

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
LAND DIVISION
AT ARUSHA

MISCELLANEOUS LAND CASE APPEAL NO. 5 OF 2018

(From the Decision of District Land and Housing Tribunal of Arusha District at
Arusha in Land Case Appeal No. 90 of 2016 and Original Ward Tribunal of
Lemara Ward in Application No. 26 of 2016)

JOHN KIYANI KIVUYO.....APPELLANT

VERSUS

MATHAYO KIYAN KIVUYO.....RESPONDENT

JUDGMENT

5TH OCTOBER, 2018

MWENEMPAZI, J.

The appellant and the respondent are blood brothers. Their father, referred to Mr. Kiyani had three wives. The parties herein are children of the elder wife of the late Kiyani. A second wife of the late Kiyani had with him a son by the name of Joshua. The third and younger wife had one child named Lakaai. All children were given their portions of land. The appellant and respondent shared a piece of land which was allotted to their mother. It would appear, at the time of allotment the respondent was still young, his area of land was under the care of his brother the appellant. Then, the respondent started following up for his portion, hence this dispute. Attempts were made to settle the dispute at the clan level, by the

assistance of the 'Wazee wa Boma'. The efforts were futile. The respondent filed a suit in the Ward Tribunal, Land case No 26/2016 where he was awarded his share on 12th November, 2016. The appellant appealed unsuccessfully in the District Land and Housing Tribunal, Land Appeal No. 90 of 2016. He is aggrieved hence this appeal.

The appellant is appealing against the judgement and Decree thereof. In both appeals, the appeal at the District Land and Housing Tribunal and this court, the appellant is being represented by Mr. Jacob Malick, the learned advocate. The appellant has filed six grounds of appeal, as follows: -

1. That both the trial Ward Tribunal and the appellate Tribunal Chairman erred in law for delivering judgement in favour of the Respondent herein without sufficient proof.
2. That the lower appellate chairman erred in law and fact for contending that there was no proof that the Trial Tribunal entered into the disputed land and made allotment of the same among the parties before delivery of its judgment.
3. That both lower tribunals erred in law for failing to apprehend that the appellant herein lived onto the disputed land undisturbed for more than twelve years, that is from the year 1964.
4. That, the lower appellate tribunal erred in law for contending that the trial tribunal had jurisdiction to try the matter while the value of the subject matter was over and above the pecuniary jurisdiction of the trial tribunal.
5. That the appellate lower tribunal erred both in law and fact for holding that the trial tribunal secretary rightly signed the tribunal's judgement at his

capacity as a Tribunal secretary something which is in contravention of the enabling law.

6. That the appellate lower tribunal chairman erred in law for failing to apprehend that the judgment of the lower trial tribunal was vague which didn't state the reasons for judgement, which is in conservation of the law.

At the hearing, the appellant was represented by Jakob Malick, the learned advocate and the respondent was represented by Lugakingira, learned advocate. The counsel for the appellant submitted on grounds 1,2 and 6 together. He argued that the Ward Tribunal delivered its judgment in one page. There are no any reasons to decide in favour of the respondent. As there was no sufficient proof. The record shows that the members of the tribunal divided the land into two portions and allotted to the parties.

The tribunal had the role to evaluate the evidence brought before it, determine it and deliver the judgment. Not to act the way they did, to divide the land and allot the same to the parties. They did so in collaboration with the 'Wazee wa BOMA'. In fulfilling the act, they measured the land, put boundaries, and allotted to the parties as if the land had no owners at all. General jurisdiction of the Ward Tribunal is provided under section 13(2)(3)(a), (b), (c) and (4) of the Land Dispute Courts Act, NO. 2 of 2002. It is to maintain peace and harmony by assisting the parties to arrive at mutually acceptable solution on any matter concerning land within its jurisdiction. This was not done when they visited a locus in quo. Instead they in collaboration with the 'Wazee wa Boma' they divided the land and allotted to the parties. It is not stated whether parties were involved or nor. The first appellate tribunal had obligation to apprehend this as illegal and allow the grounds of appeal. Instead they dismissed. The appellant prays therefore

that ground 1, 2, and 6 be allowed and this honourable court proceed to quash the decision of the appellate tribunal and set aside the dismissal order.

In reply, the respondent counsel has submitted that both the Ward Tribunal and the first appellate Tribunal were right, there was no any allotment of land. The Counsel for the appellant said the judgement has one page. There is no specific number of pages for judgments. Responding to the argument that the members of the Ward Tribunal distributed the land and allotted the same to the parties, the counsel submitted that the practice has been to visit the locus in quo in order to see the area and be properly informed of the area in dispute. That is what was done by the members. On 15th October, 2016 members of the Ward Tribunal visited the locus in quo and later on decided. It was decided in the first appellate court that no apportionment was done. Parties and their witnesses were properly heard. He therefore prayed these grounds be dismissed with cost.

