

IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

AT IRINGA

MISCELLANEOUS LAND CASE APPEAL NO. 29 OF 2010

(From the decision of the District Land and Housing Tribunal of
Njombe District at Njombe in Land Case Appeal No. 69 of 2009

and Original Ward Tribunal of Kidegembye

Ward in Application No. 8 of 2009)

HALMASHAURI YA WALEI

PAROKIA YA MATEMBWE APPELLANT

VERSUS

PETRO KITALUKA RESPONDENT

13/3/2014 & 25/5/2014

JUDGEMENT

MADAM SHANGALI, J.

This matter started at Kidegembye Ward Land Tribunal where the present respondent Petro Kitaluka sued the present appellant Halmashauri ya Walei Parokia ya Matembwe claiming over the ownership of a piece of land measuring about three acres which was trespassed and occupied by the appellant.

After hearing the evidence from both sides the trial Ward

Tribunal ruled in favour of the appellant and ordered the appellant to pay a compensation of T.Shs.500,000/= being the value of the wattle trees planted by the respondent. The appellant agreed to pay the said compensation but the respondent was not satisfied with that decision.

The respondent filed an appeal to the Njombe District Land and Hosing Tribunal, to wit Land Case Appeal No. 69 of 2009. After hearing the appeal the first appellate Land Tribunal deliberated in favour of the respondent and overruled the decision of the trial Ward tribunal.

Disgruntled with that decision of the first appellate District Land Tribunal the appellant has filed this second appeal intending to impugn that decision.

In this appeal the appellant was represented by Mr. Mushokorwa, learned counsel while the respondent was represented by Mr. Chaula, learned counsel.

On 13th August, 2013, the counsel request to argue the appeal by way of written submission was granted and subsequently both of them complied with the scheduled order for filing their written submissions.

In his petition of appeal the appellant filed four main grounds namely:-

1. By granting ownership of the suit land to the respondent, the learned Chairperson erred to override the concurrent opinions of her two members who had correctly viewed the appeal to be concerned only with what was the fair amount of compensation payable to the respondent and not ownership of the suit land.
2. The learned Chairperson while she appreciated the abundant evidence led by the appellant (*oral and documentary*) to show that the suit land and other adjacent land not in dispute which all belonged to the appellant, was allocated to them by the respective Village Counsel of Kidegembye in 1982, she erred to invalidated that allocation on the suit land (3 acres) on the flimsy allegation by the respondent that he was not consulted oblivious of the admitted fact he had then abandoned that land and went to live in another village of Havaga.
3. That the Chairperson erred not to uphold ownership of that suit land in favour of the present appellant who had held the suit land uninterrupted since 1982 and even developed the same by planting trees and made fire breakers; thus on the principle of adverse possession. The suit to challenge the appellant was

filed by respondent in the Ward Tribunal late in 2009.

4. That, if the District Land and housing Tribunal was of the firm view that the trial by the Ward Tribunal was fraught with basic errors and that there were two decisions, it was duty bound to quash the entire proceedings as being perverse and order a retrial and not itself to assume the purported trial which itself and decision thereof is bad in law.

In his written submission Mr. Mushokorwa learned counsel for the appellant decided to abandon the fourth ground of appeal and opted to argue ground one, two and three together. He claimed to have abandoned ground four on the reason that the alleged procedural errors committed by the trial Ward Tribunal were curable under Section 45 of the Land Dispute Court Act, Cap. 216.

With due respect to the learned counsel the procedural errors or irregularities mentioned under that provision of the law are saved only where the court is satisfied that such procedural errors and irregularities have not occasioned any failure of justice to the parties.

Therefore having perused the record of proceedings and the decision of the lower tribunals, I am convinced that the first issue

to be considered by this court at this stage is whether the apparent procedural irregularities and errors committed by the trial ward tribunal could be saved under Section 45 of the Land Dispute Court Act, 2002.

