

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO 62 OF 2021

*(Arising from Land Appeal No 80 of the Tarime District Land and Housing Tribunal,
Originating from Land Case No 7 of 2020 of Nyanungu Ward Tribunal dated
04/06/2020)*

MATARO PETRO MARWA APPELLANT

VERSUS

KEMORE NYAMOHANGA MEKORE RESPONDENT

JUDGMENT

1st August & 16th August, 2022

F. H. MAHIMBALI, J.

This is the second appeal now after the appellant had lost his first appeal at the District Land and Housing tribunal of Tarime. He too lost the case at the trial Ward Tribunal of Nyanungu via land case no. 7 of 2020 where the respondent successfully sued him for the claim of land. Now being not amused by the decision of the first appellate tribunal, has come to this Court armed with a total of three grounds of appeal, namely:

- 1. That the 1st appellate Tribunal erred in law and fact by declaring that the respondent as rightful owner of the suit land as he has been owning the land since 1981 contrary to the evidence on the Tribunal records.*
- 2. That the 1st appellate Tribunal erred in fact by misdirecting its mind in respect of respondent's locus standi concerning the administration of the respondent's mother estate.*
- 3. That the 1st appellate Tribunal erred in law and fact by totally ignoring the appellant's 1st and 4th ground of appeal.*

During the hearing of appeal, the respondent could not be traced thus, the matter proceeded ex parte against him after the Court's satisfaction of the dully processed summons.

For the hearing of the said appeal, Mr. Makowe represented the appellant. When Mr. Makowe for the appellant was invited to argue the appeal on behalf of his client, he first addressed the Court on the legal issues pertaining to the Ward Tribunal's proceedings.

He first clarified that as per proceedings dated **7/5/2020, 14/05/2020, 18/05/2020, 21/05/2020** of the Ward Tribunal, there had been 9 members constituting the panel. As per law, Cap 216, under section 11 (1), the membership of the Ward Tribunal is not more than 8. In this matter, as the coram established that there had been 9

members (extra by one member), he was of the view that the Ward Tribunal was over constituted in membership beyond those statutorily provided for. Therefore, the trial tribunal was not properly constituted as per law and therefore, it vitiated the whole proceedings and orders thereof. However, in a close scrutiny, it appeared that one of the nine members described composing the panel was Secretary to the trial tribunal who mistakenly appeared in coram list. Thus, this legal concern though tasteful, it had no reality. After all, there is no evidence in record that the said Secretary participated in decision making of the said proceedings for it to be vitiated.

As if that was not enough, Mr. Makowe, raised another legal issue that as per his reading of the trial tribunal's judgment and proceedings, it has not been clear to him whether there was any voting of the members before the decision. The judgment and proceedings don't reflect voting and which members formed the majority. He was thus afraid if there was judgment as per law. He considered it as being violation of section 14 (3) of LDCA.

Moreover, as per page 10 of the typed proceedings of Ward Tribunal (dated 18/5/2020), he introduced another issue that there were two witnesses for the appellant who were denied their testimony (page

10 and 11 of the typed proceedings). He queried if the denial was proper as per law. Thus, the appellant had no fair trial. Should these witnesses had testified, perhaps there would have been a different position of verdict. That was equivalent to breach of fundamental right of being heard on the part of the appellant.

Lastly, he faulted the procedure and proceedings at the visit to the locus in quo. The proceedings at the locus in quo were irregular. The appellant had no opportunity of asking questions. Furthermore, the proceedings established that there were strange members who gave their opinion and formed the basis of decision of the Ward Tribunal. As they were not witnesses, their opinion must have influenced the tribunal members.

As what is to be done at the locus in quo, without specifying or giving any citation, Mr. Makowe argued that the CAT in one case, made a proper guidance on that. On these legal deficiencies, he prayed that this court under section 43 (1) b and (2) of LCA, Cap 216, R. E. 2019, be pleased to revise and quash the two lower tribunals' proceedings and set aside all orders emanating thereof.

