IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 57 OF 2023

(Arising from Civil Appeal No.19 of 2020 in the District Court of Bagamoyo(M.I.Sabuni,SRM) dated 15th March 2021 and Original Civil Case No. 25 of 2020 of Chalinze Primary Court)

KASHU MORETO MAITEI ..... APPELLANT

VERSUS

SEKUNDE SANGAINE SAITO *(Administrator of the estate of the late Masaine Keiya Kamunyu)*..... **RESPONDENT**

JUDGEMENT

17th April, & 30th May, 2023

MWANGA, J.

This is a second appeal. The appellant, **KASHU MORETO MAITEI** appealed against decision of the District Court of Bagamoyo in Civil Appeal No. 19 of 2020, which has a root in Civil Case No. 25 of 2020 from Chalinze Primary Court. The trial court, decided in favour of the

appellant by confirming him as a Chief (Laibon Mkuu) of Maasai in the Parakuyo tribe. The trial court proceeded to nullify the respondent as a Chief priest (Laibon Mkuu) and stopped him from practicing as such.

Being aggrieved with the above decision, the respondent successfully appealed to the District Court whereby the decision of Chalinze Primary Court was nullified. It was further ordered that, the Leigwanani should convey a meeting and appoint "Laibon Mkuu"; and clear rules for the appointment of Laibon Mkuu according to the customs and practice should be stated.

The basis of the decision of the District Court was that; **One,** it was in doubts as to whether members nominated and appointed the Laiboni Mkuu, both from the appellant and respondent were members from the respective areas where the Maasai customs and practice apply. **Two,** it was in doubts as to whether all those who participated in the meetings were laibon or laigwanan and qualified to participate on the said meeting. **Three,** the trial court was wrong to declare that the respondent was duly appointed as Laibon Mkuu while the procedures known to the parties were not adhered to. **Four,** neither party had met the required number of

laigwenani to be appointed as Laibon Mkuu. **Five,** the right quorum for appointing Laibon Mkuu was between 80 and 40 laigwenani.

The appellant was dissatisfied with the above decision. Therefore, he appealed to this court on three grounds as shown hereunder: -

1. That, the Honourable District Court erred in law and fact in raising and grounding its decision on factual matters relating to the numbers of *laigwanani* required for appointment of the appellant herein as *Laibon Mkuu*.; the issue which was not raised and addressed by the parties during the trial and on appeal.
2. That, the Honourable District Court erred in grounding its decision on the numbers of *"Laigwanani"* in appointment of the Appellant herein as "*Laibon mkuu*" by discussing the issue which is not before the court and or pre- mature issues.
3. That, Honourable District Court erred in law and facts adjudging the decision of the trial court on the numbers of *laigwanani* required for the appointment of the appellant herein as that particular factual issue was not placed

before the trial court and neither was it placed before the District Court for determination.

Now, to appreciate the nature of this appeal, I find it necessary to state brief facts of the case as follows: That, this matter originated from dispute arose from members of Maasai in Parakuyo society where chiefdoms is in practice way back 1882. The appellant and respondent are rooted from Mtengo clan which later gave birth to Maitei family where the appellant belong and Kamunyi family where the respondent is aligned with.

The record as per the proceedings shows that, chiefs are appointed in the lineage of maitei family. It appeared that, the chief priest of Maasai tribe (Laibon Mkuu) from Parakuyo society up to 2016 was Tikwa Moreto from maitei family. The dispute between the parties herein arose soon after his death whereby both the appellant and respondent fought for being appointed as the prospective chief priest of Maasai community in the respective areas of practice, which includes Coast Region, (Pwani), Tanga, Kilimanjaro, Morogoro, Dodoma, Iringa and Mbeya.

After such a hot encounter between the parties, both resorted to amicable settlement of the dispute by engaging some of the high-profile leaders in Maasai community, one being Hon. Christopher Olonyoike Ole

Sendeka, but all went in vain. As a result, through a meeting held at Mindukeni, the respondent declared himself as a chief priest of Maasai community of Parakuyo, the act which was defined to be not conformity with existing the customs and practices of the Maasai community.