In law it is the duty of the Ward Tribunal to maintain peace and harmony through mediation. In the process, the parties are assisted to reach a mutual agreement by the parties. I have gone through the record, specifically the proceedings of 22/10/2016 in the Ward Tribunal. What I have found is not what the counsel for the appellant has submitted. The members of the tribunal did not apportion the piece of land. But they measure to reinforce what Wazee wa Boma had marked in their attempt to resolve the dispute at hand. Wazee wa Boma had put marks using 'masale' around the boundaries of portion of hand. The Ward Tribunal has a chance to interview witnesses. Then, the asked the chairman of the Baraza la Wzee wa Boma who confirmed the area to belong to the mother of the parties. The proceedings therefore were recorded as follows; -

“Baraza likamuuliza Mwenyekiti wa Boma Mzee Melayeki Jamreke swali. Unafahamu nini kuhusu eneo aliloonyesha mlalamikaji Mathayo Kiyani? Mzee Melayeki Jamreke kama Mwenyekiti wa Boma alilithibitishia baraza kuwa hili eneo ni la mama yao Mathayo Kiyani mlalamikaji na John Kiyani Mlalamiwa. Baraza baada ya hapo lilimuuliza tena Mzee Melayeki Jamreke kuwa mipaka unafahamu mliogawa awamu ya kwanza? kwa pamoja wazee wote wakaonyeshe mipaka iliyowekwa, kwa kuwa masale ya kwanza yalishatolewa wazee waliweka alama ya masale jinsi walivyogawa mwanzo baraza lilitoa ushauri kwa kuwa eneo hili mwanzo liliwekwa alama tuu ya masale lakini ukubwa wa eneo halijulikani lina ukubwa gani je? Wazee tufanyeje kujua eneo hili lote lina upana na urefu gani? Ndipo kwa pamoja baraza na wazee kuona eneo lipimwe hatua kwa marefu na mapana yake...”

With due respect the learned counsel for the appellant would be right if he argued to fault the judgement that it did not reflect what transpired at the locus-in-quo. The proceedings ought to have guided the interpretation of the content of the judgement and comment on it or complain as he has done. The therefore, grounds 1, 2 and 6 have no merit they are dismissed.

In submitting on ground 3, the appellant argued that the appellant lived in the dispute land since 1964 undisturbed. During the hearing of an appeal in the first appellate tribunal this fact was raised and was not contested. Here the principle of adverse possession is applicable. But the learned Chairman of the appellate tribunal failed to comprehend and proceeded to dismiss the appeal. The principle of adverse possession is very much applicable in Tanzania. Had it been that the respondent had any right over dispute land he could have claimed

it long ago. But 52 years had passed before he made a claim on the land. The court was referred the court to the case of **Paskazia d/o Gwahame vs. Aloyce Siriro**, PC Civil Appeal No. 182 /HCD/17/1967. In the referred case it was held that: -

“in order to support a claim to the property based upon adverse possession, defendant must show that he has been in continuous and uninterrupted possession of the shamba for twelve yers or more.”

The counsel for the appellant referred this court also to the case of **Shaban Nassoro vs. Rajabu Simba**, PC Civil Appeal No. 6 -B-66/1967 HCD 233/1967 where it was held that: -

“The court has been reluctant to disturb persons who have occupied land and developed it over a long period. “(T)he respondent and his father have been in occupation of the land for a minimum of 18 years, which is quite a long time. It would be unfair to disturb their occupation....”

The appellant then prayed that under the circumstances of this case, this ground of appeal should be allowed as the doctrine of adverse possession is applicable in our country.

Replying to the submission of the counsel for the appellant on the application of the principle of adverse possession, the learned counsel counsel for the respondent prayed to raise a note that this ground was not raised in the first appellate tribunal. It cannot be raised now in the second appeal. The respondent submitted further that the respondent came out to claim in the Ward Tribunal after the appellant started to disturb the respondent. The respondent prayed that the appeal be dismissed.

The appellant submitted through his counsel that the trial tribunal had no jurisdiction to try the case at hand. He submitted that following valuation of dispute land, a report which was released when the matter was being heard in the first appellate tribunal shows that at the time the value was over 25million Tanzania shillings. At the time, only one year had elapsed since the dispute land was the subject of trial in the trial tribunal. Since the value of landed property tend to appreciate fast, the value of the property at the time of filing the dispute in the trial tribunal must have been more than Tshs. 3,000,000/= which is the pecuniary jurisdiction of the Ward Tribunal. Therefore, the trial tribunal had no jurisdiction at the time of hearing and or dealing with the case at hand. The allegation by the appellant that the trial tribunal had no jurisdiction to determine the matter was was sound. To dismiss that ground was contrary to the law.

