

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

MISC. LAND APPLICATION NO. 50 OF 2022

(Arising from the decision of the District Land and Housing Tribunal for Muleba in Land Appeal No. 23 of 2020. Originating from Civil Case No. 1 of 2019 of Kikuku Ward Tribunal)

IMELDA SYLIVESTER.....APPELLANT

VERSUS

CHRISTIAN CHRISTOPHER.....RESPONDENT

JUDGMENT

22nd September, 2022 & 29th September, 2022

Isaya, J.

This is a second appeal by Imelda Sylivester. Initially, the Respondent instituted a land suit No. 1/2019 before Kikuku ward Tribunal against the Appellant and her husband, Sylivester Mbehoma for encroaching into his land and uprooting 200 pine trees therein.

Before the ward tribunal, the Respondent contended that he was allocated that land by the village Council in 2005 but in 2011 the Appellant started encroaching the land by uprooting the trees planted therein. The matter was resolved by the local leaders. However, in 2019 the Appellant continued with the encroachment, something which led the Respondent to institute the matter at the ward tribunal. His assertion was supported the then village leaders who participated in allocating the land to him.

On her side, the Appellant contended that when she got married in 1990, her husband, Sylvester Mbehoma showed her the Suitland telling her that he had inherited it from his father. That she started cultivating it until 2005 when the Respondent complained that she had invaded his land. Her assertion was supported by her witnesses who contended to have known that land for a long time ago.

After hearing the parties, the ward tribunal decided in favour of the Respondent and he was the declared the lawful owner of that land.

Aggrieved with that decision, the Appellant appealed to Muleba District Land and Housing Tribunal (the DLHT) alleging that the ward tribunal was not well constituted. Also, that the case was not proved against her to the required standards. However, the DLHT upheld the decision of the Ward tribunal reasoning that the ward tribunal was well composed and the case proved the ownership of land to the Respondent.

Once again, still dissatisfied with that decision, the Appellant has come to this court faulting the decisions of the lower tribunals.

When the matter was called on for hearing, both parties were present but also enjoying the legal services of the learned counsels. Mr. Joseph Bitakwate appeared for the Appellant while Mr. Reinhold Tirutangwa appeared for the Respondent.

The learned advocate for the Appellant prayed to address the 1st and the 2nd grounds of appeal and dropped the 3rd and 4th grounds. Submitting on the 1st

ground, the learned counsel stated that the coram of the ward tribunal was not proper as per section 11 of the Land Disputes Courts' Act, Chapter 216 R.E 2019 (the LDCA) which requires the coram to be not less than four members and not more than eight members among whom 3 must be women. That, the names of the members who participated must be listed from the first day and in every sitting. However, in that case, from the first day of hearing, there was no any member appearing in the coram rather, the names of the members appeared in the judgment. Therefore, it is impossible to know if the members appearing in the decision are the ones who participated in hearing the dispute. The learned counsel supported his averment with the case of **Samwel Tibenderana vs Kokuberwa Gozibert**, Misc. Land Case Appeal No. 78 of 2018 (HC- Bukoba) and **Mariam Madali vs Hadija Kihemba**, Misc. Land Case Appeal No. 16 of 2019 (HC- DSM).

On the second ground, the learned counsel submitted that the Respondent ought to join the Kikuku Village Council because the Appellant was allocated that land by that council therefore, it was the necessary party. Failure to join it, the village council was denied the right to be heard, therefore, the decision becomes a nullity.

Furthermore, Mr. Bitakwate raised a legal matter on the irregularity that was committed by the DLHT on the issue of assessors' participation. He stated that the assessors did not fully participate in adjudicating the dispute before the DLHT. That, on 17/10/2021 the case was called for assessors' opinions but

those opinions are not in records. What is found in the records is the statement of the chairman stating that the opinions were given. That was anomaly which made the proceedings and the decision thereof to be a nullity.

He prayed this court to invoke section 43(1)(b) of the Land Disputes Courts' Act to declare the decisions of both tribunals; the ward tribunal and the District Land and Housing Tribunal a nullity and the case be ordered to start de novo.

Replying to the submissions made by the learned advocate for the Appellant, Mr. Tirutangwa submitting on the second ground, he stated that the Kikuku village council was not a necessary party to be joined because even without joining it, its interests were not jeopardized. He went on arguing that, the leaders in that villages who participated in allocating the land to the Respondent, testified before the ward tribunal and proved that the land was allocated to the Respondent in 2005.

Submitting on the first ground, the learned advocate stated that, the Kikuku Ward Tribunal was constituted by four members, hence, well constituted.

On the issue of involving the assessors, the leaned advocate left that matter to the court to decide.

Rejoining, Mr. Bitakwate insisted that the village government was a necessary party because the position of the law is very clear that the allocating authority becomes the necessary party when the dispute erupts.

On the issue of the coram of the ward tribunal, Mr. Bitakwate insisted that the matter was not presided over by the required members because they are not

indicated in the proceedings. Therefore, those errors disqualify the ward tribunal to be legally constituted.

