THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND PPEAL NO. 14 OF 2020.

(From the District Land and Housing Tribunal for Kyela, at Kyela, in Land Appeal No. 52 of 2019, Originated in Land Case No. 38 of 2019 in Ipande Ward Tribunal).

ANYIMIKE NGOLOKE .....APPELLANT

VERSUS

TABU KANYAMALE..... RESPONDENT

JUDGMENT

24.02 & 25.05.2021

UTAMWA, J:

In this second appeal, the appellant ANYIMIKE NGOLOKE challenged the decision of the District Land and Housing Tribunal for Kyela, at Kyela, (hereinafter referred to as the DLHT) in Land Appeal No. 52 of 2019. The matter originated in the Ipande Ward Tribunal (the ward tribunal).

The back ground of the case can be shortened as follows: The respondent, TABU KANYAMALE instituted the Land Case No. 38 of 2019 in the ward tribunal in the capacity of the administratrix of the estate of her late father, JASON MBOSA MWASILA (the deceased). She claimed that, the appellant had invaded the family land, formally the property of

the deceased. She thus, prayed for the ward tribunal to help her in resolving the dispute. The appellant disputed the claim, he also claimed to be the rightful owner of the disputed land. The ward tribunal heard both parties and visited the *locus in quo.* It finally decided in favour of the respondent. The appellant was dissatisfied by that decision and he unsuccessfully appealed to the DLHT. He thus, filed this appeal as a second chance for defending his ownership on the disputed land.

In his petition of appeal, he advanced a total of five grounds of appeal as follows:

1. That, the first appellate tribunal erred in law in holding that the dispute was not time barred.
2. That, the first appellate tribunal erred in law in confirming the decision of the ward tribunal while it was not properly composed.
3. That, the first appellate tribunal erred in law in holding that, the respondent had *locus standi*.
4. That, the first appellate tribunal erred in law and fact in confirming the decision of the ward tribunal while the evidence of the respondent left a lot to establish the claim.
5. That, the first appellate tribunal erred in law and facts in holding that, the respondent's claim was not *res judicata*.

Owing to the above grounds of grievances, the appellant prayed for this court to allow the appeal and set aside the decisions of both the DLHT and the ward tribunal. The respondent resisted the appeal at hand.

At the hearing of the appeal, both parties appeared without legal representation. The appeal was argued by way of written submissions following the agreement by the parties and the directive of this court.

Submitting in support of the first ground of appeal, the appellant argued that, the DLHT erred in deciding that, the dispute was not time barred. According to section 9 (1) of the Law of Limitation Act, Cap. 89 R.E 2019 (the LLA), the time limitation for recovery of land of the deceased is twelve years and it starts to run from the time of death of the deceased. In the present case, the deceased died in 1997 while the action over the land was filed in the ward tribunal in 2019. This was after a lapse of 22 years. To substantiate his contention, he cited decisions made by this court in the cases of **Edison Mwaipungu v. Aman Ramadhan Mwakisale, Misc. Land Appeal No. 14 of 2013, High Court of Tanzania (HCT) at Mbeya** (unreported) and **Betina Nganyanga v. Sadick Mwasumbi (Administrtaor of the Estate of the Late Kabafu Mwasumbi), Land Appeal No. 70 of 2016 HCT, at Mbeya** (unreported).

Regarding the second ground of appeal, the appellant contended that, the DLHT erred in law in confirming the decision of the ward tribunal while it was not properly composed. Section 11 of the Land Disputes Courts Act, Cap. 216 R.E. 2019 (hence forth the LADCA) provides that, the Ward Tribunal is duly constituted when it is composed of not less than three members and not more than eight, and that, three of them must be women. In the case at hand however, the proceedings of the ward tribunal did not indicate the gender of its members. The omission was fatal and rendered the proceedings and the resulting judgment a nullity. He substantiated his argument by the case of **Mariam Madali v. Haddija Kihemba, Misc. Land Appeal No. 16 of 2019 HCT, at Dar es Salaam** (unreported).

