R.E 2019] provides that:-

*“ 4 (2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question situated, upon recommendation by the Ward Committee.”*

Additionally, the trial tribunal proceeded with the determination of the case knowing that the composition of the Ward Tribunal was not met. As I have pointed earlier since the Secretary of the tribunal participated in determining the matter while he was not a member that means the number of Ward Tribunal was three members instead of four members as per the requirement of the law. The law requires the tribunal to consist of not less



than four members. As rightly stated by the learned counsel for the appellant that it was contrary to the directives under section 4 (1) of the Ward Tribunal Act, Cap. 206 [R.E 2019] which governs the composition of the ward Tribunals, requiring them to be not less than four members. Section 4 (1) of the Ward Tribunal Act, Cap. 206 [R.E 2019] provides that:-

*“ 4.-(1) Every Tribunal shall consist of- (a) not less than four nor more than eight members elected by section of the Ward Committee from amongst, list of names of persons residenting the Ward compiled in the prescribed manner.”*

Similarly, the Court of Appeal of Tanzania in the case of **Adelina Koku Anifaa** (supra) held that:-

*“ Since only three members participated in the trial of the matter subject of this appeal at the level of the Ward Tribunal, the proceedings were marred with irregularity, thus null and void.”*

Based on the above authorities, it is clear that the trial tribunal went into an error. This flagrant omission of failure to comply with the requirement of the law, rendered the trial Tribunal's proceedings a nullity.

For the foregoing reasons, I find merit on both grounds of appeal. I, therefore, invoke the revisional powers bestowed upon this court by the provisions of section 43 (1) the Land Dispute Courts Act, Cap. 216 [R.E 2019], I hereby nullify the proceedings and judgment of the District Land



and Housing Tribunal in Land Appeal No.07 of 2020. I order that if the parties are still interested an expedient fresh hearing before another Chairman and a new set of assessors be commenced. No order to costs the since it was not the fault of the parties.

Order accordingly.

DATED at Mwanza this 05<sup>th</sup> March, 2021.



  
A.Z MGEYEKWA

**JUDGE**

05.03.2021

Judgment delivered on 05<sup>th</sup> March, 2021 via audio teleconference whereas Mr. Siwale, learned counsel for the appellant and respondent were remotely present.

  
A.Z MGEYEKWA

**JUDGE**

05.03.2021

Right to appeal fully explained.