THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPEAL NO. 6 OF 2020.

(Arising from Land Appeal No. 63 of 2018, in the District Land and Housing Tribunal for Kyela, at Kyela, Originating from Land Case No. 33 of 2018, in the Ikolo Ward Tribunal).

PILI SAIBA MWAKIPWETE.....APPELLANT

VERSUS

ELIUD MWALUPETA.....RESPONDENT

JUDGMENT

02/09 & 12/11/2020.

UTAMWA, J:

The appellant in this appeal is one PILI SAIBA MWAKIPWETE. She appeals against the Judgement of the District Land and Housing Tribunal for Kyela, at Kyela, (the DLHT) in Land Appeal No. 63 of 2018. The matter originated in Land Case No. 33 of 2018, in the Ikolo Ward Tribunal, hereinafter called the trial Tribunal.

The brief background of this matter according to the record goes thus: the appellant in this appeal initiated proceedings before the trial Tribunal against the respondent, ELIUD MWALUPETA for a piece of land. The trial Tribunal decided in favour of the appellant. Aggrieved by that

decision, the respondent appealed to the DLHT. The DLHT heard the parties and sat to compose its verdict. In doing so, it did not consider the grounds of appeal before it. Instead, it raised a jurisdictional issue *suo motu*. It consequently resolved it through the impugned judgement and held thus; the trial tribunal had committed a serious irregularity for an improper coram. It thus, nullified the proceedings and the judgment of the trial tribunal. It further ordered for a trial de novo before any competent court or tribunal.

The reasons for the above decision of the DLHT were two as follows; firstly, the trial tribunal had been composed of six members. However, two members, namely **Tunsume Kapala** and **John Mwalaba** missed one sitting (of 10/10/2018). It was on that date when the respondent in this appeal (Eliud) and his two witnesses testified. Yet the two members (hereinafter called the two defaulting members) sat in deciding the case. The second reason was that, the record of the trial tribunal did not clearly show the gender of the members as required by the law and as underscored in the case of **Venance Tengeneza v. Kawawa Mwapili, Misc. Land Case Appeal No. 13 of 2008, High Court of Tanzania (HCT), at Iringa** (unreported).

The appellant was discontented by the impugned judgment of the DLHT, hence this appeal. The appeal is based on the following two grounds:

1. That, the DLHT erred in law and facts for holding that the coram of the trial tribunal was improper.

2. That, the DLHT as the first appellate court, erred in law and in facts for its failure to analyse the judgment and proceedings of the ward tribunal, hence occasioning injustice to the appellant.

Owing to the above grounds of appeal, the appellant urged this court, through the petition of appeal, to do the following: to quash the proceedings, judgment and decree of the DLHT, to confirm the decision of the trial tribunal and the respondent be condemned to bear the costs of this appeal. The respondent resisted the appeal at hand.

In this appeal, the appellant was represented by Mr. Moses Boaz, learned counsel. The respondent appeared in person without any legal representation. The appeal was argued by way of written submissions following the agreement by the parties and the directive of this court.

In supporting the first and second grounds of appeal cumulatively, the learned counsel for the appellant essentially submitted that, the DLHT erred in finding that the undisputed failure by the two defaulting members of the trial tribunal to attend in one meeting, had made them incompetent for deciding the case and vitiated the entire proceedings and the decision. He further argued that, the coram in the trial tribunal was six members as required by the law, i. e. section 11 of the Land Disputes Courts Act, Cap. 216 R. E. 2002 (Now R. E. 2019), henceforth the LADCA. These provisions require the members of a ward tribunal to be not less than 4 and not more than 8. The provisions of section 4 (1) (a) and (4) of the Ward Tribunal Act, 1985 also require members of that tribunal to be not less than a half of all members at a sitting. The coram was thus, proper, he contended.

The learned counsel for the appellant further contended that, the defaulting members might have gone through the proceedings of the tribunal so as to acquaint themselves with what had transpired in the meeting they had missed. They were thus, capable of making the decision of the trial tribunal.

It was also the argument by the learned counsel for the appellant that, the DLHT decided the matter without considering substantive justice as required by section 45 of the LADCA. The requirement under these provisions were also underscored by the Court of Appeal of Tanzania (the CAT) in the case of **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT, at Mwanza** (unreported). This precedent also underscored compliance with the principle of overriding objective. This principle underlines the obligation for courts to decide cases justly and to have regard to substantive justice. He added that, the DLHT also offended Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 (Cap. 1 R. E. 2002). These provisions require courts to avoid procedural technicalities in deciding cases.

