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

**(LAND DIVISION)**
**AT ARUSHA**

**MISC. LAND APPEAL NO. 52 OF 2018**

*(C/f the District Land and Housing Tribunal for Manyara Region at Babati in Land Appeal No. 45 of 2014, Originating from Uhuru Ward Tribunal in Land Case No. 5 of 2013)*

**PHILIMONI HIITI ..... APPELLANT**

***Versus***

**MICHAEL MARGWET ..... RESPONDENT**

**JUDGMENT**

*1st July & 13th August, 2021*

**Masara, J.**

At Uhuru Ward Tribunal (the trial Tribunal), **Philimoni Hiiti,** the Appellant, who claimed to have inherited a piece of land from the late Deemay Ama Ami, unsuccessfully sued **Michael Margwet** for trespassing and building on his land. The size of the land was not disclosed in the evidence adduced. The trial Tribunal declared the Respondent to be the lawful owner of the suit land. The Appellant was aggrieved, he appealed to the District Land and Housing Tribunal for Manyara (the first Appellate Tribunal) vide Land Appeal No. 45 of 2014. The first Appellate Tribunal upheld the decision of the trial Tribunal dismissing the appeal. Further aggrieved, the Appellant, intending to have the lower tribunal decisions reversed, has preferred this second appeal on the following grounds:

a) *The District Land and Housing Tribunal erred in law by failing to hold that the proceedings and decisions of Uhuru Ward Tribunal in Application No. 5 of 2013 were nullity for want of value of the subject matter, size and description of land and boundaries of the same land;*
b) *The District Land and Housing Tribunal erred in law by failing to hold that Uhuru Ward Tribunal having made its decision on 26th February, 2014 in favour of the Appellant was functus officio to make the subsequent decisions of 19th March 2014 and 26th March 2014;*
c) *The District Land and Housing Tribunal erred in law by failing to hold that Uhuru Ward Tribunal's proceedings and decision were nullity as the same were arrived at by involving a Tribunal assessor (sic) namely Selina Musa who was disqualified pursuant to the Appellant's letter complaint dated 27/11/2013; and*

d) *The District Land and Housing Tribunal erred in law by failing to hold that the proceedings and judgment of the Uhuru Ward Tribunal in Land Application No. 5 of 2013 were nullity for having been conducted without observing mandatory requirement of the quorum.*

Before me, the Appellant appeared in person, unrepresented, and fended for himself. From 14/9/2018, when the appeal came for the first time in this Court, the Respondent defaulted appearance. Despite being dully served by substituted service in Mwananchi Newspaper of 18/6/2021, the Respondent could not enter appearance. On 01/7/2021, it was directed that the appeal be heard *ex-parte*.

Submitting in support of the first ground of appeal, the Appellant asserted that he prays this Court to quash the first appellate Tribunal's decision as it did not consider errors committed by the trial Tribunal regarding size, value and description of the suit property.

On the second ground of appeal, the Appellant amplified that on 26/2/2014 the trial Tribunal decided in his favour which was later changed. He fortified that the trial Tribunal chairman was not there on 26/3/2014 when the decision against him was delivered. The Appellant contended that having made a decision on 26/2/2014 in the Appellant's favour, the trail Tribunal was functus officio to give another different decision on 26/3/2014.

Amplifying the third ground of appeal, the Appellant averred that participation of Selina Musa as one of the members of the trial Tribunal in determination of the matter was in contravention of the law, since he had objected her participation in the trial due to an apparent conflict of interest. According to the Appellant, he had objected participation of that member in a letter dated 27/11/2013.

On the last ground of appeal, the Appellant propounded that the decisions of the lower Tribunals were a nullity. He prayed to continue using the suit land as it contains tombs of his grandmother and uncle. He also prays to be granted costs of the suit.

I have taken note of the grounds of appeal and the submissions by the Appellant. As already alluded to, I did not have the benefit of hearing the Respondent as he did not enter appearance. I will determine the grounds of appeal in the course they are presented.

Regarding the first ground of appeal, it was the Appellant's contention that the first appellate Tribunal did not consider the errors committed by the trial Tribunal regarding the size, value and description of the suit land. I have revisited the proceedings and the decisions of both lower Tribunals. In the proceedings of the trial Tribunal, there was no description of the suit land. The witnesses who testified did not specify the actual size and borders of the suit land. Likewise, the decision made is silent on the size and description of the suit land. The proceedings and decision of the trial Tribunal dealt mainly with the number of trees and the size of the land with trees, which did not specify whether that was part of the disputed land.

