

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPEAL NO. 182 OF 2016

(From the decision of the District Land and Housing Tribunal for KILOMERO at Ifakara in Land Case Appeal No. 40 of 2015, Original Land Case No. 02 of 2015 from Kisawasawa Ward Tribunal))

MOHAMED A. MALIWATA APPELLANT

VERSUS

KULWA O. NAMKOLA RESPONDENT

JUDGMENT

Date of Last Order: 04th September

Date of Ruling: 08th December, 2017

MGONYA, J.

This is a second appeal. Originally the appellant unsuccessfully sued the respondent at Kisawasawa Ward Tribunal hence he appealed to the first appellate tribunal for Kilombero at Ifakara. Disgruntled with its

decision, the appellant has fronted his appeal with a four (4) ground petition of appeal to wit;

1. That the Chairman of District Land and Housing Tribunal of Kilombero/Ulanga erred in law and in facts for upholding decision of Kisawasawa Ward Tribunal knowing that the number of members required were not when deciding the appeal.
2. That the Chairman of District Land Housing Tribunal (sic) of Kilombero/Ulanga erred in law and facts for upholding decision of Kisawasawa Ward Tribunal knowing that the said Ward tribunal had no pecuniary jurisdiction to entertain the matter before it.
3. That the Chairman of District Land and Housing Tribunal of Kilombero/Ulanga erred in law and in facts for upholding decision of the Kisawasawa Ward Tribunal despite the fact that records show that when adducing evidence, the respondent clearly and vividly told the Kisawasawa Ward Tribunal that the disputed land belongs to his father and not to himself.
4. That the Chairman of District Land Housing Tribunal (sic) of Kilombero/Ulanga erred in law and facts for upholding

decision of Kisawasawa Ward tribunal knowing that the matter was decided in civil case no. 16/2000 Primary Court of Mang'ula District of Kilombero.

A brief history of facts of this case suffices such that the land in dispute was acquired by the appellant with some other persons as a group before the same was accordingly partitioned to each person in the group including the appellant who in total the disputed land measures 31 acres. The appellant at the Ward tribunal alleged that sometime in 1998 the land in dispute was trespassed by one Sofia Likonya konya but he successfully sued her. That the land was in peaceably use until in 2014 when the respondent trespassed into the land in dispute stating that the land in dispute belonged to his father measuring 25 acres. The Ward tribunal after visit of the locus in quo decided in favour of the respondent and instructed the respondent to develop the 25 acres as the lawful owners. Equally was the position of the first appellate tribunal which found that the land in dispute formed part and parcel of the land of the respondent's father.

When this matter came for hearing both parties were represented whereby the Appellant was represented by Mr. Mambosasa learned

advocate while the respondent enjoyed the service of Mr. Mtui also learned Advocate.

Submitting in support of grounds of appeal Mr. Mambosasa prayed to withdraw the third and the fourth ground hence remained with only the first and the second ground. He thus started with the first ground of appeal. To him, in respect of this ground, the first appellate tribunal erred in law for upholding the decision of Ward tribunal because the number of the members were not met in deciding the matter at the ward tribunal. Reference was made to section 11 of Act no. 2 of 2002 which provides for each tribunal to contain not less than four members whom three shall be women. According to him the first page of proceedings in the Ward tribunal, the quorum shows a chairperson, secretary and two members.

It was his further submission that the chairman was not supposed to be a member to the tribunal as well as the secretary. It was therefore his conclusion that the members were only two women who did not meet the required number of three women as members were to be four to eight. To his opinion, there was no judgment before the eyes of law. He therefore prayed for this court to allow the appeal from the stated reason herein

above since the first appellate court erred to proceed and allow the decision of the Ward tribunal which had such legal shortcomings.

Mr. Mambosasa went on to submit on the second ground. This ground was based on the evidence of the respondent at page 5 he stated that the farm in dispute belongs to his father, who is still alive and in the absence that the respondent has power of attorney hence he has no any right over the disputed farm. It was his conclusion that the first appellate tribunal erred in granting the ownership to the respondent. He insisted on the appeal to be allowed.