On the issue of jurisdiction of Lemara Ward Tribunal, the counsel for respondent submitted that it was not raised at the trial tribunal. That, the Chairman of the Appellate Tribunal rightly rejected the argument as this was not the issue in the Ward Tribunal. It could not be raised at the level of an appeal. He referred the court to the case **of Hotel Traventine Ltd and 20 others vs. National Bank of Commerce Ltd** [2006] T.L.R.133. This is because the point was raised relying on the valuation report which was reported in March, 2017. The Point came later during an appeal. He prayed this ground to be dismissed as well.

Ground number 5 concerns the issue of the secretary of the Ward Tribunal appearing in the quorum as member and signing the judgment as a secretary. The counsel for the appellant has submitted that the tribunal secretary signed the tribunal judgement as a member of the tribunal. The record shows that the name of Daudi Mkumbo who appear as the member of the tribunal and at the same time

assigned as Katibu of the tribunal. That means the secretary appeared in the quorum, discussed, agreed to the decision and signed the judgment. In law, he is not a member of the tribunal. Section 4(1)(a)(b) and (2) of the Ward Tribunals Act, Cap. 206 is to the effect that the members of the Tribunal are elected by the Ward Committee. Ward Secretary is a servant of the local government. So, he is not a member of the Ward Tribunal. This was also decided in the case of **Nada Oori V. Isaki Gilba**, Misc. Land Appeal No 2/2013, HC Arusha (Unreported). In that case it was held that: -

“A secretary is not a member of the Ward Tribunal but an employee of the Local Government Authority. In the circumstances, as the decision is signed by the Secretary the same is tantamount to the dispute being determined by the Secretary who is not a member of the Ward Tribunal and such decision is illegal.”

The appellant prays the appeal to be allowed and nullify the decision of the trial tribunal with costs.

In reply the advocate for the respondent started to submit on ground number 5. He submitted that the secretary to the Tribunal was listed as a member and identified as Katibu. The respondent submits that, the secretary was in the Ward Tribunal for recording the proceedings. A mere signing of the records does not render the decision defective. The Secretary was listed as a title holder not as a decision maker. He therefore prayed that the court should dismiss the ground of appeal as having no merit.

In my considered view, the issue of jurisdiction raised by the appellant during the appeal in the District Land and Housing Tribunal was not considered by the Ward Tribunal. The same was raised during an appeal. It tasked my mind to

decide whether it should be left without attending to it. But again, considering the appeal as a whole, I found there are two points which in my opinion will assist to resolve the question though not directly as it may have been anticipated by the parties. The two are the allegations that the ward Tribunal members went ahead to divide and allot pieces of land to the parties instead of only mediating. This has already been determined herein above.

The other one is the list of members who made decision and sign thereon as per section 4(4) of the Ward Tribunals Act, Cap.206. The account of it has been submitted well by the counsel for the appellant. Also, the respondent counsel has submitted on it and explained the scenario to justify the appearance of the secretary in the quorum of members of the Ward Tribunal. However, looking at the decision of the Ward Tribunal, a judgment, the recording on the quorum reads; -

‘MAHUDHURIO YA WAJUMBE WA BARAZA’

Among the members listed is Daudi S. Mkumbo. The secretary to the Ward Tribunal. The judgment of the Ward Tribunal is also signed by him and the chairman. In my understanding, members listed are those whose decision is on record and under section 4(4) of the Ward Tribunals Act, cap. 206, they have to sign the decision. In this case the secretary has also owned the decision by signing which is wrong. How do we rule out that the Secretary to the Ward Tribunal did not participate in making the decision? In my view, the counsel for the appellant was therefore right in submitting that the same is illegal.

In the premises, I invoke revisional powers vested to this court as provided for under section 43(2) of the Land Disputes Courts Act, Cap. 216 and nullify the decision of the Ward Tribunal and that of the District Land and Housing Tribunal as the appeal before it originated from a nullity. This appeal is therefore also

incompetent thus struck out. I order a fresh trial before the Ward Tribunal in accordance to the law.

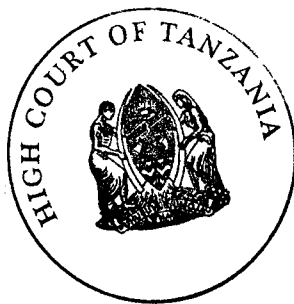
It is so ordered.

SGD: T. M.Mwenempazi

JUDGE

5/10/2018

I hereby certify this to be a true copy of the original



J.F. Nkwabi

J.F. NKWABI

DEPUTY REGISTRAR

ARUSHA

15/6/2018