

**IN THE HIGH COURT UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND CASE APPEAL NO. 16 OF 2019

(Arising from the decision of Kilosa District Land and Housing Tribunal, Land Appeal No. 19 of 2018, dated 01/02/2019; Originating from Land Case No. 182 of 2017 of Rudewa Ward Tribunal)

MARIAM MADALI.....APPELLANT
VERSUS
HADIJA KIHEMBA.....RESPONDENT

J U D G M E N T

Date of last order: 10/02/2020
Date of Judgment: 08/05/2020

MANGO, J.

This is an Appeal against the decision of Kilosa District Land and Housing Tribunal in Land Appeal No. 19 of 2018 which originates from Land Case No. 182 of 2017 adjudicated before Rudewa Ward Tribunal.

The Appellant, Mariam Madali raised three grounds of Appeal which reads:-

- 1. That, the Kilosa District Land and Housing Tribunal erred in law and fact in not properly addressing the 1st ground of Appeal that, the trial tribunal (Rudewa Ward Tribunal was not properly constituted;***
- 2. That, the Kilosa District Land and Housing Tribunal erred in law and facts in not properly examining and considering the***

evidence adduced by the Appellant and her witnesses in the trial Rudewa Ward Tribunal, during hearing;

3. That the Kilosa District Land and Housing Tribunal erred in law and in facts in deciding the matter in favour of the Respondent while the same was not proved to the balance of probability, the standard required by law.

When this matter was called on for hearing the Appellant had services of Mr. Bartholomeo Tarimo learned advocate while the Respondent appeared in the person. The Appeal was ordered to be disposed by way of written submission and parties to this appeal filed their submissions within the schedule.

Arguing in support of the first ground of Appeal, Mr. Bartholomeo Tarimo submitted that the Appellate tribunal grossly erred in law and fact for not addressing the issue raised by the Appellant that, the trial tribunal was not properly constituted when it was adjudicating this case.

Quoting provisions of section 11 of the land disputes courts Act, [Cap 216 R. E. 2019], the learned counsel is of the view that Rudewa Ward Tribunal was not properly constituted as the entire record does not show members who attended each day when the case was called before the tribunal; the names of members alleged to have taken part in adjudicating this matter appear at the last page of the Judgment but their gender is not disclosed.

He argued further that the name of the secretary is not disclosed and it is not clear whether members who had their names and signature, appended

to the Judgment have participated in adjudicating this matter or they merely took part in composing the Judgment.

Mr. Tarimo stressed that the coram requirements under Section 11 of Cap. 216 is mandatory and failure to comply with the same is not curable as it affects jurisdiction of the Tribunal. He referred this Court to the decision of this Court, Aboud, J. in **Abdi Musa Msagati Vs. Stephano Mbega**, Misc. Land Case No. 14 of 2016 in which the decision in **Amina Abdallah Vs. Mkombozi Athumani**, Land Appeal No. 26 of 2014, High Court Tanga Registry which quoted the holding of the Court in **Ane Kisunga Versus Said Mohamed** Misc. Land Appeal No. 59 of 2009, High Court of Tanzania at Dar es Salaam on the interpretation of Section 11 of Cap 216. **In Ane Kisunga's** case the court interpreted Section 11 of Cap 216 as follows:-

"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 to whether it is in compliance with the law. Those members who participated during the 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 difficult to know as in this instant case, the members who participated to compose the Judgment were the same as those who appeared during trial".

Responding on this ground of Appeal the Appellant argued that the record show that the tribunal was dully composed as it had five members; two women and three men.

Citing Section 11 of the Cap. 216 the Appellants is of the view that the mandatory requirement of three women is relevant only where the Tribunal is composed of eight members, but since the trial ward Tribunal was composed of five members, the presence of two women was enough to make the tribunal duly composed. She argued further that the trial tribunal was only mediating parties to this case and not adjudication because the primary function of the Ward Tribunal according to Section 13 (1) of Cap. 216 is mediation. She argued that in such circumstances absence of one woman during hearing of this matter did cause failure of justice.

I find it necessary to determine merits of this ground of Appeal first before the remaining grounds of appeal because it touches existence of the trial tribunal from which this Appeal originates. Composition of the tribunal concerns its existence because a tribunal which is not well composed is as good as a non-existing tribunal.

