

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA

MISCELLANEOUS LAND APPEAL NO. 71 OF 2021

*(Arising from the Decision of the District Land and Housing Tribunal for Tarime at
Tarime in Land Appeals No. 66 and 71 of 2020)*

BETWEEN

YOHANA WILSON.....1ST APPELLANT
MAIRA WILSON2ND APPELLANT
OKEMBA ABUR3RD APPELLANT
CLEOPHAS O. WARIATO4TH APPELLANT
JESHI MASIGE5TH APPELLANT

Versus

OBIERO CHACHA.....RESPONDENT

JUDGMENT

A. A. MBAGWA, J.:

This is an appeal from the judgment and decree of the District Land and Housing Tribunal for Tarime (DLHT) sitting as the first appellate Tribunal in Land Appeals No. 66 and 71 of 2020. The matter originated in the Ward Tribunal for Kigunga.

The respondent, Obiero Chacha instituted a suit i.e., Land Case No. 45 of 2019 in the Ward Tribunal against the appellants. Obiero Chacha claimed

that the appellants had trespassed into his piece of land situated at Bukame village. He continued that the appellants having encroached on his land, made different developments therein including erection of buildings and farming. The respondent further testified that the suit land belongs to him as he inherited it from his late father Obiero Ndegoye. He said that his father passed away in 1973 and thereafter his late mother was married to another man hence his mother shifted with him to Randa village where his mother's new husband was living. It is the respondent's evidence that at the time his father passed away, he was only one year old. He recounted that when he grew up, he did not come back to settle in suit land as he went to various places to try his luck of life. According to the respondent's evidence he came back in 2019 when he instituted the case.

The respondent also called Serema Okwambo to buttress his claims. Okwambo told the trial Tribunal that the suit land is the lawful property of the respondent Obiero Chacha as the same was owned by his late father Obiero Ndegoye.

Conversely, the appellants who were the defendants in the Ward Tribunal vehemently disputed the respondent's claims. In their defence, the appellants said that they were allocated the suit premises by the Village

Council of Bukame. The two defence witnesses namely, Cleoplace Wariato and Jenifa Wilson testified that they have been owning the suit premises since the time of operation vijiji. They stated that prior to their occupation, the suit premises were owned by one Girura Chacha who emigrated the village. They continued that after Girura Chacha's departure, the suit land was repossessed by the village council which allocated it to the appellants. They concluded that they have been using the land for more than forty-five (45) years. Cleoplace Wariato expounded that the respondent's father Obiero Ndegoye came to Giruri Chacha to get medical treatment as he was seriously ill but he unfortunately died while continuing to get treatment as such he (Obiero Ndegoye) was necessarily buried in Giruri's land (the suit land). He elaborated that the dispute arose when the respondent was allowed by the village to build his father's grave without knowing that he had ill intention of creating the circumstances to claim the land.

After hearing of the evidence from both parties, the trial Ward Tribunal decided in favour of the respondent, Obiero Chacha by a majority decision of four by two members.

The appellants were aggrieved by the Ward Tribunal's decision hence they appealed to the District Land and Housing Tribunal for Tarime vide Land

Appeals No. 66 and 71 of 2020. Nonetheless, their appeals were unsuccessful as the Tribunal Chairman upheld the decision of the trial Ward Tribunal.

Still dissatisfied, the appellants knocked the doors of this court to assail the judgment and decree of the first appellate Tribunal (DLHT).

The appellants fronted this court with a number of grounds of appeal. However, on the hearing day, they only argued one point namely, irregularities in the proceedings of trial Tribunal.

When the matter was called on for hearing, the appellants were represented by Edson Philip and Onyango Otieno, learned advocates whilst the respondent appeared in person, unrepresented.

