IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL APPEAL NO.38 OF 2007

(Originating from Land Appeal Tribunal

at Dar Es Salaam Appeal No.36/2005)

NIIMA GWARU .....APPELLANT

VERSUS

ELIZABETH GUTMO .....RESPONDNET

JUDGMENT

SAMBO, J.

The appellant, Niima Gwaru, was the plaintiff/complainant in case No.33 of 1996, at the Customary Land Tribunal in Arusha. When Manyara became a Region, the case was heard to its conclusion by the Manyara Regional Customary Land Tribunal in which, the appellant won the case. The respondent, Elizabeth Gutmo, was dissatisfied by the decision and appealed to the Customary Land Ajppeals Tribunal,

where she won the case. Being aggrieved by the decision of the Appellate Tribunal, he filed the present case in this court in view of the directives delivered to him by the learned chair-person of the said Tribunal.

In his petition of appeal, he raised six grounds to which I will respond to each accordingly. When the appeal came for hearing, the appellant appeared in person and the respondent was represented by the learned advocate, Mr. Mugwai.

In the first ground, which is number 3 in the petition of appeal, the appellant state that the honourable chairperson for land Appeal Tribunal erred in fact in pronouncing that Application No. 33 of 1996 was heard exparte at Babati Customary Land Tribunal. The fact is that the application was heard interparties. In perusing the records, I noted that on 20th August, 2003, the appellant/ complainant, Mr.

Niima Gwaru, told the Tribunal that the respondent refused service and that's why she did not appear before the Tribunal. Thereupon, the Tribunal ordered that the case should proceed exparte on 21st August, 2003. This is recorded on page 4 in the case file. At page 5 of the same, the appellant is recorded testifying IN THE ABSENCE OF THE RESPONDENT. At page 8, his 1st witness Darsi Gwaru, is recorded his testimony. The testimony of his 2nd witness Tahani Gilagwen is recorded. All these took place exparte.

Surprisingly enough, and may be that's the procedure obtained in Customary land Tribunals, on 19th November, 2003, the case came for hearing, both parties were present. The complainant, Niima Gwaru, testified again and was cross examined by the respondent Elizabeth Gutmo. But, his previous witnesses were not recalled, and therefore, the

respondent did not hear their evidence and was denied her right to cross examine them. The respondent also testified and the appellant awarded the chance of cross examining her, but he had nothing to ask. On 28th June, 2004, Mr. Abraham Mhindi, testified as the only witness of the respondent, and the appellant got chance of cross examining him. The judgment of the Regional Customary Land Tribunal was delivered on 30th September, 2005, in the absence of the respondent, the appellant being recorded present.

In view of the recorded evidence, stated herein above, it's apparent that the hearing of this case by the Manyara Regional Customary Land Tribunal was full of irregularities. The appellant testified twice, at first, in the absence of the respondent, but during the second time, the respondent was present. The appellant's witnesses never testified in the presence of

the respondent, who did not even cross examine them. Subject matter visited without the respondent. The judgment of the Tribunal was also delivered in the absence of the respondent. Though in its judgment the Land Appeals Tribunal stated that the exparte judgment of the Babati Customary Land Tribunal was delivered on the 10th day of October, 2005, I did not see or detect any such judgment delivered on that date. The hand written judgment of the case file is dated 30th September, 2005.

In the second ground, which is No.4 in the petition of appeal, the appellant alleges that the honourable chair- person erred infact by accepting the claim by respondent that she was allocated the suit land by the Bashnet Village Government after request. He says she was given the same by one Sylvin Tlaghasi. The entire evidence in this case, reveal that

the respondent was allocated that piece of land by the Bashnet village Government. Even in his submission, supporting this appeal, the appellant admits that she was allocated that suit land by the village Government, only that such allocation was not correct. He did admit and stated in court that the village Government invaded his land, and he started complaining against that move or act. The respondent's witness, Abraham Mlundi, who, by then was the secretary and Village Executive Officer of Bashnet village, between 1986 and 1993, testified to the effect that in 1993 the respondent requested for a piece of land from the village Government and that her request was discussed and granted. She was then allocated one acre and ten paces, that's 70 x 80 paces. In this regard, this ground of appeal is baseless and unfounded in its totality. The reasoning in this ground,

also covers for the fourth (No.6) which is short of merits and accordingly dismissed.