This notwithstanding, he argued his appeal that it raises an issue as who between the appellant and respondent own the suit premises. As

per testimony of the respondent (page 2 and 3), does not state as to how long the said respondent has been in suit premises or since when. His witness (Magaiwa at page 10 of the typed proceedings) is the one who stated that the respondent is there since 1951. Where the owner says nothing on the issue, then there is nothing to be corroborated by another. So, the witness corroborated nothing in the absence of evidence by the respondent himself that he owned that land. He challenged it as an error by the DLHT that the respondent owned land since 1981 in the absence of evidence by the respondent himself.

The second ground of appeal, deals with locus of the respondent in the absence of letters of administration. At page 5 of the typed proceedings, the appellant was sued so by the respondent. He could not cloth the title or jurisdiction by himself. As he was sued so, he replied/defended the suit by himself. Thus, the DLHT erred. Had he filed the suit by himself, the argument by the DLHT would have made good sense.

With these arguments, he prayed that the appeal be allowed with costs. The third ground of appeal he abandoned it.

I have thoroughly digested both the legal concerns raised in respect of the irregularity of the trial tribunal's proceedings and

submissions made to the grounds of appeal. The issue for this Court's determination now is whether the appeal is meritorious as per grounds of appeal argued and the legal concerns raised.

To start with the first legal concern raised by Makowe is on the issue of legality of the trial tribunal's judgment for want of voting. It is not clear to him as to whether there was any voting by the members of the trial tribunal as per proceedings of the trial tribunal. On that basis, he challenged the legality of the said judgment by the trial tribunal pursuant to section 14(3) of the LDCA. For proper guidance, I hereby reproduce what the said relevant section reads:

14.-(1) The Tribunal shall in **all matters of mediation** consist of three members at least one of whom shall be a woman.

(3) In the event of the **equality of votes**, the member presiding shall have a casting vote in addition to his deliberative vote.

My understanding of the reading of this section, it caters for mediation proceedings. However, I appreciate the concern of Mr. Makowe though it is not backed up by the said cited provision of the

law. The relevant law in my considered view is not the Land Disputes Courts Act, but the Ward Tribunal Act, Cap 206. The same under section 4 (1), (3) and (4) provides for the composition, quorum in every sitting of the tribunal and the manner of giving decision. I hereby quote:

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;

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.

According to the trial tribunal's proceedings and judgment, it is not reflective as who voted for the appellant's favour and who voted for the respondent's favour. The proceedings and judgment are silent on this. What is seen in the judgment is this:

"... kwa kuzingatia sheria namba 7 ya Mwaka 1985 inayolipa Baraza Mamlaka ya kufanya maamuzi ya ardhi kama Mahakama ya Ardhi pia kwa kuzingatia Sheria ya Ardhi ya Mwaka 1999 fungu la 18, 22, hadi 47 kanuni ya 81 na jedwali la pili, hivyo baraza linatamka kuwa Ardhi yenye Mgogoro ni haki ya Mlalamikaji KEMORE S/o NYAMOHANGA @ KEMORE na mvamizi MATARO S/O PETRO @ MARWA aache mara moja kumsumbua huyu Mlalamikaji..."

As who amongst the eight constituting members of the trial tribunal formed majority of the decision, the proceedings and the judgment are silent. Therefore, whereas I agree with Mr. Makowe on this legal issue of the members "how many casted for the appellant and respondent being not known", the judgment has not complied with the law. As it appears, it is as if suggesting that all members voted for the respondent which fact is not reflective in the proceedings and judgment. Since the person drafting judgment of the trial tribunal is the Secretary of the Ward Tribunal, he just does so upon recording the position/decision of each member present in the respective proceedings and the majority of them, make the decision of the trial tribunal.

On the second legal issue posed by Mr. Makowe is on the denial of appellant's two witnesses during the hearing. He queried if the denial was proper as per law. He considered the denial of the appellant's

witnesses from testifying before the trial tribunal had an impact to the fair trial of the case. He was of the view that, should these witnesses had testified, perhaps there would have been a different position of verdict. That was equivalent to breach of fundamental right of being heard on the part of the appellant.

I have gone through the trial tribunal's proceedings, I am satisfied that as per proceedings of the trial tribunal dated 18th May, 2020, two appellant's witnesses (Marwa Mwiti @ Mohere and Simon Mwiti @ Mohere) were denied giving their testimonies basing on the claims of consanguinity with the appellant, personal **glargies** between the respondent and those witnesses.

