

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. LAND APPEAL NO.38 OF 2021

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya Appeal No.35/2012, Original from Ward Tribunal Iyela Land Case No.3 of 2011))

LUCAS LAMSI MWAMPAGAMA.....APPELLANT

VERSUS

OMWILE MWASYANDILE.....RESPONDENT

JUDGMENT

Date of last order: 28/04/2022

Date of judgment: 08/06/2022

NGUNYALE, J.

This is an appeal filed by the appellant **Lucas Lamsi Mwampagama** after being aggrieved by the decision in the first appeal before the District Land and Housing Tribunal for Mbeya at Mbeya in Land appeal No.35 of 2012. The said first appeal originated from the decision of Iyela Ward Tribunal in Land Application No. 3 of 2012. The appellant preferred nine grounds of appeal to fault the decision of the District Land and Housing Tribunal for Mbeya at Mbeya. For reasons which will be apparent the Court will not confine itself to answer the grounds of appeal in seriatim to dispose the appeal.

In the course of composing judgment, the Court found it necessary to re-open the proceedings for the parties to address the following issues which were not covered by the grounds of appeal; -

1. *Whether in the ward tribunal proceedings, the names of the members were clearly shown in all dates of hearing.*
2. *Whether the proceedings during locus in quo were properly recorded.*

The appellant appeared under the service of the learned Counsel D.P. Sanga who submitted each issue separately. Starting with the first issue the counsel submitted that, it is trite requirement of the law under S.11 of The Land Disputes Court Acts, cap 216 R.E 2019 that names and genders of the members participating in cases before the Ward Tribunal be clearly shown. The Counsel cited the case of **Sigberth Paulo Vs. Fabian Muganga**, Misc. Land Appeal No. 51 of 2021, High Court of Tanzania at Bukoba (unreported) where the position from the case of **Fransis Kazimoto Vs. Daglas Mkunda**, Misc. Land Appeal No.123 of 2016, High Court Land Division, at Dares Salaam was quoted. Thus, looking at the entire proceedings of the Ward Tribunal, there is nowhere save for the date when judgment was delivered where names of the members has been indicated. It seems that the hearing of the entire matter had never been presided by the members as required by law. The Counsel further state that, the entire proceedings of the ward tribunal are a nullity and accordingly the same must be nullified alongside with those of the first appeal.

Turning to the second issue, the Counsel submitted that, it is trite principle of law that, in visiting the *locus in quo*, the Court or the Tribunal must ensure that the parties and their witnesses are present. The corum and everything transpires during the visit to be recorded. The parties and their

witnesses to testify and the adverse party to cross examine. He referred the case of **Albinus Joshwa Ponge Vs. Magoiga Sasi**, Land Appeal No. 30 of 2021 HC Of Tanzania at Musoma (unreported). In the present case nothing was complied with. The proceedings of 20/1/2012, does not meet the requirement of the law. No names of the members or parties appeared in the purported visit *locus in quo*. The parties were not given the right to give their evidence, to call their witness and to cross examine the adverse party. Since the guidelines on visiting the *locus in quo* was not complied with, the entire proceedings are a nullity.

Consequently, the counsel humbly prayed the Court to nullify the proceedings of both tribunals for being vitiated, and set aside their judgement, orders and decree.

In response, the respondent who appeared in person, unrepresented was against what was submitted by the appellant's counsel. Regarding the first issue, the respondent submitted that, it is true that the proceedings of the Ward Tribunal do not show the names of the members. He appreciated on the provision of the law cited by the learned counsel, but his argument was that failure of the Ward Tribunal to indicate those names did not occasion injustice to neither the appellant nor the respondent. He cited the case of **Yakobo Magoiga Gichere Vs. Peninah Yusuph**, Civil appeal No. 55/2017 CAT at Mwanza(unreported) to cure the anomaly.

The respondent was of the view that under the current regime of overriding principles the mistake which do not affect jurisdiction of the Tribunal cannot affect the competency of the matter. Legal technicalities have no room in the current legal regime. He submitted that the parties have been in dispute since 2008 for the same disputed property, hence it

was his settled view that justice should not be delayed just because of some technicalities that are curable under overriding objective.

Regarding the second issue the respondent argued that, the proceedings by the Ward Tribunal were not properly taken, but the DLHT went to the *locus in quo*. He cited the case of **Peter Vs. Sunday Post Limited** [1958] E.A 424 where the court has mandate to re-evaluate the evidence of the lower court, and may arrive at its own conclusions. He cited also the case of **Bomu Mohamed Vs. Hamisi Amiri**, Civil Appeal No. 99 of 2018, CAT Tanga (unreported). Therefore, the respondent argued that the mistake done when the Ward Tribunal was in the visit *locus in quo* was cured by the first appellate Tribunal. Hence, he prays the Court to dismiss the appeal with costs.

Having in mind the rival submission of the parties and the history of the dispute, it is time to answer the two issues in seriatim as hereinunder; -

On the first issue, records of the Ward Tribunal show that the matter was at first heard on 11/1/2012 when the applicant was Lucas Mwampagama, and the respondents were Omwile Mwasvandile and Charles Mwampagama. They adduced their evidence on the first date of hearing. The matter proceeded to hearing on 19/1/2012 when Uswege Mwakifundo, Jemson Mwakisui, Jackson Mwakila, Benard Kasitila Mwafilombe, Eliza Mwampagama and Amosisye Mwangoka testified as witnesses. On 20/1/2012 the Ward Tribunal visited *locus in quo*. In all those dates names of the members of the Tribunal were not disclosed.