According to the evidence on record, the chief priest of Maasai community is appointed basing on heredity of the family where the chiefdom is based. The candidate is appointed by the family members through a clan meeting and the name is forwarded to the traditional leaders (Wazee wa Kimila-Laigwanani) who shall appoint the chief Laibon and also who shall confirm the name followed by endorsement and celebrations.

During the hearing, the appellant was represented by Mr. Benjamin Jonas, the learned advocate and the respondent was represented by Mr. Edwin Lasteck Mushi, also the learned advocate. With leave of the court, parties argued their appeal by way of written submissions.

On first ground of appeal, the learned counsel Mr. Benjamin Jonas contended that the issues on numbers of laigwanani required for the appointment of appellant and the requirement of the members to appoint the chief priest were not proved and also not addressed to the 1st appellate

court. Therefore, it was wrong for the same to be raised in this appeal. The counsel supported his contention with the case of **Tagwira Versus Attorney General and others (2009)1EA 418** where it was stated that:

> ***"It is true that the practice in appeals is normally for an appellate court to consider and determine the grounds of appeal set out in a memorandum of appeal"***

On the basis of the above position, the counsel argued that if the honourable court felt important to raise and address such an issue on appeal, the correct procedure was to invite parties to address the court on the particular issue instead of raising and deciding it *Suo moto*. And that, failure to afford parties such opportunity amount to denial of the right to be heard. The counsel supported his argument by citing the case of **Slhina Mfaume and 7 Others Versus Tanzania Breweries Co. Ltd,** Civil Appeal No.111 of 2017 where the court of appeal held that it was a fatal irregularity for the court to determine matters raised by the court *Suo moto* without availing parties an opportunity to be heard and it has the effect of rendering the judgment and proceedings so conducted a nullity. According

to the counsel, the district court raised and grounded its decision on matters neither raised nor addressed by parties during hearing.

In reply, Mr. Edwin Lasteck Mushi did not agree with the submission of the learned counsel stating that the issue of Laigwanani (wazee wa kimila) who was required to appoint Laibon Mkuu(chief priest) was addressed both at the trial court and district court in participation of the parties themselves. The counsel made reference at page 8 of the decision of the trial court, whereas the court, after hearing the witness of both sides, was of the settled view that the quorum of appointing Laibon Mkuu is at least 80 Laigwanani and the same Laigwanani should not be less than 40 and, failure to comply such requirements it would render any decision drawn void. It was his assertions further that, the same remark was reiterated by the first appellate court. Therefore, the ground raised by the learned counsel on the issue of numbers of Laigwanani was misconceived.

Further to that, the counsel reiterated that, for the interest of justice, the district court did that, in exercise of its powers of review, re-evaluate and reconsider the evidence as adduced by parties. In support of that position, the counsel cited the case of **The Registered Trustees of the Joy in the Harvest Versus Hamza K. Sungura,** Civil appeal No.149 of

2017(unreported). On the other hand, the learned counsel distinguished the case of **Salhina Mfaume**(Supra) as cited by his fellow counsel stating that, it is inapplicable in the circumstances of the instant appeal because the said case dealt with the situation where the court has raised an issue on its own and determine it without inviting parties to argue the same. To buttress his argument, the counsel reiterated the issue of number of Laigwanani required to the appointment of Laibon Mkuu as one of the conditional precedents. According to the counsel, such ground is not new as it was among the grounds of appeal that was raised at the 1st appellate court. To put emphasis, the counsel quoted ground three raised in the district court which states;

> ***"That the trial court misdirected itself in holding that the appointment of appellant was void for want of proper procedure basing on procedure and practice not proved to be part of the Maasai tribe."***

On top of that, the learned counsel submitted further that, the issue of procedures and conditions for appointment of Laibon Mkuu was framed as an issue number two and three at the trial court.