In addition, the appellant contended that, by looking at the names of the six members who participated in the ward tribunal, only one name of the female member can be noted. This was contrary to the law and the above cited precedent. The composition of the tribunal is not a mere procedural issue, but is important since it helps to ensures that, the ward tribunal was properly constituted as it was observed in the **Mariam case** (supra).

Concerning the third ground of appeal, the appellant submitted that, the DLHT erred in law in confirming the decision of the ward tribunal in the matter in which the respondent had no *locus standi*. This was because, the respondent did not produce any letter appointing her as administratrix of the estate of the deceased before the ward tribunal. Though the DLHT decided that, the latter was in the proceedings of the ward tribunal, it was not known as to how the same was admitted in evidence. It was the appellant's further contention that, in fact, a ward tribunal is not bound by the rules of evidence and procedures as provided under section 15 of the Ward Tribunal Act, Cap. 206 R.E. 2002. Nonetheless, exception does not cover the procedure on admissibility of documents. To him, the inclusion of the letter of administration into the record of the ward tribunal without affording him an opportunity to object it or cross-examine the respondent on the same, is as good as denying him of his right to be heard. He thus, underlined that, the respondent had no *locus standi*.

In relation to the fourth ground of appeal, the appellant argued that, the DLHT erred in confirming the decision of the ward tribunal while the respondent did not prove her claims. The evidence by the respondent before the ward tribunal had contradictions on the size of

the disputed land. The respondent did not also disclose the name of the chief who had allegedly allocated the land to the deceased. The appellant therefore, prayed for this court to allow the appeal with costs.

In her replying submissions, the respondent argued against the first ground of appeal that, the matter in the ward tribunal was timely filed. This was because upon the death of the deceased, the disputed land remained under the control of the deceased's wife who also died in 2016. She (appellant) applied for the letter of administration in 2016. The time limitation thus, started to run against her in that year. The respondent further argued that, since the matter was filed in the ward tribunal in 2019, there was a lapse of only three years. Her argument was supported by the decision in the case of **Tabu Mkwambe (administrator of the estates of the late Exavery Mkwambe) v. Mario Kasambala, Misc. Land Appeal No. 3 of 2018 HCT, at Mbeya** (unreported).

In her arguments against the second ground of appeal, the respondent contended that, a second appellate court like this one, cannot decide on a matter of evidence on which the two lower courts/tribunals had made a concurrent finding. He argued therefore, that, going back to the proceedings of the ward tribunal to look at the genders of members who participated in the hearing of the case, is as good as re-evaluating the evidence. He also contended that, this ground was not raised before the DLHT in the first appeal. It cannot thus, be raised at this stage.

On the third ground of appeal, the respondent argued that, the DLHT properly decided the issue of *locus standi*. It did so upon being

satisfied that, the respondent was appointed the administratrix of the estate of the deceased since the record (the proceedings) of the ward tribunal contained the letter of administration appointing the respondent. The complaint by the appellant that, it was not understood as to how the letter came into the record, the DLHT properly decided that, the ward tribunal is not bound by the rules of evidence and procedure. Hence this ground deserves to be dismissed.

As to the fourth ground of appeal, the respondent submitted that, the complaint by the appellant that the DLHT erred in confirming the decision of the ward tribunal amounted to welcoming this court to re-evaluate the evidence. However, this court being a second appellate court cannot do so. Alternatively, she argued that, the DLHT properly re-evaluated the evidence, it thus reached into a just decision. The respondent therefore, urged this court to dismiss the entire appeal with costs. The appellant did not wish to make any rejoinder submission

I have considered the grounds of appeal, the submissions by the parties, the record generally and the law. I opt to firstly test the third ground of appeal and in case need will arise, I will also examine the rest of the grounds. This plan is based on the following reasons: that, the third ground of appeal touches not only the competence of the proceedings before the ward tribunal, but also a fundamental right of the appellant regarding the procedure adopted by the ward tribunal in admitting the letter claiming to appoint the respondent as the administratrix of the estate of the deceased. It follows thus, that, under this plan, in case the third ground of appeal will be upheld, it will dispose of the entire appeal without even considering the rest of the grounds of appeal.

