

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB REGISTRY**

AT MOROGORO

LAND APPEAL NO. 10 OF 2021

**(Originating from Judgment & Decree in Land Application No. 99 of 2017,
of the District Land and Housing Tribunal for Morogoro, at Morogoro)**

TERESIA PAULO CHUMA APPELLANT

VERSUS

NYAMONGE KENYA MHENGA RESPONDENT

JUDGMENT

30th Dec, 2021 & 31st March, 2022

CHABA, J.

This is an appeal against the decision of the District Land and Housing Tribunal of Morogoro, at Morogoro (the District Tribunal). The background which gave rise to this appeal can be briefly summarised as follow; The respondent, Mr. Nyamonge Kenya Mhenga sued Ms. Teresia Paulo Chuma the appellant in the present appeal jointly with others who are not party to this appeal namely; Peter J. Maliba, Mr. Mokiwa and Mr. Seba over unsurveyed parcel of land measuring 39 by 25 paces situated at Mafisa Ward within Morogoro Municipality.

Records from the District Tribunal reveals further that, Peter J. Maliba without any claim of right trespassed the respondent's plot and sold it to the appellant who without diligence purchased it while the vendor had no right to sell. Mr. Mokiwa and Mr. Seba were joined as the third and fourth respondents at the District Tribunal only for the reason that they witnessed the sale agreement as a Suburb Chairman and

vendors' witness respectively. The respondent who was the applicant at the District Tribunal prayed the trial tribunal to award him the following reliefs; Declaration that he is the rightful owner of the disputed land and respondents at trial be declared as trespassers, eviction and demolition order against the second respondent (the appellant herein), damages to the tune of 2,000,000, costs of the suit and any other reliefs.

After full trial, the District Tribunal decided in favour of the applicant (the respondent herein) and declared him the rightful owner of the disputed land. Undaunted by the decision of the District Tribunal, she preferred an appeal to this Court based on the following grounds:

- 1) That, the proceedings of the Tribunal (District Land and Housing Tribunal for Morogoro) are irregular in that, no reason was recorded for the change of the Chairpersons during trial;
- 2) That, the honourable trial Tribunal erred in law in deciding the application without being clothed with the jurisdiction;
- 3) That, the Honourable trial Chairperson erred in law in deciding the application without involving assessors;
- 4) That, the Honourable Trial Chairperson erred in law for failure to consider that the appellant is a bonafide purchaser of the suit land;
- 5) That, the Trial Chairperson erred in law by not appending his signature at the end of each witness's testimony in the proceedings, and

6) That, the Trial Chairperson erred in law by pronouncing the judgment after three months has elapsed since the date of conclusion of such proceedings without assigning good reasons.

At the hearing of this appeal, the appellant was represented by Mr. Mandela Kisawani, while the respondent had the service of Mr. Jovin Manyama. At commencement of hearing, the counsel for the appellant, opted to drop the sixth ground and fully argued on the other five grounds.

Arguing in support of the first ground, the counsel for the appellant submitted that the case at the District Tribunal was tried by two Chairpersons, who heard two witnesses and another Chairperson took over on 25/03/2021. He referred O. XVIII, R. 10 (1) of the Civil Procedure Code [CAP. 33 R.E. 2019] (the CPC) which provides that the predecessor may take over and proceed from where the former ended. But in the records, it is unknown who took over the proceedings. For that anomaly, the evidence so recorded was improper.

On the second ground, Mr. Mandela argued that since the disputed areas was not properly described, therefore the District Tribunal had no jurisdiction to try the matter. He submitted that, the respondent in his application stated that the land in dispute is located at Msina Street, Mafisa Ward, Morogoro while during hearing, the applicant (AW1) testified that the land is situated at Kayenzi street, Mafisa Ward. Such confusion made the trial District Tribunal to become uncertain of the proper jurisdiction as the area is unsurveyed. He referred this Court to the case of **Shiqan Thanki and Others v. New Palace Hotel** [1972]

HCD 92 insisting that jurisdiction is statutory and the case of **Daniel Dagala Kanunda v. Masaka Ibeho and 4 others**, Land Appeal No. 26 of 2015, HCT Tabora where it was held that the trial District Tribunal had no jurisdiction to try the matter whose land location was not described.

As to the third ground, the counsel submitted that the trial District Tribunal contravened Section 23 (1) and (2) of the Land Disputes Courts Act [CAP. 216 R.E. 2019] (the Land Disputes Courts Act) when it gave its judgment without involving the assessors. He stated further that, the Chairperson documented that the opinion of assessors was missing for the reason that their tenure has expired. He cited section 23 (3) of the Land Disputes Courts Act noting that he is aware of the exception, but there must be cogent reasons, otherwise the decision thereof is void. He cited **Okola Ogai and Another v. Abala Msiku**, Land Appeal No. 62 of 2020 whereby the decision of the District Tribunal was declared void for being improperly constituted.

In respect of the fourth ground, the learned counsel submitted that so long as the sale agreement was witnessed by the Chairperson, Mr. Mohamedi Mokiwa, while Peter J. Maliba was acting for the respondent, then the appellant was a bonafide purchaser who deserved, under the surrounding circumstances, to be protected.

Submitting on the last ground, the counsel asserted that, on 29/03/2018 and 15/08/2018 the District Tribunal recorded the evidence of Nyamonge Kenya Mhenga (AW1) and Theresa Paul Chuma (DW2) without certifying at the foot of the respective testimonies evidence contrary to Order XVIII, Rule 5 of the CPC (supra) and thus authenticity

of the evidence of the said witnesses is doubtful. He cited the case of **Iringa International School v. Elizabeth Post**, Civil Appeal No. 155 of 2019 (unreported) to support his stance. He therefore, prayed that this appeal be allowed and costs be borne by the respondent.

In his reply submission, Mr Manyama argued the first and third grounds jointly. He submitted that the Chairperson proceeded with the hearing without assessors because the assessor's tenure's contract had been expired and the preceding Chairperson was transferred to another duty station. In that regard, reasons were clearly given by the Chairperson as required by the law. He added that, hearing of cases without assessors is permitted under section 23 (3) of the Land Disputes Courts Act (supra) under certain circumstances. So, in his view, there was no any anomaly committed by the District Tribunal. He distinguished the case of **Ogola** (supra) cited by the appellant's counsel on the basis that in **Ogola's** case no reasons were assigned while in the case at hand the trial Chairperson expressly gave the reasons for proceeding without assessors.

On the second ground of appeal, the learned counsel stressed that the District Tribunal had jurisdiction because the value of the property in dispute is Tshs. 4,000,000/= and it was within the pecuniary jurisdiction of the District Tribunal (Tshs. 3,000,000 – 300,000,000/=) under section 33 (2) of Land Dispute Act. Regarding the description of the landed property, he argued that the same was well established in paragraph 3 of the Application to be at Sina Street, Mafisa Ward in Morogoro while the 2nd, 3rd and 4th respondents at the trial did not dispute it. Indeed, they were aware and agreed to it.

Regarding the 4th ground, he submitted that it is true the respondent never concluded a sale agreement in respect of the land in dispute, and that he was the rightful owner but the crux of the dispute is whether Peter J. Maliba had all the powers to dispose the land in dispute on behalf of the respondent herein. He asserted further that since the transaction was undertaken under the auspice of contract, it must comply with section 10 of the Law of Contract Act [CAP. 345 R.E. 2019] (the Law of Contract).

Submitting further in respect of the 4th ground, the counsel for the respondent stressed that Peter J. Maliba had no any legal document authorizing him to sell the disputed land on behalf of the respondent. That being the case, the said agreement between Peter J. Maliba and Theresia Paulo Chuma was void for lack of consent. In that view, the District Tribunal was right to declare the respondent the rightful owner of the disputed land.

On the other hand, in his oral submission the counsel for the respondent conceded the fifth ground as submitted and argued by the learned counsel for the appellant. He agrees that the Chairperson failed to append his signature on the testimony recorded from some of witnesses and such act vitiated the proceedings of the trial District Tribunal. He was of the view that, the proper remedy in this circumstance, is for the Court to order retrial.

In his re-joinder, the counsel for the appellant reiterated his submission in chief and insisted that the appellant is a bonafide purchaser of the plot of land in dispute. He therefore, prayed this Court to allow his appeal and set aside the decision of the trial Tribunal.

Having carefully gone through the District Tribunal's records and further heard the rival submissions of both learned counsel in support of their position and the petition of appeal presented by the appellant before this Court, I proceed to determine whether this appeal has merit. I will consider grounds Nos. 2, 1, 3 & 5 respectively and leave ground No. 4. I will, deal with these grounds seriatim commencing with ground 2.

The gist of the appellant's complaints in the second ground of appeal is that the District Tribunal lacked jurisdiction to determine the dispute which is subject to this appeal. The reasons behind, according to him is that the disputed land was not sufficiently described to make the District Tribunal sure of its jurisdiction. The District Tribunal records reveals that both parties didn't dispute the location of the land in dispute. The variation of AW1's testimony from what was stated in paragraph 3 of the application (plaint), had nothing to do with the issues of jurisdiction, but rather with evaluation of evidence where the Court would consider the inconsistencies and resolve them in case parties disputes the location of the land in dispute.

