

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISC. LAND APPEAL NO. 10 OF 2022**

(Arising from Land Appeal No 47 of 2021 of Moshi District Land and Housing Tribunal at Moshi, originated from Application No 8 of 2021 of Kahe East Ward Tribunal).

**ASERI ELIYA KISIMA.....APPELLANT**

*VERSUS*

**RAMADHANI SHABANI KISIMA.....RESPONDENT.**

**JUDGMENT**

*19/10/2022 & 18/11/2022*

**SIMFUKWE, J.**

This is a second Appeal; in a nutshell the respondent herein successfully instituted a land dispute before the Ward Tribunal (Trial Tribunal) against the appellant claiming that the appellant trespassed in his land measured 6 x 159 paces. The appellant was aggrieved with the decision of the Ward Tribunal, he appealed to the District Land and Housing Tribunal for Moshi (Appellate Tribunal) unsuccessfully. Consequently, he filed the present appeal to this court on the following grounds: -

- 1. That, appellate Tribunal erred in law and facts to uphold (sic) the decision of the trial Tribunal by declaring the appellant a trespasser while the respondent failed to prove ownership of the said property.*
- 2. That, the appellate Tribunal erred in law and fact to uphold (sic) decision of the Trial ward tribunal by reaching its decision without sufficient evidence to prove the claim.*



*3. That, the appellate Tribunal erred in law and fact to uphold (sic) decision of the trial ward tribunal of which some members fail to sign thus quorum was not complete.*

When the matter was called for hearing, the appellant was unrepresented while the respondent was represented by Mr. Ralph Njau, the learned counsel. The appellant prayed the matter to be argued through written submissions and the prayer was granted. I am grateful that the parties complied to the schedule of filing their respective submissions.

In support of the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, the appellant was of the view that the critical question to be asked is whether there was tangible evidence adduced by the respondent and his witnesses before the trial tribunal to prove that the disputed land belongs to the respondent to warrant the appellant trespass beyond the said boundaries. It was argued that in answering this, the appellate tribunal upheld the decision of the trial tribunal by stating that since the dispute involved boundaries of the disputed land thus dealing with ownership is going beyond the evidence adduced. The appellant was of the view that there cannot be trespass without proof of ownership and it's the ownership which show as to what extent the trespass has been done by the trespasser and to whose land.

The appellant condemned the respondent's evidence which was adduced before the trial tribunal for lacking supportive document to prove ownership to warrant to what extent the appellant had trespassed beyond the boundaries of the disputed land apart from the mere words which were not sufficient enough to prove the claim.

It was further submitted that during cross examination, the respondent at page 5 of the handwritten proceedings said that:



***Swali:*** *Wakati mzee Eliya baba yangu akiwa anaumwa ni kitu gani ulifanya mpaka ukaitwa kunyoosha mipaka?*

***Jibu:*** *Nilichimba kisima ambacho kiliingia katika eneo la mzee Eliya*

***Swali:*** *Eneo hilo ulilipataje?*

***Jibu:*** *Eneo hilo ni la baba yangu*

From the above cited quotation its clear that the respondent herein was the one who trespassed to the appellant's land, and even the respondent himself testified that the disputed property belonged to his father and there was no any proof that the title had been passed to the respondent, since there was no any documentation to prove how he has come to possess the disputed premise to enable him to know the boundaries to warrant the appellant trespass over the disputed suit premise.

It was also argued that the respondent's witness one Seleman Shaban at page 15 while being cross examined by the appellant on how the respondent acquired the said land he said from the government.

It was the opinion of the appellant that from the evidence adduced at the trial, there was no proof that the disputed land belongs to the respondent to warrant him to know the boundaries of the same and to declare the appellant the trespasser. That there is contradictory evidence on who own the disputed land and how it came to the respondent's hand since at one time the respondent said the said disputed land belonged to his father while the witness said that it belonged to the respondent as he was given by the government and he never submitted the document to prove ownership.



