THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 33 OF 2021

(Originating from the District Land and Housing Tribunal for Mbeya Land Appeal No. 89 of 2020 originating from Land Case No. 12 of 2020 Hasanga Ward Tribunal)

ADAM MASEBO ..... APPELLANT

VERSUS

LINES NZUNDA ..... RESPONDENT

JUDGMENT

Date of last order: 16/06/2022

Date of judgment: 18/07/2022

NGUNYALE, J.

The respondent LINES NZUNDA sued the appellant ADAM L. MASEBO for encroachment to her land located at Hasanga ward. The ward Tribunal heard the parties and pronounced its decision on 30th April 2020 in favour of the respondent. The respondent was aggrieved with the decision of the trial Tribunal, he therefore preferred Land Appeal No. 89 of 2020 at the District Land and Housing Tribunal for Mbeya at Mbeya (DLHT). The first appellate tribunal dismissed the appeal with costs for lack of merit.

The appellant filed the present appeal per petition of appeal dated 5th July 2021 premising it in five grounds of appeal as hereinunder; -

1. *The first appellate tribunal erred in law and facts for failure to ascertain the coram of members who herd the matter at the trial Tribunal in each day of hearing hence wrongly decided the appeal.*
2. *That the first appellate tribunal erred in law and facts for considering the records of the trial tribunal which was not well composed during hearing and visiting locus in quo.*
3. *That the first appellate tribunal erred in law and facts for upholding the decision of the trial Tribunal which was coupled with mix-up of members during hearing and visiting locus in quo.*
4. *That the first appellate tribunal erred in law and facts for failure to disclose the opinion of assessors hence wrongly decided the appeal against the appellant.*
5. *That the first appellate tribunal erred in law and facts for failure to properly evaluate the evidence of the appellant, hence unjustifiably decided the matter in favour of the respondent.*

The parties were not represented, hearing of the appeal was entertained by written submissions. The appellant in support of the appeal preferred to argued the 1st and 2nd grounds of appeal together. He submitted that section 11 of the Land Disputes Courts Act Cap 216 R. E 2019 emphasizes on the requirement of the composition of the Ward Tribunal in every sitting as well as gender of the members of the Tribunal has to be borne in mind. According to the appellant coram at the Ward Tribunal was not consistent. First the secretary formed part of the composition of members, he referred to proceedings dated 7th January 2020, secondly, number of

members of the Tribunal who sat on 23rd April 2020 for hearing reduced to 6 from 8 members who sat on the first day of hearing. On the date of judgment on 30th April 2020 members were 8 and during *locus in quo* on 31st day of March 2020 only 5 members presided. He was of the view that Tribunal decision was in violation of law as there are days where some members did not attend the hearing.

The appellant referred the case of **SALUMU ITAMBU VS. JOSEPHAT NJIKU**, Misc Land Appeal No. 16 of 2020, High Court of Tanzania at Dodoma (unreported) that the inclusion of the secretary as a member of the Tribunal was illegal.

On ground number three he submitted that members who defaulted attendance were involved in making decision contrary to law. He referred the Court to the case of **PILI SAIBA MWAKIPWETE VERSUS ELIUD MWALUPETA,** Misc. Land Appeal No. 6 of 2020, High Court of Tanzania at Mbeya (unreported) where it was held;

> *"In my view, the circumstances of the matter attract answering the issue regarding this aspect affirmatively. This is because, in the first place, it is the law that, a ward tribunal has jurisdiction to enquire into and determine land disputes; see section 11 (2) of the LADCA. In so doing, it hears evidence from the parties before reaching into a decision. Now, the two defaulting members did not hear the evidence of the respondent and his witnesses on the date when they did not attend the meeting. They did not also have the privilege of observing their demeanour. They were thus, not acquainted with the necessary tools of evidence for making the decision. Hearing witnesses and observing*

their demeanour at the time of testimony are very important tools in resolving disputes, it is more so where the evidence is given through oral testimony (viva voce)."

It was further submission of the appellant that the trial Tribunal allowed participation of members who were absent in some dates when the matter was scheduled for hearing. Some members did not attend during hearing but they participated during decision making. He was of the view that the irregularity was fatal.

The respondent in return contested the submission by the appellant. She submitted that there was no fault in the coram as properly considered by the first appellate Tribunal. According to section 11 of the Land Disputes Courts Act Cap 216 R. E 2019 the Tribunal has to be constituted by not less than four members and not more than eight members. The proper coram has to be constituted by 1/3 of female members. The Ward Tribunal complied to the dictates of the law about number of members to constitute the Ward Tribunal for decision making. There was no any fault in the trial Tribunal. The respondent preferred the 1st and 2nd grounds of appeal to be dismissed for want of merit.