The appellate tribunal determined this ground of appeal as follows:

"As for the ground relating to improper constitution of, I also see no defects in this judgment because the trial tribunal's quorum was proper because it sat with five members while the required coram is 4 members including the chairperson and among them at least a woman. Since in this judgment there were two female members, this ground also lacks merits."

As submitted by the parties to this Appeal composition of the tribunal is provided under Section 11 of Cap. 216 of our laws. The Section reads:

"Each Tribunal shall consist of not less than four nor than eight members of whom three shall be women who shall be elected by a Ward committee as provided for under Section No. 4 of the Ward Tribunal Act, 1985".

A thorough reading of Section 11 does not show that the requirement of women members has been reduced when the coram is formed by four members as a minimum number of members required to duly constitute a Ward tribunal when adjudicating land matters.

Unfortunately, the proceedings of Rudewa Ward Tribunal in Application No. 182 of 2017 does not have any coram because the names of the members and the dates in which the matter was heard are not reflected in the proceedings. The said proceedings indicates two dates, the date when the Application was received and the date when Judgment was delivered. It does not indicate when the Application was heard and who was in attendance during the hearing, although it has testimonies of the parties and their witnesses. Absence of coram of the tribunal during hearing of this matter makes it difficult to assess the composition of the tribunal.

It is also not clear, as submitted by the Appellant, whether the names of the members appended to the Judgment are same members who attended the proceeding of the tribunal in this case or they merely took part in composing the Judgment. Even if one considers the names of members appended to the Judgment as members who participated in adjudicating this matter, yet, there is another serious error, their gender is not disclosed. This also makes it challenging to rule out the number of male and female members from the names that are appended in the Judgment.

Such irregularities were among the reasons that made the Court of Appeal of Tanzania order retrial in the case of **WILLIAM STEPHEN Versus MS.LEAH JULIUS (Administratrix of the estate of the late Neeva Saboro)** Civil Appeal No. 65 of 2013 Court of Appeal of Tanzania at Arusha.

Although Section 45 of Cap. 216 requires Courts to concentrate on substantive justice and limits them from reversing or altering decisions of the Ward and District land and Housing Tribunals on account of any error, omission or irregularity in the proceedings, irregularities in this case cannot be cured by Section 45 because they have occasioned justice as it is not known whether the matter was tried by a ward tribunal within the meaning of Section 11 of Cap. 216 or not. The proceedings do not establish when the tribunal sat to adjudicate the matter and who actually took part in adjudicating the same. This can be seen even in the Respondent's reply submission at page two, where she failed to mention the exactly number of members who adjudicate the matter, she first stated the tribunal had six members, then 5 members. Uncertainty of the number of members of the tribunal who adjudicated the matter and complaints by the Appellant that the tribunal was not fully composed makes it difficult for this Court to employ provisions of Section 45 and disregard procedural irregularities in this case for the sake of upholding substantive justice.

In my view, composition of the tribunal is not a mere procedural issue, it is in fact a determining factor as whether the institution that adjudicated the matter was really a Ward tribunal within the meaning of Section 11 of Cap. 216 or something else. Tribunals must ensure that they are properly

constituted when adjudicating cases because failure to that reduces their status as ward tribunals to legally unknown institution.

For those reasons, this Court finds this ground of Appeal meritorious and the decision of the District Land and Housing for Kilosa is hereby quashed. This court also invokes its revisionary powers to nullify proceedings and decisions of the trial tribunal and orders retrial of this matter before a dully composed Ward Tribunal.

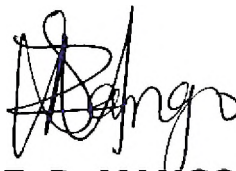
Given the circumstances in this case no order to costs is awarded. Each party should bear its own costs.

Right of Appeal explained.



Hon. Z. D. MANGO
JUDGE
08/05/2020

COURT: Judgment delivered today 08th May, 2020 before Hon. C. Tengwa, Deputy Registrar in the presence of the Appellant and Respondent in chamber No. 25.



Hon. Z. D. MANGO
JUDGE
08/05/2020