The appellant continued to state that it is a cardinal principle under **section 110 and 111 of the Evidence Act [CAP 6 R.E 2019]** which provides that:

*"110 (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person on whom burden of proof lies.*

*111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either."*

That, the one who alleges existence of facts, must prove that those facts exist. To support this provision, the appellant referred to the case of **Dinkerrai Ramkrishna Pandya vs R (1957) E.A.C.A.** in which it was held that:

*"The first appellate court erred in that it had not treated the evidence as a whole to that fresh and exhaustively scrutiny which the appellant was entitled to expect, and as a result of its error affirmed conviction resting on evidence which had it been duly reviewed, must have been seen to so defective as to render the conviction manifestly unsafe."*

In conclusion of the 1<sup>st</sup> and 2<sup>nd</sup> grounds, the appellant insisted that nothing was submitted by the respondent to prove ownership over the disputed land to warrant the appellant to be a trespasser.

Submitting in respect of the 3<sup>rd</sup> ground of appeal, it was averred that the appellate tribunal erred in law and fact to uphold decision of the trial ward tribunal of which some members failed to sign thus the quorum was not complete. In addition, it was submitted that it is a cardinal principle that the ward tribunal upon determining dispute it must be properly constituted for justice to be done. In that respect, it was stated that in the judgment of the trial tribunal at the last page the quorum is not complete in the eyes of the law since throughout the hearing and determination of the dispute at hand there were two women and three men who did not participate since the women did not sign the judgment hence renders the judgment and proceedings a nullity.

It was argued further that failure by the trial tribunal to abide with the rules as to quorum is very fatal and it touches to the merit of the case in a manner that it cannot be cured by the principle of overriding objectives since **section 11 of the Land Dispute Courts Act, Cap 216 R.E 2019)** speaks loud and clear as to the composition of the ward Tribunals upon determination of the disputes. That, the provision 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."*

It was stated that the said provision makes it mandatory for Ward Tribunals to be properly constituted, there must be three women thus failure to comply with the said provision renders the whole proceedings and judgment into nullity.




In conclusion, the appellant prayed the appeal to be allowed and the decision of the trial and appellate tribunal be quashed and set aside with costs.

In reply, the learned counsel for the respondent submitted to the effect that evidence tendered at the Ward tribunal leave no fault in the finding that the appellant was trespasser to the respondent's land. That, the question for determination was not ownership of the land but trespass to the extent of 6m x 159 metres. That, respondent's testimony is that he acquired the disputed land through inheritance from his late father. It was the opinion of the learned counsel that the fact that the respondent's father might have acquired the said land through allocation by a village government does not at all bring contradictions in the respondent's testimony.

It was further contended that, before the trial tribunal, evidence of the respondent is very clear and straight forward and supported by the witnesses who are neighbours and close relatives to both disputants. That, the record shows that in the year 2019 there was a dispute on the boundary between the parties and the same was amicably resolved by clan elders as narrated by PW1 a clan Chairman. That a boundary was even laid down.

The learned counsel went on to state that both Tribunals below did consider and evaluate evidence on record in reaching their respective decisions. The contradictions in the evidence of the appellant and his witnesses were brought and pointed out. On his part, the respondent, was able to make out his case to the satisfaction of the requirements of **section 110 and 111 of the Evidence Act** (supra) which Mr. Njau was



of the opinion that the appellant cited out of context and that what he said therein can easily be ignored.

Responding to the allegations that the respondent ought to have brought documentary evidence, Mr. Njau replied that the contention has no legal support as it was sufficient for the respondent to establish his case by way of oral evidence.

Responding to the 3<sup>rd</sup> ground of appeal in respect of the quorum, the learned counsel for the respondent stated that they this ground of appeal rather unintelligible. That, going through the proceedings of the Ward Tribunal, they found that on each date the case was called members of the Tribunal did sign against their respective names. However, the judgment was not signed by some members. The learned counsel was of the view that there is no legal requirement that a copy of judgment must be signed by each and every member present. That, the omission if any is very procedural and it does not at all prejudice the rights of the parties in dispute. He added that, failure to sign does not have any relevancy to the question of quorum.

