

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT ARUSHA

MISC. LAND APPEAL NO. 16 OF 2020

*(C/F from the District Land and Housing Tribunal for Arusha in Land Appeal No. 10 of 2017;
Originating from Moivo Ward Tribunal Land Application No. 32 of 2016)*

JOSEPHAT P. MUNISHI APPELLANT

Versus

CALLYSTIC CHAMI RESPONDENT

JUDGMENT

6th July & 25th August, 2021

Masara, J.

This appeal traces its origin in a claim filed at Moivo Ward Tribunal (the trial tribunal) by the Appellant. He sued the Respondent for demolishing his 13 rooms and two latrines on a piece of land measuring 18 x 13 paces (the suit land). The suit area is located at Oleresho Village, Moivo Ward within the City of Arusha. The trial tribunal delivered declared the Respondent the lawful owner of the suit land. The trial tribunal further ordered the Appellant to refund TZS 3,000,000/= to the Respondent as purchase price and costs of the suit. He also ordered him to pay a fine of TZS 50,000/= for pretending to be the buyer of the suit land. The Appellant was aggrieved by that decision, he appealed to the District Land and Housing Tribunal for Arusha (the appellate tribunal). The appellate tribunal dismissed the appeal. Still aggrieved, the Appellant has preferred this second appeal on the following grounds:

- a) That the trial tribunal erred both in law and fact by allowing the secretary to be the member of the Ward tribunal and participate in decision making and signing the judgment;*
- b) That, the Trial Tribunal erred both in law and fact as the quorum was not properly composed;*
- c) That, the Trial Tribunal erred both in law and in fact by failing to evaluate the evidence adduced by the Applicant who is the Appellant herein; and*
- d) That, the Trial Tribunal erred in law and fact by giving its decision without relying on the evidence as adduces (sic) in the proceedings.*

Facts leading to this appeal can be summarized as follows: The Appellant alleged that the Respondent trespassed in the suit land on 15/3/2015 and demolished his properties, which included 13 rooms house and 2 latrines. The Appellant claimed to have inherited the suit land from his mother, the late Theresia Paulo *alias* Mama Frida. That on 21/3/2015 he was informed that the Respondent has started constructing a fence at the suit land. He reported the matter to the Ward Executive Officer (WEO). WEO summoned the Respondent and inquired from him why he carried on the construction. The Respondent replied that the land was sold to him. He claimed to have bought the suit land from the Appellants' mother on 29/3/2015 for TZS 8,500,000/=. He added that the Appellant is one of the witnesses in the sale agreement, alongside his other siblings who also testified in favour of the Respondent at the trial tribunal. It was stated that after selling the suit land to the Respondent, the late Mama Frida called all her children and gave each a share of TZS 700,000/= from the purchasing price. After the sale, the Appellant's mother left for Moshi where she later died.

Before me, the Appellant appeared in person while the Respondent was represented by Ms. Magdalena Sylsiter, learned advocate. The appeal was heard *viva voce*.

Submitting in support of the grounds of appeal, the Appellant asserted that it was wrong for the secretary of the trial tribunal to participate as a member. According to the Appellant, the secretary was the one who signed the records, including the judgment of the trial tribunal. He maintained that the secretary also prevented him and members from cross examining the Respondent. He also stated that his witnesses were prevented from testifying after he was locked in.

On the second ground, the Appellant averred that it was wrong for the trial tribunal to condemn him to pay TZS 3,000,000/= as that was not the dispute before it. It was the Appellant's further submission that the appellate tribunal was in error by failing to order a retrial considering that his evidence was not considered. He argued that the Respondent did not buy the suit land as alleged, adding that his mother could not sell it as she was 98 years old. He also stated that the demolition of the houses at the suit land was done by the Respondent without any authorisation.

