

TANZANIA / JUDGMENT

halima hamadi vs mariam idd

2022 tzhc 15819 13 december 2022

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA (DISTRICT REGISTRY OF MOROGORO) AT MOROGORO LAND APPEAL NO. 90 OF 2022 (Arising from the judgement and decree of the District Land and Housing Tribunal for Morogoro, Hon. E Mogassa, Chairperson, in Land Appeal No. 11 of 2020 Originating from Dispute No. 02/2019 Tununguo Ward Tribunal) HALIMA HAMADI APPELLANT VERSUS MARIAM IDD RESPONDENT

JUDGEMENT

Hearing date on: 11/11/2022 Judgement date on: 13/12/2022 NGWEMBE, J: The appellant Halima Hamadi, was also the appellant in the District Land and Housing Tribunal for Morogoro also was the defendant in Tununguo Ward Tribunal established within Morogoro region. All along she has been faulting the decision of the Ward Tribunal, which decision was in favour of the respondent. Being dissatisfied with that decision of the Ward Tribunal, she challenged it by appealing to the District Land and Housing Tribunal, which Tribunal, likewise, confirmed the decision of the Ward Tribunal. Such decision aggrieved further the appellant, who knocked the doors of this court for the second appeal. In this court the appellant is armed with two grounds of appeal as quoted hereto: -

1. That, the District Land and Housing tribunal erred in law for failing to note that that the trial ward tribunal was improperly constituted and therefore lacked jurisdiction; and
2. That, the District Land and Housing Tribunal erred in law and fact by failing to re-evaluate the evidence properly. The appellant asked this court to allow the appeal, reverse the judgement and decree of the District and Housing Tribunal, declaration that the appellant is the lawful owner of the disputed land and the costs of this appeal and the proceedings below. However, the respondent strongly resisted the appeal and equally prayed the appeal be dismissed with costs. Proceeded to convince this court to uphold the decision of the District Land and Housing tribunal. Tracing the genesis of this appeal, it is evident that, the respondent herein sued the appellant before Tununguo Ward tribunal for trespassing into her farm land, which she alleges that, she got from her late father. The appellant denied those allegations and provided her side of the story on how she came to possess the suit land. That, she was allocated the same by Tununguo Village Government. After

determination by the trial tribunal, ended up deciding in favour of the respondent herein after being satisfied that, she has proved the case to the preponderance of probability that, the farm is hers and that the appellant trespassed into it. The claims that she was allocated the suit land by Tununguo Village Government was proved to be false. Dissatisfied with the decision of the Ward Tribunal, the appellant unsuccessfully challenged it before the District Land and Housing Tribunal for Morogoro in Land Appeal No. 11 of 2020. However, unfortunate to the appellant, even that appellate tribunal ended upholding the decision of the Ward Tribunal and joined hands to declare that the respondent is the true and rightful owner of the suit land. Aggrieved therewith, preferred this appeal clothed with two grounds referred above. On the hearing date of this appeal, both parties were represented by learned advocates under the scheme of legal aid, while the appellant had the legal services of Ms. Benadeta Iteba, the respondent had the legal service of advocate Mr. Erick Chale. This court appreciates for their inputs. In support to the appeal, Ms. Iteba on the first ground argued that, the District Land and Housing tribunal erred in law for failing to note that the trial ward tribunal was improperly constituted and therefore lacked jurisdiction, supported her submission by citing section 11 of Land Disputes Courts Act Cap 16 R.E 2019 that the composition of the ward tribunal requires presence of the chairman and two assessors. Also, she referred this court to section 4 of the Ward tribunal's Act [Cap 206 R.E 2002], that a quorum shall be one half of a total number of members. Referred this court to the case of Alexander Mashauri Vs. Dionis Nyamla, Land Appeal No. 65 of 2020 at page 5 and 6. In respect to this appeal, she argued that there was no record of quorum in the whole proceedings save only on the judgement date. # Thus cited the cases of Edward Kubingwa Vs. Matilda Pima, Civil Appeal No. 107 of 2018 in pages 4, 5 & 6 and R.S.A Ltd Vs. Hans Paul Automechs Ltd Civil Appeal No. 179 of 2016 at page 12. Ms. Iteba insisted that, the trial tribunal was improperly constituted, hence lacked jurisdiction. In response thereto, advocate Chale conceded to the fact that the proceedings of the ward tribunal did not show the quorum on daily basis, save on the decision date when quorum was shown clearly including three women as per the requirement of law. He further stated that the law was complied as per section 11 of the Land Disputes Courts Act Cap 216 R.E 2019 and 4 (1) of the Ward Tribunal's Act [Cap 206 R.E 2002], Insisted that eight members participated in determining the dispute. Failure to record quorum daily is minor omission correctable under section 45 of the Land Disputes Courts Act Cap 16 R.E 2019, in fact no party suffered any injustice and that the law is not strict on procedural irregularities on the proceedings at the ward tribunal. On the second ground that, the District Land and Housing Tribunal erred in law and fact by failing to re-evaluate the evidence properly. Ms. Iteba submitted that, there was evidence of Wilbroad Thomas, a hamlet Chairman who distributed a suit land to the appellant and that the land was also matrimonial. The District Land and Housing Tribunal failed to analyse properly the evidence adduced during trial. Lastly, she prayed that this appeal be allowed, judgement and decree of the District Land and Housing Tribunal be reversed, the appellant be declared the lawful owner and the costs. In disparity Mr. Chale submitted that the District Tribunal properly evaluated the whole evidence and arrived to the correct judgement. Challenged that Wilbroad Thomas was a hamlet chairman who had