With reference to the second ground of appeal, the appellant contended that the district court erred in grounding its decision on the numbers of *"Laigwanani"* on the appointment of the appellant as "chief priest". According to him, parties were not at variance during hearing with regard to procedures for appointment and bestowing the chief priest. It was his view that, the only complaint by the respondent was that the throne ought to have been on rotational basis; that is clearly shown in the records of the trial court and submission of the parties during appeal. The counsel also contended that, parties were not in dispute on the fact that the correct procedure is that the name of the prospective leader Laibon Mkuu is proposed by clan and confirmed by the community for the validity of the appointment; therefore, it was the counsel submission that if the decision of the district court remains unchallenged it will distort the long-standing customs and traditions of the Maasai Parakuyo community. The counsel added further that, the procedures proposed by the district court are not only alien but also trespassing in the traditions and customs of the particular community because the Laigwanani had never had a role to appoint and bestowing a chief priest.

Per contra, the counsel for the respondent argued that, it appears from trial court's record that, as far as the principles for appointment of chief priest (Laibon Mkuu) is concerned, it must involve confirmation by the Laigwanani and confirmation ceremony as it is stated in page 6 of the trial court's judgement; the facts which were not disputed by either party. He therefore argued that, page 6 of the judgement of the trial court provides that SM1, SM2, SM3, SM4 and SU1, SU2, SU3 and SU4 confirmed the role of Laigwanani in the appointment of the chief priest. The counsel argued further that, according to the evidence on record *wazee wa mila* means the Laigwanani as given meaning at page 2 and 8 of the judgement whereas the court stated that *"kuhusu kutofautiana kwa idadi ya viongozi wa mila na desturi "malaigwanani.* The counsel also submitted that the appellant has failed to prove his arguments prompting to mislead this honourable court that the number, nomination and confirmation by Laigwanani is not an issue in appointing the chief priest. The counsel reiterated that the number of Laigwanani was an important issue before the trial court as categorically discussed in page 7 and 8. It was his contention further that, the appellant counsel did not make any reference to judgement or proceedings in relation to his argument concerning the procedures for

appointment of Laibon Mkuu so as to fault the district court magistrate decision. Furthermore, the counsel join hand the trial magistrate and the 1st appellate court that the procedure for appointment of Laibon Mkuu must be approved by the Laigwanani and that, the number of Laigwanani should not be less than 40 members and not more than 80 members. Also, agreed that the meetings for appointment of the appellant as Laibon Mkuu held on 11/06 2016, 25/06/2017 and 26/07/2017 did not reveal the actual numbers of Laigwanani who were present at the meeting, but only identified the invited members to the meeting.

According to the counsel, it was wrong for the trial court to rely on the evidence adduced by the appellant alone without considering the fact that the appellant did not follow the required procedure for appointment of Laibon Mkuu. In support of his argument, the counsel cited the case of **Hussein Idd & Another Versus Republic** [1986] TLR 166.

On the third ground of appeal, the counsel was of the view that the court erred in law and fact in adjudging the decision of the trial court on the numbers of Laigwanani required for the appointment of the appellant herein as that particular factual issue was neither placed before the trial

court nor the District Court for determination. It was the counsel view that, the complaint taken to court was that:-

> ***"Madai hayo ni kwamba mdai anapinga kujitangaza kwa mdaiwa kuwa kiongozi wa kimila Laiboni wa kabila la wamasai wa jamii ya parakuyo baada ya kujitangaza 2016 huko mindukeni"***

The counsel submitted that the respondent did not prefer any counterclaim against that complaint. And that, his main claim was the accession to the throne ought to have been on rotational basis and, this time around, it was his turn. The counsel argued that, this particular ground was raised in both ground three and four of the appeal and, in both cases, it was upheld. It was the counsel further view that, the district court having dismissed this claim in ground four as unmeritorious, ought not to have raised a new issue on the number of Laigwanani required to appoint the chief priest and determine the whole issue on the unfounded factual matter. Further to that, the allegation raised by the appellant both during trial and on appeal was in respect of the issue of succession to throne as chief priest ought to have been on rotational basis. It was argued further that by grounding its decision and nullifying the trial court proceedings on

an issue which was not raised and determined by the trial court was incorrect. To support his argument, the counsel cited the case of **Tanzania Cotton Marketing Board vs Cogecot Cotton Company S.A(2004) TRL 132** where it was stated that the court cannot be a judged on an issue it never had an opportunity to consider and express an opinion.