The other issue raised by the Appellant related to a purported anomaly by the appellate tribunal. He queried the basis of the appellate tribunal's decision, since the original file was recorded to have been lost. He referred to the letter by Betty Timothy, the secretary of the trial tribunal, dated 6/1/2018.

On evaluation of evidence, the Appellant submitted that the trial tribunal erred in deciding for the Respondent despite the fact that he did not prove ownership or prove that he bought the suit land. According to the Appellant, the Respondent's witnesses were prearranged. He added that his brother who was among the witnesses had a dispute with him. He disputed the allegations that he was given TZS 700,000/= as a share of the proceeds of the sale of the suit land.

The Appellant asserted that he had evidence to prove his ownership over the suit land, insisting that he is the one who paid the purchasing money but registered it in the name of his mother. In the same line of argument, the Appellant was of the view that had the Respondent bought the suit land he should have involved neighbours and area leaders and summoned them to testify. He insisted that he has rights over the suit land as the last born and the

only person who bought the land and lived with his deceased mother. He prayed that the appeal be allowed with costs.

Contesting the appeal, Ms Magdalena submitted that as per section 12 of the Land Disputes Courts Act, a secretary is a member of the ward tribunal. She fortified that there is no law which prohibits a secretary to sign judgment of the ward tribunal and that there is no law which provides who should sign the record of the ward tribunal. Ms. Magdalena propounded that there is no law which says that if the record or judgment of the ward tribunal is signed by the secretary of the tribunal it is rendered illegal. The learned advocate contended that as per section 15(2) of the Ward Tribunals Act, Cap. 206 ward tribunals are free to regulate their own proceedings as they deem appropriate. In her view, signing and membership are matters of procedure. She asserted that there was no miscarriage of justice occasioned to the appellant by the participation of the secretary and signing as a member in both the judgment and the proceedings.

Regarding the quorum, Ms Magdalena submitted that since there were five members, it was properly composed. Submitting on the third and fourth grounds of appeal, Ms Magdalena contended that there was sufficient evidence that the suit land originally belonged to the Appellants' mother (Mama Frida), who later sold it to the Respondent. That the Appellant tendered exhibits J1 and J2 proving that the suit land belonged to his mother. She therefore submitted that the Appellant had no claim over the suit land. In her view, since the Respondent tendered exhibit C1, he proved by evidence to have bought the suit land from the Appellant's mother. Further, it was her submission that the Appellant's siblings proved that the Respondent bought the suit land legally. That the trial tribunal also visited the suit land and the appellant failed to identify it including its measurements.

Ms Magdalena also faulted the contention by the Appellant that he was prevented from bringing witnesses. She stated that this allegation was a new ground therefore an afterthought. On the denial of the right to cross examine the Respondent, she maintained that it is also a new issue which should have been raised in the appellate tribunal. To support the contention that matters not discussed in the appellate court cannot be entertained by the second appellate court, Ms Magdalena made reference to the decision in ***Merita Naikminjal and Loishilaari Naikiminjal Vs. Sailevo Laibangati*** [1998] TLR 122.

On whether the Appellant's witnesses were denied to testify, Ms Magdalena stated that the allegations has no proof. She stated that the Appellant had lawyers who assisted him to draft appeal documents and submissions; therefore, he cannot deny them at this moment. To support her argument, she cited the decision of the Court of Appeal in ***William Steven Vs. Ms Leah Julius (as the administratrix of the estate of the late Neeva Saboro)***, Civil Appeal No. 65 of 2013 (unreported) which held that Ward tribunals are not bound by strict rules of procedure relating to evidence or otherwise.

The learned advocate denied the allegation that the file got lost. She maintained that in a second appeal, courts should not interfere with concurrent findings of the lower courts/tribunals. She maintained that there are no serious irregularities warranting interference of this Court. On the strength of the submission made, the counsel for the Respondent urged this Court to dismiss to dismiss the appeal with costs.

