

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

LAND APPEAL NO.5 OF 2022

(C/f Land appeal No.13 of 2020 at the District Land and Housing Tribunal for Arusha at Arusha , Originating from Land Application No.8 of 2020 at Meserani Ward Tribunal)

LORAMATU KAVIETAPPELLANT

Vs

NAMAYAN KAVIET.....RESPONDENT

JUDGMENT

Date of last Order: 18-7-2022

Date of Judgment : 17-8-2022

B.K.PHILLIP,J

Aggrieved by the decision of the District Land and Housing Tribunal of Arusha at Arusha (Hereinafter to be referred to as "the Land Tribunal") the appellant herein lodged this appeal on the following grounds;

- i) That the Land Tribunal erred in law and fact for not holding that the judgment of the Ward Tribunal was illegal as it was prepared by the secretary to the Tribunal not the Tribunal.
- ii) That the Land Tribunal erred in law and fact for hearing and delivered judgment while its members did not meet the quorum and the secretary was treated as a member of the Land Tribunal.

- iii) That the Land Tribunal erred in law and fact for hearing and delivering a judgment while the trial Tribunal lacked jurisdiction .
- iv) That the Land Tribunal erred in law and fact for hearing and delivering a judgment not a result of evidence of parties /or which is backed with evidence adduced by parties.
- v) That the Land Tribunal erred in law and in fact as the proceedings of the Ward Tribunal were tainted with irregularities.
- vi) That the Ward and Land Tribunal erred in law and in fact for deciding in favour of the respondent yet the issue in controversy was not the basis of the judgment.

The appellant prays the decision of both the Ward and Land Tribunal be quashed and set aside with costs.

A brief background to this appeal is that the respondent herein sued the appellant at the Meserani Ward Tribunal claiming that the appellant herein trespassed into her land. The appellant denied the respondent's claims. He alleged that the land in dispute belonged to his father. The matter was heard inter parties and each party brought his/her witnesses at the Ward Tribunal. The Ward Tribunal visited the land in dispute and at the end of the day it made its decision in which it declared the respondent as the rightful owner of the land in dispute. Aggrieved by the decision of the Meserani Ward Tribunal, the appellant appealed to the Land Tribunal but his appeal did not sail through. It was dismissed for lack of

merit. Thereafter the appellant lodged the instant appeal on the grounds enumerated at the beginning of this judgment.

The learned Advocate Kennedy Chando and Amani Mkwama appeared for the appellant and respondent respectively. I ordered the appeal to be disposed of by way of written submission.

Submitting for the 1st ground of appeal, Mr. Chando, argued that it is apparent in the judgment of the Ward Tribunal that the secretary signed the judgment in contravention of section 5 (3) of the Ward Tribunal Act, which provides that the secretary of the Tribunal shall attend all sitting of the Tribunal and record all its proceedings but shall not participate in decision making. He cited the case of **Lucas Mwaruka Vs Clemence Mwaruka**, Misc. Land Appeal No.27 of 2012 and **Nada Qori Vs Isaki Gilba**, Misc. land Appeal No. 2/2013(Both unreported), to bolster his argument.

With regard to the 2nd ground of appeal, Mr. Chando argued that the Ward Tribunal was not properly constituted because there was no female member as required in section 11 of the Court (Land Disputes Settlement) Act, Cap 216, R.E 2019 (Henceforth " Cap 216") , which provides that each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women. He contended that the proceedings of the ward Tribunal does not disclose the gender of the members who were present during the hearing which is a fatal irregularity since the composition of the member of the Ward Tribunal cannot be ascertained. That renders judgment of the Ward Tribunal a nullity. He

cited the case of **Mariam Madali Vs Hadija Kihemba , Misc. Land case Appeal No.16 of 2019**, (unreported) to support his arguments.

With regard to the 3rd ground of appeal , Mr. Chando argued that the Ward Tribunal had no jurisdiction to entertain respondent's case on the following reasons ; One, that the land in dispute was not properly identified. There was no description and identification of the land in dispute. He cited the case of **Daniel Dagal Kanuda (Administrator of the the estate of the late Mbalu Kashana Bulunda) Vs Masaka Ibeho and 4 others, Land Appeal No.26 of 2015** (unreported). Two, the dispute between the parties was centered on the land that formed part of the estate of the appellant's father (now deceased), so the Ward Tribunal proceeded to determine the matter while it had no jurisdiction to deal with matters concerning administration the deceased estates.