Submitting in support of the appeal, Mr. Edson Philip told the court that the proceedings in the Ward Tribunal were tainted with irregularities. He elaborated that the members who made the decision did not participate fully in the hearing of the matter, an anomaly which, according to him, turned the whole proceedings into a nullity. Mr. Philip referred this court to page 29 of the handwritten proceedings dated 16/09/2019 and lamented that one member by the name of Milulu P. Mgasa was not present whereas at page

62 of proceedings dated 26/03/2020, Milulu Peter appeared. Mr. Philip further pointed out that at page 75 of the proceedings dated 07/04/2020 in relation to the visit at the locus in quo, Milulu was present and more so, he gave his opinion during decision making. The appellants' counsel concluded that owing to the errors identified, the proceedings of the Ward Tribunal for Kigunga were nothing but a nullity.

In addition, the appellants' counsel attacked the proceedings in relation to the locus in quo as reflected at page 74 and 75. The counsel contended that they do not show what transpired at the locus in quo hence a fatal irregularity. To bolster his point, he cited the case of **Kimondimiri Mantheakis vs Ally Azim Dewji and 14 others**, Civil Appeal No. 4 of 2018 and **Jovent Clavery Rushaka and another vs Bibiana Chacha**, Civil Appeal No. 236 of 2020, CAT at Dar es Salaam.

In the end, Mr. Edson Philip invited the court to nullify the proceedings and judgment of the two lower Tribunals. He further prayed each party to bear its own costs along with an order directing the party who is still interested, to pursue the matter afresh in the court or Tribunal of competent jurisdiction.

In reply, the respondent, being a layperson had a little to comment on the appeal. Nonetheless, he resisted the appeal and invited the Court to take into account the fact that the opinion of Milulu Mgasu was against his favour and for that reason, the respondent submitted that, it did not affect the decision. He prayed the court to dismiss the appeal.

Having heard the rival submissions by the parties, I took time to thoroughly review the record of appeal. According to the record of the trial Ward Tribunal, the matter was heard on three different dates namely, 16/09/2019 when Obiero Chacha testified, 19/03/2020 when Serema Okwambo and Cleopace Mariato testified and 26/03/2020 when Jenifa Wilson gave her evidence. Thereafter on 07/04/2020, the Tribunal visited the locus in quo and on 16/04/2020 members of the Ward Tribunal gave out their opinion and shortly after delivered judgment.

According to the proceedings, the coram that heard this case was composed of seven members namely;

1. Samwel Nyaoga – Chairman
2. Victor M. Odingo – member
3. Thomas Chacha – member

4. Wilikister Petro- member
5. Felister Albetus – member
6. Milulu P. Mgasas – member
7. Sara Kiresya – member

It is true as correctly submitted by Edson Philip that on 26th day of March, 2020 when the defence witness Jenifa Wilson testified, Milulu Mgasas was absent but he attended the rest of the proceedings. This is to say that Milulu Mgasas did not hear at all the testimony of Jenifa Wilson yet he participated in determining the case. As such, it goes without saying that Milulu P. Mgasas was involved in decision making without participating fully in the hearing of the case. This anomaly is fatal and vitiates the proceedings and the resultant decision. This position is reinforced by a number of decisions of the Court of Appeal including **Seif Khamis Seif vs Nassor Mohamed Ebrahim**, Civil Appeal No. 99 of 2021, CAT at Zanzibar, **John Masweta vs. General Manager MIC (T) Ltd**, Civil Appeal No. 113 of 2015 and **Mariam Ally Ponda vs Kherry Kissinger Hassan** [1983] TLR 2.

In the case of **Seif Khamis Seif** (supra), the Court of Appeal held that it was not proper to involve in decision making an assessor who did not participate fully in the hearing of the case. Although the case of **Seif Khamis**

Seif was discussing the assessor of the Land Tribunal in Zanzibar, the same had a similar role to the member of the ward Tribunal.

That said and done, I allow the appeal and consequently nullify the proceedings and set aside the judgements of the two lower Tribunals.

Ordinarily the matter was supposed be retried however, the Ward Tribunals, in terms of sections 45 and 46 of the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 5 of 2021, do no longer have jurisdiction to adjudicate land matters. I thus decline to order a retrial and instead I direct that a party who still wishes to pursue the matter is at liberty to institute a case afresh before a Tribunal of competent jurisdiction subject to the existing legal requirements. Each party should bear its own costs.

It is so ordered.

Right of appeal is explained.




A. A. Mbagwa

JUDGE

24/11/2022