In a rejoinder submission, the Appellant submitted that it is not true that he did not know the size of the disputed land. He added that if the record is properly scrutinized, the size determined by the trial tribunal differs with the size of the

suit land stated by the Respondent and himself. The trial tribunal stated that the size of the suit land is 11×26 which is more than 18×15 stated by the Respondent, while the Appellant stated it to be 31×18. The Appellant insisted that he used to live there, when part of land was sold to the Respondent, therefore the suit land does not include land sold to the Respondent.

Regarding denial of his witness to testify, the Appellant submitted that his sister attended the trial tribunal but she could not testify. He made reference to page 2 of the trial tribunal judgment which shows that she was to give false evidence. In his view, as she did not testify, how could the trial tribunal know that she was going to give false evidence? On the quorum, the Appellant argued that there were only 4 members at the trial tribunal. The secretary cannot be a member as she is an employee of the local government.

Having given close scrutiny to the grounds of appeal, the records of the lower tribunals and the rival submissions by the Appellant and the learned advocate for the Respondent, the issue for determination is whether the case at the trial tribunal was properly determined and whether the appellate tribunal properly upheld the said decision.

In so far as the first issue is concerned, the Appellant's complaint is that the proceedings of the trial tribunal were marred by irregularities that warrant an order for retrial. In the first ground of appeal, the Appellant faults involvement of the secretary as one of the members in the proceedings and judgment. On her part, the learned advocate for the Respondent challenged the contention stating that the secretary is a member of the tribunal as per section 12 of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. She further states that there is no law that prohibits the secretary from signing the judgment and or proceedings.

I have revisited the record of the trial tribunal. At the outset, I do not agree with Ms Magdalena that the secretary of the Ward Tribunal is a member of the tribunal. A secretary is not a member of the trial tribunal, but an employee of a local government authority. Composition of the Ward Tribunal is provided under section 4 of the Ward Tribunals Act 1985, Cap. 206. The provision 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 provision of the law, election of the members of the trial tribunal is provided under section 4(1) (a) and (b). Members of the Ward Tribunal are elected by the Ward Committee from a list of names of persons resident in the ward compiled in the prescribed manner. Chairman of the Tribunal is appointed by the appropriate authority from among the members above elected. Secretary is therefore not among the members elected above. From the provision, the secretary is appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee. This is provided under subsection 3 of section 4. Members of the tribunal hold office for three years subject to re-election as per section 6(1), while the appointment to the office of Secretary shall be permanent in the

service of the Local Government Authority within which the Tribunal to which he is appointed to be Secretary is situated. This is provided under section 6(3).

Section 12 of Cap. 216 relied on by Ms Magdalena to support her contention that the secretary of the trial tribunal is a member of the tribunal, is inapplicable and wrongly applied by the learned counsel. The section simply provides the manner the secretary is appointed, making reference to section 5 and 6 of Cap. 206. Nothing in that provision purports to conclude that a secretary is a member of the tribunal.

From the above analysis, the secretary of the trial tribunal is not among members of the tribunal considering the mode of his appointment. As to whether the secretary can sit as a member of the trial tribunal, section 4(3) of Cap. 206 comes into play. That section provides the quorum of the tribunal. The quorum at a sitting of a tribunal is one half of the total number of members. As the secretary is not a member of the tribunal, he neither sits as a member during determination of cases nor should his name appear as a member in the judgment. This was also articulated by this Court in the case of ***Nada Qori Vs. Isaki Gilba***, Misc. Land Appeal No. 2 of 2013 (unreported), where it was stated:

"A secretary is not a member of a Ward Tribunal but an employee of the Local Government Authority. In the circumstances, as the decision is signed by the secretary the same is tantamount to the dispute being determined by the secretary who is not a member of the Ward Tribunal and as such decision is illegal." (Emphasis added)

The above position is the proper position of the law. In the appeal under consideration, the secretary of the trial tribunal, one Bethy Timothy, signed as a member of the trial tribunal in the decision. This is in contravention of the law. I hold this view because she did not sign in her capacity as the tribunal

secretary. To the contrary, she signed as one of the members who decided the case. I therefore sustain the first ground of appeal.