On the third ground that the first appellate Tribunal erred for upholding the trial tribunals decision which was coupled with mix up of members during hearing and visiting locus in quo, the appellant submitted that this point was considered by the appellate Tribunal and it found no fault on

the same done by the trial Tribunal, she was of the settled view that the appellate Tribunal was correct in such regard. She further argued that if there was any error in the trial Tribunal it is curable under overring objectives as the omission to record some members names in the proceedings does not occasion injustice to both parties. To support his argument he referred to the case **of YAKOBO MAGOIGA GICHERE VS. PENINAH YUSUPH,** CIVIL APPEAL NO. 55/2017 CAT at Mwanza (unreported) where in avoiding procedural technicalities into simple and assessable way Ward Tribunals in Tanzania conduct their daily business the Court said;-

> *"with the advent of the principle of overriding objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 18 of 2018] which requires the court to deal with cases justly, to have regard to substantive justice; Section 45 of the Land Dispute Courts Act should be given more prominence to cut back on over- reliance on procedural technicalities"*

It was her further argument that failure of the Ward Tribunal to show members who heard the matter does not go to the root of the matter.

On the fourth ground that the first appellate Tribunal erred when it failed to disclose the opinion of the assessors, she partially agreed with the appellant on this ground, only to the fact that in the trial Tribunals' judgment the assessor's opinion were not indicated. The assessors were properly involved till they read their opinion to the parties, the only

mistake their opinion were not considered in the final judgment by the Chairman. It was the view of the respondent that such mistake is curable under the overriding objectives principle.

On the fifth ground that the first appellate Tribunal erred when it failed to properly evaluate the appellant evidence the respondent submitted that the Tribunal did its work very well as it is supposed to do as mentioned in the case of **Peter vs. Sunday Post Limited** [1958] E. A 424 that the Court may also re-evaluate evidence. He concluded his submission by praying the Court to dismiss the appeal for being unmerited.

Having in mind the rival submission of the parties and the grounds of appeal, I am of the settled view that the issue as to whether the trial Tribunal was properly constituted will entirely determine the appeal at hand. The very issue is born from the 1st, 2nd and 3rd grounds of appeal per petition of appeal dated 5th July 2021.

In the first and second ground of appeal, which were argued jointly by the parties, the issue is whether there was proper composition of members in the ward tribunal. The law is certain under Section 11 of The Land Disputes Court Acts, cap 216 R.E 2019 as to what constitutes the Ward Tribunal. That names and genders of the members participating in cases before the ward tribunal must be clearly reflected in each sitting of the ward Tribunal. The ward Tribunal is properly constituted if composed

of not more than eight or less than four members as provided 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 as follows;

> *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.*

Thus, after a thorough perusal of the entire proceedings of the ward Tribunal, names of members appeared on the first day of mention, on 7/1/2020 were eight members. During visiting the *locus in quo* on 31/3/2020, there were five members. When the matter was called for hearing of the applicant case on 14/4/2020 corum was not recorded, members attended are not known. Despite the fact that there were questions asked by the members of the ward tribunal, but the names of the members who composed the ward Tribunal during hearing were not mentioned. Despite the fact that when the case was heard on the side of the appellant on 23/4/2020 six members of the Tribunal were there. On the date of judgment on 30th April 2020 when the judgement was delivered eight members attended.

The issue that the corum was not consistent in each sitting of the ward Tribunal as claimed by the appellant has merit. In this appeal names of members of the ward Tribunal who heard the dispute is inconsistent as argued by the appellant and conceded by the respondent. It is obvious that the members who partly heard evidence and could not participate during the visit the locus in quo were not in a better position to decide the case basing on evidence. This means that they cannot form the proper corum as per Section 11 of cap 216 R.E 2019.

Since the proceedings do not show members who were present at the hearing of the matter, especially during hearing of the applicant (respondent) case, and the respondent case carries equal weight before the Tribunal as it is to the appellant case, I think justice was not done. Because the composition of members who attended hearing of the respondents' case is not reflected in the records of the Tribunal it is without doubt that the omission was fatal.

It is now settled that in each day when the matter is heard in 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.'*

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 know if the members who were listed in the judgment, participated fully in the hearing. 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 show variations in attendance of the members, in my view it creates injustices to the parties when the said trial tribunal composing the judgement. Therefore, I concede with

what submitted by the appellant that there was a serious noncompliance of the law by the ward Tribunal. Because the failure of the ward Tribunal to show members who participate in the trial is inconsistent, creates injustices in decision making.

I do not support the argument of the respondent that the defect was not fatal and there was not fault in the corum. The first appellate Tribunal erred to concede with the first appellate chairman that there is no any fault in the coram recording. There was a fault that goes to jurisdiction of the very Tribunal to determine the matter before it. The respondent attempted to seek refugee under the umbrella of the principle of overriding objectives, the principle is of no help on the point which touches the jurisdiction of the Tribunal. The case of **Yakobo Magoiga Gichere**(supra) she relied is distinguishable from this case at hand.

In the end result, the trial Tribunal was not well constituted, therefore, the decision reached by the ward Tribunal while not properly constituted was a nullity. Judgment and proceedings of both Tribunals are hereby quashed and ordered set aside. upon finding that proceedings and judgment were a nullity the call is still called to grand a proper relief to the parties according to the circumstance of the case guided by law and practice.

Having quashed and set aside the above stated proceedings and judgments, ordinarily I would have directed for 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 heard *de novo.* In the circumstances I therefore direct that anyone who wishes to pursue the claim to file afresh in accordance with the current legal regime. I make no order as to costs as the mistake was done by the trial tribunal. Appeal allowed.

Dated at Mbeya this 18th day of July 2022.

D. P. Ngunyale
Judge
18/07/2022