With regard to the 4th ground of appeal , Mr. Chando argued that the decision of the Ward Tribunal is against the weight of the evidence adduced. There was no sufficient evidence to prove that the land in dispute belongs to the respondent. The appellant has lived in the land in dispute with his family for all his life and has nowhere to go. The evidence adduced shows that the one who gave the respondent the land in dispute assumed that she was the 4th wife of the appellant's father. He contended that even if it is assumed that the respondent was the 4th wife of the appellant's father, that alone does not give her an automatic right to inherit the land in dispute.

Furthermore , she contended that the Ward Tribunal failed to properly analyze the evidence adduced. It missed the issue in controversy which is; who is the rightful owner of the land in dispute , instead it made a determination on a wrong issue that is, whether or not the respondent was the 4th wife of the appellant's father as a result made an erroneous decision.

Mr. Chando implored this Court to allow the appeal.

In rebuttal , Mr. Mkwama started his submission by pointing out that in his appeal to the Land Tribunal, the appellant raised only three grounds of appeal, to wit,

- i) That the Trial Tribunal erred in law and fact for delivering a judgment which has been deliberated by a secretary to the ward Tribunal.
- ii) The trial Court erred in law and fact for hearing and delivering a judgment while its members did not meet the quorum.
- iii) That the Trial Tribunal erred in law and fact for delivering a judgment which is not backed up with evidence adduced by the parties.

He went on submitting that in this appeal the appellant has raised six grounds of appeal and three of them are completely new. This Court is not supposed to entertain and determine the new grounds of appeal to wit; ground numbers 3,5 and 6, Contended Mr.Mkwama.To cement his arguments he cited the case of **Zuberi Seifu Kimbuke V Grace Charles**

Magos , Misc. Land Appeal No.87 of 2021 and Karim Seif@Slim Vs The Republic, Criminal Appeal No.161 of 2017 (both unreported).

Mr. Mkwama submitted for the 1st ,2nd and 5th grounds of appeal jointly.He conceded that the name and signature of the secretary of Meserani Ward Tribunal appears in the proceedings and he has been clearly identified as “the secretary”.He contended that though the secretary is not a member of the Tribunal and does not participate in decision making his/her names are supposed to appear in the proceedings because he is responsible for recording all evidence adduced and all other matters transpiring during the hearing. Omitting the name of the secretary creates queries on the records of the proceedings. The question will be who wrote the proceedings. He cited the case of **Abdalamani Mohamed Vs Halidi Mohamed Misc. Land Case Appeal No.1 of 2019** (unreported), to bolster his arguments.

Responding to the arguments raised in relation to section 11 of the Cap 216, Mr. Mkwama argued that section 11 of Cap 216 provides for the composition of the Ward Tribunal, not a quorum in a single session/sitting. He contended that when it comes to the issue of quorum in a session the applicable provisions of the law is section 4(3) of the Ward Tribunals Act , which provides that quorum at a sitting shall be one half of the total number of members and does not provide that there should be a gender balance. He cited again the case of **Abdalamani Mohamed** (supra) , to cement his arguments.

Mr. Mkwama submitted for the 3,5 and 6 grounds of appeal jointly. His arguments were to the effect that Mr. Chando misdirected himself in his submission. The issue before the Ward Tribunal was on ownership of land not administration of the deceased estate. There was no problem of boundaries, size or location of the land in dispute. The respondent and her witnesses clearly proved how the respondent obtained the land in dispute. The Ward Tribunal visited the land in dispute to ascertain the correctness of the description of the land in dispute.

Moreover, relying on the provision of section 13(1) of Cap 216, Mr. Mkwama argued that the law embraces simplicity in the proceedings before the Ward Tribunal and primary responsibility of the Ward Tribunal is to maintain peace and harmony in the society, by mediating the land disputes among the members of the society.