In furtherance to that, the counsel argued that the declaration made by the district court was neither sought nor prayed during the trial even on appeal. Hence, the district court was wrong in this aspect as it was held in the case of **Abel Malingisi Versus Paul Fungameza,** PC. Civil Appeal No. 10 of 2018 (TZHC) where Mdemu, J. held that it is bad in law for the magistrate to grant reliefs not prayed for.

On the other hand, the counsel for the respondent opposed this ground of appeal strongly that, the judgment of the district court was based on issues raised during trial and not otherwise. According to him, there is no way the appellate court could dispose of the appeal without raising the points of determination. To support his argument, the counsel cited the case of **Peters Versus Sunday Post Limited [1958] EA 424** where it was stated, *interalia,* that an appellate court has jurisdiction to

review the evidence on record in order to determine the matter but the same should be exercised with caution.

In rejoinder, the counsel for the appellant reiterated his submission in chief, adding that the question of number of Laigwanani did not form part of the grounds of appeal and was not addressed by the parties during the hearing of the appeal.

I have endeavored to go through the evidence available on records, both from the trial court and district court, and also scrutinized submission of the learned counsels in respect of the grounds of appeal placed before me. The plea of the appellant in both grounds of appeal focused primarily on one issue. That is to say, whether the decision of the district court was grounded on issues which were not raised on the grounds of appeal. But, before that, as it can be observed from the available records at the first district court, it appears that all grounds of appeal were discussed and analyzed one by one and ultimately both were found to be unmeritorious. Moreover, what appears blatant from the proceedings is that, no final order was issued as to whether the appeal was allowed or not.

Nevertheless, the district court proceeded further to discuss several issues relating to procedures for appointment of chief priest and, at last,

the decision of Chalinze Primary Court was nullified and the Leigwanani should convey a meeting and appoint "Laibon Mkuu"; and lay down clear rules for the appointment of Laibon Mkuu according to the customs and practice.

The fact that the district court found all grounds of appeal to be of no merits, in all fairness the court ought to issue the final order and dismiss the appeal forthwith. Instead, the court raised some issues to wit; **One,** whether members nominated and appointed Laiboni Mkuu, both from the appellant and respondent were members from the respective areas where the Maasai customs and practice apply. **Two,** whether all those who participated in the meetings were Laibon or Laigwanan and qualified to participate on the said meeting. **Three,** the trial court was wrong to declare that the respondent duly appointed Laibon Mkuu while the procedures known to the parties were not adhered to. **Four,** neither party had met the required number of Laigwenani to be appointed as Laibon Mkuu as the respondent told the trial court that, the right quorum for appointing Laibon Mkuu was between 80 and 40 Laigwenani.

It was not clear stated why the above issues were raised and deliberated by the district court after having found out that the grounds of

appeal were not meritorious. In the circumstances, it is my considered view that, if the district magistrate was of the view that there were unresolved issues pertaining to the decision of the trial court, the right approach was to call parties to be addressed on the maters instead of nullifying the decision and issuing directive that parties should go back and follow proper procedures without even issuing the final order stating whether the appeal succeeded or not. In essence that becomes new issues on which every party should be accorded such right before the decision. The right to be heard is a fundamental right as enshrined under article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977. See also the case of **The Trustees of Jamaat Answar Sunna Tanzania & 5 others** where it was held that:

