IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, C.J., MKUYE, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 343 OF 2020

ERICK DOMINIC MASSAWE..... APPELLANT

VERSUS

RICHARD KELLY.....1ST RESPONDENT
MWANZA CITY COUNCIL.....2ND RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Magoiga, J.)

dated the 6th day of December, 2018
in
Land Appeal No. 147 of 2018

.....

JUDGMENT OF THE COURT

12th & 15th February, 2024

JUMA, C.J.:

At the centre of this second appeal is Plot No. 473, which we shall refer to as the "disputed plot," located in the Luchelele area (Kisoko Block A) in Mwanza City (Mwanza Region), over which the appellant, Erick Dominic Massawe, went to the District Land and Housing Tribunal at Mwanza (the DLHT) in Land Application No. 121 of 2015 to pray for a declaration that he is the lawful owner and that the deed of its sale between the first respondent Richard Kelly and George Nkinga, who is not part of this appeal, is null and

void. Secondly, the appellant prayed for damages of shillings 300,000/= from the respondents for delaying him from developing the disputed plot.

At the trial DLHT, the appellant blamed the second respondent, Mwanza City Council, for granting the appellant the right of occupancy over the disputed plot without following the local government procedure requiring prior identification of the person who made an earlier offer to the surveyed land. He pointed to his letter dated 20/07/2001 when he applied for an Offer of Customary Right of Occupancy before the local government authorities surveyed that area to create individual plots of land.

In his defence at the DLHT, the first respondent averred that he is the legal owner of the disputed land, holding a Certificate of Title No. 161, which the City Council of Mwanza allocated him after he bought that land from one Matayo John. The Mwanza City Council and Mr. George Nkinga disputed the appellant's claim of ownership and right to the disputed plot No. 473.

After hearing the parties and their witnesses, the DLHT believed the first respondent's evidence that Richard Kelly was the legal owner and dismissed the appellant's claim over the disputed plot.

Aggrieved by the decision of the DLHT, the appellant filed Land Appeal No. 147 of 2016 in the High Court at Mwanza, faulting the trial DLHT for

failing to evaluate the evidence that supported his rightful claim. He believed that proof of his claim he made through the evidence of the sale agreement (exhibit P1) and the evidence of the Title Deed (exhibit D1) sufficiently established his ownership of the disputed plot.

The appellant's appeal in the High Court seeking to overturn the decision of the DLHT failed when the High Court (Magoiga, J.) dismissed his appeal for lacking merit.

Still aggrieved by the dismissal of his appeal by the High Court, the appellant filed this second appeal, faulting the first appellate Judge for disregarding his customary title over the disputed plot and for granting the first respondent the ownership of that disputed plot.

At the hearing of this appeal on 12/02/2024, the appellant, Mr. Erick Dominic Massawe, appeared unrepresented to argue his grounds of appeal. Learned counsel Mr. Fidelis Cassian Mtewele appeared for Mr. Richard Kelly (the first respondent). Mr. David Kakwaya, learned Principal State Attorney, assisted by Mr. Allen Mbuya and Mr. Joseph Vungwa, learned State Attorneys, appeared for the second respondent (the Mwanza City Council). The appellant and the learned counsel for the first and second respondents all relied on their respective written submissions.

Before we allowed the appellant to submit on his grounds of appeal, we asked him to address us first on the legal consequences of this second appeal following the failure of the Chairman of the trial District Land and Housing Tribunal for Mwanza to administer oaths or affirmations to witnesses before they testified before that trial court as the Oaths and Statutory Declarations Act Cap 34 R.E. 2019 demands. We referred him to pages 27, 34, 36, 40, and 43 of the record of appeal, where the DLHT Chairman allowed PW1, PW2, DW1, DW2, and DW3 to testify without taking oaths or affirmations, respectively.

After flipping through the relevant pages of the record of appeal where he, Erick Dominic Massawe (PW1), Moshi Cheye (PW2), Richard Kelly (DW1), Jeremiah Mpembe (DW2), and George Nkinga (DW3) testified, the appellant readily, conceded that indeed, the record shows that witnesses did not take oaths before the trial DLHT Chairman allowed them to testify. The appellant urged us to take his word that although the Chairman of the trial DLHT for Mwanza failed to record witnesses' oaths or affirmations, he (the appellant) and other witnesses in fact took their oaths before they testified and that the trial Chairman of the DLHT inadvertently failed to record that witnesses

took oaths before testifying. The appellant thought the irregularity to be trivial, and he implored us to proceed with the hearing of his appeal.

Submitting on behalf of the first respondent on the issue of law the Court had raised, Mr. Mtewele looked through pages 27, 34, 36, 40, and 43 of the record of appeal. He unhesitatingly submitted that failure by the DLHT Chairman to administer oaths or affirmations to witnesses before allowing them to testify was a fatal irregularity. Consequently, he urged that this second appeal is not competent before this Court. The only remedy, he added, is to nullify the evidence of all the witnesses and send back the remaining record to enable the trial DLHT Chairman to administer oaths to witnesses before allowing them to testify.