no legal jurisdiction to grant land to anyone in the village, and that the respondent had locus to sue because she was given the land by her father. Mr. Chale informed the court that, both parties are represented by legal aid scheme, in which parties are not entitled to costs as it was decided in the case of Evatha Mosha Vs. Arusha City Council and two Others, Civil Case No. 14 of 2021(HC Arusha), he prayed this court to dismiss the appeal and uphold the decision of the District Land and Housing tribunal for Morogoro. Having summarized the rival arguments of learned counsels, I have perused the proceedings and judgments of both lower Tribunals, obvious the question for determination is whether this appeal has merit. Regarding the first ground of appeal on failure of the District Land and Housing tribunal to take note on the errors committed by the Ward Tribunal. Ms. Iteba referred this court to section 11 of the Land Disputes Courts Act cap 16 R.E 2019 and Section 4 of the Ward Tribunal's Act [Cap 206 R.E 2002] that those sections were contravened by the Ward Tribunal. Section 11 of the Act is quoted hereunder for easy of reference: - "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 4 (1) (a) of the Ward Tribunal's Act [Cap 206 R.E 2002] state in the following words as follows: "Every Tribunal shall consist not less than four nor more than eight other members elected by the ward committee from among a list of names of persons resident in the ward compiled in the prescribed manner" Again Section 4(3) of the Ward Tribunal's Act (supra) provides:- "The quorum at a sitting of a tribunal shall be one half of the total number of members" In the case of Edwin Kekwesigabo and Another Vs. Adventina Gerevazi, Misc. Land Appeal No. 33 of 2021 (unreported) the court held inter alia as follows: - "The quorum of the Ward Tribunal should be maintained in all sittings" This court perused the records of the Ward Tribunal in Land Case No. 6 of 2018 only to note, there is no quorum recorded in the whole proceedings. At page one of the proceedings at the very beginning it features the following statements: "JAMHURI YA MUUNGANO TZ HALMASHAURI YA WILAYA MORO BARAZA LA KATA TUNUNGUO 6 2-12-2019 KESI NO(3) MADAI MDAL-MARIAM IDD KABILA MRUGURU DINI-ISLAM UMRI- DAI KUVAMIA SHAMBA MDALWA - HALIMA HAMADI" In view of the above assertion, I subscribe with Ms. Iteba that it is true that the proceedings of the Ward Tribunal of Tununguo features no names of the members of the ward tribunal and it is really not reflected in the proceedings when was hearing the dispute from the beginning to the end of trial save on the judgement day. That being said, I agree with the submissions by counsel for the appellant that failure to show the quorum was violation of clear provisions of law and as a result the whole proceedings of the Ward Tribunal is a nullity. The question is how would it be possible to contemplate if the requirement of members as stated by law was complied with without proper records. List of members on the judgement is not enough to prove that they attended the whole proceedings. I have deeply considered the rival reply from advocate Chale that failure to record such quorum was a minor error cured under section 45 of Land Dispute court's Act, [Cap 216 RE 2019]. However, the position on this issue is well settled as was so decided by this court in the case of Osmundi Ngongi Vs. Florian Ndumba, Land Case Appeal No.31 of 2014(HCT - Songea) at p.5 held: - Now, since the record of the ward tribunal does not show the quorum of the