Furthermore, he argued that procedural technicalities are not supposed to be given preference over the substantive justice which aims at solving the real controversy between the parties. To cement his arguments he cited the provision of section 45 of Cap 216 and the case of **Yakobo Magoiga Gichere Vs Peninah Yusuph , Civil Appeal No.55 of 2017** (unreported) .Finally , he implored this Court to dismiss the appeal.

In rejoinder, Mr. Chando reiterated his submission in chief and submitted that there is no any new ground of appeal raised by the appellant. He contended that issues of jurisdiction and irregularity can be raised at any stage. To cement his arguments he cited the case of **Ngolo Mgagaja Vs Republic, Criminal Appeal No. 331 of 2017** and **Hamisi Mdida and**

**Said Mbogo Vs The Registered Trustees of Islamic Foundation,
Civil Appeal No.232 of 2018** ((both unreported).

Moreover, Mr. Chando insisted that the Ward Tribunal had no Jurisdiction to entertain the case because boundaries of the suit land were not clearly identified. The Tribunal visited the suit land but failed to indentify the boundaries and the secretary to the Ward Tribunal signed the judgment. Also, he distinguished the case of **Abdalahaman** (supra) from the facts of this case on the ground that it did not address the issue of indicating the gender of the members of the Tribunal.

Having analyzed the rival arguments made by the learned Advocates, let me start with the concern raised by Mr. Mkwama that the appellant has brought up new grounds of appeal which were not raised at the Land Tribunal. The Court's records reveal that at the Land Tribunal the appellant raised three grounds of appeal. The 3rd, 5th and 6th grounds of appeal are new grounds since they were not raised at the Land Tribunal. I am inclined to agree with Mr. Mkwama that this Court has no jurisdiction to entertain new grounds of appeal. The case of **Karim Seif** (supra) cited by Mr. Mkwama is very relevant here. In that case the Court of Appeal quoted with approval its decision in the case of **Samweli Sawe Vs Republic , Criminal Appeal No.211 of 2009** (unreported) , in which it said the following;

*".....In the case of **Abdul Athuman Vs Republic (2004) T.L.R. 151**, the issue on whether the Court of Appeal may decide on matters not raised in and decided by High Court on first appeal was raised. The Court*

held that the Court of Appeal has no jurisdiction. This ground of appeal is therefore, struck out”

From the above quoted findings of the Court Appeal, the position of the law is that this Court cannot entertain grounds of appeal which were not raised in and decided in the 1st appellant Court, for this matter the Land Tribunal. In other words, this Court cannot fault the decision to the Land Tribunal basing on grounds of appeal which were tabled before it. However, as correctly submitted by Mr. Chando it has to be noted that grounds of appeal on pure points of law on jurisdiction or irregularities can be raised at any stage. [See the case of **Mwanaisha Rashid Vs Meri Dede and Odero Dede, PC Civil Appeal No.14 of 2021** and **Hamisi Mdida and Said Mbogo** (Both unreported)]. In this appeal I have noted that the 3rd ground of appeal is on jurisdiction of the Ward Tribunal. The 5th ground of appeal is on irregularities and in fact it is similar to the 1st ground of appeal. For the reasons explained herein above, I will entertain the 3rd and 5th grounds of appeal. However, I am constrained to strike out the 6th grounds of appeal, as I hereby do. The 6th grounds of appeal is hereby struck out.

Having said the above, let me proceed with the determination of the grounds of appeal and I will start with the 3rd ground of appeal which is on the jurisdictional issue for obvious reason that if it sails through then the judgment of the Ward Tribunal will be a nullity.

The records of the Ward Tribunal reveal that the respondent's claim before the Ward Tribunal was that the appellant trespassed into her land.

In the course of hearing the case it was put into light that the respondent was the 4th wife of the appellant's father and the land in dispute was given unto her upon the demise of her husband. In my considered opinion, Mr. Chando's contention that the dispute between the parties before the Ward Tribunal was on administration of the deceased estate is misconceived. The Ward Tribunal dealt with the complaint that was filed by the respondent. There was no any claim concerning the administration of the deceased estate. It was the appellant herein who claimed that the land in dispute belonged to his father. The appellant's defence cannot be a basis of determining the nature of the complaint that was filed before the Ward Tribunal. In short, the Ward Tribunal had jurisdiction to determine the respondent's complaint since it was a pure land matter.

