

**IN THE HIGH COURT OF TANZANIA  
MWANZA DISTRICT REGISTRY  
AT MWANZA  
MISC. LAND APPEAL NO. 96 OF 2017**

*[Arising from the decision of District Land and Housing Tribunal of Geitain Land  
Appeal No. 83 of 2016 which originates from Land case No. 13 of 2016,  
Buhama Ward Tribunal]*

**KILISINGA MACHERE ..... 1<sup>ST</sup> APPELLANT**  
**SIMON MANYEGE ..... 2<sup>ND</sup> APPELLANT**  
**LEAH MANYEGE ..... 3<sup>RD</sup> APPELLANT**

***VERSUS***

**SIWEMA KAZULA ..... RESPONDENT**

**JUDGMENT**

*18<sup>th</sup> October 2018 & 10<sup>th</sup> January, 2019*

**M.M. SIYANI, J.**

This is a second Appeal against the decision of Buhama Ward Tribunal where initially, Siwema Kazula, who is the respondent herein successful filed a land matter against Kilisinga Machere, Simon Manyege and Leah Manyege, (the appellants) claiming for ownership of a piece of land located at Ilagaza suburb in Buchosa District. Dissatisfied with the decision of Buhama Ward Tribunal, the appellants referred the matter to

the Geita District Land and Housing Tribunal. They lost again hence this appeal which contains three grounds as follows:

- (1) *That both the trial Court below failed to consider that the respondent was an invitee hence cannot claim good title to the disputed land.*
- (2) *That both the 1<sup>st</sup> appellate and the trial Court failed to consider that by the respondent failure to join the seller of the land to the case, the appellants were wrongly impleaded in a land case No. 13 of 2016 before Buhama Ward Tribunal.*
- (3) *That the Judgment and Proceedings were null and void as the Buhama Ward Tribunal were improperly constituted.*

When the Appeal came for hearing on 6<sup>th</sup> September 2018, Counsel Constantine Ramadhan who appeared for the appellants prayed to abandon the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal above. He instead, opted to argue the 3<sup>rd</sup> ground of appeal. On the other hand the respondent who was unrepresented moved the court to consider disposing the appeal by way of filing of written submissions. There was no contention from Mr. Constantine and so for fairness, I granted the prayer.

In their written submissions, the appellants through their advocate contended that the trial Ward Tribunal was improperly constituted when

entertaining the matter which is a subject of this appeal and therefore as a result of such irregularity both proceedings and the ultimate Judgment were null and void. As to why the appellants believed that the tribunal was improperly composed, it was submitted that the secretary of the ward who is not a member of the tribunal participated in the hearing and deciding the matter. It was argued that such a practice contravened section 4 (1) (a) and (b) of the Ward Tribunal Act Cap 206 RE 2002 and section 11 of the Land Dispute Courts Act Cap 216 RE 2002.

In her brief reply, the respondent submitted that the said Secretary to the Ward Tribunal, did not participate in hearing and deciding the case. According to the respondent what the secretary did was merely recording the proceedings as mandated by the law.

I have gone through the submissions made by parties. In the first place I think it is important to point out at this stage that the only ground of appeal which is a complaint that Buhama Ward Tribunal was improperly constituted, was not raised at the first appellate Tribunal. As such it is a new ground before the Court. It is a trite law that a ground not raised in

the 1<sup>st</sup> appellate Court cannot be raised in a second appellate Court. In **Seleman Rashid @ Daha Vs Republic** Criminal Appeal No. 190 of 2010 and **Bihani Nyankongo & Another Vs Republic** Criminal Appeal No.182 of 2011 (both unreported) the Court of Appeal of Tanzania held the following:

*The Court has on several occasions held that a ground of appeal not raised in first appeal cannot be raised in a second appeal.*

In my view the rationale behind this practice is that an appellate court should only deal with matters which has already been determined by courts below it. Matters not taken or pleaded and decided in the court (s) below should not be entertained on appeal. [See **Kennedy Owino Onyango & others Vs Republic**, Cr App no 48/2006.

I would have therefore proceeded to dismiss the appeal on that reason. However since the raised ground involves a point of law, I find it prudent to consider the same. From what have been submitted, it is clear that parties are at the same understanding that the law requires only members of the tribunal to participate in decision making. Section 4 (1) of the Ward Tribunal Act Cap 206 RE 2002 stipulates the composition

and who actually are the members of the Ward Tribunal. For easy of reference I have reproduce the contents of section 4 as hereunder:

#### *4. Composition of Tribunals*

*(1) Every Tribunal shall consist of*

*(a) not less than four nor more than eight other members elected by the Ward Committee from amongst a list of names of persons resident in the ward compiled in the prescribed manner;*

*(b) a Chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph*

*(2) There shall be a 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 of members.*

*(4) At any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal, and in the event of an equality of votes the Chairman shall have a casting vote in addition to his original vote.[Underlined emphasis supplied]*

My understanding to the above provision is that members of the ward tribunal are elected by the ward committee. In terms of section 4 (2) of the Ward Tribunal Act (supra), a secretary to the ward tribunal is

appointed by the Local Government Authority in which the respective Ward situates. Section 4 (4) makes it clear that the tribunal's decision is that of the majority of the members. I therefore agree with parties that only members to the Tribunal can make decisions and the secretary being not a member envisage under section 4 (1) cannot legally participate in the final decision making.

That being said, the question now is whether the secretary to the ward tribunal which made a decision subject of this appeal, participated in the proceedings and the final decision. The respondent did not indicate in his submissions how the secretary to the Tribunal participated in the proceedings and in reaching the decision. The record however, indicates at page 34 that; having finalized the hearing of the case, the tribunal deliberated and each member gave his or her opinion as to which party had the right over the ownership of the disputed land. The ward secretary just as it was for other members, gave his opinion. In his recorded opinion the Tribunal secretary was of the view that the land at issue belonged to the appellants (respondents) and that the respondent (complainant) had no good title.

In its decision dated 20<sup>th</sup> October 2016, the trial Tribunal basing on the majority opinions of the members, decided in favour of the respondent (complainant). Therefore although it was a procedural irregularity for the secretary to give his opinion since he is not a member of the Tribunal, I am of the settled view that such irregularity in the circumstances of this case, did not cause any injustice on the party of appellants because the complained decision was not influenced by the said opinion. That is why the appellants did not raise that issue in their first appeal before the District Land and Housing Tribunal.

For the reasons above; the appeal lacks merits and I accordingly dismiss the same with costs.

It is so ordered.

**DATED at MWANZA this 10<sup>th</sup> Day of January 2019**



**M.M. SIYANI**  
**JUDGE**