The learned counsel for the appellant further submitted that, the fact that the proceedings of the trial court did not indicate the gender of its members was also not fatal and did not occasion any injustice to the parties. Showing the gender in the proceedings does not save any purpose. Besides, by a mere look at the names of the members of the trial tribunal in the proceedings, one can know the gender of each of them. The **Venance case** (supra) that was relied upon by the DLHT was decided

against the requirements of the principle of overriding objectives. This precedent does not also bind this court.

In the respondent's replying submissions, which said submission had a professional flavour though he was unrepresented, it was argued that, the fact that the two defaulting members who missed one meeting participated in making the decision of the trial tribunal was fatal to the proceedings and decision of the trial tribunal. This was because, the two defaulting members did not know what had transpired before the trial tribunal on the fateful date. They thus, had no ability to decide the case. He added that, according to section 15 (3) of the Ward Tribunal Act, a ward tribunal has powers to hear statements of witnesses and documents produced by them in deciding matters. It is in this forum where members of a ward tribunal become aware of the evidence adduced by the parties, get the knowledge on the evidence and decide the case. This is because, judgment is made on the basis of the evidence. He also contended that, it cannot be presumed, as the learned counsel for the appellant suggested, that the two defaulting members had gone through the record of the trial tribunal for purposes of acquainting themselves with the evidence adduced in their absence.

It was also the contention by the respondent that, the irregularity committed by the trial tribunal occasioned injustice and cannot be made good under Article 107A (2) (e) of the Constitution. In law, breach of important procedural rules cannot be saved under this Article of the Constitution. He supported, this contention by the decision of this court in **Durra Abeid v. Honest Swai, Misc. Civil Application No. 182 of**

2017, HCT at Dar es Salaam (unreported) and a precedent of the CAT in case of **Zuberi Musa v. Shinyanga Town Council, Civil Application No. 100 of 2004, CAT** (unreported). He further submitted that, the irregularity at issue cannot also be hidden under the principle of overriding objective. This principle does not bulldoze other important principles of law which are intended to promote fair trials. He supported the contention by citing a decision of this court in **Oil Com Tanzania Limited v. Christopher Letson Mgalla, Land Case No. 29 of 2015, HCT, at Mbeya** (unreported). He thus, distinguished the **Yakobo case** (supra) relied upon by the appellant in his written submissions in chief. He also argued that, in the **Yakobo case,** the irregularity at issue was a mere failure to indicate the name of the presiding member of the ward tribunal in the proceedings, which is not the case in the matter at hand.

Regarding the non-disclosure of the gender of the members of the trial tribunal, the respondent argued that, it was equally a serious irregularity since it offended the requirement of the law. In the case at hand, it was also not possible to detect the gender of the members of the trial tribunal from their names only. This irregularity cannot also be saved by the principle of overriding objective or by Article 107A (2)(e) of the Constitution.

The respondent thus, urged this court to dismiss the appeal, uphold the impugned judgment of the DLHT, order a trial de novo, grant him costs and make any other just and fair order it deems fit.

In his rejoinder submissions, the learned counsel for the appellant basically reiterated the contents of his submissions in chief. He also underlined the prayers made in the petition of appeal.

In deciding this appeal, I will consider only the first ground of appeal. This is because, the appellant's counsel did not offer much contention regarding the second ground. He merely purported to argue the two grounds cumulatively though at the end of the day he mainly focused on the first ground. In so doing, he discussed the two irregularities pinpointed by the DLHT in its impugned judgment and highlighted earlier. I therefore, agree with the respondent that, in effect, the appellant had abandoned the second ground of appeal. I will thus, proceed to consider the first ground only.

Now, regarding the first ground of appeal, the major complaints by the appellant are two as hinted above. The first complaint is that, the DLHT erred in holding that the decision by the trial tribunal was a nullity for the incapacity of the two defaulting members to make the decision following their non-attendance in one of the meetings. The second is that, the DLHT erred in holding that the non-disclosure of the gender of the members of the trial tribunal was fatal to its proceedings and decision. For purposes of convenient, I will firstly consider the second aspect of the appellant's complaints.

