

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

MISC. LAND APPEAL NO.28 OF 2022

(Arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No.82 of 2020 originating from Ward Tribunal for Mabwepande in Case No.015 of 2020)

UMMI HAMISI CHIFUPA APPELLANT

VERSUS

ADAMU WAZIRI RESPONDENT

JUDGMENT

Date of Last Order: 13.06.2022

Date of Judgment: 22.06.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Mabwepanda in Land Case No. 015 of 2020 and arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 82 of 2020. Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kinondoni, at Mwananyamala vide Land Appeal No.118 of 2020 among others the appellant complained that the

trial tribunal did not consider that the facts that the appellant was the lawful owner of the suit land. The District Land and Housing Tribunal upheld the decision of the trial Tribunal. The first appeal irritated the appellant. Hence, the appellant lodged the instant appeal and raised two grounds of grievance, namely:-

- 1. That, the Honourable appellate tribunal erred in law and facts in determining the decision which was procured by the improper quorum in the Ward Tribunal.*
- 2. That, the Hounourable appellate tribunal erred in law and facts in holding that the respondent is the legal owner without evidence to prove the same.*

When the matter came up for hearing on 13th June, 2022, the appellant enjoyed the legal service of Mr. Joshua Ruben Marwa, learned counsel, and the respondent enlisted the legal service of Mr. Roman Selasini Lamwai, learned counsel.

In his submission, the appellant' Advocate opted to abandon the second ground of appeal. With respect to the first ground, Mr. Josuhua contended that the decision of the trial tribunal was fatal. He contended that the trial tribunal proceedings show that the quorum of Ward Tribunal members was not met. He added that the trial tribunal consisted of fewer members than the required number. Supporting his position he referred this court to section 4

of the Ward Tribunal Cap. 206. Mr. Joshua went on to submit that the quorum consists of not less than 4 nor more than 8 members but the proceedings are silent, it does not show if the quorum was met.

Mr. Joshua continued to submit that the law requires members to their names and indicate their gender. The learned counsel for the appellant asserted that only one member signed the proceedings. To bolster his submission he cited the cases of **Kassimu Ngoroka v Bernard Masembula**, Misc. Land Appeal No. 3 of 2016 and **Edward Kubingwa v Matrida A. Pima**, Civil Appeal No. 107 of 2018.

On the strength of the above submissions, the appellant's counsel beckoned upon this court to quash the proceeding of the trial tribunal and set aside both tribunals' decisions.

Opposing the appeal, on the first ground, Mr. Roman's confutation was strenuous. He came out forcefully and defended the trial tribunal decision as sound and reasoned. Mr. Roman argued that the proceedings upon which the counsel is relying are not certified. He prayed for this court to look at the original proceedings. Mr. Roman contended that the proceedings dated 10th March, 2020 had three members and on that date, the tribunal adjourned the hearing and there was no need for the Chairman to sit with all members. Mr. Roman submitted that the quorum was properly constituted and gender is reflected by looking at the

members' names. He referred this court to the case of **Edward** (supra) and submitted that section 11 of the Land Disputes Courts Act, Cap. 216 states that members of Ward Tribunal is not more than 8 members without saying that the gender must be indicated. The learned counsel for the respondent insisted that the Court of Appeal of Tanzania found it was not necessary to indicate the gender.

He went on to submit that by examining the proceedings closely one can see that female names were mentioned such as Tatu, Fatuma, Wema, and Neema. He complained that this matter requires evidence thus he urged this court to disregard the counsel for the appellant's submission. He stated that this court as a second appellate court cannot interfere with the findings of the lower court if there is no misdirection or misapprehension of evidence. Mr. Roman invokes the Court of Appeal of Tanzania jurisprudence in the case of **Bushangila Ng'oga v Manyanda Maige** (PC) Civil Appeal No. 18 of 2000. Stressing on this point he submitted that there is nowhere shown of the tribunals misdirected themselves and no evidence that there were less than 4 or more than 8 members.

He did not end there, Mr. Roman submitted that the cited cases are persuasive considering the fact that there is no any legal requirement to indicate the gender of each member. He valiantly argued that this appeal

is an afterthought because the same was raised at the District Land and Housing Tribunal.

The learned counsel for the respondent continued to argue that the appellant participated in the trial, he saw the members and noted that ladies were present in case of any doubt he could have raised this ground at the District Land and Housing Tribunal. He added that raising a new ground is not acceptable in appellate court.

On the strength of the above submission, Mr. Roman beckoned upon this court to dismiss the appeal with costs.

Rejoining, Mr. Roman reiterated his submission in chief. Stressing on the point of names of members that there was a need to indicate the gender of each member of the Ward Tribunal. He distinguished the cited case of **Bushagile** (supra) that the circumstances of the case is different from the one at hand. Ending, he urged this court to allow the appeal with costs.

I have considered the rival arguments by the learned counsel for the parties to this appeal. The learned counsel for the appellant opted to drop the second ground. Therefore, I will address the first ground as it appears. The appellant's Advocate contended that the Ward Tribunal quorum was improper. In his submission, he referred this court to section 11 of the

Land Act Cap. 113 and section 4 of the Ward Tribunal. Mr. Roman on his side submitted that the quorum was well constituted and he stated that this ground was not raised at the District Land and Housing Tribunal

I have scrutinized the trial tribunal's records and noted that the issue of the composition of the Ward Tribunal is a new ground that was raised for the first time at the appellate tribunal. I respectfully agree with the learned counsel for the respondent that generally it is not proper to raise a ground of appeal in a higher court based on facts that were not canvassed in the lower courts. It is settled position of law that issues not raised and canvassed by the appellate court or tribunal cannot be considered by the second appellate court. The Court of Appeal of Tanzania in the case of **Farida & Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court of Appeal of Tanzania held that:-

" It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court."