The same applies to the proceedings and the decision of the first appellate Tribunal. The size and description of the suit land was not canvassed in either the proceedings or in the decision. In the absence of the description of the suit land, in terms of size, location and its borders, the end verdict will be inexecutable. I borrow leaf from the decision made by Makani, J. who, while dealing with a scenario such as the one at hand in ***The Board of Trustees of the F.P.T.C Church Vs. The Board of Trustees Pentecostal Church***, Misc. Land Appeal No. 3 of 2016 (unreported) had the following to say:

*"The rationale for proper description is to make execution easy and to avoid any chaos by proper identification of the suit property. The judgment of the Ward Tribunal is therefore not executable for failure to have proper details/description of the suit land."*

Further, in Mohamed ***Salehe Vs. Fatuma Ally Mohamed***, Land Appeal No. 182 of 2018 (unreported) DSM H.C Land Division, Maige, J. observed the following:

*"I would add however that, the cause of such inconsistencies is lack of clear and sufficient description of the suit property in the pleadings. The omission to clearly and sufficiently describe the suit property was violative of the mandatory requirement of order VII rule 3 of the Procedure Code, Cap. 33, R.E. 2019 ..."*

The same decision was also made by Utamwa, J. in ***Agast Green Mwamanda (suing as the Administrator of the Estate of the late Abel Mwamanda) Vs. Jena Martin***, Misc. Land Appeal No. 4 of 2019 (unreported) when he stated:

*"Indeed, it is the law that, court orders must be certain and executable. It follows thus that, where the description of the land in dispute is uncertain, it will not be possible for the court to make any definite order and execute it."*

The learned Judge went on to say:

*"Owing to the above reasons, it cannot be argued that the Respondent in the matter at hand followed the law when she made the blanket description of the land in dispute by merely referring to it as her father's farm and house as shown earlier, without mentioning the title of the land or the boundaries surrounding it."*

From the above authorities, description of the size and description of the suit land is paramount. In the case at hand, this was not done. This vitiates the proceedings and the decisions of both lower Tribunals as correctly submitted by the Appellant, since the decision thereon cannot be easily executed. That said, it is my finding that the first ground of appeal has merits; it is therefore allowed.

The second ground of appeal is a complaint that there was more than one decision by the trial Tribunal. I have carefully gone through the entire record; I could not find the decision that the Appellant suggest that it was delivered on 26/2/2014. What can be observed from the record is that on 26/2/2014 the trial Tribunal members were giving their opinion (voting) on whose right they preferred. The exercise was repeated on 19/3/2014.

The question is whether votes by the trial Tribunal members amounts to a judgment/decision of the trial Tribunal. In my view, they do not because it was not written in a formal way as judgments are written. Further, it does not qualify as the decision since they were not signed by any member of the Tribunal. What the Appellant claims to be the decision is specifically titled *'Maoni ya wajumbe ya kwanza kwa hukumu ya Philimon Hiiti na Michael Margwet of 26/2/2014.'* On 19/3/2014, the second phase titled *'Mara ya pili. Maoni ya Kura ya II'.* From the above explanation, the Appellant misconstrued the voting of the Tribunal members by assuming them to be the decision of the trial Tribunal. Rightly as it was held by the first Appellate chairman, the decision of the trial Tribunal was delivered on 26/3/2019. This decision was signed by all the trial Tribunal members and it declared the Respondent as the lawful owner of the suit land. The other complaint by the Appellant was that on 26/3/2014 when the decision was delivered the trial Tribunal chairperson was not present. This is true. What is not clear from the complaint is whether his absence vitiates the decision reached. The record show that there was notice of the date of judgment and the chairperson signed the judgment alongside other members. I see nothing unusual or illegality as alleged. The second ground of appeal is therefore devoid of merits.

Regarding the third ground of appeal which challenges participation of Selina Musa at the hearing and determination of the case in the trial Tribunal, I note that the court record contains a letter written by the Appellant and directed to the chairperson of the trial Tribunal objecting the participation of one Tribunal member, who he referred as 'Mama Neema.' I also note that in the original hand written letter, the name of that member was referred as mama Neema. The photocopy of the letter annexed in the petition of appeal contains the name Mama Neema, followed by the name Selina Musa.

