

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

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LAND APPEAL NO. 1 OF 2023**

*(Arising from Land Appeal No. 10 of 2021 in District Land and Housing Tribunal Moshi, and  
Originating from Land Case 5/2020 at Mji Mpya Ward Tribunal)*

**EPIFANIA ROGATI KIMARIO..... APPELLANT**

***VERSUS***

**HERIETH CHARLES MAKULE .....RESPONDENT**  
(As Administratrix of Estate of Late Charles Makule)

**JUDGMENT**

24<sup>th</sup> May. & 26<sup>th</sup> July 2023

**A.P.KILIMI, J.:**

The appellant successfully initiated a land suit at Mji Mpya Ward Tribunal claiming that the respondent has caused nuisance to his area surrounding her house by closing an easement towards her house and planted banana trees therein. The tribunal granted her his prayer and ordered the respondent hereinabove to break the wall he built connecting to the house of the appellant and to remove banana trees in that locality.

The respondent aggrieved by this decision of the ward tribunal appealed to the Moshi District Land and Housing Tribunal basing on the ground that, first, that the ward tribunal erred in law and fact for not stating the boundaries of suit land, second, its decision did not consider evidence tendered and third, the quorum of ward tribunal assessors was not in accordance to the law. The District tribunal after considering the ward tribunal record grasped that the quorum of assessors was not shown when ward tribunal made hearing of the case on 13/02/2020, 20/02/2020, 19/03/2020, 26/03/2020, 02/04/2020 and 09/04/2020. Subsequently declared the proceeding of ward tribunal to be nullity and advised parties that there are free to file again claim at the ward tribunal for mediation within 30 days and if mediation will fail, they should any party aggrieved should file application to the District Land and Housing tribunal.

The appellant being dissatisfied with the above decision and orders thereto, has knocked the door of this court being equipped with the following grounds:-

1. That the trial chairman of the tribunal error in fact and law by not considering the quorum in the ward tribunal was well constituted according to the law which established it and the date which was missed was no legal effect to the decision and was not among reason which was raised during appeal.

2. That the tribunal court erred in facts and laws by fail to consider the opinions of assessors during arrival of its decision.
3. The Judgment does not explain the right of appeal.

At the hearing of this appeal, Mr. Innocent Msaki learned counsel appeared for appellant while the respondent enjoyed the service of Mr. Baraka Masawe also learned counsel.

Mr. Msaki started by submitting that, according to section 11 of Land District Court Act, Cap 216 R.E. 2019 read together with section 4 and 5 of ward tribunal act, says when ward sit need to be with 8 members and not less than four, when sit with 8 members then women be 3 and when sit with 4 members woman be 1. That is what done at the ward tribunal. But when the case came to appeal the District Tribunal says the quoram was not proper, this is contrary to the law as stated in the case of **Jason R. Richard vs. Jackson Mwanga** Misc. Land Appeal No. 82 of 2021 High Court Mwanza (Tanzlii), at page 14.

Mr. Msaki further contended that, when we look the proceeding which say there are dates coram is not shown, it is not true they were there, and

the deceased Charles William Makule consented and signed the Judgment. The counsel also submitted even if at all the quorum was missing the court of appeal in the case of **Yokobo Magoiga Gichese vs. Peninan Yusuph** Civil appeal No. 55 of 2017 CAT at Mwanza, emphasized that court is not to bound on technicality. Therefore, the fact that the chairman was absent but the Judgment was issued and both parties signed. The issue that there days quorum was improper has no legal effect, because no parties changed, so the counsel prayed the Appeal be allowed and the ward tribunal decision be restored.

Arguing in regard to the opinion of assessors, Mr. Msaki contended that the District Land Housing of Moshi did not consider opinion of Assessors, in accordance to section 24 of Land Dispute Act Cap 216 R.E. 2019. Moreover, the counsel added that, according to page 2 of Judgment, the chairman did not issue reasons why he was different with the opinion. This is contrary to the Judgment of **Jumanne Mahendue Wanganyi vs. Republic** Criminal Appeal No. 204 of 2020 at page 9 which emphasis that the reasons must be stated if chairman differ with assessors which was not done. Mr. Msaki concluded that the Judgment of the District Tribunal did

not say that he has right of appeal, which is contrary to article 13(6) (a) of the United Republic Constitution of Tanzania 1977.

