

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA
AT MUSOMA

LAND APPEAL NO. 5 OF 2021

JOHN SARYA MACHAGE APPELLANT

VERSUS

SIDO MARA 1ST RESPONDENT

SUBIA COURT BROKER 2ND RESPONDENT

JUSTINE KILawe 3RD RESPONDENT

***(Appeal from the decision of the District Land and Housing
Tribunal for Mara at Musoma in Application No. 45 of 2019)***

JUDGMENT

25th October and 26th November, 2021

KISANYA, J.:

This appeal originates from the judgment and decree of the District Land and Housing Tribunal for Mara at Musoma (trial tribunal) in Application No. 45 of 2019 in which the appellant herein was the applicant. He instituted a suit against the respondents for a declaration order that his house on plot No. 192, Block V, Mutex Area, Musoma (suit premises) was illegally sold to the 3rd respondent by the 2nd respondent under the instruction of the 1st respondent.

Brief facts leading to the suit lodged before the trial tribunal is that the appellant was the lawful owner of the suit premises. On 24th October, 2002, he entered into a loan agreement with the 1st respondent in which

he received a loan of Tshs. 5,000,000 from the latter. It was agreed the loan would be repaid within twelve months. As the appellant failed to pay part of the loan, the 1st respondent engaged the 2nd respondent to sell the suit premises. It was sold to the 3rd respondent. Believing that the sale was illegal, the appellant filed a case which led to this appeal.

During the trial, the appellant gave his oral testimony to support his case. On the other hand, one witness namely, Thomas Patrick Mgimba adduced evidence for the 1st respondent. He denied the appellant's claims. At the end of the day, the appellant's case was dismissed for want of merit. Not amused, the appellant has lodged the present appeal containing five grounds.

When the matter was called for hearing, the appellant appeared in person. On the other side, the 1st respondent was represented by Mr. Kitia Turoke, learned State Attorney while, the 2nd respondent was represented by her manager one, Mr. Shaban Ali Zaid. The hearing proceeded in the absence of the 3rd respondent who defaulted to appear without notice.

Before the hearing could proceed, I wanted to satisfy myself on the propriety of the proceedings of the trial tribunal, particular, the authenticity of the evidence adduced by both parties. Pursuant to the record, the learned trial chairman did not append his signature after

recording the oral testimonies given by the appellant and DW1 as required under Order VIII, Rule 5 of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC). Therefore, in addition to the grounds of appeal, I probed the parties to address the Court on that issue.

Having gone through the record and considering the submissions by the parties in response to the issue raised by this Court, I am of the view the issue pointed out by the Court is sufficient to dispose of this appeal. It gives rise to the question whether the proceedings of the trial tribunal were vitiated.

Being a lay person, the appellant had nothing to respond on the issue raised by the Court. On his part, Mr. Turoke conceded that the proceedings of the trial tribunal were tainted with the irregularity pointed out by this Court. Referring to the case of **Mohamed Hassan Omary Juma vs R**, Criminal Appeal No. 494 of 2019, CAT (unreported), he argued that the proceedings of the trial tribunal are a nullity for want of authenticity. Thus, he urged me to nullify the proceedings of the trial tribunal, quash and set aside the judgement and decree, and order a new hearing of the case *de novo*. Mr. Shaban supported the submission made by the learned State Attorney.

The issue of recording evidence is not covered by the Land Disputes Courts Act [Cap. 216, R.E 2019] (the LDCA) and its Regulation. Therefore, guided by section 51(2) of the LDCA, that issue is governed by the CPC. The relevant provision is Order XVIII, Rule 5 of the CPC which provides:

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."

The record in the case at hand shows that the learned trial chairman did not append his signature after recording the evidence adduced by the appellant and DW1. As rightly argued by Mr. Turoke, the said omission raises doubt on the authenticity of the evidence adduced before the trial tribunal. The trite law is that, failure by the trial magistrate or judge to append his or her signature after recording the evidence is an incurable irregularity. Apart from the case of **Mohamed Hassan Omary Juma (supra)**, this position was stated by the Court of Appeal in the case of **Masumbuko Makeleze @ Kosovo vs R**, Criminal Appeal No. 433 of 2017, CAT at Mwanza (unreported) where it was held:

*"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.

Upon considering that the irregularity pointed hereinabove has the effect of vitiating the proceedings and in view of the settled law, I agree with Mr. Turoke that, the proper recourse is to nullify and quash them and set aside the decision made thereon.

Given the circumstances, I exercise the revisionary powers vested in this Court, to quash the proceedings of the trial tribunal starting from the evidence of the appellant (PW1), and set aside the judgment and

decree made by the trial tribunal, as hereby do. On the way forward, I order that the case file be remitted to the trial tribunal for rehearing of the suit starting from the stage when the appellant adduced his evidence. Further to this, it is ordered the rehearing be conducted before another chairman and new set of assessors. I make no order as to costs because the appeal has been disposed of basing on the issue raised by the Court, *suo mottu*.

It is so ordered.

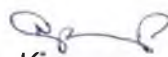
DATED at MUSOMA this 26th day of November, 2021.




E.S Kisanya
JUDGE

Court: Judgment delivered this 26th day of November, 2021 in the absence of the parties. BC Jovian Katundu present.

Right of appeal explained.


E. S. Kisanya
JUDGE
26/11/2021