

**IN THE COURT OF APPEAL OF TANZANIA  
AT MOSHI**

**(CORAM: KOROSSO, J.A., KIHWELO, J.A. And RUMANYIKA, J.A.)**

**CIVIL APPEAL NO. 199 OF 2020**

**THE MUNICIPAL DIRECTOR,  
MOSHI MUNICIPAL COUNCIL ..... APPELLANT**

**VERSUS**

**SURESH KANJI SOLANKI ..... FIRST RESPONDENT**

**SUBASH KANJI SOLANKI ..... SECOND RESPONDENT**

**VASUDEV KANJI SOLANKI ..... THIRD RESPONDENT**

**MARENDRA KANJI SOLANKI ..... FOURTH RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,  
(Land Division) at Dar es Salaam)**

**(Sumari, J.)**

**dated the 27<sup>th</sup> day of March, 2018**

**in**

**Land Case Appeal No. 15 of 2017**

.....

**JUDGMENT OF THE COURT**

4<sup>th</sup> & 10<sup>th</sup> July, 2023

**KIHWELO, J.A.:**

The appellant herein seeks the reversal of the decision of the High Court of Tanzania, Moshi District Registry (Sumari, J.) in Land Case Appeal No. 15 of 2017, dated 27<sup>th</sup> March, 2018 which allowed the respondents' appeal against the decision of the District Land and Housing Tribunal for Moshi (the Tribunal) in Land Application No. 24 of

2013 that dismissed the application with costs for the reason that, the respondents failed to substantiate their claims.

It is noteworthy that, before the Tribunal the respondents and the appellant locked horns in a legal battle over ownership of a parcel of land described as Plot No. 160/2 Block "JJJ" located at Pasua Area within Moshi Municipality. We shall henceforth refer to Plot No. 160/2 JJJ simply as "the suit property".

The background giving rise to the matter at hand, so to speak, is quite simple and straight forward but in order to appreciate the issues of contention in this matter, we find it apt to very briefly explain the genesis behind it. Before the Tribunal the respondents lodged a complaint against the appellant and another one not part to this instant appeal for the following reliefs:

*"(i) A declaratory order that the respondents are owners of the suit land;*

*(ii) An order for eviction of the appellant from the suit land;*

*(iii) An order requiring the appellant to do such acts as will result in the issuance of a certificate of title to the respondents;*

*(iv) Costs of the suit; and*

*(v) Any other and further relief as the Tribunal may consider it just and proper to grant."*

The essence of the respondent's claim before the Tribunal was that; way back in 1991 the respondents bought a 10 acres piece of land which originally belonged to Kiyungi Plantation (1964) Limited, and that, following a survey which was conducted by Moshi Municipal Council in or about 1998 the same fell under the municipality and it was registered as Plot No. 160 Block "JJJ" in the name of the respondents.

A little later, Plot No. 160 Block "JJJ" was sub-divided into two plots namely, Plot No. 160/1 and the suit property, and that certificates of title were prepared by the appellant in collaboration with the Director of Surveys and Mapping, the result of which Plot No. 160/1 was allocated to the respondents while the suit property was allocated to the appellant. During the time when the certificates of title were being prepared, the appellant gave permission to the Center for Informal Sector Promotion, who were the first respondent in the application before the Tribunal, to temporarily occupy the suit property. Protesting, the respondents demanded the appellant to give vacant possession of the suit property

but the respondents' demand fell on deaf ears, as a result the respondents were compelled to lodge an application before the Tribunal.

In the ensuing matter before the Tribunal the respondents produced three witnesses namely Suresh Kanji Solanki (PW1), Agust Matoli (PW2) and Jeofrey Oshonikararo (PW3) and a host of documentary exhibits namely Power of Attorney (exhibit P1), Sale Agreement (exhibit P2) which however, was later expunged for failure to meet the requirements for not being duly stamped in terms of section 47 of the Stamp Duty Act, Cap. 189 R.E. 2019, demand letter (exhibit P3), statutory notice (exhibit P4), and property tax receipts (exhibits P5 and P6). On the adversary side, the appellant featured two witnesses, Gimson Stephen Msemwa (DW1) and Shavii Iddi Msuya (DW2). Moreover, the appellant produced the certificate of occupancy (exhibit D1).

At the height of the trial on 8<sup>th</sup> June, 2017, the Tribunal (Silas, Chairman) dismissed the application as hinted above. Disgruntled, the respondents approached the High Court armed with four grounds of appeal challenging the decision of the Tribunal. After listening to the parties, the High Court found in the balance of probability that the evidence of the respondents was more credible than that of the

appellant and therefore, allowed the appeal in its entirety and declared the respondents, lawful owners of the suit land. This is what precipitated the present appeal before us.

The appellant has filed this appeal which is grounded upon three (3) points of grievance, namely:

- 1. That, the Honourable Judge erred in law by declaring the respondents as owners of the disputed plot as she failed to evaluate the evidence left after the sale agreement being expunged that the appellant has strong evidence of the title deed compared to that of the respondents;*
- 2. That, the Honourable Judge erred in law by holding that DW1 and DW2 were not present prior to 2002 when the survey of the plot was conducted while in fact they were office bearers and custodians of documents; and*
- 3. That, the Honourable Judge erred in law by concluding that the land in dispute was allocated to another person by the appellant as per title deed that was admitted as exhibit D1 in the District Land and Housing Tribunal where the matter originated.*

At the hearing before us, the appellant was represented by Mr. Deodatus Nyoni, learned Principal State Attorney assisted by Mr. Yohana Marko Odada and Mr. Moses Muyungi, both learned State Attorneys

while the respondents were represented by Mr. Patrick Paul, learned counsel.