Since the disputed land is situated within Mafinga Ward in the District of Morogoro and its value fall within the pecuniary jurisdiction of the District Tribunal under Section 33 (2) (a) of Land Dispute Courts Act (supra) I am of settled view that the District Tribunal had both geographical and pecuniary jurisdictions to determine the dispute presented by the applicant (the respondent herein). For the above reasons, I find that the second ground has no merit.

On the first ground, the appellant complained that the Chairman didn't assign reasons for the change of the Chairpersons while in the third ground he asserted that the Chairman decided the application without assessors. I have gone through the records of the District Tribunal and found that the trial Chairman notified parties that he presided over the trial Tribunal's proceedings because his predecessor had been transferred to another duty station. In that regard, this ground must fail as the same is devoid of merit. Regarding the third ground, the District Tribunal's records reveals that the Chairman opted to proceed without assessors because their tenure had expired. Since hearing without assessors is permitted under section 23 (3) of the Land Disputes Courts Act (supra) and the trial Chairman assigned reasons why he opted to proceed in their absence, I find the third ground of appeal to have no merit as well.

I now turn to the last ground of appeal. In this ground, both parties conceded that the trial Chairperson erred in law by not appending his signature at the end of witness's testimony. Upon going through the record of the District Tribunal, I noted that it is true that the Chairman didn't append his signature on the testimony recorded from some of the witnesses as rightly submitted by learned counsel for both parties. Although the whole evidence regarding ownership of the land in disputes adduced at trial Tribunal suggests and appears to be in favour of the respondent, it is a trite law that without the signature of a Chairperson, its authenticity would be put into doubt. It has to be noted that the objective of requiring the trial Judge or Magistrate or even the Chairperson to sign the evidence of each witness in term of Order XVIII, Rule 5 of the CPC (supra) is to authenticate the recorded evidence. This

position of law has been emphasized in several cases including **Unilever Tea Tanzania Limited v. Davis Paulo Chaula**, Civil Appeal No. 290 of 2019 and **Chacha s/o Ghati @ Magige v. R**, Criminal Appeal No. 406 of 2017 (All unreported).

The effect of failure to append signature in the proceedings was stated in **Yohana Mussa Makubi v. R**, Criminal Appeal No. 556 of 2015 (unreported), where the Court of Appeal of Tanzania held that:

*"In light of what the Court said in **WALII ABDALLA KIBWITA's** and the meaning of what is authentic can it be safely vouched that the evidence recorded by the trial Judge without appending her signature made the proceedings legally valid? The answer is in the negative. We are fortified in that account because, in the absence of signature of trial Judge at the end of testimony of every witness: **firstly**, it is impossible to authenticate who took down such evidence. **Secondly**, if the maker is unknown then, the authenticity of such evidence is put to question as raised by the appellant's counsel. **Thirdly**, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; **Fourthly**, such evidence does not constitute part of the record of trial and the record before us."*

From the above holding of the Apex Court of our land, it should be noted that failure to append the signature at the end of the testimony of each witness is a procedural irregularity that require intervention of this Court.

I am alive of the provision of Section 45 of Land Disputes Courts Act (supra) which states inter-alia that:

"No decision or order of a Ward Tribunal or District Land and 4 Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing... unless the error or omission occasioned failure of justice"

I however, find that the omission of signature after the witnesses' testimony is not remediable under Section 45 of Land Disputes Courts Act (supra). I say so because in the case of **Iringa International School v. Elizabeth Post**, Civil Appeal No. 155 of 2019 the Court underscored the remedy available where a Judge or Magistrate failed to append his or her signature after the testimony of each witness. The Court held that:

"Failure by the magistrate or judge to append signature to the evidence of each witness is fatal and vitiates the proceedings of the court".

In the light of the above quoted decisions and the forgoing reasons, I find that failure by the Chairperson to append his signature at the end of the testimony of each witness vitiated the proceedings before the trial District Tribunal. That being the position of law, I find this ground to have merit.

Basing on the above settled position of the law, I allow the appeal and proceed to quash the proceedings of the trial District Tribunal,

Judgment and the Decree delivered on 14th day of September, 2021 and set aside all orders issued by the trial District Tribunal. I order the matter to be remitted at the District Tribunal to be tried *de novo* before another Chairperson.

It is so ordered.

DATED at MOROGORO this 31st day of March, 2022.



M. J. Chaba

Judge

31/03/2022

COURT:

Judgement delivered at my Hand and Seal of this Court in Chambers this 31st day of March, 2022 in the presence of the appellant and respondent, and their learned counsel namely; Mr. Mandela Kisawani and Mr. Jovin Manyama.



M. J. Chaba

Judge

31/03/2022

Rights of the parties fully explained.



M. J. Chaba

Judge

31/03/2022