I am aware that Ward Tribunals are mandated as per law to regulate its own procedures. In the course, Ward Tribunals shall have power to hear statements of witnesses produced by parties to a complaint, and to examine any relevant document produced by any party (see section 15 (2) and (3) of the Ward Tribunal Act, Cap 206, R.E 2019). However, the law is restrictive that notwithstanding the provisions of section 15, a Ward tribunal shall in all proceedings seek to do justice to the parties and to reach a decision which will secure the peaceful and amicable resolution of the dispute, reconciliation of the

parties and the furtherance of the social and economic interests of the village or ward as a whole in which the dispute originates. For the purposes of securing a just determination of a complaint, the Tribunal shall not make a decision on any complaint unless it has given an equal opportunity to each party to explain his part of the matter and to present his witnesses (see section 16 of the Ward Tribunal Act, Cap 206).

I am therefore satisfied that as per proceedings of this case at the trial court, the two witnesses were unreasonably denied opportunity to give their testimony. One cannot be denied to give his testimony on the basis of consanguinity. If that person is vested with material facts of telling the court on the legal issues, that person is a competent witness. Though Ward Tribunal shall not be bound by any rules of evidence or procedure applicable to any court, however, are bound by rules of natural justice such as hear the other party. The appellant in this case was denied with the right to be fully heard in his case.

Lastly, Mr. Makowe faulted the procedure and proceedings at the visit to the locus in quo. He clarified that the proceedings at the locus in quo were irregular. The appellant had no opportunity of asking questions. Furthermore, the proceedings established that there were

strange members who gave their opinion and formed the basis of decision of the Ward Tribunal. As they were not witnesses, their opinion must have influenced the tribunal members. I agree with Makowe that, the proceedings of this case at the locus in quo by the trial tribunal were irregular. The strange members to the tribunal were invited to give their opinion to the deciding members of the trial tribunal and therefore vitiated the proceedings and judgment. Instead of recording their evidence at the visit to the locus in quo, the trial tribunal collected the opinions from local leaders and elders of the said locality and then made its decision. I quote:

".....Maoni ya viongozi wa Serikali ya Kijiji pamoja na Kata wameonyesha kuwa Baraza litoe hukumu ya haki bila kupendelea sababu mazao yaliyopo kwenye eneo hilo ni mali ya Mlalamikaji KEMORE NYAMOHANGA @ KEMORE..... Hivyo Baraza linatamka kuwa Ardhi yenye Mgogoro ni haki ya Mlalamikaji KEMORE S/o NYAMOHANGA @ KEMORE na mvamizi MATARO S/O PETRO @ MARWA aache mara moja kumsumbua huyu Mlalamikaji..."

According to law, the decision of the Ward Tribunal is not based from the opinions of other people but by the decision of the majority members of the sitting members of the Ward Tribunal and upon hearing

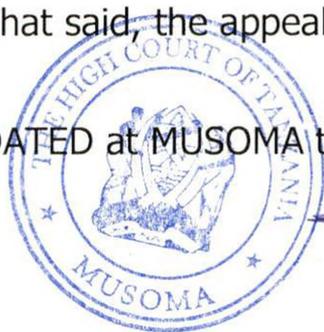
the parties' testimony and evidence and not others (See section 4, 15 and 16 of the Ward Tribunal Act).

With these procedural irregularities, I shake hands with the learned counsel for the appellant Mr. Makowe, that the trial tribunal's proceedings were nothing but nullity. In the circumstances, I hereby nullify all the proceedings and orders/decisions of the trial tribunal as well as those of the first appellate tribunal for being nullity.

Any party still interested in pursuing the matter should do so in a strict compliance as per current law governing such land disputes.

That said, the appeal is allowed with no order as to costs.

DATED at MUSOMA this 16th day of August, 2022.




F. H. Mahimbali
Judge

Court: Judgment delivered thin 16th day of August, 2022 in the presence of the Mr. Makowe, advocate for the appellant, Mr. Gidion Mugo, RMA and respondent being absent.


F. H. Mahimbali
Judge