Now, according to the arguments by both sides, the parties do not dispute that the letter of appointment is in fact, laying in the record of the ward tribunal. They do not also dispute that, the letter was not formerly tendered in evidence before the ward tribunal for the appellant to also react against it. Furthermore, it is in record that the DLHT also recognized the fact that, the letter was only found laying in record though it had not been formerly in court as exhibit. The DLHT however, held that the procedure adopted by the ward tribunal was justified since it is not bound by the rules of evidence and procedure as per section 15 of the Ward Tribunal Act. The issue under this ground is thus, reduced to *whether or not the DLHT was justified in upholding the procedure adopted by the ward tribunal in admitting the respondent's letter of appointment as administratrix of the estate of the deceased (Jason) in evidence to establish her locus standi in the matter at hand.*

In my view, the circumstances of the case do not attract answering the issue posed above affirmatively on the following grounds: indeed, my perusal of the ward tribunal's record also confirms that when the respondent testified before the ward tribunal (on 23rd May, 2019) she merely declared that she was suing the appellant in her capacity as the administratrix of the estate of the deceased. However, she neither produced the letter appointing her as such nor disclosed the court which appointed her. She did not also disclose the date of her appointment and the reference number of her application for the administration of the estate before the said primary court. Again, it is confirmed from the record of the ward tribunal that, an uncertified copy of the alleged letter of appointment is laying therein showing that the appellant had been so appointed on the 12th December, 2018 by the primary court of Lusungo

(in an application No. 15 of 2018). It is also very unfortunate that, the letter does not show in which District is the said primary court located.

According to the arguments by the parties and the record, it is clear that, the only instrument which gave the respondent mandate to sue was the letter of appointment. This letter was thus, a very significant tool for proof of the respondent's capacity. Nonetheless, the same was not tendered in court for the appellant to see and react against it despite its weaknesses I have pointed out above. Indeed, it is true that the law relaxes the rules of evidence and procedure in proceedings before ward tribunals. This is by virtue of section 15 of the Ward Tribunal Act upon which the DLHT based its decision on this issue. The provisions read thus, and I quote them verbatim for the sake of a readymade reference:

> **"15. Proceedings before Tribunal**
>
> (1) The Tribunal shall **not be bound by any rules of evidence or procedure applicable to any court.**
>
> (2) A Tribunal shall, subject to the provisions of this Act, **regulate its own procedure.**
>
> (3) In the exercise of its functions under this Act a Tribunal shall have power **to hear statements of witnesses produced by parties to a complaint, and to examine any relevant document produced by any party.**" (Bold emphasis is mine).

In my settled view, the provisions of law just quoted above actually exempt a ward tribunal from being bound by the rules of evidence or procedure applicable in any court. The provisions also give it powers to regulate its own proceedings subject to the Ward Tribunal Act itself, to hear parties and to examine the relevant documents produced by them. It follows thus, that, the ward tribunal in the matter under discussion,

abdicated its duty when it failed to examine the letter of appointment (being a document) because the same was not formerly produced before it according to the record. It also failed to follow the law by not hearing the appellant regarding the letter of appointment which was not formerly produced before the ward tribunal for his challenge.

Furthermore, my broad construction of the above cited law is that, the statutory mandate given to the ward tribunal in regulating its own proceedings and in enjoying the exemption from being bound by the rules of evidence or procedure is not absolute. Such mandate and exemption have limitations. One of the limitations is that, the mandate and exemption are subject to the same Ward Tribunal Act; see section 15 (2) of the same Act. It follows thus, that, the provisions of section 15 of the Act quoted above must not be read in isolation from other provisions of the same Act. It must be read together with them.

In my settled opinion therefore, examples of such other relevant provisions of the Ward Tribunal Act envisaged above are those of section 16 of the Ward Tribunal Act. These provisions requires a ward tribunal to pursue principles of justice. Section 16(1) in particular, provides *inter alia*, that, notwithstanding the provisions of section 15, a Tribunal shall, in all proceedings seek to do justice to the parties. Furthermore, section 16(2)(a) commands that, for the purposes of securing a just determination of a complaint, the Tribunal shall not make a decision on any complaint unless it has given an equal opportunity to each party to explain his part of the matter and to present his witnesses.