> ***"...However, as correctly submitted by Mbwana, when the new issue is raised suo mottu, parties should be given an opportunity first to address the court on the same so as a party has a right to be informed and address the court on the point intended to form part of the decision..."***

Also, in the case of **Charles Christopher Humprey Kombe vs Kinondoni Municipal Council,** Civil Appeal No. 81 of 2017 (Unreported) the court of appeal held that: -

"On the authority of the decisions cited above, we are certain in our mind that the High Court erred in basing case on the issue raised suo motto without according the parties the right to be heard on that issue. In John Morris Mpaki (supra)We held that any decision affecting the right to be held is a nullity even if the same decision would have been arrived at had the affected party been heard"

I would like also to stress that, matters relating to customs and traditions should not be taken lightly. As rightly submitted by the learned counsel for the appellant if the parties are not accorded the right to be heard on the issues raised, we may end up distorting or trespassing the long-standing customs and traditions of the Maasai Parakuyo community because matters relating to appointment of chiefs and the like are hereditary in nature. For avoidance of doubts, I am inclined to hold that this ground of appeal is meritorious.

As to the second ground of appeal, there was no legal justification for not issuing the final order basing on the analysis on the grounds of appeal

by the district magistrate. In the case of **Baghayo A Saqware Versu Salaam Health Services &Another,** Civil Appeal No 24 of 2022(Unreported) it was stated that the omission to give final order as entered by the court renders the whole decision defective. That being the position this ground of appeal is also answered in the affirmative.

The third ground of appeal is substantially similar to the 2nd ground of appeal. It concerns the consideration of the evidence on record and submission by parties in respect of the decision of the 1st appellate court grounding its decision on the number of laigwanani. Consequently, I find no need to dwell much on it. That being the case, this court also finds that the same is meritorious.

I hasten to state that, the power of the district court to re -evaluate the evidence on record of the trial court in order to come up with just decision should be exercised with caution to the extent not to divert from the scope of the grounds raised thereto**.** In the present case, the 1st appellate court Magistrate diverted from the findings of the grounds raised in the appeal. However, centered his decision on the new issue not part to an appeal. In **Malmo Montage Konsult AB Tanzania Branch vs**

Margaret Gama, Civil Appeal No.86 of 2001 CAT(unreported) Court of appeal stated that;-

> ***"...an appellate court is not expected to answer the issues as framed at the trial court. That the role of the trial court. It is, however expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address each ground separately."***

In the case of **Abubakari I.H Kilongo and another Vs R,Criminal Appeal No.230 of 2021 CAT** it was stated that remedy for non-compliance of the contents of judgment is to order to re-compose judgement in line with the requirement of the law.

In light of the above, it is my considered view that the findings of the District Court were, on the face of it, not conformity with the law. The appeal is, therefore, hereby allowed. In the results, the District Court's decision is quashed and set aside.

In the circumstances, I remit the case file to the district court for it to hear the parties on the issues regarding the following issues; **One,** whether members nominated and appointed Laiboni Mkuu, both from the

appellant and respondent were members from the respective areas where the Maasai customs and practice apply. **Two,** whether all those who participated in the meetings were Laibon or Laigwanan and qualified to participate on the said meeting. **Three,** the trial court was wrong to declare that the respondent duly appointed Laibon Mkuu while the procedures known to the parties were not adhered to. **Four,** neither party had met the required number of Laigwenani to be appointed as Laibon Mkuu as the respondent told the trial court that, the right quorum for appointing Laibon Mkuu was between 80 and 40 Laigwenani. And depending on the outcome of the issues raised, the district court shall determine the case according to law and compose fresh judgment. I order no costs as neither party was at fault on the respective matter.

Order accordingly.

H. R. MWANGA

JUDGE

30/05/2023

COURT: Judgement delivered in Chambers this 30th day of May, 2023 in the presence of advocate Benjamin Jones for the appellant and Advocate Edwin Mushi for the respondent.

H. R. MWANGA

JUDGE

30/05/2023