

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPEAL NO.18 OF 2021

(Arising from Judgment of the District Land and Housing Tribunal of Mwanza in land Appeal No. 46 of 2017, by, Hon. Masao E, Chairman, Originating from the decision of Igogo Ward Tribunal in Land Application No. 5 of 2017.)

RICHARD OBONG'O..... APPELLANT

VERSUS

FELIX KINYONGA..... RESPONDENT

JUDGMENT

12th July & 30th September, 2022

ITEMBA, J.

This is the second appeal which was heard *exparte*. The appellant herein, is aggrieved by the decision of the District House and Land Tribunal (DLHT), issued by Masao, E, Chairman, in Land Appeal No. 46 of 2017. As a result, on 19th December, 2019, he filed his petition of appeal raising three grounds namely;

- 1. That the District Land and Housing Tribunal of Mwanza erred in law and fact by failure to take into consideration that the respondent's claims at the Ward Tribunal of Igogo were time barred.*
- 2. That the District Land and Housing Tribunal erred in law by failure to take into consideration that the decision of*



the Ward Tribunal was illegally procured as the Ward Tribunal of Igogo was not properly constituted.

3. That the District Land and Housing Tribunal of Mwanza erred in law and fact by upholding the decision of the Ward Tribunal of Igogo which declared the respondent herein rightful owner over the disputed property while there was no sufficient evidence proving the same causing injustice on part of the appellant.

Facts constituting the basis for this appeal are gathered from the records briefly are as follows: The respondent had instituted a land dispute against the appellant through application No. 05 of 2017 in the Ward Tribunal of Igogo at Nyamagana. He complained that in the year 2000 he travelled to Bukoba for taking care of his parents and upon coming back to his home in 2010, he found the appellant encroaching his plot by building two toilets and planting some trees. The appellant defended himself that the plot is his, that he was given by his father in 1999 and in 2000 he moved in. He agreed to have planted some trees but it was under the guidance of the village leaders and that the respondent later uprooted them. Witnesses from both sides testified among others that the appellant's house was owned by one Regina who was like an adopted daughter of the appellant's father. A person who built the appellant's house named Kisesa Buruba, who was called as a witness for the appellant stated that both the appellant and respondent inherited the

suit plots, each from his parent. That, the appellant house was once owned by Regina and when the said Regina was still staying at the disputed plot, the toilets were not there. Following this evidence, a decision was issued in favour of the respondent. The appellant preferred an appeal to the District Land and Housing Tribunal of Mwanza at Mwanza in Land Appeal No. 46 of 2017 which was unsuccessful, hence this second attempt.

When the matter came up for hearing, on 10th May 2022 both parties appeared in person before the court and it was ordered that hearing will commence on 12th July 2022. However, on 12th July 2022, while the appellant was present before the court ready for hearing the respondent without any information did not appear. The court was left with no other choice than proceeding with *ex parte* hearing. Arguing in support of the appeal, Mr. Nestory Joseph the learned counsel for the appellant started by withdrawing the 3rd ground of appeal stating that it was misconceived as issues of evidence cannot be argued at the second appellate Court.

Regarding the 1st ground of appeal, he submitted that, the matter was filed in 2017 but the proceedings of the DLHT at page 12, shows that the respondent has stated that he built the house in 2005. He argues that under Item 22 of the first Schedule of the Law of Limitation, Act Cap. 89

R.E. 2019, it provides for 12 years' time limitation from when the cause of action arose. He kept on arguing that, the fact that the respondent agrees that the encroachment happened in 2005 when the house was built in the disputed land, it means that the dispute was filed out of time in year 2017. He urges this Court to dismiss both lower Courts decision as required by the law under Cap. 89 Section 3.

When replying on the questions which were put forward by the court, he stated that, 13 years has lapsed computing from 2005 to 2017.

