

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

(CORAM: KWARIKO, J.A., SEHEL, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 256 OF 2020

ALIKI FALANGA.....APPLICANT

VERSUS

**THE REGISTERED TRUSTEES OF
ST. ELIZABETH SISTERS.....1ST RESPONDENT**

**THE REGISTERED TRUSTEES OF THE CONVENTUAL
FRANCISCAN FRAIRS (O.F.M. CONV.) TANZANIA2ND RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Arusha)**

(Maghimbi, J.)

dated the 13th day of December, 2017

in

Land Case No. 34 of 2015

RULING OF THE COURT

28th & 30th August, 2023

KWARIKO, J.A.:

The appellant, Aliko Falanga was aggrieved by the decision of the High Court of Tanzania at Arusha (the trial court) in Land Case No. 34 of 2015 which was decided in favour of the respondents. Formerly, the appellant had sued the respondents before the trial court for payment of USD 468,000.00 being value of her land measuring 7.8 acres situated at Arumeru District in Arusha Region allegedly occupied illegally by the respondents. She also claimed for general damages, eviction of the

respondents from the said land, an order for permanent injunction to the respondents from entering the suit land, interest and any further relief as the court would deem fit. For their part, the respondents denied any encroachment on the appellant's land.

At the end, the trial court dismissed the suit for being time barred. However, it declared the respondents lawful owners of land measuring approximately twenty four acres as per Certificate of Title No. 1755 (EX-C.T. No. 5511) issued on the 22nd March, 1986. It also revoked the Certificate of Title No. 23587 (EX. C.T. No. 511) issued to the appellant on the 9th May, 2008 and ordered the Registrar of Titles to expunge it from the register. The appellant was also ordered to bear costs of the suit.

Aggrieved by that decision, the appellant filed this appeal upon six grounds which for what will be apparent soon, we find it inexpedient to reproduce them herein.

At the hearing of the appeal, Ms. Patricia Eric teamed up with Mr. Gwakisa Kakusulo Sambo, both learned advocates to represent the appellant. On their part, the respondents had the services of Mr. Meinrad Menino D'Souza, assisted by Mr. Mnyimwala Mapembe, both learned advocates.

Before the hearing could commence, we informed the parties that upon our perusal, we were satisfied that the evidence of DW2 which was used in the judgment is not only missing from the record of appeal but also from the original record. We thus invited the counsel for the parties to address us on what will be the way forward.

When Ms. Eric took the stage, she admitted the fact that the evidence of DW2 is missing as intimated by the Court. In that case, she argued, that, for any appeal to be heard and determined on merit, the record of appeal must be complete as required under rule 96 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules). That, since the evidence of DW2 is missing from both files, it is impracticable for both parties to initiate procurement of such record via shared responsibilities.

The learned counsel submitted further that; the missing record renders the appeal incompetent and ordering the trial court to take the evidence of DW2 afresh, will prejudice the parties to the case. It was Ms. Eric's submission that the proceedings of the trial court are incompetent for failure to record important piece of evidence of DW2. According to her, the proceedings are a nullity deserving to be expunged followed by an order of retrial where both parties will have sufficient opportunity to use the evidence of DW2 to their favours.

In addition, Mr. Sambo submitted that when he was preparing the record of appeal and upon discovery that the evidence of DW2 was missing from the copy of proceedings which was supplied to the appellant by the Registrar, he followed up the matter. His follow-up revealed that the learned trial Judge was personally recording the proceedings in her computer and had promised to trace the missing piece of evidence and avail it to him. That, his reminder did not bear any fruits and therefore he decided to lodge the appeal on 29th October, 2019 without the missing evidence as the time of limitation was running out.

Further, Mr. Sambo submitted that, since the missing record cannot be found in the original record, the appeal cannot be salvaged by lodging a supplementary record of appeal under rule 96 (7) of the Rules. He thus urged us to nullify the proceedings of the trial court, judgment and decree and order a trial *de novo*.

On his part, Mr. D'Souza admitted that the evidence of DW2 is missing from the record of appeal as well as the original record. However, he was of the contention that, only the record of appeal was faulty and not the whole proceedings of the trial court. As to the way forward, he argued that a trial *de novo* will not be in the interest of justice since DW1 is now aged 82 years and DW4 is in Rome pursuing his studies. He thus urged

the Court to nullify the judgment and decree and order taking afresh the evidence of DW2 by the same Judge who is still in the High Court.

We have considered this matter together with the submissions made by the learned counsel for the parties. It is not disputed that the evidence of DW2 which was also used to decide the case before the trial court is missing from the record of appeal. Under normal course of events, the Court could have granted leave to the appellant to lodge a supplementary record of appeal to include the missing record of evidence under rule 96 (7) of the Rules. However, that will not be possible since the said record is also missing from the original record. It is also noteworthy that the learned trial Judge was personally typing the proceedings in her laptop and when contacted could not avail such evidence.

Under such state of affairs, we have considered the opposing submissions from the learned counsel as to the way forward. We are of the settled mind that justice of the case requires that it should be tried afresh. We therefore invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and proceed to nullify the trial court's judgment, decree and the proceedings. We accordingly remit the case to the High Court to be tried afresh from the stage immediately after failure of mediation. In the circumstances of the case,

the fresh trial be conducted by another judge. We make an order that each party shall bear its own costs.

DATED at **ARUSHA** this 29th day of August, 2023.


M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The ruling delivered this 30th day of August, 2023 in the presence of Ms. Belinda Alphayo, learned advocate for the appellant and in the absence of the respondents, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL