

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF DODOMA  
AT DODOMA**

**LAND APPEAL NO. 01 OF 2022**

**MOHAMED ABDALA KITORI.....APPELLANT**

**VERSUS**

**RAMADHANI SULANDA MSURI.....RESPONDENT**

(Appeal from the Judgement of Kondo District Land and Housing Tribunal -  
R.S.Mandari-Chairman)

Dated 16<sup>th</sup> day of September, 2021

In

Land Appeal No. 27 of 2021

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**JUDGMENT**

**16<sup>th</sup> August & 9<sup>th</sup> September, 2022**

**MDEMU, J:.**

This is a second appeal. In the Ward Tribunal of Msaada, the Appellant Mohamed Abdalla Kitori filed a land dispute registered as Land Case No. 03/2021 claiming that the Respondent has trespassed into his Land measuring 28x70 paces. The Respondent denied the claim stating that, the disputed land is his measuring 3 acres. It was sold to him by one Fada Mganga. The suit was decided in Respondent's favour.

The Appellant herein appealed to the District Land and Housing Tribunal (DLHT) for Kondoia which dismissed the appeal on merits. It was on 16<sup>th</sup> of September, 2021. Aggrieved further by the decision of the first appellate tribunal, the Appellant lodged this instant appeal on the following grounds: -

1. *That, the District Tribunal erred in law and in fact for failure to consider that the Ward Tribunal was not constituted properly.*
2. *That, the District Tribunal erred in law and in fact on holding the position of Village Tribunal as the Appeal is not emanated from the Village Tribunal.*
3. *That, both Tribunal erred in law and in fact in deciding in favour of Respondent based on speculative, imaginative and contradictory evidence of Respondent and ignored true and sufficient evidence of Appellant side.*
4. *That, the District Court erred in law and in fact for failing to observe the law.*

The appeal was heard by way of written submissions. The Appellant enjoyed the service of Mr. Gothard Mwingira, learned counsel whereas the Respondent was represented by Mr. Kesanta, learned Advocate too.

In his written submissions filed on the 2<sup>nd</sup> of August, 2022, Mr. Mwingira after abandoning the second and fourth grounds of appeal submitted in respect to the first ground of appeal that, Kondoa DLHT erred in law and fact in upholding the decision of Ward Tribunal whilst the Tribunal was not properly composed. He said that, section 11 of the Land Disputes Courts Act, Cap. 216 requires the ward tribunal to consist not less than four not more than eight members, three of whom shall be women. He also stated that, according to section 24(1) of the Ward Tribunals Act, record of proceedings of the Ward Tribunal have to be properly kept. He contended that, Msaada Ward Tribunal did not comply to the above provision in three fold; first, signatures of members are wanting. **Second**, gender of members not indicated and **third**, coram was not indicated particularly on proceedings dated 18<sup>th</sup> of February, 2021 and 22<sup>nd</sup> of February, 2021. In his view, such omission is fatal thus, cited the case of **Jane Kisonga vs. Said Mohamed, Misc. Land Appeal No. 59 of 2009** and **Kassimu Ngoroka vs. Bernad Matembula, Misc. Land Appeal No. 3 of 2016** (both unreported) to bolster his assertion.

On the third ground of appeal; it was his submissions that, the Appellant at the Ward Tribunal claimed to have acquired the disputed land

through sale from Mzee Saba Saidi in 1986 measuring 28/70 paces, the version which was corroborated by PW2. On the other hand, the Respondent asserted to have purchased the disputed land from Mzee Mhaja but neither mentioned the year when the said sale agreement was executed nor stated the size of the said disputed land. He added further that, DW2 testified that the disputed land was 2 acres which the Respondent purchased from Riziani.

He also argued that, the Respondent relied on sale agreement executed in 1988 in which, the vendor was one Fada Mganga and not Riziani as claimed by DW2. It was Mr. Mwingira's argument that, Appellant's evidence was stronger and heavier than that of the Respondent and had the chairman critically given the said evidence a detailed evaluation and analysis, he would have decided in favour of the Appellant herein. He bolstered his submissions by citing the case of **Hamad Said vs. Hemed Mbilu [1984] T.L.R. 113**. He finally prayed this Court to allow the appeal with costs.