On the other hand, Mr. Mtui learned advocate for the respondents submitted that the appellant's counsel misdirected himself in interpreting section 11 of Cap 216 R.E. 2002. Mr. Mtui submitted further that the said provision of the law is silent and only concerned with the composition of members who should not be less than four (4) and not more than eight (8) members. It was Mr. Mtui's further submission that there is nowhere in the provision directing that the chairman and secretary be regarded as members or not. Again on the number of women, he submitted that the said provision is silent as to when the women should be three when members are either four or eight in their composition.

However, from his conclusion referring to the judgment of the ward tribunal, the chairman and the secretary are proper members. Reference was also made to the case of *Halmashauri ya Walej, Parokia ya Matembwe v. Petro Kitaluka, Misc. Land Case Appeal no. 29/2010 (unreported)*. He was of the view that, it would suit if two would be women and two are men when it set with only four members while there should be 3 women in case the members are more than four. It was his view that the first ground has no merit and deserves to be dismissed.

In the second ground, Mr. Mtui was of the view that the same has no merit. His basis of this kind of submission was that, at the Ward tribunal. It was the very appellant who sued the respondent and therefore he was the one to inquire into and ensure that he sues a proper party and thus at this point he cannot benefit from his own wrong. He prayed for the entire appeal to be dismissed. In rejoinder, Mr. Mambosasa insisted that the quorum was incomplete and from the provision of section 11 the chair person and the secretary are not mentioned only two members. Also on the number of women the law is very clear by stating that there shall be three women as mandatory. In respect of the second ground, he re-joined

by submitting that at the time of instituting the suit, the appellant knew the respondent to be the owner. He prayed for this appeal to be allowed.

The main issue for determination is whether this appeal has merit.

As prefaced in the beginning of this judgment, this is a second appeal. The law in our jurisdiction is now settled that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. It can only interfere with such finding where there is misapprehension of evidence or or a violation of some principles of the law. I am supported in this view by the decision in the case of **DPP V. JAFFARI MFAUME [1981] T. L. R 149**. In this case the District Land and Housing Tribunal, which was the first appellate tribunal concurred with the findings of fact by the Ward tribunal. In order to determine the issue poised herein I will only deal with the first ground of appeal which is a pure point of law and which if determined and found to have merit is capable of disposing off this appeal.

The requirement of the members of the ward tribunal is provided under **section 4 of the Ward Tribunals Act Cap 206 R. E. 2002** which says;

(1) Every Tribunal shall consist of-

(a) not less than four nor more than eight other members elected by the Ward Committee from amongst a list of names of person's resident in the ward compiled in the prescribed manner;

(b) a Chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a).

(2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee.

(3) The quorum at a sitting of a Tribunal shall be one half of the total number of members.

This provision of law is also echoed under **section 11 of the Land Disputes Courts Act Cap 216 R. E. 2002** thus;

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, 1985.

From the fore going, it is crystal clear that the quorum must consist of not less than four and not more than eight members. And the quorum at a sitting must be one half which means four members. Unfortunately, the learned counsel invoked only section 11 of Cap 216 R.E. 2002. Only leaving out section 4 of the Ward Tribunal Act (supra) which states expressly that the chairperson is selected among the members and therefore a member (see section **4(b)** of the Ward Tribunal Act). While the secretary is not among the members forming the quorum (see **section 4(2)** of the Ward Tribunal Act). It suffices to say that the Ward tribunal heard and determined the matter while the quorum was having only 3 members. This was in contravention of the law. It therefore occurs to me that the quorum was incomplete and therefore the first appellate tribunal erred in law and in facts for upholding the decision of the ward tribunal. This is irregularity which is fatal.

It is this court's opinion that this is fatal irregularity which renders the trial tribunal's proceedings null and void and through this court's revision

powers under section 43 (1) (b) of the Land Disputes Courts Act (supra) are hereby quashed. Likewise, the proceedings before the district tribunal which originated in the now quashed proceedings lack legs to stand and are declared null and are quashed.

Since the first ground of appeal disposes of the appeal the remaining second ground of appeal die naturally. This appeal has merit and thus allowed. In the interest of justice, it is hereby ordered that the case to be heard de novo before the trial tribunal by a well legally constituted tribunal. I order no costs since the said anomaly was not the parties' making but the ward tribunal.

It is so ordered.

L. MGONYA

JUDGE

08/12/2017