With regard to the 1st and 2nd grounds of appeal, it is true that the secretary signed the decision of the Ward Tribunal. However, as correctly submitted by Mr.Mkwama the record shows that the secretary signed it in his capacity as a secretary and his position is clearly indicated. The case of **Abdalamani Mohamed** (supra) cited by Mr.Mkwama is relevant here. In that case this Court said the following.

"..... The secretary is not a member of the Tribunal and does not participate in decision making ,but he records the decision made therefore his name must appear in the coram not as a member but as secretary .Skipping his name in the proceedings may attract a question as to who recorded the proceedings"

By reading the judgment of the Tribunal I noted that the judgment has indicated the names of all members including the secretary and each one signed against his/her name. However, the decision states that it was

made by the members of the Tribunal. Under the Circumstances, I do not see any injustice that was occasioned by the fact that secretary's names and signature appears in the judgment of the Ward Tribunal.

With due respect to Mr. Chando, the case of **Lucas Mwaruka** (Supra) is distinguishable from the facts of this case since in that case the decision of the Ward Tribunal was signed by the chairman and the secretary only. That is why on appeal this Court made a finding that the decision was signed by one member only, that is , the chairman because the secretary is not a member of the Ward Tribunal. Similarly the case of **Nada Qori** (supra) is distinguishable from the facts of this case since in that case the decision of the Tribunal was signed by the secretary only. In the case in hand the decision was signed by four members of the Ward Tribunal.

The record shows that at the hearing of the respondent's complaint five members of the Ward Tribunal were in attendance and the secretary was also present which is quite in line with the requirement of section 4(3) of the Ward Tribunal Act. For clarity let me reproduce the provision of section 4(3) of the Ward Tribunal Act hereunder;

"4(3) The quorum at the sitting of the Tribunal shall be one half of the total members."

On the total number of members, Section 11 of Cap 216 provides that;

"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 by section 4 of the Ward Tribunal Act"

I entirely associate myself with the findings of this Court in the case **Abdalamani Mohamed** (supra) , in which it held as follows:

" The relevant provision for coram during adjudication as section 4(3) of the Act. which provides that ;

The quorum at a sitting of the Tribunal shall be one half of the total number of members

The law as quoted above does not require gender balance"

However, reading the provisions of the law in respect of the members of the Ward Tribunal, it is evident that in every sitting there must be a least one female member so as to comply with the need of having both gender represented. In this case, as correctly submitted by Mr. Chando, the record does not disclose the gender of the members attended at the hearing. But I have noted that Mr. Chando has not stated that there was no female member, his concern is that this Court cannot be able to know if there was a female member or not. Under the circumstances, it is the finding of this Court that Mr. Chando's argument is weak, as it appears it is based on speculations. Had it been true that there was no any female member , then he would have said so straight forward. Having in mind the observations made by the Court of Appeal in the case of **Yakobo Magoiga Gichere**, (supra), that is the Courts have to embrace the simple and accessible way the Ward Tribunals in Tanzania conduct their daily business and that the principle of overriding objective requires Courts to deal with cases justly and to have regard to substantive justice, I decline to agree with Mr. Chando's stance that the failure to indicate the gender of the members of the Ward Tribunal vitiates the proceedings of

the Ward Tribunal. Thus, I hereby hold that the both the 1st and 2nd grounds of appeal have no merit.

With regard to the 4th ground of appeal, this cannot detain me , since the records of the Ward Tribunal shows clearly that the evidence adduced by the respondent and her witnesses proved to standard required by the law that the land in dispute belongs to the respondent. The Tribunal visited the land in dispute and Court's records reveal that the boundaries of the suit land were identified very well. The appellant failed to prove that he has right of ownership of the same. In his defence he alleged that the land in dispute belonged to his mother but his father gave it to the respondent. In short, ample evidence was adduced at the Ward Tribunal to prove that the appellant trespassed into the respondent's land as he admitted himself before the Tribunal that the respondent was his father's 4th wife and she was given the land in dispute by her father. Thus, the fourth ground of appeal fails too.

In the upshot, this appeal is dismissed with costs.

Dated this 17th day of August 2022




B.K.PHILLIP,

JUDGE