

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF TANGA.
AT TANGA.**

MISC LAND CASE APPEAL No. 41 OF 2020

(Arising Land Appeal No. 01 of 2020 of the District Land and Housing Tribunal of Lushoto at Lushoto and originating from Soni Ward Tribunal case No. 01/2020).

RAMJI YUSUPH MWANAFUNYO APPELLANT

VERSUS

MAGRETH SHEMPENBA RESPONDENT

J U D G M E N T

MRUMA, J.

This appeal traces its origin from Land Dispute No. 1/2020 of the Ward Tribunal of Soni in Lushoto District. In the Tribunal, the Appellant herein lodged a complaint of trespass to land against the Respondent. In the end of the trial, the tribunal found in favour of the appellant, these results did not amuse the respondent and so she filed an appeal to the District court of Lushoto at Lushoto where she emerged a winner.

This aggrieved the appellant who has filed the present appeal in this court.

The appeal hinges on the following grounds;-

1. That's the District Land and Housing Tribunal misdirected itself by failed to note and hold that the Ward Tribunal misdirected itself in law

in failing to specify and point the genders of its tribunal assessors.

2. That the District Land and Housing Tribunal misdirected itself on the facts in holding that the land in dispute in the Ward Tribunal was the same one as that in Soni Primary Court Civil case No. 34/1996.
3. That the District Land and Housing Tribunal misdirected itself in holding that the case filed in the Ward Tribunal was time barred.
4. That decision of appeal in favour of the Respondent was against the weight of evidence.
5. That the District Land and Housing Tribunal misdirected itself in law in heavily basing its decision on the Soni Primary Court Judgment.

Both Parties to this appeal were represented, Senior Advocate Mramba represented the appellant while Mr. Njowoka also learned advocate, stood for the respondent, the appeal was conducted orally.

Mr. Mramba on behalf of the Appellant Ramji Yusuph Mwanafunyo submitted that the District Land and Housing Tribunal erred in law by failing to note that the Ward Tribunal failed to specify genders of members who sat in the Ward Tribunal proceedings. He submitted that section 11 of the Land disputes courts Act prescribes a number of members which are required to sit and their genders. He stated that in Land case Appeal No. 59 of 2009 between J. Kisonga Vs Said Mohamed, this court held that the Ward Tribunal must specify in its proceedings

the names and gender of its members therefore the proceedings were a nullity.

On the second ground it was his submission that the District Land and Housing Tribunal erred in law in holding that the same dispute was heard and determined by the primary court of Soni in Civil case No. 34/1996 while there was no evidence that the land was the same and even the parties were different.

On the third ground it was his submission that the District Land and Housing Tribunal was wrong to decide that the suit was time barred. The Judgment at page two para 1 shows that the appellant institute the suit claiming that her land was invaded in 2018 and he instituted the suit in 2020. Mathematically he filed a suit within a period of two years. He inquired whether the matter become time barred when it is filed within two years? He reminded the court that the appellant is the one who was complaining and he stated that he was invaded in 2018.

Reading the fourth ground he stated that it was wrong to declare the respondent a winner against the weight of evidence adduced and finally concerning the fifth ground, he faulted the DLHT for basing its decision on the judgment not evidence, he prayed that the appeal be allowed.

On his side, Mr. Henry Nhowoka for the respondent opposed the appeal. He stated that if an issue was not raised in the lower court, it cannot be raised in appeal. He cited this court's case of *Mapinduzi Mbaruku Vs Hussein Sufian Mkombozi Land Appeal No. 14 of 2019 at page 5*. He said that since in this case the issue of gender of members

was not raised in the first appeal. It cannot be raised safely at this stage. He further submitted that the learned counsel has not stated any injustice suffered by such irregularity if any.

Also, even if it is found that the Ward Tribunal didn't specify genders then the overriding objective do apply and it is cured by S. 45 of the Land Disputes Courts Act (see Yakobo Magoiga Kachere Vs Penina Yusuph, Civil Appeal No. 55 of 2017 pg 13 & 14 which was cited in Mapinduzi Mbaruku's case at page 9 on the case of Jenny Kisonga (SUPRA) as cited by Mr. Mramba he stated that the same was decided in 2009 long before coming into being of the principle of overriding objective. Additionally, he states that looking at the names of members, it appears there are three female members Fatuma Abdi, Rehema Athumani and Sabitiana Bilal. They are obvious female names in our societies. It was his submission therefore that gender requirement was observed.