Apart from the grounds of grievance which the appellant raised and argued, the Court had to determine the issue of whether the respondents' witnesses took oath before their testimonies were recorded by the Tribunal, thus, the learned Principal State Attorney and the learned counsel addressed us on that aspect as well in addition to the above grounds of grievance.

When he took the stage to address us, Mr. Nyoni was fairly brief. He premised his submission by requesting the Court to look into the original court record, but upon satisfying himself that even the original Court record had that anomaly he took a different turn and argued that the anomaly vitiates the entire proceedings of the Tribunal.

Mr. Paul, for his part, was equally brief. He took the view that, if witnesses for the respondents did not take oath before their testimonies were recorded by the Tribunal that vitiates the entire proceedings of the Tribunal and the only remedy available is to nullify the proceedings and judgment of the Tribunal, and since the judgment of the High Court originated from nullity proceedings, then proceedings and judgment of

the High Court should equally be nullified and the matter be remitted back to the Tribunal for fresh trial, he stressed.

We have given due consideration to the uncontested submission by the learned Principal State Attorney and that of the learned counsel for the respondents and this brings us to a brief discussion of the law relating to the requirement for witnesses to take oath before they give evidence. The requirement is provided for under section 4 (a) of the Oaths and Statutory Declarations Act, Cap. 34 R.E. 2019 (the Act). For clarity, we wish to extract the relevant parts of section 4 (a) of the Act thus:

*"4. Subject to any provision to the contrary contained in any written law **an oath shall be made by-***

*(a) **any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before the court"** (Emphasis added)*

It has to be noted that, section 2 of the Act, defines the word court to include every person or body of persons having authority to receive evidence upon oath or affirmation.

In our respectful opinion, and by necessary implications, the Tribunal falls squarely under the ambit of that definition. The rationale is not farfetched, taking oath, is the means for encouraging truthful testimony by ensuring that witnesses speak the truth and the truth only. It is a legally binding promise by witnesses to assert only true facts and not tell lies. Such is the law regarding the mandatory requirement for witnesses to take oath before they give evidence in court which by extension applies to any tribunal legally entrusted to take evidence upon oath or affirmation in adjudicating matters before them.

Unfortunately, one thing is conspicuously clear as the record bears out that, PW1 on page 123, PW2 on page 133 and PW3 on page 138 of the record of appeal did not take oath before giving their evidence before the Tribunal. With respect, the totality of the above clearly demonstrates that, the evidence of PW1, PW2 and PW3 and its weight to be accorded becomes questionable.

As to what is the effect of omitting to administer oath to witnesses before they give their evidence in court, the law is settled and clear. There is, in this regard, a long and unbroken chain of decisions of the Court which underscores the duty imposed on the court to ensure that every witness is examined upon oath or affirmation, see, for instance



**Nestory Simchimba v. Republic**, Criminal Appeal No. 454 of 2017, **Mwami Ngura v. Republic**, Criminal Appeal No. 63 of 2014 and **Jafari Ramadhani v. Republic**, Criminal Appeal No. 311 of 2017 (all unreported). The requirement is mandatory and the omission to do so vitiates the evidence of that particular witness or the entire proceedings depending on the circumstances of the case. The spirit behind is to ensure that no witness will be examined without oath or affirmation and that any evidence recorded without oath or affirmation will have no value before any court of law. See, for instance the case of **David Joseph Mahende v. Afriscan Group (T) Ltd**, Civil Appeal No. 200 of 2016 (unreported). We equally take inspiration from the case of **Rex v. Marsham ex parte Pethick Lawrence** [1912] 2 KB 362 in which Lord Alverstone CJ stressed that, a judgment or conviction found on unsworn evidence is nullity.

We, on our part, think the Tribunal, erred in respect of the failure to comply with the mandatory requirement to administer oath to PW1, PW2 and PW3 before giving their evidence. There can be no better words to express our view and conclude as we do that, the entire testimony of PW1, PW2 and PW3 is invalid. The logical conclusion drawn from the above, is that, since the testimony of all witnesses for the

respondents was recorded without oath or affirmation the omission vitiates the entire proceedings of the Tribunal.

In the event, we hereby nullify and quash the proceedings of the Tribunal and those of the High Court. As a result, we set aside the decision of the Tribunal and judgment of the High Court which reversed the decision of the Tribunal. On the way forward, we order that the matter be remitted to the Tribunal for the dispute to be determined *de novo* before another Chairperson with a different set of assessors. Given the circumstances of this case, we make no order as to costs.

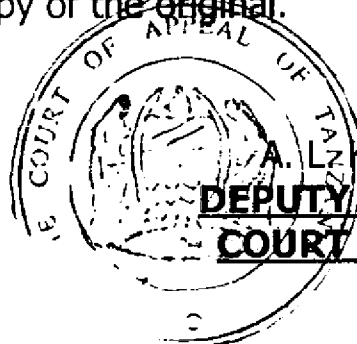
**DATED** at **MOSHI** this 10<sup>th</sup> day of July, 2023.

W. B. KOROSSO  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Judgment delivered this 10<sup>th</sup> day of July, 2023 in the presence of the Ms. Glorian Issangya, learned State Attorney for the appellant and Mr. Patrick Paul, learned counsel for the respondent is hereby certified as a true copy of the original.

A circular seal of the Court of Appeal of Tanzania, featuring a central emblem and the text 'THE COURT OF APPEAL OF TANZANIA' around the perimeter.  
A. L. Z. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**