In the third ground (No.5) the appellant alleges that the chairperson did not put the facts right. He says he cultivated the suit land with his father from 1985 up to 1993 when he died. In 1994, he did not cultivate following an accident in 1993 which left him with a badly fractured arm. But, in his recorded evidence, on 19th November, 2003, he told the Tribunal that at the time the suit land was being allocated to the respondent, it was not tilled or cultivated for a period of four years! How come, now he states that the suit land was under cultivation from 1985 to 1993? Contradictions leads me to believe that he's not talking the truth, and if what he alleges in appeal were correct, the Bashnet village Government could have seen it and in any way they could not have decided to

allocate the same to the respondent. This ground has no merit and I do dismiss it forthwith.

In the fifth ground, the appellant states that the honourable chairperson erred in fact for claiming that he was a process server for the Customary Land Tribunal. Infact what the learned chairperson noted was that in taking part to serve the respondent in the company of the said militia, the appellant purported to be a process server for the Tribunal, not that he was the process server for that Tribunal. In so doing, there's a danger for him to cheat in one way or another to the detriment of the respondent. For this reason, this ground is also meaningless and baseless.

In the sixth and last ground, the appellant alleges that the honourable chairperson, erred in fact, law and principle for delivering judgment on gender basis. I have carefully and with keen interest read the

judgment of the learned chairperson and did not succeed to detect any clue or indicator to the effect that the same was prepared and delivered on the basis of gender. Even the gentlemen assessors, as the learned counsel Mr. Mughwai, rightly submitted, were not all women. Hence, there was no issue of favouring a woman. The decision was, as expected, based on the recorded evidence and not otherwise.

In the upshot, and for the reasons stated herein above. I am satisfied that this appeal was preferred in the absence of sufficient grounds to convince this honourable court to fault or interfere with the judgment of the Customary Land Appeals Tribunal, dated the 21st day of June, 2007. I therefore dismiss it with costs.

After concluding his submissions in the instant case, the learned counsel Mr. Mughwai, as a Court

Official, expressed his concern in respect of this appeal to this court. He submitted to the effect that this is a decision of the Customary Land Appeals Tribunal established by the Customary Leaseholds (Enfranchisement) Act, No.47 of 1968, which was dis established by section 53 of the Land disputes Courts Act, No.2 of 2002. Under Section 54 of the said new Act, the former Tribunals were given two (2) years to conclude their cases. The decision in the instant matter was delivered on 21st day of June, 2007, beyond the two years. The parties were informed that judgment delivered under section 54 (5) of Act No. 2 of 2002, and that any aggrieved party had the right to appeal to the High Court of Tanzania, Arusha zone. The learned counsel has a problem if Act No.2 of 2002, allows parties to appeal to the High Court of Tanzania. Before that, appeals from the Customary Land Appeals

Tribunal lied to the Minister, and his decision was final. He has not seen any section under Act No.2 of 2002, which creates a right of appeal to the High Court by any person dissatisfied with such a decision. He's further not aware if that Act was subsequently amended to create such a right.

I have carefully considered the submission of the learned counsel on this matter. The learned chairperson indicated that the said decision was delivered as per section 54 (5) of Act No.2 of 2002, which empowers the minister to extend the time required for the said Tribunals to conclude their obligations. The decision was read on 21st day of June, 2007, after the expiration of the two (2) years because that time had been extended as per the provision of section 54 (5) of Act No. 2 of 2002.

The aforesaid decision was prepared in respect of the previous laws, that's Customary Leaseholds (Enfranchisement) Act No. 47 of 1968 and the Regulation of Land Tenure (Established Villages) Act No.22 of 1992, as if they were not repeated. Section 9(2) of Act No.22 of 1992, provided that any person dissatisfied with the decision of the Appeals Tribunal may further appeal to the Minister whose decision shall be final and conclusive and shall not be reviewed by any Court. Act No.18 of 1995, Written Laws (Miscellaneous Amendments), amended section 9(2) of Act No.22 of 1992, to the effect that whoever is aggrieved by the decision of the Customary Land Appeals Tribunal could now appeal to the High Court of Tanzania, and the words to the effect that the decision of the Minister should not be reviewed by any court, were deleted.

Notwithstanding what have been stated herein above, the said amendments should be read together with the holding of the Court of Appeal of Tanzania, in the case of **Attorney General V. Lohay Akonaay and Joseph Lohay [1995] T.L.R. 80.** For all these reasons, it's apparent that this appeal is properly before this court.

K.M.M. SAMBO
JUDGE
02/06/2009

Delivered in chambers this 9th day of June, 2009, in the presence of Mr. Mughwai, for the respondent who's also present and the appellant being present.

K.M.M. SAMBO
JUDGE
9/6/2009

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