In the second ground of appeal, he contended that, the DLHT erred in law for not considering that the Ward Tribunal made its findings while it was not properly constituted. According to him, the law does not recognize the secretary of the Tribunal as a member. He submitted further that, since the secretary was involved as a member in the Ward Tribunal his presence rendered the Tribunal incapacitated hence, the proceedings and decision is against the law and should be set aside. He cited the High Courts' decision in the case of ***Charles Lugeeta v Serikali ya Kijiji Cha Siharoga***, Misc. Appeal No. 55 of 2017 to solidify his arguments.

When clarifying on the questions by the Court on this issue, the learned counsel for the appellant stated that, Section 4 of the Ward Tribunal Act, provides for quorum and it states categorically that the

secretary shall not form the quorum of the Ward Tribunal otherwise the decision will be unlawful.

Based on these averments he prayed this Court to allow his appeal and nullify the proceedings and judgment of the Ward and the District Tribunals.

Having heard the submissions made by the appellant, the Court's duty, at this stage of the proceedings, is to determine whether the appeal has any merit.

Two issues arise from the submission made by the appellant's counsel. **One**, that the application before the Ward Tribunal was time barred and, **two**, that inclusion of the Tribunals' secretary in the quorum rendered the proceedings and the decision of the Ward Tribunal a nullity. These two issues bring out a broad question as to whether the application is meritorious.

First, I have to mention that the records of the Ward Tribunal where the suit was heard, are primary and basic one in guiding the appellate courts. In principle, the DLHT, being the appellate tribunal, cannot accept new evidence unless under special circumstances to be recorded by the said tribunal, something which is not reflected in the DLHT proceedings. **Secondly**, I have gone through the said DLHT proceedings and page 12

do not have any records which supports the appellant's submissions regarding the timing of building and encroachment of the suit plot. The proceedings therein reveals that the appeal was still at pre hearing stage. Further there is no evidence that this dispute was initiated in 2017. I say so because, the opening statement of the Ward Tribunal's judgment reveals that the suit was refiled following an order of retrial by the High Court. Records are silent on the previous proceedings which led to the said order of retrial and the appellant has not mentioned anything to that effect. Therefore, the appellant's submissions which refer to 2017 as the date of filing the dispute are unfounded and the first ground fails.

In relation to the second issue, section 11 of the Land Disputes Courts Act, Cap 206 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 for under section 4 of the Ward Tribunals Act.'

The last page of the Ward Tribunal's judgement shows that there were five members including the secretary, who was the fifth. As the law provides for the quorum of the tribunal to be at least four members and the minimum number of members was reached, I am of the firm view that the quorum of the Tribunal was properly constituted within the meaning



of section 11 of the Land Disputes Courts Act (supra). The Ward Tribunal is records reflect the Secretary's name and signature in the proceedings among the members. However, I honestly do not think that the presence of the secretary's name listed among the members of the Tribunal has in any way prejudiced the appellant or occasioned any failure of justice. The secretary was there in his capacity as a secretary, and his influence to the decision is not evidenced. Nevertheless, being guided by the provisions of section 45 of the Land Disputes Courts Act (supra) which states;

*'No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal 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 of evidence has in fact occasioned a failure of justice.**'*

(Emphasis supplied).

I therefore hold the view that mere listing of the Secretary in the proceedings of the Trial Tribunal, without there being proof of his role and influence in the decision making, is not an irregularity that caused any failure of justice on the part of the appellant so as to vitiate the proceedings and resultant decision. As a result, this ground lacks in merit.

Taking the view that both grounds raised by the appellant have no merit, this appeal fails and it is hereby dismissed. The judgments of both

Ward and District Housing and Land Tribunals remain undisturbed. Costs to be borne by the appellant.


It is so ordered.

DATED at **MWANZA** this 30th day of September, 2022.




L. J. ITEMBA
JUDGE

Judgement delivered by Hon. A. Mbando, Deputy Registrar and in chambers, in the presence of the respondent and Ignas, RMA and in the absence of the appellant.


L. J. ITEMBA
JUDGE
30/9/2022