It was concluded that given the strength of their submission, the appeal lacks merit and prayed the same to be dismissed with costs.

I have keenly examined the lower tribunals' records, grounds of appeal as well as the parties' rival submissions. Before scrutinizing the grounds of appeal, I hasten to make it clear that this being the second appeal, the court should not interfere with the concurrent findings of the lower courts unless there is misapprehension of the evidence, miscarriage of justice or violation of principles of law. See the case of **Amratlal D.M. Zanzibar Silk Stores vs A.H Jariwale Zanzibar Hotel [1980] TLR.**



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On the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal which are to the effect that there was no evidence to prove ownership and the claim; with due respect I concur with the learned counsel for the respondent that the respondent's evidence on record clearly shows that he acquired the land by inheritance from his late father. The alleged trespass was also supported by witnesses who included PW1 a clan Chairman who was once involved in amicable settlement of the dispute by clan elders. Thus, I find the two grounds lack merit.

On the 3<sup>rd</sup> ground of appeal the appellant has challenged the quorum of the trial tribunal in two aspects: *first*, it was claimed that some of the members did not sign the judgment of the trial tribunal and *second*, that the Tribunal was not well composed as there were no three women as required under **section 11 of the Land Disputes Court Act**. (supra)

When emphasizing the above requirement of the law, the Court of Appeal in the case of **Edward Kubingwa vs Matrida A. Pima, Civil Appeal No 107 of 2018 [2021] TZCA 662** held that:

*"...a properly constituted Ward Tribunal shall consist of at least four members and not more than eight members, three of whom being women."*

The above cited authority speaks loudly that the quorum before the Ward Tribunal should not be less than four members and not more than eight members, of which 3 must be women and failure to adhere to this mandatory requirement vitiates the whole proceedings.

In the appeal at hand, throughout the proceedings of the trial tribunal, the quorum comprised five members and two of them were women





(Saliha Mchomvu and Witness Daniel) as rightly submitted by the appellant. With due respect, the requirement of three women applies where the Ward Tribunal is fully comprised of eight members. Therefore, two women out of five members meets the requirement of the law. Although, as stated by the appellant the said two members did not sign the judgment the same is not fatal as the said two members participated fully in the hearing of the dispute, signed on each attendance and gave their opinions which were recorded prior to composing judgment.

In the case of **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017**, the Court of Appeal of Tanzania at Mwanza at page 13 and 14 of its judgment held that:

*"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice; section 45 of the Land Disputes Courts Act 13 should be given more prominence to cut back on over-reliance on procedural technicalities. Section 45 provides:*

*"s .45. - **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.***


*Section 13 of the Land Disputes Courts Act underscores the spirit of simplicity and accessibility of Ward Tribunals, by reminding all and sundry that the primary functions of each Ward Tribunal are to secure peace and harmony, mediating between and assisting the parties to reach amicable settlements.” [Emphasis added].*

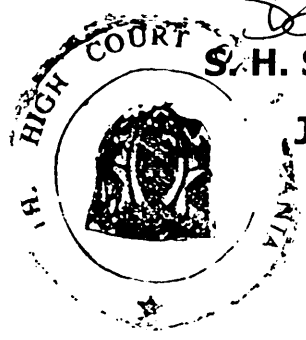
In this case, on the strength of the above cited decision I am of considered opinion that the noted omission did not occasion any miscarriage of justice to the appellant.

In the upshot, I do not see any reason to interfere with the concurrent findings of the two tribunals below. I therefore dismiss this appeal with costs.

It is so ordered.

Dated at Moshi this 18<sup>th</sup> day of November, 2022

  
**S. H. SIMFUKWE**  
**JUDGE**

The seal of the High Court of Tanzania is circular. It features a central emblem depicting a traditional Zulu shield and spears. The words "H. HIGH COURT" are inscribed along the top inner edge of the circle, and "TANZANIA" is inscribed along the bottom inner edge.