

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI**

LAND APPEAL NO. 03 OF 2023

(Appeal from the decision of Mwanga District Land and Housing Tribunal at Mwanga dated 18th April 2023 in Miscellaneous Application No.2 of 2023 which arises from Kileo Ward Tribunal in Land case No.04 of 2021)

HADIJA MICHAEL.....APPELLANT

Versus

RAHMA A. NZUNGI.....RESPONDENT

JUDGMENT

7th December 2023 & 19th February, 2024

A.P.KILIMI, J.:

The Respondent sued the appellant at Kileo Ward Tribunal in land Case No. 4 of 2021 claiming that the appellant have trespassed to her piece of land and continuing to cultivate on the said land. The Ward Tribunal having heard both parties gave the judgment in favour the respondent. Aggrieved by the trial tribunal decision, the appellant wrote a letter of complaint to the District Land and Housing Tribunal of Mwanga at Mwanga praying for the trial tribunal's decision to be reviewed as to its correctness on the ground that the trial Tribunal lacked jurisdiction.

The District Land and Housing Tribunal of Mwanga through Miscellaneous Land Application No.02 of 2023, called the parties to address the tribunal and having revisited the record decided that the trial tribunal had jurisdiction to entertain the matter as the matter was instituted and filed on 28/04/2021 a date before the amended law which took away the Tribunals powers to adjudicate land matters and consequently the District Land and Housing Tribunal of Mwanga upheld the Ward Tribunal's decision.

Dissatisfied with the outcome of Misc. Land application No 2 of 2023 the appellant preferred to file his appeal in this court basing on the following grounds;

1. That the Ward Tribunal of Kileo was not well composed as the law requires.
2. That the honorable Chairman of the District Land and Housing Tribunal misdirected himself by holding that the proceeding and judgment of the Kileo Ward Tribunal was right while the said judgment was pronounced after the amendment of law disallowing the Tribunal to pronounce judgment.

Based on the above grounds, the appellant prayed for her appeal to be allowed and the decisions of District Land and Housing Tribunal and that of Kileo Ward Tribunal to be quashed and set aside.

This appeal was disposed by way of written submissions and both parties enjoyed the service of learned counsels. Mr. Sebastian Rwegerela for Appellant while Mr. Pius Ndanu represented the Respondent.

Submitting in support of the appeal Mr. Sebastian Rwegerela on the first ground submitted that the coram at the ward tribunal was not consistent as the coram for members who sat on 24th August 2021 and 21st September 2021 was not recorded. He further submitted that on a day of visiting a *locus in quo* which was 27th September 2021 the list of members of the tribunal were different from those who participated in decision making. The learned counsel cited section 11 of the **Land Disputes Courts Act Cap 216** showing what constitutes the ward tribunal and that the names and gender must be reflected in every sitting of the trial tribunal which was contrary to what the trial tribunal did as per available record. To buttress his argument the counsel referred the case of **Adam Masebo vs. Lines Nzunda**, Land Appeal No 33 of 2021, High Court of Tanzania at Mbeya (unreported).

In respect to second ground, the learned counsel submitted that the appellate tribunal erred in law for entertaining the matter which originated from ward tribunal because a trial ward tribunal lacked jurisdiction. He further submitted that section 15 and 16 of the **Land Disputes Courts Act No. 2 of 2002 Cap 216** was repealed on 11th October 2021 by section 46 of

the **Written laws (Misc. Amendment Act)** Act No. 3 GN No. 41 which was published on 11th October 2021 whilst the judgment of Kileo Ward Tribunal was delivered on 9th November 2021 when its power of adjudication was already been stripped off by such amendments. Bolstering his assertion the learned counsel referred this court the case of **Edward Kubingwa vs. Matrida A. Pima** , Civil Appeal No 107 of 2018,Court of Appeal of Tanzania at Tabora (Unreported).

The counsel for appellant further referred section 14 of **The Law of Interpretation Act Cap 1 R.E 2019** and submitted that every Act comes into operation on the date of its publication, thus he argued that The Written Laws (Misc. Amendments) No.3 of 2021 was published on 11th October 2021 to which a decision of Kileo Ward Tribunal was on 9th November 2021 which was contrary to those amendments. He added that the Act itself deals with procedures and therefore its amendments were retrospectively. To cement his arguments, the learned advocate referred to me decisions of **Benbros Motors Tanganyika LTD vs Ramanlal Haribhai Patel** [1967] HCD 435 and that of **Johari Jumanne vs. Juma Swalehe** Misc. Land Appeal No 18 of 2023, High Court of Tanzania at Babati (Unreported).

Responding to the appellant submissions above, Mr. Pius Ndandu in reply for the first ground contended that the trial tribunal was well composed

during the first hearing on 21/09/2021 as members of the trial tribunal were five. The counsel supported his argument by referring to page ten of the handwritten proceedings of Kileo ward tribunal. He further submitted that on the day of visiting *locus in quo* which was 27/09/2021, the members of the trial tribunal were six as indicated in handwritten proceedings of Kileo ward tribunal at page 5 and that on the day of the decision on 29/11/2021 the members of the tribunal were four hence the tribunal was well constituted.

In respect to the second ground, the Learned counsel for respondent submitted that the law operates prospectively and not retrospectively and that the trial tribunal by the time the case was filed it had jurisdictional power to hear and determine the matter. The learned advocate submitted further that the amendments of the law in The Written Laws (Misc. Amendments) No.3 of 2021 affects and operate to a new filed cases and not to the ones which was already been filed like the land case No 4 of 2021 to which the Trial Tribunal was at its final stages and that the appellant was given right to appeal by the said decision of the trial tribunal within 45 days instead he filed for review at the District Land and Housing Tribunal.

Having gone through the rival submissions of both parties and scanned the entire record, the issue for determination is whether this appeal has

merits. However, for purpose of convenience, I have opted to start with the second grounds;

I agree as rightly submitted by the appellant counsel that section 14 of The **Law of Interpretation Act (supra)** provides that every Act comes into operation on the date of its publication unless the legislature stipulate direct on the said law, but in my research the court has further developed the law not to affect substantive right of the parties.

According to the record although the judgment at the tribunal was delivered on 9th November, 2021, the new law was published on 11th October 2021, the records shows that at this date of publication, already the case was heard on merit and it was scheduled for judgment. For instance, after full hearing the visiting of *locus in quo* was done on 27/09/2021 and the opinion of assessors was taken on 29/10/2021. In those circumstances, I am settled the tribunal reached the position of delivering substantive justice.

Therefore, as observed above, it is also important to note that the law would not apply retrospectively if it affects substantive rights of the victim/ party. (See **Makorongo vs. Consiglio** [2005] 1 EA 247 (CAT); **The Director of Public Prosecutions vs Jackson Sifael Mtares & Three Others**, Criminal Appeal No. 2 of 2018; **Jovet Tanzania Limited vs**

Bavaria N.V, Civil Application No. 207 of 2018; **BIDCO Oil and Soap Ltd v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 89 of 2009; and **Lala Wino vs. Karatu District Council**, Civil Application No. 132/02 of 2018 (all unreported).

Bolstering the above, in the case of **Jackson Sifael Mtares and Three Others** (supra), the Court faced with a similar situation wherein the Court had *suo motu* invited the parties to address on whether the appeal was properly before them in view of the amendments which were made in the law. In addressing such issue, the court while citing the case of **Makorongo** (supra) quoted with approval the statement of principle made by Newbold, J.A, of the defunct East Africa Court of Appeal in the case of **Municipality of Mombasa vs Nyali Limited** [1963] EA 372, at 374 where it was held that:

"The general rule is that unless there is a dear indication either from the subject matter or from the working of Parliament that Act should not be given a retrospective construction. One of the rules of construction that a Court uses to ascertain the intention behind the legislation is that if the legislation affects substantive rights, it will not be construed to have retrospective operation, unless a clear intention to that

effect is manifested, whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary"

[Emphasis added]

In the premises and the circumstances stated above, and having considered the amended law did not specifically provide for that effect, I am not in line with the appellant's counsel that retrospective effect of the said law affects the case at the Ward Tribunal which as stated above reached the stage of substantive justice. In the premises, in view of the circumstances of state above, cases referred by the counsel for appellant are distinguishable thus cannot apply. It is therefore my considered opinion the second ground of appeal must fail, and consequently I hereby dismissed it for want of merit.

Back to the first ground of appeal, before dwell on it, I have considered the District Land Tribunal ruling, there is no dispute it was initiated sua moto through complainant letter of the appellant. However, the learned trial chairman did not look on other illegalities or incorrectness rather than looking the effect of amended law whether affected the case at the Ward Tribunal, wherein he found did not affect and further pronounced that if at all the

appellant was aggrieved by the decision of the Ward Tribunal could have appealed against the said decision.

In my opinion the learned Chairman misconceived the requirement of law which gave him such power to call the record upon received the complaint. The revisionary jurisdiction of the Chairman of The District Land and Housing is provided under section 36 of Land Dispute Act (supra) and for ease of reference hereunder is reproduced;

"36 (1) A District Land and Housing Tribunal may call for and examine the record of any proceedings of the Ward Tribunal for the purpose of satisfying itself as to whether in such proceedings the Tribunal's decision has—

(a) not contravened any Act of Parliament, or subsidiary legislation; or

(b) not conflicted with the rules of natural justice; and whether the Tribunal has been properly constituted or has exceeded its jurisdiction, and may revise any such proceedings.