In reply, Mr. Kesanta in his written submissions filed on 16<sup>th</sup> of August, 2022 stated that, the first ground of appeal was not raised in the DLHT, therefore it cannot be raised and entertained in this second appeal. He cited the case of **Melita Naikiminyat & Loishilaari Nakiminyal vs. Sailewo Loibunguti [1998] T.L.R. 120**. He argued further that, the Appellant's

conduct of not raising the issue of Ward composition at the first appellate Tribunal meant satisfaction on such a composition of the tribunal.

That notwithstanding, it was his submissions that, the composition of Ward Tribunal was proper as section 11 of the Land Courts Disputes Act, Cap. 216 does not make it mandatory for writing gender of members in the proceedings of the Ward Tribunal. It only requires number of members, the learned counsel insisted. He also stated that, the Appellant has not stated how his right was affected by the fact that gender of members was not recorded. He said therefore, since no right of any party was affected, the matter be determined on merits.

On the third ground of appeal, he cited the case of **Alex Mwarabu vs. Dickson Nhonya and Another, Misc. Land Appeal No. 43 of 2018** (unreported) arguing that, whereas the Appellant alleged that his land measured 28x70 paces, evidence during visit revealed 3 acres thus, proved that the Appellant was not certain to which land he alleged to have purchased, if any. It was his submissions that, certainty regarding size of land is very important. In all, he failed to prove his case as required under section 110 and 111 of the Evidence Act, Cap.6. He argued further that, the Appellant failed to tender any document to prove that he really acquired the

suit land through sale from Mzee Saba Saidi and also failed to call any witness witnessed the alleged transfer of land.

It was his further submissions that, the Respondent proved his case as he tendered sale agreement executed in 1988. He cited section 100 of the Law of Evidence Act, Cap. 6 that, oral evidence cannot be imposed to prove disposition of property reduced to the form of a document. He thus prayed this court to dismiss the appeal with costs. There was no written rejoinder from the Appellant's counsel.

Having heard counsels' submissions and after going through the findings and decisions of the two lower tribunals, the issue to be determined is whether the appeal has merits.

This being a second appeal, the law is clear that, where two courts or two tribunals, as in this case, have a concurrent findings of facts, the second appellant Court should not interfere unless, there is misapprehension in assessment of such facts. See **Neli Manase Foya vs. Damian Mlinga [2005] T.L.R. 167**. In determining this appeal, I will also be guided by this principle for one reason that, both the Ward Tribunal of Msaada in Land

Dispute No. 3 of 2021 and Kondoa DLHT in Land Appeal No.27 of 2021, found the evidence in favour of the Respondent.

The first ground of appeal is typical on point of law. It questions the decision of the first appellate tribunal being made without considering the issue of constitution of Ward Tribunal. Mr. Kesanta however observed this ground to be a new one as it was not raised in the first appellate tribunal thus, urged me to disregard it. That notwithstanding, I find it to be a point of law which can be raised at any time as it touches the question of jurisdiction of the Ward tribunal and it certainly goes to the root of the case.

My perusal of the trial Ward Tribunal proceedings and judgment has revealed that the dispute was filed by the Appellant on 01<sup>st</sup> day of February, 2021 on this day, the both parties and their witnesses were heard. However, the coram was not recorded, but members participated in examination of witnesses. On 18<sup>th</sup> February, 2021 the Ward Tribunal visited the *locus in quo* where the coram is quoted hereunder for easy reference:

WALIOHUDHURIA TAREHE 18/02/20221

<b>JINA KAMILI</b>	<b>WADHIFA</b>
ADAMU RAMADHANI	MWENYEKITI
HASSAN HAMADI	KATIBU

MELEA MWALUKO	MJUMBE
ADRISA MWALUKO	MJUMBE
HAMIDA S. KONDO	MJUMBE

The decision of the Ward Tribunal was delivered on 22<sup>nd</sup> day of February, 2021 in which the coram is shown to be of four people namely; Adam Ramadhani (chairperson), Adrisa Omary, (member), Hamida S. Kondo (member) and Melea Mwaluko (member). On this date members endorsed their signature, unlike in the proceeding of 18<sup>th</sup> day of February, 2021. Furthermore, in both dates where coram was indicated, gender of members was not indicated. Is this fatal?