members Who heard the case then one cannot be sure as to whether there were any members at all on 26.8.2013 or the ones shown during the judgment date were the same as those who sat during the hearing. Consequent to the foregoing it is my considered view that the omission was fatal and it occasioned failure of justice. The Rules of procedure are handmaiden of justice without which administration of — justice will be at jeopardy. Therefore, the District Land and Housing Tribunal did not error to nullify the proceedings of the ward tribunal and order of retrial of the case and that decision is hereby upheld..." Though this decision is not binding upon me, yet to depart there must be good reason for it which is not forthcoming. Notably, the members of the Ward Tribunal are common citizens of the respective ward who are not necessarily educated to a certain level, but purely resident who knows to read and write. So, the issue of recording quorum of attendants may not be an issue serious to them rather to do justice to the disputants. I even tend to agree with the Legislature to waive such powers to make decisions to the land dispute, rather to give mere advice. Otherwise, it has appeared in several land disputes in this court and the Court of Appeal, that many Ward Tribunals have failed to comply with dictates of law. Such procedural requirements have impeded many disputants in seeking for justice. Land Tribunals like Labour Tribunals and other Tribunals are not courts per se as defined by the law. Most of time, tribunals are not manned by competent and regulated legal professionals like in the courts of law. For instance the Ward Tribunals, though do make decisions, (currently the law has been amended to allow them to play advisory roles as opposed to substantive decisions), but they are manned by common men in the society. Likewise, the District Land Tribunals are manned by officers who are employed and regulated by the Ministry of Lands. To do justice to those tribunals, at most have relaxed some procedural strictness like in the courts of law. Usually in those tribunals they are concerned with substantive justice as opposed to procedural compliance. This position was rightly observed by the Court of Appeal in several cases including, in the case of William Stephen Vs. Ms. Leah Julius (Administratrix of estate of the late Neema Saboro), Civil Appeal No. 64 of 2013 and Yakobo Magoiga Gichere Vs. Penina Yusuph, Civil Appeal 55 of 2017 where it was observed: - "We are of the decided view that the Court should not read additional procedural technicalities into the simple and accessible way Ward Tribunals in Tanzania conduct their daily business" In similar vein, the Court of Appeal in Chandrakant Joshubhai Patel Vs. R, [2004]T.L.R. 218, provided a long living guideline as follows: - "No judgment can attain perfection but the most that Courts aspire to is substantial Justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism" Equally Important Is to note that, substantively, the appellant seem to lack evidential justice over the suit land and the members of the Ward Tribunal and the normal residents of the respective village, may be surprised to hear that the matter Is returned to the Ward Tribunal for retrial. Considering deeply on the decision of the Ward Tribunal, It Is evident as follows: - "Waiiosikiiiza kesi na kutoa hukumu ni" then proceeded to mention their names. The language used therein meant those who sat and hear the dispute from the beginning to the end and who composed the decision were the same and their names were mentioned therein. To my understanding, that alone, satisfied the procedural requirements,

hence no need for retrial. Accordingly, this appeal lacks merits same Is dismissed. Since each party obtained free legal assistance. It Is therefore, just and equitable to order each party to bear her own costs. Order accordingly. Dated at Morogoro this 13th December, 2022 \JRT OA CO -2- 17

- p. J. NGWEMBE X V JUDGE 13I12I2Q22 10 Court: Judgment delivered at Morogoro In Chambers on this 13th day of December, 2022Z, Before Hon. A.W. MMBANDO, DR In the presence -# of Ms. Bernadete Itebe, Advocate for the Appellant and in the presence of the Respondent in person. Right to appeal to the Court of Appeal explained. SGD. HON. A.W. MMBANpOth'fyihatthisisatrund correcl I I copy of the original L, DEPUTY REGISTRAR i 13/12/2022 ix.puiy registrar- Registr- Pat.. 'il.Ilf^o,oaarn 11 y iJ

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