As to the second aspect of the appellant's complaints (on non-disclosure of gender of members), the parties do not dispute that, the list for the members' names in the record of the trial court did not in fact,

disclose the gender of each member who participated in making the decision under consideration. In fact, the record itself subscribes to that fact. The parties do not also dispute the stance of the law that, the composition of a ward tribunal includes women. The issue regarding this second aspect of the appellant's complaints is thus, *whether the omission to disclose the gender of each member of the trial tribunal who made its decision was fatal to its proceedings and decision*. The appellant contends that the omission was not fatal and faults the impugned judgment. On his part, the respondent argues that, it was not fatal and supports the impugned judgment.

On my part, I agree with both sides on the undisputed facts and the guidance of the relevant law. Indeed, section 11 of the LADCA clearly provides that, each ward tribunal shall consist of not less than four nor more than eight members of whom three shall be women. Again, section 14 (1) of the same legislation guides that, a ward tribunal shall, in all matters of mediation consist of three members at least one of whom shall be a woman.

In my further view however, I do not agree with the appellant's counsel that, gender of each member of ward tribunal may be detect through a mere look at their names in the list found in the record. In the first place, this view is not supported by any law and the learned counsel cited none. In fact, this proposed criterion for detecting gender of human being is very delicate. It may easily lead to a wrong conclusion since it is common ground that, some names are not so common to everybody.

Besides, no law prohibits women from using masculine names and the vice versa.

Furthermore, it must be noted here that, actually, the fact that the record of the trial tribunal does not disclose the gender of its members does not necessarily mean that there were no women/or woman in the coram of the trial tribunal that made the decision at issue. The DLHT thus, made its decision at issue on a mere presumption that, the non-disclosure of the gender was fatal. Courts are not entitled to decide serious matters on mere presumptions only.

However, even if it is presumed (without deciding) that the non-disclosure of the gender of the members meant that only male members of the trial tribunal had made its decision, I will still not take that omission as a serious blunder. This follows the fact that, in my firm opinion, the requirements under section 11 and 14 (1) of the LADCA highlighted above, were only meant to encourage and promote equality between men and women in the appointment of members for ward tribunals and in assignment of their duties. They were not mean to command that, a decision of a ward tribunal reached by male-members only, without any participation of a woman, was a nullity. In other words, the requirements did not make male-members unqualified to make decisions without participation of any female-member. The vice versa is also applicable. To be precise, the provisions were not meant to discriminate men from women. Had the legislature intended to enact the law to that effect, nothing would have obstructed it to expressly do so. What matters in decisions of ward and district land tribunals therefore, is only substantive

justice. It does not matter whether the same has been performed by male members only, or by female members only or by a combination of both genders of members.

It follows thus, that, in the matter at hand, the mere omission to indicate the gender of the members of the trial tribunal in the proceedings, could not be in anyway fatal to its decision. It is more so since there is no any demonstration of injustice occasioned by that omission. This particular view is supported by the very spirit under section 45 of the LADCA as rightly contended by the appellant's counsel. These provisions guides clearly that, and I quote them for a readymade reference:

> "**No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity** in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or, rejection of any evidence **unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.**" (Bold emphasis is added).

Indeed, the provisions of section 45 of the LADCA carries the actual spirit of the overriding objective as underscored in the **Yakobo case** (supra). This principle has been recently underlined in our law vide the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). It essentially requires courts to deal with cases before them justly, speedily and to have regard to substantive justice.

Owing to the emphasis on the principle of overriding objective made by the CAT in the **Yakobo case** (supra), this court is not bound to follow the decision in the **Venance case** (supra) that was relied upon by the

DLHT in its impugned judgment. This is because, the decision was made by a judge of this same court which does not, by virtue of the doctrine of *stare decisis* (or the doctrine of precedent) bind me as correctly contended by the appellant's counsel. Moreover, decisions by the CAT, bind this court, other courts and tribunals subordinate to the CAT. This is in accordance to the same doctrine of *stare decisis.*