Section 11 of the Land Disputes Courts Act, Cap. 216 requires the tribunal to be constituted by not less than four members and not more than eight members, three of them being women. This provision states as hereunder: -

*"11. 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 Tribunal Act"*



The above provision is also reflected in the provisions of section 4(1)(a) of the Ward Tribunals Act, Cap. 206. In Section 4(3) of the said Act, composition of the Tribunal during determination of disputes is clearly stated. Now, in attempting to resolve the issue of composition of the tribunal, the Court of Appeal in the case of **Edward Kubingwa vs. Matrida A. Pima, Civil Appeal No. 107 of 2018** (unreported) guided as hereunder:

*"The failure and the irregularity by the Tribunal to observe the mandatory requirement on the composition of the trial tribunal did not only vitiate the proceedings and the resulting decisions of the trial Tribunal but it also rendered the trial Tribunal lack jurisdiction to try the case.*

Back to the case at hand, I find that **one**, the tribunal was properly constituted. The reason is one, that is, members participated in examination of witnesses. An omission on the part of the tribunal to record the coram at the commencement of hearing in circumstances of this dispute where members asked questions to witnesses, is not fatal. **Two**, in the coram of the proceedings dated 18<sup>th</sup> of February, 2021 and 22<sup>nd</sup> of February, 2021, much as it is not indicated as to gender of members, it is not difficult to determine presence of female members in the composition as there are names whose rhythms sounds feminine. In the case of **Daluwe Lusumbo**

**vs. Daudi Mwanisenga, Misc. Land Case Appeal No. 18 of 2010**

(unreported) regarding this position, was observed that: -

*"It is difficult to determine whether there were three female members in the such Sandulola Ward Tribunal's quorum because most of those six names are pronounced with female rhythms".*

In the instant case, names Melea Mwaluko and Hamida S. Kondo appearing in the composition of Msaada Ward Tribunal are female members. An omission to indicate gender in the circumstances of this land dispute is an omission which is curable and cannot, in anyway, turn Melea and Hamida male members.

As to three female members in the composition, my interpretation to section 11 of Cap.216 is that, as the Tribunal is supposed to be composed of not more than eight members but not less than four, where members in attendance are four or five as was here, then it is not mandatory that three of them must be females. This condition, in my opinion, is only relevant and mandatory where, for example, all eight members constitutes the tribunal in the coram of a particular hearing date. In the instant land dispute where the coram of the tribunal composed 5 members, presence of two female

members was in compliance with the dictates of the law. This ground is thus dismissed.

Now to the third ground of appeal. The complaint of the Appellant is that, the two tribunals never evaluated properly the evidence of the Appellant and that, the evidence of the Respondent deployed was weak to place ownership of the suit land to the Respondent. According to the submissions and the evidence on the record, the Appellant claims from the Respondent a piece of land measuring 28x70 paces. The Appellant neither called Mzee Mwaja Mbaire Sabahi who sold the farm to him nor described the modality of that purchase. In fact, Mzee Mbaire Maherera did not witness the sale transactions but was asked to show boundaries. His version that the land in dispute was sold to the Appellant by Mwaja Mbaire Sabahi is unreliable for three reasons; **one** that, he did not witness the sale transaction and **two**, that his evidence is devoid of facts on how it came to his knowledge that the Appellant herein purchased the suit land from Mwaja Mbaire Sabahi. **Three**, he was not present during that sale transaction. Let the evidence of Mzee Mbaire Maherera speak of itself as hereunder:

*Mimi nilikuwa nakaa Machiga. Mimi nilihamia Machiga 1960-1972, mpaka 1976 ndipo tukahamishwa. 1976 ndipo tukaanza*

*kufyeka pori basi kipindi cha kufyeka na Mzee Mwaja Mbaire Sabahi. Basi tulifyeka 1976-1980 pori likawa limeisha. Baada ya hapo, 1981 nikaenda kukamata pori Changamka. Basi. 1981 niliwaacha Mzee Mwaja na Sabahi, mwaka 1981 shamba hilo Mzee Sabahi alimuuzia Mohamed Abdala. Basi Sabahi aliniita na kuniambia tukamwonyeshe mipaka ya shamba ya kwake pamoja na ya kwangu, basi tulienda kuwaonyesha mipaka, baada ya hapo walielewana na kuanza kulima hiyo mwaka 1981. Ndiyo mwisho wa maelezo.*

With this evidence, there is also evidence of visit by members of Msaada Ward Tribunal which reveals that, the disputed land measuring 3 acres belonged to the Respondent herein. The tribunal was guided by the following terms of reference as recorded in the trial tribunals proceedings:

*BARAZA LA KATA BAADA YA KUFIKA KWENYE ENEO/ SHAMBA LA MGOGORO  
LILIZINGATIA VITU VIFUATAVYO:*

- 01. KUJUA LALAMIKO KUU LA MLALAMIKAJI*
- 02. KUJUA MPAKA MKUU WA MLALAMIKAJI NA MALALAMIKIWA*
- 03. JINSI MLALAMIKAJI ALIVYOLIPATA SHAMBA NA MWAKA WA KUPATA SHAMBA*
- 04. NANI ALIYEPANDA MIGOMBA*
- 05. SHAMBA LIPO KATIKA KIJJI GANI*
- 06. KUJUA WANAMIPAKA WA PANDE NNE.*
- 07. SEHEMU ZENYE LALAMIKO NI NGAPI*
- 08. SHAMBA LINA USHAHIDI WA VIANDISHI*
- 09. KUPIMA ENEO LA MGOGORO*
- 10. MASWALI KWA WAJUMBE, BARAZA LA KATA KUULIZA MDAI NA MDAIWA.*

Following the above terms of reference, the trial tribunal made the following findings:

*Baada ya kueleza yote hayo, Baraza la Kata-Msaada linathibitisha kuwa eneo/ardhi ambayo ilikuwa na mgogoro ambayo imejumuisha kiasi cha miguu (28x70) na eneo lililolala jumla ya ekari 3 ni mali ya ndugu Ramadhani Sulanda Msuri mkazi wa Kijiji cha Machiga Chemba. Hivyo, hukumu hii haikupishana sana na maamuzi ya Baraza la Ardhi la Kijiji cha Machiga ya kumkabidhi ndg. Ramadhan Salunda kiasi cha ekari 3.*

In my opinion, we cannot get better evidence that this where the Land Village Council and the Ward Tribunal whose members, along with being familiar to both the Appellant and the Respondent, also visited the disputed piece of land and had a concurrent finding that the land in dispute is the property of the Respondent herein. This piece of evidence was also considered by the Kondoa DLHT. I am therefore in all fours with the Respondent's counsel banking on the case of **Alex Mwarabu vs. Dickson Nhonya and Another** (supra), the Appellant did not prove the case on balance of probabilities to have acquired the land in dispute through sale.

As there is no misapprehension of facts in the two tribunals below regarding a finding that the land belongs to the Respondent, I have no

reason whatsoever to interfere with such a finding. On that account, this appeal is dismissed with costs.

It is so ordered.



**Gerson J. Mdemu**

**JUDGE**

**09/09/2022**

**DATED** at **DODOMA** this 09<sup>th</sup> day of September, 2022



**Gerson J. Mdemu**

**JUDGE**

**09/09/2022**