

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. LAND APPEAL NO. 40 OF 2021

(Arising from Appeal No. 30 of 2019 of the District Land and Housing Tribunal for Kagera at Bukoba & Originating from Civil Case No. 02 of 2019 of the Kasharu Ward Tribunal)

TRYPHONE YOHANA ----- APPELLANT

VERSUS

ISSA NDYETABULA-- ----- RESPONDENT

JUDGMENT

Date of the Last Order: 07/10/2021

Date of Judgment: 10/11/2021

A.E. Mwipopo, J.

The Respondent namely Issa Ndyetabura filed a Civil Cause No. 02 of 2019 at Kasharu Ward Tribunal against the Appellant namely Tryphone Yohana alleging that the Appellant has trespassed into his land. The Ward Tribunal decided in favour of the Respondent. The Appellant was aggrieved by the decision and filed Appeal No. 30 of 2019 in the District Land and Housing Tribunal for Kagera at Bukoba. The Appellate Tribunal delivered its judgment on 04th April, 2020 where the appeal was dismissed for want of merits. The Appellant was once again not satisfied with the decision of the Appellate Tribunal and filed the present appeal.

The Petition of the Appeal filed by the Appellant contains four grounds of the appeal as provided hereunder:-

- 1. That, the learned Chairman grossly erred in law by his refusal of consenting with the Assessor's opinion of quashing and setting aside the entire proceedings of the trial Tribunal following the lack of locus standi by the Respondent at the instance of filling the suit by importing his version of the disposition of the suit land inter vivos from the late Baingika which was not earlier established at all.*
- 2. That, the learned Chairman grossly erred in law by failing to observe the raised contention of the time limitation from the physical occupation and use of suit land from 1988 and that the cause of action occurred in 2019.*
- 3. That, the first appellate failed to evaluate the adduced testimonies in records and erroneously upheld the decision of the lower Tribunal.*
- 4. That, like the lower Tribunal the appellate Tribunal did not observe that the value of the suit land had not first been ascertained before proceeding with the case which was null and void.*

On the hearing date the Applicant was represented by Mr. Lameck John Erasto, Advocate, whereas, the Respondent was represented by Mr. Mulokozi, Advocate.

Mr. Lameck John Erasto, before commencing his submission in support of the appeal, raised a point of law that the Ward Tribunal was not properly composed. He submitted that the names of the members of the Ward Tribunal

were not provided in the proceedings, but the names of members of Ward Tribunal are found in its judgment. He said that it was not possible to know if the members who composed judgment are the one who heard the witnesses and visited the locus in quo. He is of the view that the irregularity is fatal and prayed for the proceedings and decisions of Ward Tribunal and Appellate Tribunal be quashed.

Mr. Mulokozi who was surprised with the issue of jurisdiction being raised by the Appellant Counsel on the hearing date, prayed for time to reply which he was granted. On the following hearing date he argued that the issue jurisdiction raised by the counsel for the Appellant has no merits. He said that the Ward Tribunal proceedings is governed by the Ward Tribunal Act, Cap. 206 R.E 2002 where section 14, 15 and 16 of the Act provides how the trial before the Ward Tribunal is conducted. That, section 15 (1) of the Act provides that the tribunal shall not be bound by any rules of evidence of procedure applicable to any court and it regulate its own procedures. The omission to record the names of the members of tribunal is the issue of procedure and does not go to the gist of the case. The duty of the tribunal is to provide justice. Both parties were given justice as they were heard.

The Counsel added that despite the omission to record the names of the members of the tribunal, the record shows that members were asking questions

to the witnesses. This means that the members were present during the hearing of the case. Section 14 (4) of the Land Disputes Court Act, Cap. 216 R.E 2019 provides that after the settlement of a dispute the Tribunal has to record the order of mediation. The verdict of the tribunal shows that all members of the Tribunal have agreed on the decision. There is no law which was breached. He made reference to the decision of the Court of Appeal in the case of **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania, at Mwanza**(unreported), where at page 14 it held that the omission to record the member of the tribunal who presided the hearing is cured under section 45 of the Land Disputes Court Act. He is of opinion that the decision is fit for our case and the appeal is saved by section 45.

He is of the view that if we are going to vitiate the decision of the Ward Tribunal because of the omission, this precedent will make all disputes determined by the Ward Tribunal be null and void. There will be no decision which stands. Ordering for the hearing to start a fresh is punishment to both parties. He made reference to **Meru Flowere Tanzania Ltd V. Box Board Tanzania Ltd, Civil Appeal No. 266 of 2018, Court of Appeal of Tanzania, at Arusha**, (unreported), where the court held that principle that parties should not be punished for errors committed by court is sound in circumstances. The Counsel prayed for the court to overrule the objection as the

omission is not fatal and cannot vitiate the proceedings for the reason that the judgment shows the members who made the decision.

In his rejoinder, Mr. Lameck John Erasto maintained that the omission by the Ward Tribunal is fatal and vitiates the proceedings. He said that the Ward Tribunal Act provides in section 4 for the composition of the Ward Tribunal appointed by the Ward Committee and in this case there is no corum showing members who were presiding the matter. Even the number of the members who were present during the hearing is not known. The members who visited the locus in quo are not the one who composed the decision, hence it is not known if the members who composed the decision are the one who heard the witnesses. He said that the principle of Justice includes to know the members who were present at the trial.

The Counsel for the Respondent distinguished the case of **Yakobo Magoiga Gichele**, (Supra), cited by the counsel for the Respondent that in the cited case the names of the members was present and the coram is there. The issue was in some of the dates during hearing when the Chairperson was not present, the Tribunal was not appointing another person to preside the meeting as Chairperson. Thus, the circumstances of the two cases are different.

From the submissions, the Counsel for the Appellant raised the issue of jurisdiction that record of proceedings of the Ward Tribunal does not have coram

on the hearing dates as result the composition of the trial Tribunal during hearing is not known. This point of law raised affects the jurisdiction of the trial Tribunal to determine the matter and may dispose of the appeal. For that reason, it has to be determined first by this Court.

The learned Counsel for the Appellant argued that the trial Tribunal was not properly composed as there is no coram recorded during the hearing hence it is not known the members who presided and heard the witnesses, the members of the Ward Tribunal who visited locus in quo were different from those who composed the judgment, and that it is not known if the member who composed the judgment heard the witnesses at all.

In response, the Respondent counsel was of the view that the record shows that members were asking questions to the witnesses meaning that the members were present during the hearing of the case. The verdict of the tribunal shows that all members of the Tribunal have agreed on the decision. As the Ward Tribunal is not bound by rules of evidence of procedures and it regulates its own procedures, the omission to record the names of members of the tribunal who presided the hearing is cured under section 45 of the Land Disputes Court Act hence the omission is served.

The relevant law which provides for the composition of the Ward Tribunal is section 11 of the Land Disputes Court Act, Cap. 216 R.E. 2002. The section

provides that the Ward Tribunal is properly constituted where it consist of not less than four nor more than eight members of whom three shall be women. In other words the Ward Tribunal has jurisdiction to determine the matter before it when it is properly constituted according to the law.

The Composition of the Ward Tribunal is supposed to be reflected in the proceedings and in the Judgment to show that it was properly constituted to hear and determine the case before it. In the case of **Anne Kisunga V. Said Mohamed, Land Appeal No. 59 of 2009**, High Court Land Division, at Dar Es Salaam, (Unreported), the court discussed section 11 of Cap. 216 R.E. 2019 where it held that, I quote:-

"My interpretation of the cited law is that; the names and gender of the members participating in a case in the Ward Tribunal must be shown in order to ascertain its composition as whether it is in compliance with the law. Those members who partclpated during trial, their names and gender must be recorded on coram on each day the trial takes place up to the stage of judgment. Failure to follow proper procedure, it is difficult to know as in this case, the members who participated to composed the judgment were the same as those who appeared during trial."

Similarly, the High Court was of the same position in the case of **Mariam Madali V. Hadija Kihemba**, Misc. Land Case Appeal No. 16 of 2019, High Court Land Division, at Dar Es Salaam, (Unreported), where it held that:-

"In my view, 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 or something else. Tribunals must ensure that they are properly constituted when adjudicating cases because failure to that reduces their status as ward tribunals to legally unknown institution."

From above cited cases, the position is that the members who participated during trial during trial in the Ward Tribunal, their names and gender must be recorded on coram on each day the trial takes place up to the stage of judgment.

I have thoroughly examined the record proceedings and the decision of the Kasharu Ward Tribunal and observed that the Respondent filed the case in the Tribunal on 04th February, 2019 claiming that the Appellant have trespassed in his land. The value of the land was stated to be Tshs. 2,000,000/=. The hearing commenced on 11th February, 2019 when the Respondent testified. There is no coram which was recorded and the names of the members of the Ward Tribunal or their number is not stated. The Respondent was cross examined by the Appellant before he was questioned by the members of the Ward Tribunal whom their names were not stated. On 18th February, 2019 the Respondent's witnesses namely Protase Ishengoma, Vedasto Venance and Salvatory Mfungula testified and were cross examined by the Appellant before being questioned by unknown members of the Tribunal. The hearing proceeded

on 04th March, 2019 where Appellant and his witnesses namely Zakaria Musa, Alexanda Dimian Banabaenju, Rafaely Pastory Musheshe, Thereza Dionice, Anchila Sostenes and Faustin Dionice testified, were cross examined by the Respondent before being question by the members of Tribunal. During hearing on these dates no coram was written and the names of Members of Tribunal or their gender was not recorded.