In my settled opinion therefore, since the said copy of the letter of appointment in the matter at hand got into the record of the ward

tribunal without being formerly tendered in court as evidence, that course deprived the appellant of his opportunity to react against the letter by objecting to it or by asking questions on its authenticity. That process was not therefore, compatible with the provisions of section 16(1) and (2) of the Ward Tribunal Act just discussed above.

Indeed, in my further concerted opinion, the legislative spirit under the provisions of the Ward Tribunal Act discussed above is essentially that, since a ward tribunal is not presided over by any legally skilled professional, its decisions should not be faulted by merely violating the rules of evidence or procedure if the violation does not cause injustice to parties. My further view is that, despite of the mandate and exemption of the ward tribunals discussed above, a ward tribunal is still bound to do justice to the parties. In other words, though it can regulate its own proceedings and remain not bound by the rules as observed previously, it still has the duty to observe the principles of natural justice and to promote the parties' rights to fair trial. These are fundamental entitlements of the parties and are well enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (henceforth the Constitution).

It must also be noted here that, the right to fair trial just mentioned above is very significant for administration of justice in both civil and criminal proceedings. The Court of Appeal of Tanzania (the CAT) once described it as one of the cornerstones in the process of adjudication for any just society and an important aspect of the right which enables effective functioning of the administration of justice; see in the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported). Now, since the

principles of natural justice and the right to fair trial are fundamental and are enshrined under the Constitution, no court or tribunal of this land enjoys the mandate of floating them. This is the reason why the provisions of the Ward Tribunals Act set the safeguards of justice discussed above.

Furthermore, it is trite law that, a decision of a court reached through violation of principles of justice or the right to fair trial is a nullity; see decisions in **Agro Industries Ltd v. Attorney General [1994] TLR 43**, **Raza Somji v. Amina Salum [1993] TLR 208** and the **Kabula case** (supra). The law further guides that, it is immaterial whether the same decision would have been arrived at in the absence of the violation; see **General Medical Council v. Spackman [1943] AC 627** followed in **De Souza v. Tanga Town Council [1961] EA. 377** (at p. 388), and **Abbas Sherally and another v. Abdul Sultan Haji Mohamed Fazalboy, CAT Civil Application No. 133 of 2002, at Dar es Salaam** (unreported). See further the case of **Alex Maganga v. Awadhi Mohamed Gessan and another, HCT Civil Appeal No. 13 of 2009, at Dar es Salaam** (unreported).

In fact, the undisputed fact that the letter of administration got into the record of the ward tribunal in the matter at hand without being formerly tendered in court in the presence of the appellant, is an indication that it was placed in the record without the knowledge of the appellant, or to be specific, secretly. Justice cannot be done in such style since that will not promote the right to fair trial for the parties. Instead, it will encourage arbitrary decisions of ward tribunals, hence a serious injustice to parties. Evidence or any material to be used in decision making must be openly disclosed to the parties with sufficient

transparency for them to react or appreciate. It is for this reason that my brother (Moshi, J. as he then was) observed in the case of **Gilbert Nzunda v. Watson Salale, (PC) Civil Appeal No. 29 of 1997, at Mbeya** (unreported) that, transparency and justice are inseparable.

Owing to the above discussed irregularities committed by the ward tribunal in the matter at hand, its proceedings and decision cannot be saved under section 45 of the LADC. These provisions basically guide that, irregularities committed by a ward tribunal or a DLHT cannot vitiate its decision if the same does not cause injustice to parties. However, I have shown above that the course adopted by the respondent and the ward tribunal in tendering the letter of administration in evidence behind the curtain caused injustice to the appellant.

The erroneous procedure discussed above cannot also be saved by the principle of overriding objective. This principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice. It was also underlined by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) in construing the provisions of section 45 of the LADCA discussed earlier.