I do not understand why the two documents differ. But in any case, since the original letter refers to Mama Neema, whose name does not appear in the trial Tribunal record as one of the members who participated at the hearing of the case, I find it difficult to sustain the complaint that the said member was objected. I subscribe to the decision of the first Appellate Tribunal that there is no evidence that Selina Musa was disqualified as a member at the hearing of the case in the trial Tribunal. The third ground of appeal is found to be devoid of merits.

In the last ground of appeal, the Appellant urges me to vary the decisions of the two lower Tribunals for being a nullity. In response to this ground, I will begin with the proceedings of the trial Tribunal. It is noted form the record that at the hearing of the case by the trial Tribunal, members of the Tribunal who participated at the hearing were not recorded. In other words, there was no quorum of the members who participated at the hearing of the case in the trial Tribunal. The quorum of the members presiding at the hearing of any case in the ward Tribunal is provided under the law.

I hold this view because proceedings of the trial Tribunal infringed the mandatory provisions of the law, specifically section 11 of the Courts (Land Disputes Settlements) Act Cap 216 R.E 2002 which provides inter alia;

> *"11. Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act 1985."*

The above provision is in *pari materia* with section 4 of the Ward Tribunals Act, Cap. 206 which provides:

> *"4. Composition of Tribunals*
> *(1) Every Tribunal shall consist of-;*
> *(a) not less than four nor more than eight other members elected by the Ward Committee from amongst a list of names of persons resident in the ward compiled in the prescribed manner;*
> *(b) a Chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a).*
> *(2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee.*
> *(3) The* ***quorum at a sitting of a Tribunal shall be one half of the total number of members.***
> ***(4) At any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal, and in the event of an equality of votes the Chairman shall have a casting vote in addition to his original vote."*** (Emphasis added)

From the above position of the law, it is apt to note that the proceedings of the trial Tribunal were in contravention of the law. They cannot be left to stand because members who participated at the hearing are , unknown. The assumption is that the trial Tribunal was not properly constituted. The fact that the proceedings of the trial Tribunal are marred with material irregularities for failure to disclose the quorum of the members who sat at the hearing, it is worth to note that even the judgment emanating therefrom is also a nullity. The appeal to the first appellate Tribunal as well cannot be left to stand as it stems from a nullity.

Another glaring irregularity apparent from the record is the fact that the decision of the first Appellate Tribunal was also procured in contravention of the law. The record of the first Appellate Tribunal depicts that the appeal was heard on 16/11/2017, and it was fixed for judgment to be delivered on 20/12/2017. On that day, the judgment was adjourned to 27/2/2018, when the same was delivered to the parties. There is no record as to whether assessors' opinions were read to the parties prior to the composition of the judgment. It is the requirement of the law that the Tribunal chairman, before composing the judgment, he should read or ask the assessors to read the opinion of the assessors to the parties. Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N 174 of 2003 imposes a duty on the Chairman to require every assessor present at the conclusion of the hearing to give his opinion in writing before making his/her judgment. The relevant provision provides:

> *"Notwithstanding sub-regulation (1) the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."*

Failure to read the opinion of assessors before composing judgment has been declared fatal. The Court of Appeal decision in ***Edina Adam Kibona Vs. Absolom Swebe (Sheli)*** Civil Appeal No. 28 of 2017 (unreported), held:

> *"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record.* ***And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose.***" (Emphasis added)

From the above analysis, it is apposite to state that the first appellate Tribunal dispensed with mandatory requirements of the law for failure to read the

opinion of the assessors to the parties prior to composing the judgment. That vitiates the judgment of the first appellate Tribunal. I therefore agree with the contention by the Appellant that the proceedings and judgments of both lower Tribunals were marred with material irregularities, which suffice to nullify both the proceedings and the decisions therefrom. The fourth ground has merits, I allow it.

Consequently, given what I have endeavoured to state, the appeal before me has merits to the extent above explained. By invoking revisional powers conferred to me under section 43(1)(b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019], I hereby quash and set aside the proceedings and decisions of both trial Tribunal as well as those of the first Appellate Tribunal for being a nullity. If any of the parties is still interested to pursue the dispute herein, he should file a fresh case before a Tribunal of competent jurisdiction. Considering that the anomalies were attributed by neither of the parties, I make no order as to costs.

Order accordingly.


Y. B. Masara

**JUDGE**

13th August, 2021.