

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., KWARIKO, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 38 OF 2019

BARAKA IMANYI TYENYI.....APPELLANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....1ST RESPONDENT

NORTH MARA GOLD MINE LIMITED.....2ND RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Mwanza)**

(De-Mello, J.)

dated the 28th day of June, 2016

in

Land Case No. 10 of 2008

RULING OF THE COURT

29th November & 1st December, 2021

KWARIKO, J.A.:

The appellant, Baraka Imanyi Tyenyi was aggrieved by the decision of the High Court of Tanzania (De- Mello, J.) sitting at Mwanza (the trial court) dated 28th June, 2016 in Land Case No. 10 of 2008, hence, he is before this Court on appeal.

Before the trial court, the appellant sued the first respondent for trespass on his land at Nyankanga village in Musoma District (the suit land), whilst the second respondent was joined in the case as a third

party. He claimed that he had surveyed the suit land with intention to construct a secondary school named Bukiroba. However, he complained that, while in that process, the first respondent installed a high-tension electricity transmission line across the suit land which disrupted his business plan. Due to the foregoing, the appellant claimed TZS 200,000,000.00 for specific and general damages as well as interest and costs of the suit.

On her part, the first respondent disputed the appellant's claims. She stated that before the installation of the high-tension electricity transmission line to cater for use by the second respondent's mining activities, a valuation was conducted for compensation of those who were likely to be affected by the project. That, the appellant who was among the affected people refused to collect TZS 1,089,500.00 from Musoma District Council to cover for crops on his 1.04 acres of land. As such, the first respondent averred that since the required legal procedure to acquire the suit land was followed, she was not at fault and thus not obliged to pay any damages. She contended that, the appellant had not effected any development on the suit land.

For its part, the second respondent disputed the claims for the reason that the Memorandum of Understanding with the first respondent was for the latter to acquire land and deal with all encumbrances attached to it including compensation to the affected people and thus she contributed USD 20,341,650.00 for that purpose. She therefore maintained that the appellant had no claims against her.

In its decision, the trial court found that the Memorandum of Understanding between the respondents was concluded on 30th October, 2006 which was ahead of the appellant's business plan dated December, 2006 and the survey of the suit land of July to October, 2007. It also found that the appellant had failed to prove that he had effected any development on the proposed school and that he had already been compensated for the suit land. For these reasons, the trial court dismissed the appellant's suit.

Before this court, the appellant has raised five grounds of appeal but for the reasons which will be apparent soon, we find no pressing need to reproduce them here.

At the hearing of the appeal, the appellant was represented by Mr. Francis Stolla, learned advocate whilst the first respondent had the

services of Mses. Angela Lushagara and Stella Machoke, learned Principal State Attorneys together with Ms. Subira Mwandambo, learned Senior State Attorney and Mr. Steven Urassa, learned State Attorney. On his part, Mr. Faustin Malongo, learned advocate, appeared for the second respondent.

However, before the hearing of the appeal could commence in earnest, we wished to satisfy ourselves on whether the trial was properly conducted by the trial court owing to the fact that the learned trial Judge did not append her signature at the end of each witness's evidence. We, thus, invited the counsel for the parties to address us on that matter.

All the learned counsel for the parties conceded that the trial Judge did not append signature at the end of each witness's testimony thus vitiated the whole proceedings. For that reason, the counsel urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the AJA) and nullify the trial court's proceedings, quash the judgment and set aside all orders therefrom and order for a trial of the suit *de novo*. In support of the foregoing, Mr. Malongo referred us to the Court's decisions in the cases of **Yohana Mussa Makubi and Another v. R**, Criminal Appeal No. 556 of 2015 and

Iringa International School v. Elizabeth Post, Civil Appeal No. 155 of 2019 (both unreported).

We have considered the submissions by the learned counsel for the parties and agree with them that the learned Judge did not append signature at the end of each witness's testimony. For instance, no signature was appended at the end of evidence of the appellant (PW1) whose testimony appears from pages 30 to 40 of the record of appeal and also that of Oswald Rwezaura (PW2) appearing from pages 41 to 47. Likewise, no signature was appended on the defence evidence by Abel Joseph (DW1), Projestus Rutayuga Katabalo (DW2) and Hillary Simon Towo (DW3) from pages 53 to 62.

Appending signature at the end of witnesses' testimony is a mandatory requirement of law and not a discretion of the trial judge or magistrate. Order XVIII rule 5 of the Civil Procedure Code [CAP 33 R.E. 2019] which is relevant here provides thus:

"The evidence of each witness shall be taken down in writing, in the language of the court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in

*that of a narrative **and the judge or magistrate shall sign the same.**"*

[Emphasis ours]

See also – section 210 (1) (a) of the Criminal Procedure Act [CAP 20 R.E. 2019].

The purpose behind a judge or magistrate appending signature at the end of each witness's testimony is to ensure the authenticity and veracity of the court's proceedings as it has been pronounced in the various decisions of the Court. For example, in the case of **Mhajiri Uladi and Another v. R**, Criminal Appeal No. 234 of 2020 (unreported), the Court observed thus:

"As demonstrated in this appeal, the testimonies of all witnesses were not signed by the learned trial Judge not only the authenticity of the testimonies of the witnesses but also the veracity of the trial court record itself is questionable. In absence of the signature of the person who recorded the evidence, it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witness since the recorder of such evidence is unknown. On account of such omission, the entire trial court proceedings recorded after the conduct of the

preliminary hearing are vitiated because they are not authentic.”

Further, times without number, the court has insisted that the omission to sign a witness’s testimony jeopardizes the authenticity of that evidence and its fatal to the proceedings. One of such instances is in the case of **Chacha s/o Ghati @ Magige v R**, Criminal Appeal No. 406 of 2017 (unreported) where the Court observed thus:

“.... we entertain no doubt that since the proceedings of the trial court were not signed by the trial judge after recording evidence of witness for both sides, they were not authentic. As a result, they are not material proceedings in the determination of the current appeal.”

See also – **Unilever Tea Tanzania Limited v. David John**, Civil Appeal No. 413 of 2020; **Joseph Elisha v. Tanzania Postal Bank**, Civil Appeal No. 157 of 2019; and **Sabasaba Enos @ Joseph v. R**, Criminal Appeal No. 411 of 2017 (all unreported).

Consequently, the omission by the trial Judge in the instant case to append signature at the end of each witness’s testimony vitiated the proceedings of the trial court. Thus, by our revisional powers under

section 4(2) of the AJA, we nullify the proceedings of the trial court, quash the judgment and set aside all orders emanated therefrom. However, for the interest of justice, we remit the court record to the trial court for the suit to be heard *de novo* by another judge. We order no costs since the matter has been raised by the Court *suo mottu*.

DATED at **MWANZA** this 30th day of November, 2021.



R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered this 1st day of December, 2021 in the presence of Miss Subira Mwandambo, learned Senior State Attorney for the first Respondent and Mr. Faustin Malongo for the second respondent also holding brief for Mr. Francis Stola, learned counsel for the Appellant, is hereby certified as a true copy of the original.


F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL