

TANZANIA / JUDGMENT

anselmo maliatbu vs imelda mwanisawa

2023 tzhc 21746 12 october 2023

COURT
TZHCDECIDED
12 October 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUMBAWANGA DISTRICT REGISTRY AT SUMBAWANGA LAND APPEAL NO. 05 OF 2023 (From Land Appeal No. 8 of 2021 in the District Land and Housing Tribunal for Rukwa at Sumbawanga, Original Land Dispute No. 36 of 2021 at Kate Ward Tribunal) ANSELMO MALIATABU APPELLANT VERSUS IMELDA MWANISAWA.....);:.....;..w.RESPONDENT 26/07/2023 & 12/10/2023

JUDGMENT

MWENEMPAZI, J. | % Anselmo Maliatabu unsuccessfully instituted a dispute against the Respondent herein;^t<J<ate A^ard Tribunal, that the Respondent has I' !- ;-'= 's'*-'! ~i:- •;'t• v! .■,., v';" • encroached into his land. The appellant appealed to the District Land and Housing Tribunal for Rukwa at Sumbawanga. He lost again. This is the second appeal. In his appeal, the appellant has raised two grounds of appeal, namely: - i

1. That the appellate Tribunal erred in law to entertain the matter which was a nullity ab initio for failure to show the members who heard the matter day to day as well as the gender of the members.
2. That the appellate Tribunal erred in law and fact in evaluating the evidence on ownership of the disputed land which was adduced by the "Wk parties hence reached to a wrong decision. The appellant has prayed for judgment and decree of this Court quashing the judgment of the lower Tribunals!.. : At the hearing of an appeal, parties prayed Topresent their appeal by way of written submission. That was. on 21/06/2023. Leave of the Court was granted and a scheduling order was issued. I have at this juncture to express my sincere appreciation of the hard work done for both parties. The appellant was J being represented by Mr. Peter Kamyalile, learned advocate and the respondent though not represented, from the assessment of the written submission filed, she had a lawyer who did prepare a researched written submission in defence of an appeal. The counsel for the appellant submitted that the appellate tribunal erred to entertain the matter which was a nullity ab initio for failure to show the 2 members who heard the matter day to day as well as the gender of the members. The issue was not raised at the District Land and Housing Tribunal

when the first appellate tribunal was considering the appeal. So, the counsel for the appellant took off in his submission starting with the justification of the point at this level. The counsel for the appellant submitted that it is trite of the law that ground of appeal hinged on a point of law can be raised at any time. He has submitted that the appellate Court is duty bound to make a judicial notice of the matters of law relevant to the case even if such matters have not been raised in the memorandum of appeal. That, since the first ground hinges on the point of law it should be addressed and determined on merit although it was not raised and determined at the first appellate Tribunal. The counsel has supported his argument by citing the case of *Adelina Koku vs. Sr Anifa and Another Vs. Byanigaba Alex*, Civil Appeal No. 46 of 2019, Court of Appeal of Tanzania at Bukoba (unreported) at page 6-7. Where the holding can be summarized that: 'Where the ground of appeal on the second appellate Court hinges on a point of law, the second appellate Court is duty bound to address it and determine the same on merit despite of the fact that it was not raised in the first appellate Court. The reason for the holding is that the Court has a duty to ensure proper application of the laws by the subordinate Courts and or tribunals'. The counsel for the appellant submitted that section 10 of the Land Disputes Courts Act, [Cap 216 R.E 2016] and section 4(3) of the Ward Tribunal Act, [Cap 206 R.E 2019] clearly and mandatorily require that "a properly constituted Ward Tribunal shall consist of at least four members and not more than eight members, three of whom being women. In our present case on the 21/05/2021 members of the Ward tribunal were not shown and the whole proceedings does not show the members who were present when the matter was being heard. Also, out of seven members who signed the decision, female members were only two which is contrary to the law. He therefore insisted that the appellate tribunal erred in law by determining the appeal and basing its decision on the decision which was a nullity ab initio for failure to show the members who heard the matter day by day as well as to gender of the members. The counsel for the appellant cited the case of *Edward Kubingwa Vs. Matrida A. Pima*, Civil Appeal No. 107 of 2018, Court of Appeal of Tanzania at Tabora (Tanzilii) where it was held: "The failure and the irregularity by the trial tribunal to observe the mandatory requirement on the composition of the tribunal, did not only vitiate the proceedings and the resulting decision of the trial tribunal it also rendered the trial tribunal lack jurisdiction to try the case". On the point, the respondent has submitted in reply that the first ground of appeal lacks merit since the appellant has raised new ground of appeal which was not raised in the lower tribunal. The counsel for the Respondent has raised the case of *Juma Said Luhombero and Another Vs. Aisha Hamad Luhombero*, Land Appeal No. 21 of 2022, High Court of Tanzania at Morogoro. Alternatively, the respondent has argued that during hearing of the dispute the trial ward tribunal, was well composed and the attendance of members on day to day was well constituted. The appellant has failed to show on which day the trial tribunal failed to comply with section 11 of the Land Disputes Courts Act, [Cap 216 R.E 2019], The counsel proceeded to mention the names of the members as Leonard Kanyepa, Edes Mbalamwezi, Vitus Monela, Mary Kamkome, Ledepa Mwarini and Sospeter Kawiti. She has argued that there were three women as required by-law hence the ground raised has no merit. She prays the same to be dismissed with costs. The second