However, I find it prudent to entertain the preliminary objection raised by the respondent's advocate. Since this court has a duty to take judicial notice of matters relevant to the case even when the matter is not raised in the memorandum of appeal. The Court of Appeal of Tanzania in the

case of **Adelina Koku Anifa & another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported) that:-

“... the court cannot justifiably close its eyes on such glaring illegality because it is his duty to ensure proper application of the laws by the subordinate courts and/or tribunals..”

The facts of the instant suit correspond very well with the authority above. Thus, I find it necessary to entertain the objection raised by the respondent because in case the point of law could not have been raised now, the same could have been raised in a later stage. I will determine the issue *whether there was a proper composition of the Ward Tribunal*. Section 11 of the Land Disputes Courts Act, Cap.216 is related to the establishment of the Ward Tribunal whereby the Ward Tribunal is made by not more than 8 members and not than 3 women. For ease of reference, I reproduce section 11 of the Land Disputes Act, Cap. 216 as hereunder:-

“11. 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.”

Section 11 of the Land Disputes Act, Cap. 216 has nothing to do with the composition of the quorum at the sitting of tribunals. This section is related to the establishment of the Ward Tribunals by Ward Tribunal's gender must be observed and the was observed by learned brother Hon. Maruma, J in the case of **Mapinduzi Mbaruku v Hussein Sufian**, Land Appeal No. 14 of 2019 whereas it was held that:-

*" Thus, section 14 (1) of the Ward Tribunal Act, Cap. 206 of 2019 and section 11 of the Land Disputes Act, Cap. 216 [R.E 2019] has nothing to do with the composition of the quorum at the sitting of the tribunals. The two provisions are related to creation or **establishment of the Ward Tribunals by Ward Tribunal's gender must be observed.**" [Emphasis adde].*

Therefore, guided by the above provision of the law and the authority of this court, it is vivid that issue of gender is required to be observed in the establishment of the Ward Tribunal and is not related to the quorum of the Ward Tribunal. The issue of the quorum of Ward Tribunal members is well articulated under section 4 (1) and (4) of the Ward Tribunal Act, Cap. 206 .state as follows:-

"4.-(1) Every Tribunal shall consist of-

(a) not less than four nor more than eight members are elected by the Ward Committee from amongst, list of names of persons

residing in the Ward compiled in the prescribed manner.

Tribunal.

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

Applying the above provisions of the law, and the holding in the case of **Mapinduzi Mbaruku** (supra) it is clear that the issue of the composition of the Ward Tribunal was not an issue in the instant matter since the same is related to the establishment of the Ward Tribunal. I have gone through the Ward Tribunal and noted that the quorum of sitting at the tribunal was observed. On the Ward Tribunal Proceedings dated 21st July, 2020 the quorum shows that two women; Fatuma F. Abdallah and Wema J. Mbonde were present in the adjudication of the matter at the trial tribunal.

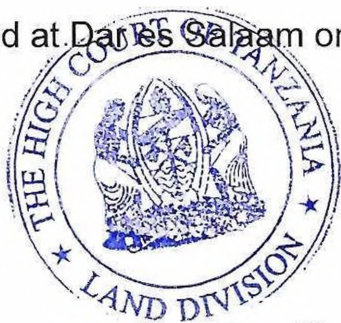
Therefore, the issue of gender is immaterial because section 4 of the Ward Tribunal Act, Cap. 206 did not state the requirement of mentioning the gender of members. What matters is every tribunal has not less than four members nor than eight other members. The proceedings of the Ward Tribunal dated 21st July, 2022 show clearly that 6 members in exclusion of the Secretary were present therefore the quorum was met. Therefore, the issue of gender balance is demerit. The issue of naming the names of assessors when they raised their questions is not fatal since during the proceedings members had an opportunity to ask questions.

As rightly pointed out by Mr. Roman that the appellant's counsel the quorum was met and when a matter is adjourned, the requirement of sitting with 4 or more members is inapplicable as members are required to present during the hearing of the case to enable them to ask questions and state their opinion at the end of the hearing of witnesses testimonies. I have also considered the fact that during the hearing of the case, the Ward Tribunal is not bound by the procedure applicable to any court. See section 15 of the Ward Tribunals Act, Cap. 206 [R.E 2019].

Given the foregoing and, as I intimated earlier on, I find the appeal misconceived and lacking in merit. Accordingly, the same is dismissed with costs.

Order accordingly.

Dated at Dar es Salaam on 22nd June, 2022.



A.Z.MGEYEKWA

JUDGE

22.06.2022

Judgment delivered on 22nd June, 2022 via audio teleconference whereas Mr. Joshua Marwa, learned counsel for the appellant, and Mr. Roman Selasini Lamwai, learned counsel for the respondent were remotely present.



AK
Z.MGEYEKWA
JUDGE
22.06.2022

Right to appeal fully explained.