It is also notable that, the provisions of both section 11 and 14 (1) of the LADCA employ the term "shall." It is apparent that the DLHT, through the impugned judgement and the respondent in his submissions before this court construed this term as implying an obligation. They might have been so influenced by section 53 (2) of the Interpretation of Laws Act, Cap. 1 R. E. 2019. However, I will not approve that view under the circumstances of the case at hand. In fact, the contemporary construction of the term "shall" is that, it implies an obligation, unless an injustice is likely to be caused by such an interpretation; see the holdings by the CAT in the cases of **Bahati Makeja v. Republic Criminal Appeal No. 118 of 2006, CAT, at Dar es Salaam** (unreported), **Herman Henjewele v. Republic Criminal Appeal No. 164 of 2005, CAT, at Mbeya** (unreported) and **Fortunatus Masha v. William Shija and another [1997] TLR 41.** Actually, these precedents interpreted the same provisions of section 53 of Cap. 1 (supra). However, interpreting the term "shall" in the case at hand as implying obligation, will lead to an absurdity and injustice since the omission under discussion did not go to the root of the decision of the trial tribunal.

In fact, the construction of the term "shall" underscored by the CAT in the three precedents just cited above go in tandem with the principle of

overriding objective discussed earlier. This principle must be cherished unless the circumstances of a case concerned demand otherwise. It must also be noted that, the provisions of section 11 and 14 (1) of the LADCA were enacted in 2002, being long time before the statutory emphasis discussed above on the principle of overriding objectives was made in 2018. These provisions of the LADCA must thus, be given a modern construction sweeting the contemporary techniques of construing statutory provisions. These techniques consider the principle of overriding objective positively. It was, for this reason that, this court (Tiganga, J.) was of the view that, the omission to indicate the gender of members of ward tribunals, as it was in the case at hand, was not fatal vide the principle of overriding objective; see the case of **Bahati Kachira v. Bundala Mihayo, Misc. Land Appeal No. 27 of 2018, HCT, at Mwanza** (unreported).

Owing to the reasons shown above, I agree with the learned counsel for the appellant that, the finding by the DLHT that the failure by the trial tribunal to indicate the gender of the parties was fatal to the proceedings and its judgment was unjustified. It in fact, amounted to an overreliance on procedural technicalities and offended the provisions of Article 107A (2) (e) of the Constitution.

It is my further view that, Article 107A (2) (e) of the Constitution and the principle of overriding objective are vital in the process of adjudication. Under these provisions, not every breach of a procedural rule vitiates a decision of the court. The same way, not every breach of a procedural rule can be hidden under these provisions. A balance must thus, be struck

between doing substantial justice to the parties and respecting procedural rules. The major criterion should thus, be, whether the violation of a give rule of procedure occasioned injustice. If the answer is affirmative, then the proceedings and or a decision resulted from that violation should not stand. However, in case the answer is negative and substantive justice was performed, then the proceedings and or the decision concerned has to stand irrespective of the violation of the rule.

Having observed as above, I find that, though the composition of a ward tribunal set under the statutory provisions cited above has to be observed, and though indicating the gender of the members thereof in the proceedings is a good practice for purposes of transparency in the process of justice dispensation, failure to indicate the gender of each member siting and making a decisions of the ward tribunal is not necessarily fatal to the proceedings and the decision thereof. In the matter at hand, I do not see any injustice caused by the omission under consideration. The DLHT did not also mentioned none in the impugned judgement. The respondent as well, did not do so in his replying submissions or anywhere else. The answer to the issue regarding the second aspect of the appellant's complaints is therefore, negative thus; the omission to disclose the gender of each member of the trial tribunal who made its decision was not fatal to its proceedings and decision. This finding makes it necessary for me to revert back and consider the first aspect of the appellant's complaints.

Regarding the first aspect of the appellant's complaint, the parties do not dispute that the two defaulting members in fact, did not attend the meeting of the trial tribunal on 10/10/2018 when the respondent and his

two witnesses testified. They do not also dispute that, the two defaulting members sat in the subsequent meetings and made the decision of the trial tribunal. The issue here is thus, *whether the participation of the two defaulting remembers in decision making vitiated the decision of the trial tribunal.*

In my view, the circumstances of the matter attract answering the issue regarding this aspect affirmatively. This is because, in the first place, it is the law that, a ward tribunal has jurisdiction to enquire into and determine land disputes; see section 11 (2) of the LADCA. In so doing, it hears evidence from the parties before reaching into a decision. Now, the two defaulting members did not hear the evidence of the respondent and his witnesses on the date when they did not attend the meeting. They did not also have the privilege of observing their demeanour. They were thus, not acquainted with the necessary tools of evidence for making the decision. Hearing witnesses and observing their demeanour at the time of testimony are very important tools in resolving disputes, it is more so where the evidence is given through oral testimony (*viva voce).* The argument by the learned counsel for the appellant that the two defaulting members could have perused the record of the trial tribunal to know about the evidence adduced on that date is untenable. Courts do not decide matter by mere presumptions.