Replying to the above Mr. Masawe contended that, the law in respect to quorum as cited by appellant is clear that when they are four, women shall be three and one shall be a man. Therefore, to his view the quorum was not well constituted because women were only two, and man and the chairman who is not part of quorum, therefore even quorum of the four people were not met. The counsel also distinguished the case of **Jacob Magoiga Gichese** (Supra) saying that on that case only one day was not present, but in this matter at the ward tribunal a lot of days member or quorum was not indicated more than four times which is on, 13/2/2020, 20/2/2020, 19/3/2020, 26/3/2020, 2/4/2020 and 9/4/2020. Therefore, in these circumstances there is no way to use overriding principles, so the case is distinguishable with this case.

Mr. Massawe further submitted that, there is no evidence that tribunal was required to move sua motu, this was happened in **Christopher Wantora v. Maselo Meck Makula**, Misc. Land Appeal No

112 of 2021 at the High Court Musoma. At page 4. Therefore, prayed the first ground be dismissed.

In respect to second ground, Mr. Massawe agreed to the section cited but objected the entire submission that the tribunal did not give reasons, the counsel said the same was stated at page 3 of the District Land and Housing Tribunal decision,

In regard to third ground which failure to state right of appeal, Mr. Massawe submitted that right of appeal is automatic, that is why they have appealed without being refused. The counsel further referred section 45 of Land Dispute Act Cap, 216 R.E. 2019, and there is no way the failure to write to appeal has accessioned failure of Justice to the appellant.

In brief rejoinder Mr. Msaki submitted that the Authority select Chairman among the members, one who is not part of corum is secretary, this is in accordance section 5(3) of Ward Tribunal Act, which was also emphasis in the case of **Gibson Kalishanga v. Marian Yotham** Misc. Land Appeal No. 32 of 2021 High Court Kigoma, where number of members and their sex to be present at ward tribunal was stated. The

Counsel further insisted the coram at the Ward Tribunal was proper. The issue of dates mentioned all members were signed, showing they were present, therefore the case cited is distinguishable.

Lastly, the counsel for appellant contended that, the right to appeal is not automatic, because the article cited says must be explained, so we pray this appeal be allowed. And the decision of the Ward Tribunal be restored.

Having considered the rival submissions above and the entire record of the ward tribunal and that of the District Land and Housing tribunal, commencing with the first ground of appeal.

The law is clear that ward tribunals, during hearing and determining land disputes must consist not less than four nor more than eight members of whom three should be women. (See sections 4 of the Ward Tribunals Act [Cap. 206 R.E. 2002] and section 11 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] The same was emphasized by the court in the case of **Edward Kubingwa vs. Matrida A. Pima**, Civil Appeal No. 107 of 2018.

According to the decision of the District tribunal the Chairman after perusing the ward tribunal record reasoned that he observed on some days when the hearing conducted at the ward tribunal the record did not show the quorum of assessors then declared proceeding to be nullity. In his ground the appellant averred that date which was missed was no legal effect to the decision and was not among reason which was raised during appeal. This argument has forced me to consider myself whether the said hearing as stated by District Tribunal had no effect to the decision of the ward tribunal at the end.

In **Anne Kisonge vs. Said Mohamed**, Land Appeal No. 59 of 2009, this court was disturbed by failure of the ward tribunal to reflect members' participation on each day of trial and their gender status. It was observed that;

*"My interpretation, of the cited law is that: the names and gender of the members participating in a case in the ward tribunal must be shown in order to ascertain its composition as whether it is in compliance with the law. Those members who participated during trial, **their names and gender must be recorded on coram on each day the trial takes place up to the stage of judgment Failure to follow proper procedure, it is a difficult to know as in***



***this case, the members who participated to compose the judgment were the same as those who appeared during trial.***

(Emphasis supplied).

In my view I can't hesitate to subscribe to the above decision owing the facts of this case at hand, I am thus not in agreement with the counsel for the appellant, that the failure to show the quorum at the hearing did not affect the decision of the tribunal, and the reasons stated above dictates that justice must be seen to have made from the beginning.

