

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA
AT MUSOMA
LAND APPEAL NO. 20 OF 2021

RAYMOND IKULA APPELLANT

VERSUS

TABITHA JACOB KAHUNGWA RESPONDENT

(Appeal from the decision of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 168 of 2016)

JUDGMENT

9th August and 27th October 2021

KISANYA, J.:

The respondent, Tabitha Jacob Kahungwa, successfully sued the appellant, Raymond Ikula and other six persons in the District Land and Housing Tribunal for Mara at Musoma (trial tribunal). The dispute between them was in respect of ownership of a piece of land located at Majimoto in Serengeti District.

In her application before the trial tribunal, the respondent averred to have inherited the disputed land from her late father. She stated further that, Primary Mining Licence No. 00000211 in respect of the disputed land was issued to her. She went on to contend that the appellant and six other persons namely, Benedicto Bise, Bhoke Machango, Rhobi Nyamkumba, Rhobi Mrate, Nyamhanga Machera and Mwita Mangosi trespassed into the disputed land by undertaking some economic activities. Therefore, she moved the trial tribunal to declare her as the lawful owner of the disputed land, compel the appellant and six others

to give vacant possession of the disputed land and restrain them from trespassing into the disputed land.

In his written statement of defence, the appellant disputed the applicant's claims as baseless. He contended that the disputed land was given to him by his father-in-law in 1985. The appellant claimed further it is the respondent who trespassed into the disputed land by conducting mining activities.

The hearing proceeded in the absence of the other six persons because they failed to appear on the date of hearing.

In her endeavour to prove her claim, the respondent's evidence was given by Kabore Jacob Kahungwa (PW1) who had the power of attorney to represent her. Other witnesses who testified for the respondent were, Hadaika Rumanyika (PW2), Mataye Makore (PW3), Makori Michael (PW4), Joseph Nyamhanga (PW5) and Samwel Manyuki (PW6). Their oral testimonies were supplemented by the Mining Licence (Exhibit P1), payment receipts for the mining licence (Exhibit P2) and Renewed Mining Licence (Exhibit P3) tendered by PW1.

On the other hand, the appellant adduced evidence on his own behalf as DW1. His evidence was supported by Susana Sangi (DW2) and Mresi Mrate Mresi (DW3).

Upon full trial, the learned trial chairperson (Kaare J.T) was not satisfied with the appellant's evidence. He went on to declare the respondent as the

lawful owner of the disputed. Further to that, the appellants and other six persons were ordered to vacate the same.

The appellant was aggrieved with that decision. He therefore lodged this appeal. For the reason to be reflected in this judgment, I find it not apposite to reproduce the grounds of appeal advanced in the petition.

When this matter was called for hearing on 9th August 2021, the appellant was reported bereaved while, Mr. Venance Kibula, learned advocate appeared for the respondent. Following Mr. Vanance's prayer, the Court ordered this matter to be disposed of by way of written submissions. In addition to the grounds stated in the petition of appeal, parties were asked to address the Court on whether the evidence was recorded in accordance with the law. This issue was posed to the parties after noticing that the chairperson did not append his signature after recording the evidence of all witnesses.

While Mr. Emmanuel John, learned advocate lodged his written submission in support of the appeal, the respondent defaulted to file her written submission. She is therefore, deemed to have defaulted to appear on the date of hearing. And in terms of Order XXXIX, rule 17(2) of the Civil Procedure Code [Cap. 33, R.E. 2019], the Court is enjoined to proceed ex-parte.

I have carefully considered the petition of appeal, record and submission by the appellant's counsel. In my view, this appeal can be disposed of by determining the issue raised by the Court, *suo mottu*.

Responding to the issue whether the evidence was recorded in accordance with the law, Mr. Emmanuel John submitted that the defect pointed out by the Court renders the whole proceedings a nullity. He therefore urged the Court to make an order for retrial of the case before another chairperson and new set of assessors.

The starting point is the fact that, neither the the Land Dispute Courts Act [CAP 216 R.E 2019] (the LDCA) nor the Land Dispute Courts (The District Land and Housing Tribunal), Regulations, 2003, GN No. 174 of 2003 provide for the mode of recording evidence. Therefore, guided by the provisions of section 51(2) of the LDCA, Order XVIII, Rule 5 of the CPC applies. The later provisions provide as follows on the issue under consideration: -

"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."(Emphasize supplied)

This section having been couched in mandatory terms, the trial chairperson has no other option than, appending his or her signature after recording the evidence of each witness. The law is settled that the rationale behind this legal requirement is to assure authenticity of the testimony given by the witness. The law is now settled that the omission by the trial chairperson, magistrate or judge to append his or her signature after recording the evidence

is an incurable irregularity for want of authenticity. There is a plethora of authorities on that position. One of them is the case of **Masumbuko Makeleze @ Kosovo vs R**, Criminal Appeal No. 433 of 2017, CAT at Mwanza (unreported) where the Court of Appeal held as follows:

*"At the forefront, we agree with the learned counsel that in **Sabasaba (supra)** and **Yohana Mussa Makubi (supra)**, the Court underlined in imperative terms that a presiding Judge must append his or signature after recording the testimony of each witness so as to authenticate the testimony so recorded. Non-compliance with that requirement cannot be glossed over; it is incurable".*

In yet another case of **Yohana Musa Makubi (supra)**, the Court of Appeal held that:-

"We are thus, satisfied that, failure by the Judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted.

In the instant appeal, it is on record that the learned trial chairperson did not append his signature at the end of the evidence adduced by the witnesses called by both parties (PW1, PW2, PW3, PW4, PW5, PW6, DW1, DW2 and DW3). This implies that the testimonies of all witnesses were not authenticated. Guided by the above position of law, this irregularity is incurable. It, therefore, rendered the proceedings and judgment of the trial tribunal a nullity. For that

reason, I will not address other issues pertaining to this appeal as they are premised on the vitiating proceedings and judgment.

In the exercise of the revisionary powers vested in this Court, I hereby nullify the proceedings of the trial tribunal starting from the evidence of PW1, quash and set aside the judgment and decree thereon. As for the way forward, the Court orders retrial of the case starting from the proceedings after recording issues. Further to this, it is ordered that the case be heard before another chairperson and new set of assessors. Since neither party attributed to the said anomaly, the Court orders each party to bear its own costs.

It is so ordered.


DATED at MUSOMA this 27th day of October, 2021.




E.S Kisanya
JUDGE

Court: Judgment delivered this 27th day of October, 2021 in the presence of the appellant and in the absence of the respondent. B/C Neema Likuga present.

Right of appeal explained.


E.S Kisanya
JUDGE
27/10/2021