The second ground of appeal faults the quorum of the trial tribunal. I have carefully revisited the record of the trial tribunal. The record is silent on the quorum of members who heard and determined the case. The record shows only the date and the parties. Section 4(3) specifically requires the quorum at the sitting to be one half of the total number of the members. In the event the quorum is not reflected in the proceedings, as it is in the case at hand, it becomes difficult to ascertain whether the tribunal was properly constituted. In that regard, it is the finding of this Court that section 4 of Cap. 206 was not complied with.

The record also does not show whether the case was heard on the same date, as all the witnesses seem to testify on a single date. There is no indication in the record whether a particular witness was testifying for either the Appellant or the Respondent, since after the Appellant and the Respondent testified, all the testimonies of the witnesses followed. This irregularity makes the record hard to comprehend.

The Appellant also complained that he was not allowed to cross examine the Respondent in the trial tribunal. The record supports his contention. It shows that Callists Chami (the Respondent) testified but he was not cross examined. His evidence was immediately followed by the evidence of Bibiana Paulo Munishi. Ms. Magdalena faulted this argument stating that it is an afterthought since it was not raised in the appellate tribunal. In as much as I agree that such complaint was not raised in the appellate tribunal, I do not agree with her that it is an afterthought. The right to cross examine a witness is a fundamental right, as it tends to shake the credibility of a witness and test his/her

truthfulness. I am alive that matters that are not covered in the appellate court/tribunal cannot be entertained by the second appellate court. But there are circumstances where Courts dispense with that principle. The Court of Appeal in the case of ***Gift Mariki and 2 Others Vs. Republic***, Criminal Appeal No. 289 of 2015 (unreported), observed:

*"While ordinarily, we would have generally been less inclined to entertain a ground of appeal not pressed or canvassed earlier and determined by the High Court, taking into account the seriousness of the offence of gang rape, the sentence of which is imprisonment for life; **the nature of the irregularity which is apparent on the face of the record; the judicious responsibility of the trial court to take into account totality of evidence, properly tested including that of the defence before arriving at its own conclusion; the interests of justice, and considering that no unfairness would be occasioned, we are constrained to make up the fresh point of law and fact on this appeal.**"* (Emphasis added)

In the light of the above decision, the irregularity complained of in this appeal is that the Appellant was denied the right to cross examine the Respondent which is grave irregularity apparent on the face of record, I am inhibited to agree with the Appellant that this is a fit case where an issue not raised in the appellate tribunal can be deliberated in this second appellate Court. I hold this view because denying a party the right to cross examine a witness, is tantamount to denying him the fundamental right to be heard. This was the holding of the Court of Appeal in ***Shehe Ramadhan @ Idd Vs. Republic***, Criminal Appeal No. 82 of 2020 (unreported)

*"We note from the above except that, the trial Magistrate formed the opinion that he will not give the appellant opportunity to cross-examine PW2 even before attempting to do so. We say so because the proceedings do not suggest that he was given the opportunity to cross-examine. We note further that, PW2 testified without taking oath but this fact alone **could not justify denial of appellant's fundamental right to cross -examine her.**"* (Emphasis added)

In the circumstances, it is apparent that neither the Appellant nor the tribunal members were given opportunity to put questions on the Respondent so as to test his veracity. That omission is grave. It waters down the weight accorded to the evidence by the Respondent. The court doth hereby nullify the evidence of the Respondent.