Nonetheless, the principle of overriding objective was not meant to absolve each and every blunder committed by parties or adjudicating bodies. Had it been so, all the rules of procedure including those aimed at promoting the parties' right to fair trial would be rendered nugatory. The principle does not thus, create a shelter for each and every blunder committed in the course of trials. This is the envisaging that was recently underlined by the CAT in the case of **Mondorosi Village**

Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported). In that case, the CAT declined to apply the principle of overriding objective amid a breach of an important rule of procedure.

Due to the reasons adduced above, I find that, the irregularity committed in the matter at hand in tendering the letter of administration in evidence before the ward tribunal, was fatal to its proceedings and the resulting decision. The anomaly had the effect of depriving the appellant of his right to be heard and to fair trial regarding the issue of *locus standi.* It is more so considering the fact that, the letter was significant tool in establishing the respondent's *locus standi* in the matter. It is further more so since the issue of *locus standi* is crucial in dispensation of justice as demonstrated below.

The significance of the issue on *locus standi* comes from the following factors: the law instructs that, a party to court proceedings cannot prosecute or defend a mater into which he lacks *locus standi,* a court of law also lacks powers to entertain such proceedings. Otherwise, the proceedings become a nullity; see the holding of this court in the **Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi [1996] TLR 203**.

The rule on *locus standi* was described under the **Lujuna case** (supra) as being governed by common law, but applicable in our jurisdiction. It guides that, a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with and he is entitled to bring the matter before the court. I also underscored this stance in the case of **Lazaro Kimbindu v. Athanas**

Mpondangi, High Court (PC) Civil Appeal No. 137 of 2003, at Dar es Salaam (unreported).

The rationale for the rule of *locus standi* underlined above is, in my settled opinion, that, it avoids a situation where a party who is not entitled to a given right sues in court successfully or unsuccessfully, but afterwards the rightful party sues before the court in his own capacity or under the same title for the same claim. The danger of this situation, if not well checked by courts of law is that, it will cause *inter alia*, a serious injustice to persons who are entitled to some rights and chaos in courts for opening flood gates of needless litigations.

It follows thus that, a court of law must effectively determine an issue of *locus standi* whenever it is raised by either party or whenever it discovers it *suo motu*. Under both such situations, the court has the duty to firstly give opportunity to the parties to address it on the issue before it determines it. The court should not proceed with the hearing of the matter on merits with an uncertainty on the *locus standi* of the parties for fear that, its proceedings may later be declared a nullity by an appellate court.

Having observed as above, I answer the issue posed above in respect of the third ground of appeal negatively that; *the DLHT was not justified in upholding the procedure adopted by the ward tribunal in admitting the respondent's letter of appointment as administratrix of the estate of the deceased (Jason) in evidence to establish her locus standi in the matter at hand.* I accordingly uphold the third ground of appeal to extent that, it was improper for the DLHT to hold that the respondent had *locus standi* under the circumstances of the case discussed above.

The findings I have just made above regarding the third ground of appeal are capable enough to dispose of the entire appeal. I will not thus, test the rest of the grounds of appeal.

The sub-issue that arises at this stage is therefore, which orders should this court make so as to meet the justice of the case? In my view, for the reasons shown earlier, the decisions made by both the ward tribunal and the DLHT cannot stand. I therefore, allow the appeal, nullify the proceedings of both the ward tribunal and the DLHT. I also set aside the respective judgments. If parties are still interested, they may refile fresh proceedings and abide with the law. Each party shall bear his own costs since the ward tribunal and the DLHT were also instrumental in committing the irregularity at issue. It is so ordered.

JHK. UTAMWA

JUDGE

25/05/2021

25/05/2021.
CORAM; JHK. Utamwa, J.
Appellant: present in person.
Respondent: present in person.
BC; Ms. Patrick Nundwe, RMA.

Court: judgment delivered in the presence of both the appellant and the respondent in court, this 25th May, 2021.

JHK. UTAMWA.
JUDGE.
25/05/2021.