I concede with the argument by the counsel for respondent when he distinguished the case of **Jacob Magoiga Gichese** (Supra), in that case it was argued that what transpired in the Ward Tribunal on 16/05/2011 appearing on page 97 of the record of appeal. On that day, one Juma Michael Ghati who was supposed to preside as Chairman was marked absent on account of being ill. Next Neither the Chairman nor any member appointed to be a presiding member appears in the proceedings on 24/05/2011 on page 102 of the same record. The Court of appeal referred section 45 of the Land Dispute Act (supra) and proceeded to observe that

failure to identify the member who presided over the proceedings of the Ward Tribunal when the Chairman was absent, did not occasion any failure of justice to the appellant. If anything, it was the appellant who benefitted from the proceedings. Therefore, in this matter other members were identified except the chairman.

Indeed, the above circumstances is different with this case at hand where the quorum members were not mentioned in all those days mentioned above which were for hearing and as stated above the efficacy of the quorum during the hearing. Having said discussed above, it is thus my considered opinion this ground must fail and is hereby dismissed.

Next, is ground number two, though the ground itself stated only that the tribunal failed to consider opinions of assessors, in his argument the counsel added that the chairman did not give reasons why he was different with the opinion of assessors. I have perused the judgment at the tribunal, for easy reference I wish to reproduce part of page 4 in the language used at the said tribunal;

*"Baada ya rufaa hii kumalizika kusikilizwa, wajumbe wa Baraza hili waliunga mkono hukumu ya Baraza la Kata ya Mji mpya na kushauri kila upande kwenye rufaa hii ubebe gharama zake.*

*Baada ya kuupitia kwa makini mwenendo wa shauri, hukumu na amri za Baraza la Kata ya Mji mpya pamoja na hoja za pande zote mbili kuhusiana na sababu za rufaa; ninapingana na maoni ya wajumbe wa Baraza hili kwa sababu ifuatayo: -*

*Baraza la Kata ya Mji mpya halikuonyesha akidi ya wajumbe waliosikiliza shauri kwa tarehe zifuatazo: - 13/02/2020, 20/02/2020, 19/03/2020, 26/03/2020, 02/04/2020 na 09/04/2020. Akidi ya wajumbe wa Baraza la kata ya Mji mpya imeonyeshwa tarehe 30/04/2020, 06/02/2020 na tarehe 30/01/2020. Ni wajibu wa Baraza la Kata wa kuonyesha akidi ya wajumbe waliosikiliza shauri na kuliambia kwa siku zote. Maelekezo hayo yalitolewa katika kesi ya **Julius Mshai vs. Daudi Mlumba**, Misc. Land Case Appeal No. 41 of 2009, High Court of Tanzania at Dodoma (unreported)."*

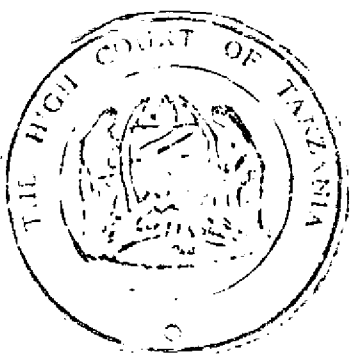
From the above passage, it is apparent the appellate tribunal chairman considered the opinion of assessors and also gave reasons why he departed. In view thereof this ground has also no merit and thus dismissed forthwith.

In the last ground, I am also in agreement with the counsel for the appellant that the right to appeal need to be stated and is not automatic. However, I have considered the facts that the appellant has managed to appeal in this court without that right being stated, I am of considered opinion, this is the fit matter to invoke the provision of section 45 of the Land Dispute Act Cap 216 R.E. 2019 and find that this omission by the District Tribunal to state right of appeal, did not occasioned a failure of justice on part of the appellant. I therefore find that also this ground has no merit and I proceed to dismiss it forthwith.

In the upshot and for the above reasons and observations, it is a finding of this Court that the entire appeal devoid of merit and subsequently is hereby dismissed with costs.

It is so ordered.

DATED at MOSHI this 26<sup>th</sup> day of July 2023.



  
**A. P. KILIMI**  
**JUDGE**