About the second ground, the learned counsel states that the DLHT was right to find that the same Land was in dispute in Civil Case No. 34/1996 whose Judgment was produced as evidence in Court. The records are clear that the Land is the same. The Ward Tribunal faulted the Soni primary court on two grounds. One that the primary court didn't conclusively settle the matter and secondly that it did not involve Mama Kisambo and Mwanafunyo looking at that means that the land was one and the same.

He further submitted that the Ward Tribunal had no supervisory, revisional or appellate powers over the primary court as Ward tribunals are established by the Land Disputes Courts Act which is a different law

to the magistrates courts Act which establishes primary courts. He stated that the decision of Soni Primary court remains a good law. He cited the case of John Mwansansu vs R, Criminal Revision No. 8/2002 in support.

On the third ground, it was his submission that the issue of time limit arises from the fact that the 1st dispute was resolved through Civil case No. 34/1996 before Soni Primary court. No appeal was preferred till 2020 when the appellant rose and instituted the matter at hand. In terms of Part 1 item 22 of the law of limitation Act, cap 89 R.E 2019 the DLHT was correct to find that the appellant was time barred sailing to the 4th ground the learned counsel submitted that pursuant to S. 3(2) (d) read together with section 110 and 111 of the law of Evidence Act, the respondent's evidence was heavier than that of the appellant. He quoted the case of *Hemedi Said vs Mohamed Mbilu* (1984) TLR 113.

Finally, on the fifth ground, Mr. Njowoka reiterated what he submitted with regard to the second ground. He therefore prayed that the appeal be dismissed with costs for lack of merit.

Mr. Mramba in rejoinder submitted that the 1st ground is a point of law which can be raised at any stage of the case Regarding names he submitted that it is not every person who is named Fatuma is a female on the case at the primary court he states that since parties in that case were not the same. He also emphasized that the matter was not time barred as it was trespassed in 2018 and the case filed in 2020.

I will now draw attention to five grounds of appeal placed before this court for determination. Starting with ground number one about failure to indicate the gender of tribunal members. The respondent's

counsel states that it cannot be raised in the second appeal as it was not raised in the first appeal. In my view this principle that new grounds shouldn't be raised at the second appellate court best applies where it is the same party who appealed in both stages. In this case Ramji Mwanafunyo could not have raised this ground at the DLHT as he was not an appellant there in hence he did not prepare the grounds of appeal. That way it is proper for this ground to be raised now by the appellant, moreover it is a point of law.

However, this subject of genders of tribunal members has been discussed now and then by this court in the cases of and I will not waste time repeating the principles already laid. One of them being the case of *Mapinduzi Mbaruku sVs Hussein Sufiani Mkombozi*, as cited and produced in court by the appellant. This case clearly explains why this ground cannot hold water. In any case, section 45 of the Land dispute court Act, Cap 216 R.E 2019 provides that no decision or order of a Ward Tribunal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection or evidence has in fact occasioned a failure of justice.

The appellant has not explained the injustice suffered by the gender of members not being shown hence I will proceed to dismiss the first ground of appeal.

On the second ground, the DLHT is faulted for having held that the land in dispute before it is the same with the land of which dispute

was determined through Civil cause No. 34/1996. I have gone through record and found that in both cases the matter in dispute was over boundaries of the same place, in the DLHT the respondent who was the appellant therein referred back to case No. 34/1996 of Soni Primary court now and then and was not challenged by the appellant who was the respondent. Stating that the land was not the same is considered to be a mere afterthought on the appellant's side. In the circumstance, the second ground fails.

Coming to the third ground, about the matter being time barred. For a matter to be time barred in court the case must have been instituted beyond the time prescribed by the law. The law of limitation Act under the status in quo. That was the only way that parties could show their respective areas. Record shows that on that day when members were on the suit land with both parties the respondent herein flee from the scene and locked herself in her room. This can be found in page 4 of the proceedings of the ward tribunal. This unwarranted *habu per se* shows that the respondent herein was not confident with showing her part of the suit land. In this circumstance it is clear that the appellant's evidence was heavier in the Ward Tribunal in the eyes of any reasonable being. This ground also Triumphs.

Having found that the matter in the Ward Tribunal was not time barred and that this appellant's evidence was heavier than that of the respondent, I find it nugatory to discuss the remaining ground. I proceed to decide in favour of the appellant in this case and I order that the boundaries set by the Ward Tribunal of Soni in Land Dispute No. 01/2020 be honoured by both parties. Each party is to bear own cost.



A handwritten signature in blue ink, appearing to read "A. R. Mruma", is written above the printed name.

A. R. Mruma

Judge

07/04/2022