In her judgement, the Chairperson of the first appellate District Land Tribunal summarized the errors and irregularities as follows:-

“Proceedings at the Ward Tribunal were not clear because were written in reporting way. Record also shows that evidence was taken from both parties but rules of taking evidence were not followed.. The judgement itself has two parts i.e. part of judgement delivered on 27/11/2009 and another one delivered on 3/8/2009, the judgement had some abnormalities for instance, parties were allowed to give their opinions in the said judgement instead of tribunal members and were given time to think about the first part of the judgement and give their view before delivery of final decision.”

Although there are no codified rules of taking evidence before the Ward Land Tribunal, the record of proceedings of the Kidegembye Ward Land Tribunal is totally confusing. The witnesses evidence was not precisely and separately recorded. Parties were not given a chance to cross-examine the witnesses

and the participation of the tribunal members was fraught with ambiguities. The record is silent on how the members of tribunal participated in the deliberation of the said two unsigned parts of judgement.

Furthermore, I was not able to discover anywhere in the proceedings showing that the respondent ever demanded T.Shs.5,000,000/= (five million) as compensation. However, that amount was stated in the first part of judgement delivered on 27/11/2009. Then, in the second part of judgement which is purported to have been delivered on 3/08/2009, i.e. three months before the pronouncement of the first part of judgement, the amount was conspicuously changed to T.Shs.500,000/=. In his submission Mr. Mushokorwa claimed that it was the respondent who claimed for a compensation of T.Shs.5,000,000/= at the end of the hearing. That is not true because the record does not support the claim. No wonder the respondent is complaining that the issue of compensation was reached arbitrarily because there is no evidence to support any judicial assessment or valuation report. In my considered opinion the alleged two unsigned portions of the so called judgement of the trial Ward Land Tribunal have no scintilla of any judicial objectivity.

Another discrediting shortcoming is the fact that in hearing and determining the matter, the trial Ward Land Tribunal violated Section 14 (1) of the Land Dispute Act, Cap. 216 which provide for the composition or quorum of the Ward Land Tribunal. The law

states clearly that in all matters of mediation the Ward Land Tribunal shall be constituted by three members at least one of whom shall be a woman. The section provides as follows, quote;

“14 (1) The Tribunal shall in all matters of mediation consists of three members at least one of whom shall be a woman.”

The record of proceedings of the trial Ward Tribunal indicate, at the end of the proceedings to have been constituted of several members as follows:-

WAJUMBE WA BARAZA WALIOHUSIKA NI HAWA:-

- | | | | |
|----|-------------------|---|---------------|
| 1. | SALVATORY NGODA | - | KATIBU BARAZA |
| 2. | ALOISI MLOWE | - | MWENYEKITI |
| 3. | ERNEST MHOKA | | |
| 4. | JESKA KINYUNYU | | |
| 5. | EDINA NYATO | | |
| 6. | JUSTIN MPONZI | | |
| 7 | LAULENDI MADAGALA | | |
| 8. | ERNESTI NYATO | | |
| 9. | LUVONIKE MWENDA | | |

That means the trial Ward Tribunal was constituted of nine (9) members contrary to the law. That is a serious irregularity

which goes to the roots of the whole matter because it touches on the statutory composition of the Ward Land Tribunal. In law a wrongly constituted land tribunal have no mandate or jurisdiction to hear, mediate or determine a case.

In my considered opinion the above stated serious irregularities substantially occasioned failure of justice to the parties and indeed the position of law is that any decision made by a wrongly constituted Land Tribunal must be declared a nullity. The first appellate District Land and Housing Tribunal deliberated on a decision originating from questionable proceedings and perverse decision.

For the foregoing reasons the proceedings and decision of the Kidegembye Ward Land Tribunal are hereby reversed and declared null and void. Consequently the decision of the first appellate District land and Housing Tribunal is equally declared a nullity and set aside.

I hereby direct the case to be heard de-novo before a competent and legally constituted Ward Land Tribunal able to avoid unnecessary irregularities. No order for costs.

M. S. SHANGALI

JUDGE

23/5/2014

Judgement delivered today 23/5/2014 in the presence of Mr. Mwelelwa, learned advocate holding brief for both Mr. Mushokorwa for Appellant and Mr. Chapla for Respondent. Parties present in person.

M. S. SHANGALI

JUDGE

23/5/2014