The Record shows that on 12th March, 2019 the Ward Tribunal visited the land in dispute and the coram shows that the chairperson at locus in quo was Boneventure Gervase and there were total of 15 other persons who were present. The coram does not state if there are members of the Ward Tribunal among those who were present at locus in quo. The judgment of the Ward Tribunal which was delivered on 01st April, 2019 shows that the members of the Tribunal who composed it are Justinian Laurent, Hamidu Mukurasi, Frahisca Braiton and Stephano Mpanda. These 4 members were not among the persons who were present when the Ward Tribunal visited the locus in quo. This means that the members of the Ward Tribunal who composed the judgment did not visit the locus in quo. Further, the silence of the record of proceedings on the composition of the Members of the Ward Tribunal on the hearing dates means it is not possible to ascertain from the proceedings whether the Members of the Trial Tribunal were properly composed and they met the quorum. Also, it is not

possible to ascertain if the Members of the Tribunal who heard witnesses are the one who composed the judgment.

The Counsel for the Respondent argued that the omission is served by section 15(1) of the Ward Tribunal Act, Cap. 206 R.E. 2002, and section 45 of the Land Disputes Courts Act, Cap. 216 R.E. 2002 but I don't agree with him. The omission is not served by section 45 of Cap. 216. The cited section is relevant where such error, omission or irregularity or improper admission or rejection of evidence has not occasioned a failure of justice, if the error or omission or irregularity in fact occasioned a failure of justice the same is not served by section 45 of Cap. 216. In this case the issue is the jurisdiction of the Ward Tribunal to determine the land case before it without being properly ~~composed according to the law. This omission has occasioned a failure of justice~~ since it is not known if the trial Tribunal was properly composed.

The Respondent referred to the case of **Yakobo Magoiga Gichere V. Peninah Yusuph, (Supra)**, but the case is not applicable in this circumstances where the coram was not recorded during hearing and the names, gender and number of the Members of the Tribunal are not known. In absence of the names of the members of the Trial Tribunal who were present during each day of the hearing of the case means that the composition of its members is not known. This have prejudiced the right of parties since it is not known if the Members of

the Ward Tribunal who composed the judgment are the one who heard witnesses testifying. The evidence has already proved that the Members who composed the judgment of the Ward Tribunal are not the one who visited locus in quo. This has occasioned injustice to the parties. The omissions are fatal and they invalidate the proceedings of the Ward Tribunal. This Court was of similar position in the case of **Francis Kazimoto V. Daglas Mkunda**, Misc. Land Appeal No. 123 of 2016, High Court Land Division, at Dar Es Salaam, (Unreported), where it held that-

"In my opinion therefore, since the proceedings of the Trial Tribunal are silent on the membership composition on various dates of hearing the case, it is obvious that the judgment and proceedings under scrutiny are null and void."

Therefore, the Court finds this point of law raised by the Appellant has merits as the trial Ward Tribunal was not properly composed. As a result, the trial Ward Tribunal lacked jurisdiction to determine the matter. Consequently, the proceedings of Kasharu Ward Tribunal and that of the District Land and Housing tribunal for Kagera at Bukoba are hereby quashed and their decisions are set aside. The parties are at liberty to institute a fresh case before the Tribunal. Given the circumstances of this case, I will give no order as to costs. As the preliminary point of law has disposed of the appeal, I'm not going to determine the Appellant's grounds of appeal.



A handwritten signature in blue ink, consisting of stylized, flowing letters that appear to be "A.E. Mwipopo". The signature is written over a horizontal line.

A.E. Mwipopo

Judge

10.11.2021

Date: 10/11/2021

Coram: Hon. J.M. Minde, DR

Appellant: Present

~~Respondent: Absent~~

B/C: Lilian

Advocate Herieth for the Appellant: This matter comes for judgment. We are ready to receive judgment if it is remedy.

Court: Judgment delivered today 10th day of November, 2021 in the presence of the Appellant and his Advocate and in the absence of Respondent.




Sgd: J.M. Minde, DR

10/11/2021