(2) In the exercise of its revisional jurisdiction, a District Land and Housing Tribunal shall have all the powers conferred upon it in the exercise of its appellate jurisdiction"

Therefore, according to the excerpt of the law above, the said Chairman was having all powers as if is an appeal, thus was required to

proceed with further examination in respect to the record to ascertain its correctness. For instance, in this appeal the issue of composition of members of the ward tribunal has been raised, thus, the same could have been settled if could have checked the entire proceeding.

Be that as it may, since the same is the ground in this appeal I proceed to determine the same as follows; According to Section 11 of the Land District Court Act, Cap 216 provides that;

"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 under section 4 of the Ward Tribunal Act"

[Emphasis added]

Section 4 of the Ward Tribunal Act, Cap 206 R.E 2022 also provides that;

- 1. Every Tribunal shall consist of*
 - a) Not less than four nor more than eight members elected by the Ward Committee from amongst a list of persons resident in the Ward complied in the prescribed manners;*
 - b) A chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a)*

- 2. There shall be 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 members."*

I have gone through the records of the trial Tribunal in Land Case No. 4 of 2021, the record is silence in respect to members who sat on 24/08/2021 as the learned counsel for appellant had already submitted. The records further show that on 21/09/2021 the members who participated were five namely; Mwanaidi Halifa-Chairperson; Hassan Ayubu-Member; Hatibu Said-Member; Juma Mkilindi-Member; and Kasira Mtae-Member.

It is also evident that on 27/09/2021 the corum increased and comprised of six members with only two women namely Mwajuma Majanga and Mwanaidi Halifa and the same was also reflected on the sitting of 29/10/2021 for members opinion. The records further show that on the day of the decision 09/11/2023 the members of the trial Tribunal decreased and shows only four attended. Having showed the composition from the record of Kileo Ward Tribunal, I am settled the tribunal sat with different corums in two sittings and one sitting is undefined for lack of corum.

As rightly said by the appellant counsel the composition needs to be in accordance with the law, I am inspired with the decision of **Mariam Madali vs Hadija Kihemba**, Misc. Land Appeal No.16/2019, HCT Land Division at DSM where this court observed that;

"In my view, composition of the Tribunal is not a mere procedural issue, it is in fact determining factor as whether, the institution that adjudicated the matter was really a Ward Tribunal within the meaning of section 11 of Cap 216 or something else. Tribunal must ensure that they are properly constituted when adjudicating cases because failure to that reduces their status as ward tribunals legally unknown institution."

Moreover, the requirement of displaying members' participation on each day of trial and their gender status was emphasized in the case of **Anne Kisonge vs. Said Mohamed**, Land Appeal No. 59 of 2009 (unreported) wherein the court observed that;

"the names and gender of the members participating in a case in the ward tribunal must be shown in order to ascertain its composition as whether it is in compliance with the law. Those members who participated during trial, their names and gender must be recorded on

coram on each day the trial takes place up to the stage of judgment Failure to follow proper procedure, it is a difficult to know as in this case, the members who participated to compose the judgment were the same as those who appeared during trial.”

(Emphasis is mine).

In considering the above excerpt, and having considered the records as shown above, which indeed shows confusions on each day of sitting and absence of a display of the gender status of the members during the proceedings, I am satisfied that there was irregularity to the trial Ward Tribunal to observe the mandatory requirement on the composition of the trial tribunal, and it is settled opinion this did not only vitiate the proceedings and the resulting decision of the trial Tribunal but it also rendered the trial Tribunal lack jurisdiction to try the case. (See **Adam Masebo vs. Lines Nzunda** (supra).

In the circumstances, I find this ground has merit and sustained. Consequently, I hereby invoke the revisional powers conferred upon me by section 43(1)(b) of the Land Disputes Courts Act to quash and set aside the proceedings of both the District Land and Housing Tribunal and that of the

Trial Ward Tribunal. If the parties still wish on pursuing their rights over such suit land, they are at liberty to refer their dispute to a tribunal with competent jurisdiction. Nevertheless, in the circumstances shown above, I order parties to bear their respective costs.

It is so ordered.

DATED at MOSHI this day of 19th February, 2024.



X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered today on 19th day of February, 2024 in the presence of Mr. Pius Ndanu, Advocate for respondents. Mr. Sebastian Rwegerela, Advocate for Appellant. Appellant and respondent also present.

Sgd: A. P. KILIMI
JUDGE
19/02/2024

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI
JUDGE
19/02/2024