At the outset, Mr. Kakwaya, the learned Principal State Attorney, submitted that the proceedings from 07/06/2016 up to 19/07/2016 show that the trial DLHT Chairman failed to administer oaths or affirmations before he allowed all the witnesses to testify. This is a fundamental irregularity, he added, that vitiates the proceedings for violating mandatory provisions of sections 3 and 4 (a) of the Oaths and Statutory Declarations Act, which states:

3. Every court shall have the authority, itself or by an officer duly authorised by it in that behalf, to administer an oath or affirmation to any person whom it may lawfully examine upon oath or affirmation.

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 a court;

The learned Principal State Attorney cited a decision of this Court in **ATTU J. MYNA VS CFAO MOTORS TANZANIA LIMITED** [2022] TZCA 187 TANZLII which reiterated a settled position of the law to the effect that it is mandatory for the witnesses giving evidence in court to do so under oath. That the omission by the witnesses to take oath or affirmation before giving evidence is a fatal irregularity that vitiates the entire proceedings that received evidence of witnesses who did not take oath.

Mr. Kakwaya rounded up his response by urging us to invoke the Court's power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) and nullify the proceedings of the trial DLHT from 7/6/2016 relating to the testimonies of PW1, PW2, DW1, DW2, DW3; the judgment of the trial DLHT; subsequent proceedings, and the judgment of the first appellate High Court.

We agree with both Mr. Mtewele, learned counsel for the first respondent and also Mr. Kakwaya, learned Principal State Attorney for the second respondent, that failure to administer an oath or affirmation to a witness before that witness testifies is a fundamental irregularity that renders the witness's evidence worthless.

Oaths and affirmations have a central role in judicial proceedings. After taking an oath or affirmation, a witness becomes bound to state only the truth, nothing but the truth.

James Jacob Spigelman, a former Australian Judge who served as Chief Justice of New South Wales from 1998 to 2011, aptly wrote in ***"Truth and the Law"*** **[2011] NSW Bar Association News 55**, "Public confidence in the administration of justice requires that the system must be directed to discovering the truth of the facts."

In 1956, Robert C. Sorensen illustrated the rationale of requiring witnesses to take oaths before being allowed to testify. Oaths deter falsehoods, he pointed out. Oaths commit witnesses to tell the truth, he added. And that oath reminds witnesses that they should expect punishments for lies. Robert C. Sorensen further stated:

*"Its **[OATHS]** function with respect to witnesses in the courtroom is several-fold. The oath is felt to be a deterrent to falsehood because the witness must commit himself to truth-telling in advance of his testimony. This involves various types of internalized response in that the witness swears to his God that he will tell the truth as he sees it. The deterrent is solidified by the oath's second function: the provision of an occasion whereby a witness may be tried for perjury should it be demonstrated that he failed to tell the truth after promising to do so. Thus, administration of the oath serves not only to warn but also to hold over the head of the witness his own sacred assurance that he would speak only the truth."* **–Robert C. Sorensen, "THE EFFECTIVENESS OF THE OATH TO OBTAIN A WITNESS' TRUE PERSONAL OPINION," JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY VOL. 47 Issue 3.**

The legal requirement to administer oath or affirmation to witnesses under section 3 of the Oaths and Statutory Declarations Act is not a rule of

technicality. It is a rule of substantive justice that seeks for nothing but the truth from a witness, and to punish falsehoods and perjury.

We will not take the appellant on his words that although the trial DLHT administered oaths to witnesses but only failed to record down. This Court faced similar invitation in the case of **ATTU J. MYNA VS CFAO MOTORS TANZANIA LIMITED** (supra) where a learned Counsel, Mr. Mayenga, argued that the witnesses were sworn except that the arbitrator did not indicate so in the record of appeal. We insisted that the record of appeal must speak for itself and show that the trial court indeed administered oath or affirmations:

> *"We are increasingly of the view that the court record should speak for itself. The Court cannot work on assumption; hence the Arbitrator was supposed to show in the proceedings that the witnesses took oath before they gave their respective evidence."*

In light of the irregularities of failure by the trial DLHT Chairman to administer oath or affirmation to all the witnesses in Land Application Case No. 121 of 2015, we invoke our power of revision under section 4(2) of the AJA, quash and set aside the evidence of witnesses and subsequent proceedings of the trial DLHT from 7/6/2016, including the Judgment of the

trial DLHT and the proceedings and Judgment of the first appellate High Court of Tanzania at Mwanza in Land Appeal No. 147 of 2016.

We direct the remaining record of this appeal, be sent back to the DLHT for Mwanza so that another Chairman shall hear witnesses afresh by administering oaths or affirmations to the witnesses, before taking their evidence.

Order accordingly.

DATED at **MWANZA** this 15th day of February, 2024.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 15th day of February, 2024 in the presence of the appellant who appeared in person, Mr. Fidelis Mtewele assisted by Ms. Stella Sangawe, both learned counsel for the 1st respondent and Mr. Joseph Vungwa, learned State Attorney for the 2nd respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL