

TANZANIA / JUDGMENT

edward kubingwa vs matrída a pima

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA fCORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.^ CIVIL APPEAL NO. 107 OF 2018 EDWARD KUBINGWA..... APPELLANT VERSUS MATRIDA A. PIM A.....RESPONDENT (Appeal from the decision of the High Court of Tanzania, at Tabora) (Mqonya, J.) dated the 28th day of October, 2016 in Land Case Appeal No. 25 of 2016 JUDGMENT OF THE COURT 1st & 5th November, 2021 MWAMPASHI, J.A.: The dispute between the parties is over a house situated within the District of Kaliua in Tabora Region, claimed by the respondent (Matrída A. Pima) to belong to her. The parties who had been living together in the said disputed house as husband and wife for about ten years, parted ways in 2011 when the appellant (Edward Kubinga) chased her away. The act of being chased away from the house she allegedly had built on her own, is what aggrieved the respondent, hence, the dispute between the parties. Determined to repossess her house, the respondent sued the appellant in Land Application No. 10 of 2013 before the Ward Tribunal of Uyowa (the trial Tribunal). The respondent's suit was however, dismissed by the trial Tribunal on 21.10.2013. Aggrieved, the respondent successfully appealed to the District Land and Housing Tribunal for Tabora (the DLHT) vide Misc. Land Appeal No. 14 of 2014 wherein the trial Tribunal's decision was set aside and the respondent was declared the rightful owner of the house in dispute. Discontented, the appellant appealed to the High Court at Tabora against the DLHT's decision in Misc. Land Case No 25 of 2015 but his appeal was dismissed on 28.10.2016. Still aggrieved, the appellant lodged the instant appeal seeking to fault the High Court decision on two grounds which are in the following form:-

1. That, both the learned Judge of the High Court and the District Land and Housing Tribunal erred in law in holding that the Respondent's Appeal before the District Land and Housing Tribunal was not time barred.
2. That, while the ward tribunal record show that the Appellant herein and the Respondent were living in a manner presuming as wife and husband then both the High Court and the tribunals erred in law to entertain this matter to which the trial ward tribunal had no jurisdiction. Before us, when the appeal was called on for hearing, whereas the appellant had the services of Mr. Musa Kassim, learned advocate, the respondent appeared in person,

unrepresented. In the course of the submission by Mr. Kassim in support of the appeal, the Court intervened and probed the parties on whether the trial Tribunal was properly constituted in compliance with the law to determine the suit. Without mincing words, Mr. Kassim contended that the composition of the trial Tribunal was not in accordance with section 11 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] (the Act) which mandatorily requires the tribunal to be constituted by not less than four members and not more than eight members, three of them being women. It was further argued by Mr. Kassim, that the trial Tribunal was not properly constituted because all the four members who sat at the hearing of the suit were all men. He, therefore, contended that since the trial Tribunal was not properly constituted its decision and the decisions by the DLHT and the High Court are a nullity. He lastly prayed for the nullification of the proceedings and decisions of both tribunals and the High Court and for an order of retrial. As for costs, Mr. Kassim urged the Court to let each party bear its own costs. The respondent, understandably, being a lay person, seemed not to grasp the gist of the issue in question. She prayed for the proceedings and decisions of the tribunals and the High Court not to be nullified and for the 3 appeal to be dismissed. It was also her argument that the appeal is liable for dismissal because the certificate of delay attached in the record of appeal is defective. Owing to the legal issue raised suo motu by the Court, the grounds raised in support of the appeal are not going to be determined in this appeal. The only issue for our consideration and determination which is whether, in the instant case, the trial Tribunal was properly constituted. It has to be emphasized at this very stage that in order for a tribunal or court to pursue any matter before it, the same must be properly constituted otherwise it lacks jurisdiction. The issue we have raised above takes us firstly, to section 11 of the Act which provides 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" [Emphasis added] Further, section 4 of the Ward Tribunals Act [Cap. 206 R.E. 2019] stipulates that: "(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 persons 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.
- (4) [Omitted]". [Emphasis added] The above recited provisions of law 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. According to the record, the

trial of the instant case, as it can be seen at pages 6 to 7 of the record of appeal, began on 20.08.2013 when the trial Tribunal heard and recorded evidence from the respondent and appellant. On that day, the trial Tribunal consisted of the Chairman Mr. Stephen K. Hoba, Messrs Sostenes Kwiyaamba and Richard Andrea (Members) and the secretary Mr. Damian M. Mdaki. 5 In counting the number of the members who participated in trying the case Mr. Kassim included the secretary who is not a member and who does not therefore constitute a quorum. It is therefore, only three members who participated in the trial instead of four members as required by the law. The same three members participated in the trial on 30.09.2013 when six witnesses for the respondent testified (see pages 9, 10 and 11 of the record of appeal) as it was also on 07.10.2013 when the last witness for the respondent testified (see page 12). Lastly, it is the same three members who, on 21.10.2013 were present when the judgment of the trial Tribunal was delivered. It is thus, very apparent that throughout the trial it is only three members who participated and finally decided the case contrary to section 11 of the Act which require that in constituting the Ward Tribunal, the least number of members should be four members. If we may add, the other ailment in the composition of the trial Tribunal was the fact that the issue of gender was completely not observed. Of the three members who participated in the trial, none of them was a woman contrary to the mandatory requirement of the law. The failure and the irregularity by the trial Tribunal to observe the mandatory requirement on the composition of the trial Tribunal, did not only vitiate the proceedings and the resulting decision of the trial Tribunal but it 6 also rendered the trial Tribunal lack jurisdiction to try the case. In an akin situation in the case of Adelina Koku Anifa and Joanitha Sikudhani Anifa

- v. Byarugaba Alex, Civil Appeal No. 46 of 2019 (unreported) where the quorum of the Muhutwe Ward Tribunal was formed by only three members contrary to section 11 of the Act, the Court observed as follows: "Since only three members participated in the trial o f the matter subject o f this appeal at the level o f the Ward Tribunal' the proceedings were marred with irregularity, thus null and void hence, because o f that ailment which we consider to be grave, we are constrained to, and we hereby quash those proceedings, as well as those in the DLHTand the High Court, and set aside the judgments in both tribunals and the High Court. We direct for the suit to be tried anew by the tribunal." Guided by the position we took in Adelina Koku Anifa and Joanitha Sikudhani Anifa (supra) and for the above given reasons, we therefore, quash the proceedings of the trial Tribunal as well as that of the DLHT and the High Court. We also set aside the resulting judgments. Having quashed and set aside the above stated proceedings and judgments, ordinarily and in line with the decision of the Court in Adelina Koku Anifa and Joanitha Sikudhani Anifa (supra) we would have directed for the suit to be heard denovo. However, in the advent of the recent amendments made to the Act by the Written Laws (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 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 head denovo. In 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. We make no order as to costs. DATED at TABORA this 4th day of November, 2021. S. A. LILA JUSTICE OF APPEAL M. C. LEVIRA JUSTICE OF APPEAL A. M. MWAMPASHI JUSTICE OF APPEAL The Judgment delivered this 5th day of November, 2021 in the presence of Mr. Musa Kassim, counsel for the Appellant and the respondent appeared in person, is hereby certified as a true copy of the original.

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