I have considered the submissions of both advocates on the first ground. At the outset, I wish to point out that I am aware that the ward tribunal is not bound by legal technicalities so as to allow them to administer justice, but in dispensing justice, they should avoid irregularities and illegalities which may impede justice. They should adhere to the procedural requirement of the law. This was observed by the Court of Appeal in **William Stephen vs Ms. Leah Julius (Administratrix of estate of the late Neema Saboro)**, Civil Appeal No. 64 of 2013 where the Court stated that:

We are aware of the need to free tribunals such as the Ward Tribunal, from legal technicalities and allow them to administer substantive justice. Indeed justice may be done in substance without impeding it with technicalities. However, where it is in the opinion of the court that the irregularities and illegalities detected on the record lead to a miscarriage of justice and offend the very basis of justice, they cannot be ignored.

In course of deliberations of the appeal before me, it is pertinent to address the first ground of appeal which, I think is capable of disposing of this appeal. As earlier pointed out by Mr. Bitakwate, under, section 11 of the LDCA which governs the composition of the Ward Tribunal, requires the members presiding

over the matter to be not less than four members and not more than eight members. The section provides that:

Each Tribunal shall consist of not less than four members nor more than eight members of whom three shall be women who shall be elected by Ward Committee as provided for under section 4 of the Ward Tribunals Act.

A careful study of the proceedings, the names of the members who presided over the case are not indicated. And the dates when each party testified, is not indicated. It is not known if the case was heard in a single day without adjournment because dates when the matter was called in for hearing is not indicated. It is the consideration of this court that every date when the matter is called for hearing must be indicated and the members who sat on that particular date must be listed or recorded to ascertain if the tribunal was constituted as per law. The rationale of listing their names is to give a certainty that in every sitting, the coram complied with the law. Failure to list the names of the members, raises doubts if the case was heard before the members as required by the law.

What is seen in the records of the Ward Tribunal, is that the decision was delivered on 24/04/2020 before four members; Semion Rubago, Threza Elizeusi, Telesphor John and Faustin Bagoka. However, listing the names of the members in the decision is not a determining and conclusive evidence that they are the ones who heard the case. This was observed by my learned sister, her

Ladyship Mango, J in **Mariam Madali vs Hadija Kihemba**, Misc. Land Appeal No. 16 of 2019, (HC- Land Division at DSM) when she stated that:

"In my view, composition of the tribunal is not a mere procedural issue, it is in fact a determining factor as whether, the institution that adjudicated the matter was really a Ward Tribunal within the meaning of section 11 of Cap. 216 or something else. Tribunals must ensure that they are properly constituted when adjudicating cases because failure to that, reduces their status as ward tribunals legally unknown institution."

See also; Alexander Mashauri vs Modesta Marwa, Misc. Land Appeal No. 67 of 2020 (HC-Musoma);

In the circumstance, I find that the trial tribunal was not constituted as required by the law. This irregularity goes to the root of the matter. Hence, vitiated the proceedings thereof. For that instance, the proceedings of Kikuku Ward Tribunal are quashed and the decision thereof is set aside. It is the trite principle as was stated in the case of **Adelina Koku Anifa and Another vs Byarugaba Alex**, Civil Appeal No. 46 of 2019, that where the proceedings of the ward tribunal are quashed and the decision set aside, the court has to order the matter to be heard de novo. However, with the advent of the amendments made to the LDCA, the Ward Tribunal has no powers anymore to determine the disputes as

it used to do before. This was stated in the case of **Edward Kubingwa vs Matrida A. Pima**, Civil Appeal No. 107 of 2018 the Court of Appeal was faced with akin prayer by the learned advocate for the appellant that the Court had to order for retrial, the Court stated that:

"... in advent of the recent amendments made to the Act by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021, whereby the powers of the Ward Tribunals to inquire into and determine disputes arising under the Land Act and the Village Land Act and also the powers to order recovery of possession of land and other powers the Ward Tribunals used to have under sections 13(2) and 16 (1) of the Act have been immensely stripped off by the said amendments, we find it not practicable to order the suit to be heard denovo. In these circumstances, we thus direct that the respondent, if she so wishes, may file her claims afresh in accordance with the current procedural and law."

I subscribe the holding of the Court of Appeal, in the circumstance, I am hesitant to grant the order as prayed by Mr. Bitakwate as it will have no substance to the current situation of the law.

In the upshot, the appeal is allowed to that extent. Therefore, proceedings of the Ward Tribunal and that of the DLHT are quashed and the decisions thereof

are set aside. The matter is left open to the Respondent, if he still wishes to file the matter to the appropriate tribunal. No order as to costs.

It is so ordered.

DATED at **BUKOB**A this 29th day of September, 2022.



Court:

G. N. Isaya

JUDGE

29/09/2022

Judgement delivered this 29th September, 2022 in the presence of both parties, Grace Mutoka, B/C and Audax Vedasto, Judges' Law Assistant.



G. N. Isaya

JUDGE

29/09/2022