The Ward Tribunal becomes well constituted if it is presided by eight or four members as envisaged under section 11 and 14 of the Land Disputes

Courts Act [Cap 216 R: E 2019]. Section 11 of the Land Disputes Courts Act [Cap 216 R. E 2019] reads;

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.

Further section 14(1) of the Act provides that;

The Tribunal shall in all matters of mediation consist of three members at least one of whom shall be a woman.

In this appeal names of members appear only in the judgment. Since, the proceedings do not show members who were present at the hearing of the matter, this Court cannot guess as to whether the Ward Tribunal was properly constituted or not. It is now settled that in each day when the matter is heard before the Ward Tribunal, coram of members who participate must be indicated in the proceedings. See the case of **Alexander Mashauri v. Regina William**, Misc. Land Appeal No. 64 of 2020 HC at Musoma and **Mwita S/O Wiranga v. Pillysincha**, Misc. Land Appeal No. 70 of 2020, HC at Musoma (both Unreported). In **Alexander Mashauri** (supra) this court held that;

'The issue whether or not the Ward Tribunal was properly constituted is addressed by looking at the proceedings of the respective tribunal. It is expected of the proceedings to indicate the name of the members present at every sitting of the Ward Tribunal. It is not enough to show or append the said names to judgment. It is my considered view that, judgment cannot be used to determine members of the Ward Tribunal who participated in hearing the application. This is especially when it is taken into account the date of hearing and date of judgment may not be the same.'

In this appeal, the original records of the Ward Tribunal are clear that names of members who heard the dispute were only indicated in the judgment, whereas the proceedings show that the matter was mediated in three occasions at different dates. Composition of the ward tribunal is not a procedural aspect, rather a legal issue which touches jurisdiction and its authority when making decision. The jurisdiction of Ward Tribunal is only available, when it is duly constituted. Failure to show names of members who heard the matter from the first date to the last vitiated the proceedings. As it is very difficult to establish if the members who were listed in the judgment, participated fully in the hearing too. The same was held in the case of **William Stephen vs. Leah Julius (administratrix) of the late Neeva Sabuni**, Civil Appeal No.65 of 2013 CAT; it was stated that; -

'Omission to disclose the names of the persons constituting the Ward tribunal during trial is a fatal irregularity'.

Since the proceedings of the Ward Tribunal are silent on the composition of members on the dates of the trial, therefore, I agree with the position suggested by the appellant Counsel that the defect is fatal, there was a serious noncompliance with the law by the trial Tribunal. The anomaly invites the Court to quash proceedings, judgment and orders. The first appellate tribunal ought to quash proceedings and judgment of the Ward Tribunal. Be it as it may, the anomaly cannot pass unnoticed at this second appeal.

Reverting to the issue of *locus in quo*, it is in record that the Ward Tribunal visited *locus in quo* on 20/1/2012 the proceedings are there but they fall short of what is required by the law as pronounced in the case of **Sikuzani Said Magambo & Kirioni Richard versus Mohamed**

Roble, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania at Dodoma (Unreported) at Pp. 6 and 7 that;

*'Now, in the case at hand, as intimated earlier, at best the record of the Tribunal's proceedings only indicated that on 3rd June, 2016 the Tribunal conducted a visit at the locus in quo without more. It is therefore not clear as who participated in the said visit and whether witnesses were re-called to testify, examined and/or cross examined, as no notes were taken and the Tribunal never reconvened or reassembled in the court room to consider the evidence obtained from that visit. We are therefore in agreement with both parties that the Tribunal's visit in this matter was done contrary to the procedures and guidelines issued by this Court in **Nizar M.H. Ladak**, (supra). It is therefore our considered view that, this was a procedural irregularity on the face of record which had vitiated the trial and occasioned a miscarriage of justice to the parties.'*


The way records in the visit of **locus in quo** were recorded contravened the dictates of the law therefore it renders the whole proceedings a nullity. In this aspect also, I agree with the appellant Counsel that the guidelines of visiting *locus in quo* were not complied off, noncompliance renders the entire proceedings a nullity. I therefore, quash the proceedings and judgment and set aside orders of the trial Tribunal as well as of the District Land and Housing Tribunal as it originates from nullity.

I am not convinced with the position suggested by the respondent that the defects are curable by overriding objectives. The respondent argued that the same did not occasion injustice to neither party relying on the case of **Yakobo Magoiga Gichere**(supra). The said case is distinguishable from the present scenario because what happened in

the case at hand affects the jurisdiction of the Tribunal. It is not curable under overriding principle.

Having quashed and set aside the above stated proceedings and judgments, ordinarily I would have directed the suit to be heard *de novo*. However, in the advent of the recent amendments made to the Land Disputes Courts Act Cap. 216 by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021, whereby the powers of the Ward Tribunals to adjudicate land disputes have been immensely stripped off. I find it not practicable to order the suit to be head *de novo*. In these circumstances, I thus, direct anyone who wishes to pursue the claim to file afresh in accordance with the current law subject to time limitation. I make no order as to costs as the appeal has been disposed on the issue raised by the court. Appeal allowed.

Dated at Mbeya this 8th day of June 2022.



D. P. Ngunyale
Judge
08/06/2022