Moreover, members of ward tribunals are not entitled to decide matters by considering the evidence on record only. As a body of first instance, a ward tribunal is enjoined to hear the evidence from the parties and make decisions as hinted above. It is our law that, a judgment before

a trial court/tribunal is based on the evidence heard by the adjudicating organ. The law further guides that, the party who adduces a heavier evidence wins the case; see the case of **Hemed Said v. Mhamed Mbillu [1984] TLR. 113.** A court or tribunal of first instance does not thus, have a mandate for deciding a matter without hearing such evidence. Deciding matters on the evidence in the record is practically the domain of an appellate court which does not hear the parties at the first instance.

In my further view, by permitting the two defaulting members to vote in making the decision, the trial tribunal committed a mistrial against the respondent. This is because, he and his witnesses had given evidence in the absence of the two deflating members who later decided the case in his disfavour. His right to fair trial was thus, violated since the two defaulting members decided the matter without considering his case. One cannot thus, predict, what would be the decision of the trial tribunal had the two defaulting member heard the respondent and his witnesses before they could vote for the decision. The course taken by the trial tribunal therefore, amounted to judging the respondent unheard. The principles of natural justice were thus, violated. In our law no decision reached through breaching the principles of natural justice can stand.

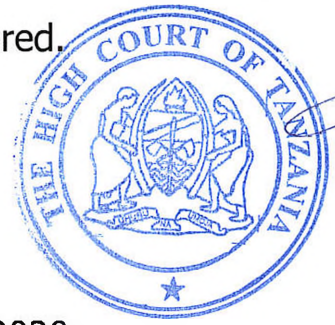
It must also be noted that, the right to fair trial (fair hearing) just mentioned above is a fundamental right. It is well enshrined under Article 13 (6) (a) of the Constitution. The CAT described the right to fair trial as one of the cornerstones of any just society which enables the effective functioning of the administration of justice; see in **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora**

(unreported). That, right cannot thus, be easily violated by any court or institution charged with judicial duties. The decision by the trial tribunal in the matter under consideration, which said decision violated the respondent's right to fair trial, cannot thus, be blessed by this court.

The negative effect of the irregularity under discussion was aggravated by the following discoveries from the record of the trial tribunal. It is clear that, the six members who made the decisions (including the two defaulting members) accordingly voted in making the decision. The results of the voting process demonstrated a clear equality of votes. The member who presided the meeting exercised his casting vote in addition to his deliberative vote. This was in fact, the procedure provided for under section 14 (3) of the LADCA. The presiding member who exercised the casting vote was the same **John Mwalaba** who was one of the two defaulting members. It is my settled views, thus, that, his casting vote determined the victory of the appellant though he (member John) did not hear the respondent at all. His casting vote was thus, arbitrarily exercised leading to an unfairness in the adjudication process.

Having observed as above, I answer the issue regarding the first aspect of the appellant's complaint affirmatively that, the participation of the two defaulting remembers in making the decision of the trial tribunal vitiated the entire proceedings of the trial tribunal and the decision thereof. The DLHT thus, did not err in reversing the decision of the trial tribunal for this reason.

Owing to the findings made above related to the two aspects of the appellant's complaints embodied into the first ground of appeal, I partly allow and partly dismiss the first ground of appeal. I thus, partly uphold the impugned judgment of the DLHT. I thus, order as, as the DLHT did, the proceedings and the decision of the trial ward tribunal remain nullified, quashed and set aside respectively. If parties still wish, they may pursue their rights before a competent tribunal. Each party shall bear his own costs since the appeal has been partly allowed and partly dismissed. It is so ordered.



J.H.K. UTAMWA

JUDGE

12/11/2020.

12/11/2020.

CORAM; Hon. JHK. Utamwa, J.

Appellant: Absent.

Respondent: Present in person.

BC; Mr. Patrick, RMA.

Court: Judgement delivered in the presence of the respondent, in court, this 12th November, 2020.

JHK. UTAMWA.

JUDGE

12/11/2020.