On a similar note, the Appellant contend that his witness attended the tribunal but was denied to testify. He referred me to page 2 of the typed judgment. I have scrutinised the judgment of the trial tribunal in the portion complained about. The trial tribunal chairman made the following observation:

"Vielelezo hivyo vimepokelewa kama "J1" na "J2", na dada yake aishiye Moshono alifika katika Baraza na kutambua anatakiwa kutoa Ushahidi wa uongo, aliondoka zake, na hakutoa Ushahidi wowote, baada ya kuwaona ndugu zake wengine wapo." (Emphasis added)

From the above excerpt, the trial tribunal manifested an outright biase. It concluded that the Appellant's sister intended to give false evidence, while her evidence was not taken. This is also a material irregularity calling the determination by this second appellate Court.

I am alive to the fact that Ward Tribunals are immune from entertaining technicalities in the course of their endeavours. Section 15(1) of Cap. 206 states that a trial tribunal shall not be bound by rules of evidence or procedure applicable to any court. Subsection 2 gives powers to the tribunal to regulate its own procedure. This was also held in the case of ***Yakobo Magoiga Gichere Vs. Peninah Yusuph***, Civil Appeal No. 55 of 2017 (unreported), where it was held:

"We are of the decided view that the Court should not read additional procedural technicalities into simple and accessible way Ward Tribunals in Tanzania conduct their businesses."

In the case at hand, it is evident that the irregularities and or illegalities highlighted are grave in such a way that they lead to miscarriage of justice. They contravene mandatory provisions of the law and that the parties were prejudiced with such irregularities and illegalities. the denial of the right to cross examine the Respondent cannot be taken to be a mere technicality. It is an omission which leads to nullification of such evidence. Moreover, involvement of the secretary as a member in the decision of the trial tribunal, which is contrary to the law as I have analysed above, cannot fall in the exempted technicalities. The same can be said regarding failure to record the quorum, contrary to section 4(3) of Cap 206. If the record is left unrectified, such irregularities and illegalities will lead to miscarriage of justice. In this stance, I am guided by the decision of the Court of Appeal in ***William Steven Vs. Ms Leah Julius (as the administratrix of the estate of the late Neeva Saboro)*** (supra), the case cited to me by Ms Magdalena, at page 4 and 5, the Court observed:

*"However the proceedings before the Ward tribunal, in our considered view, contain several irregularities which would warrant an order for retrial. Such irregularities, include, in addition to what the second appellate court held, the improper procedures adopted by the Ward tribunal in the recording of its proceedings (p. 6 to 18 of the record); not showing who were present during the trial; whether the parties (or one of them) were present on the date the "judgment" was delivered; inclusion of an administrative letter in the record without clear indication as to how and when it was admitted on the record, and more others. **We are aware of the need to free tribunals such as the Ward Tribunal, from legal technicalities and allow them to administer substantive justice. Indeed, justice may be done in substance without impeding it with technicalities. However, where it is in the opinion of the court that the irregularities and or illegalities detected on the record lead to miscarriage of justice and offend the very basis of justice, they cannot be ignored...**"* (Emphasis added)

In light of the above case law, the irregularities and illegalities pointed out are grave and material leading to injustice. It is in the opinion of the Court that the

posed irregularities vitiate the entire proceedings and decisions of both the trial tribunal and the appellate tribunal.

The rest of the grounds deal with evaluation and analysis of evidence, which at this stage cannot be dealt with considering what I have endeavoured to explain above. Determining the merits of the appeal will be condoning the illegalities and irregularities hitherto stated. The appellate tribunal did not detect the anomalies and thus fell into the same pit as the trial tribunal. Its decision cannot be left to stand since it stems from a nullity.

Guided by the above, the appeal is hereby allowed. I invoke revisional powers conferred to me under section 43(1)(b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] to quash and set aside the judgments and proceedings of the appellate tribunal as well as those of the trial tribunal. I order that any party, if interested, is at liberty to institute the case in the tribunal with requisite jurisdiction. Considering the fact that neither of the party is to blame for the flaws above explained, I make no orders as to costs.

Order accordingly.




Y. B. Masara

JUDGE

25th August, 2021