ground of appeal is on the complaint that the evidence on ownership was not evaluated well by the trial tribunal and the appellate tribunal hence reached to the wrong decision. I read the record of the trial tribunal and the appellate tribunal. In my opinion, I did not see importance of considering the submission on the second ground of appeal for the reason that, the first ground of appeal touches the jurisdiction of the trial tribunal and its determination will dispose of the appeal on the footing, of justice. As argued by the counsel for the appellant, the appellate tribunal erred in law to entertain the matter which was nullity ab initio for failure to show the members who heard the matter day to day as well as the gender of the members. The counsel for the appellant has cited the provisions of section 11 of the Land Disputes Court Act, [Cap 216 R.E 2019 and the case of Edward Kabingwa Vs. Matrida A. Pima (supra) as the base of his argument. Section 11 of the Land Disputes Court Act, [Cap 216 R.E. 2019] provided as follows: "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" According to section 4 of the Ward Tribunal Act, [Cap 206 R.E 2019], "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 persons resident in the ward compiled in the prescribed manner; 2 1. 3. The quorum at a sitting of a tribunal shall be one half of the total number of members. The complaint in our case, is that members who sat and heard the dispute at the Tribunal day to day were not shown even their gender. Hence the 7 proceedings were nullity ab initio. That is contested by the respondent who has even listed the members and distinguished their number in terms of gender. I have read the record of the trial tribunal. It shows the dispute was heard from 21/05/2021 and on the date the quorum of the ward tribunal is not shown. The case was determined on 25/06/2021: the law is clear, section 4(3) of the Ward Tribunal Act, [Cap 206 R.E, 2019], "The quorum at a sitting of a tribunal shall be one half of total number of members". In my view, the operating words in the provision are "the quorum at a sitting" meaning that at every sitting there must be a minimum number equal to a half number of the members for the Tribunal to be properly constituted. Though the law is silent on a number of women present at a sitting I have an opinion at least one woman or two should be present where the number of members is equal to a half of the total numbers. With what is shown in the proceedings, it is clear that the quorum at each sitting is not clear or shown and therefore the complaint is valid. As a consequence, the trial tribunal had no jurisdiction at the time it heard the dispute, and that cannot be cured by a list of members and their signature in the decision of Ward Tribunal which appears on the 25/06/2021. In the cited decision of the Court of Appeal of Tanzania, After the Court had found that the Tribunal had no jurisdiction, it quashed the proceedings of the trial tribunal and that of the District Land and Housing Tribunal and High Court. I have no other option but to quash the proceedings and judgment of the trial tribunal and that of the appellate, trial and High Court. As to what will be the way forward, the answer in the case of Edward Xx K>:l

t. 3,x Kubingwa Vs. Matrida A. Pima (supi;a) where the Court held that: ®r "Having quashed and set aside the above stated proceedings and judgment, ordinarily and in line with the decision of the Court in Adelina Koku and Joanitha SikudhaniAnifa (supra) we would have directed for the FF.- ^git to be heard de novo. However, in the advent of the recent amendments made to the Act by the written La ws (Miscellaneous Amendment (No. 3) Act, 2021, whereby the powers of the Ward Tribunals to inquire into and determine disputes arising under the Land Act and the Village Land Act and also the powers to order recovery of 9 possession of land and other powers the ward tribunals used to have under sections 13(2) and (16(1) of the Act have been immensely stripped off by the said amendments, we find it not practicable to order the suit to be heard de novo. Tn these circumstances, we thus direct that the respondent, if she so wishes, may file her claims afresh in accordance with the current procedure: and law". ... ■... w In the same line and reasoning ^hereby quash|the proceedings and judgments of the lower tribunals and direct thatthe appellant if he wishes to file his claims afresh in accordance witji the current procedure and law. I issue no order as to costs. It is ordered accordingly. Dated atSumbawanga this 12th day of October, 2023. T.M. MWENEMPAZI JUDGE io Judgment delivered in the presence of the appellant present in person, Mr. Peter Kamyalile, Advocate for appellant and the respondent who is present in person. T.M. MWENEMPAZI JUDGE 12/10/2023 11

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