IN THE HIGH COURT OF TANZANIA

SHINYANGA DISTRICT REGISTRY

AT SHINYANGA

LAND APPEAL NO. 91 OF 2021

MAYELELO BUBINZA.....APPELLANT

VERSUS

JILUHYA MGAYA .....1st RESPONDENT

MAHONA NJIGE @NGALIGA .....2nd RESPONDENT

[Appeal from the decision of the District Land and Housing Tribunal of Shinyanga.]

(Hon. C. Hatson, Chairman.)

dated the 5th day of November, 2021
in
Land Application No. 49 of 2019

JUDGMENT

16 & 22nd August, 2022.

S.M. KULITA, J.

This is an appeal from the District Land and Housing Tribunal of Shinyanga. The story behind this appeal in a nut shell is that, the Respondents herein namely Jiluhya Mgaya (1st Respondent) and Mahona Njige @Ngaliga (2nd

Respondent) at the District Land and Housing Tribunal sued the Appellant herein one Mayelelo Bubinza over 37 acres of land situated at Nyamikoma Suburb in Buchambi Village, in Kishapu District. In their application at the trial tribunal, the Respondents claimed that the said land belonged to the 1st Respondent who had acquired the same through inheritance from his late father one Mgaya Madama in 1967 upon his death. They added that the said 1st Respondent used the said land peacefully from that 1967 up to 1987, when he left it under the care of his sister's son, Mayelelo Bubinza, the Appellant herein and he (1st Respondent) went to live at Ihenze village in Kahama District.

It is also averred that in 2019 the said 1st Respondent decided to sell the said suit land to the 2nd Respondent at the tune of Tsh. 9,700,000/=. The said pierce of land having been sold to the 2nd Respondent by the 1st Respondent, the Appellant prevented the 2nd Respondent to occupy and use it for the reason that he is the lawful owner of the premise. That led the Respondents herein to institute the Land Application No. 49 of 2019 at District Land and Housing Tribunal of Shinyanga.

On the other hand the Appellant herein alleged that the suit land belongs to him. That he purchased it from somebody Makala in 1972 before Operation

Vijiji at the tune of Tsh. 7/=. It is the Appellant's assertion that, since then he has been using the same for cultivation and grazing purposes. He averred that, the 1st Respondent had never left any piece of land to be cared by him. He further alleged that the 1st Respondent's father namely Mgaya Madama, before he left Nyamikoma in 1978 he had sold his land to one Charles Pondi whose land is located nearby the suit land which is his (Appellant's) land.

Upon hearing the matter, the trial tribunal found the Respondents the rightful owners of the disputed land, hence allowed their application. That led the Appellant herein to lodge this appeal, basing on the following four grounds; **One**, that, in its decision the trial court relied on false document, as there was no family meeting that was conducted and concluded on the sale of the suit premise. **Two**, that, the defense evidence was not considered by the trial court. **Three,** that, the trial court was wrong for not considering the legality of the suit in terms of the cause of action that the Appellant has been owning and using the suit land for over 40 (forty) years till 2019. **Four,** that the learned Chairman failed to record some evidence and to admit some exhibits which were necessary to prove the ownership of the suit premise by the Appellant.

On the 16th day of August, 2022 the matter came for hearing. Both parties appeared in person.

I carefully went through the entire records as a means towards analyzing the grounds of appeal that have been raised. The records transpire that the Applicant's case consists a total number of 8 (eight) witnesses while the Defense (Respondent's) case comprises 4 (four) witnesses.

A notable issue that is glaring upon the testimonies of some witnesses in the original case is that, the Chairman had not been appending his signature after finishing to take down their testimonies. From the original record, I have noted this in the proceedings involving the testimonies of PW3, PW4 and PW5 dated 11/12/2021, to mention a few. That is contrary to **Order XVIII Rule 5 of the Civil Procedure Code [Cap 33 RE 2019]** of which I hereby reproduce it herein below for easy of reference;

> *"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" ***(emphasis is mine)***

Generally proceedings of the court should be authentic and not tainted. While confronted with the same scenario in **Yohana Musa Makubi vs. R, Criminal Appeal No. 556 of 2015** (unreported) the Court of Appeal held;

"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....."* ***(emphasis is mine)***

For the foregoing reasons, the Court of Appeal went on to hold as follows on the failure of the trial judge to append his or her signature after recording the evidence of each witness: -

"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".* ***(emphasis is mine)***

The above quoted principle applies to both criminal and civil cases. As the Appellant seeks to challenge the trial tribunal on the proper evaluation of the evidence that had been adduced before it, in my view, the appeal cannot be

determined in the circumstances where the authenticity of the said evidence adduced during the trial is unsafe.

From the records I have also noted that in taking the testimonies of the witnesses the trial Chairman has been recording the answers just in an ordinary form from the questions that have been asked. That is not a proper means of recording the evidence in the case file. The evidence must be recorded in such a way that each person who reads the record will be in a position to understand what the statement/evidence means, and which question led to the said statement/evidence being made, though the said question is not recoded.

I can see in the record, the trial Chairman noted down the following replies from the Witnesses in the Examination in Chief, Cross Examination and Questions from Assessors, to mention a few; *"walikuwa watu watatu", "Mtu na mjomba wake", "Itendele", "Kipacha", "Katani za Jiluwa", "Kijani zilikuwa za kwake na alikuwa anakata yeye", "Ndio tuligawana", "Nilizaliwa katika eneo hilo".*

Apart from the one who has recorded the evidence, such statements cannot be easily understood by another person like successor Chairman, or the

Judge who entertains the appeal or any other person who reads them. In making analysis on the grounds of appeal that have been submitted, this being the Court of Records, cannot be in a position to make analysis basing on such statement whose origin is not known. Even the trial Chairman himself, as a human being, cannot on future days, certainly remember as from which questions the said replies by the witnesses have been answered.

Order XVIII, Rule 5 of the Civil Procedure Code [Cap 33 RE 2019] cited above provides for the procedures in which the evidence should be taken by the court. It provides that it should be in a narrative form. The fact that recording of evidence has its specific procedure as per the above cited provision, the trial Chairman ought to have recorded the witnesses' testimonies in a narrative form, that it should be recoded in a form of story that anybody can read and understand it. The statements/testimonies recorded in a narrated form can even be easily for the one who reads it to notice the question from which the said statement/answer has been extracted from.

For the foregoing reasons, I shall not dwell into determining the Appellant's grounds of appeal.

In the event, I am inclined to exercise the revisionary powers vested to this Court under **Section 44(1)(b) of the Magistrate Court Act [Cap 11 RE 2019]**. In doing so, I nullify the proceedings of the trial Tribunal from those dated 12th October, 2020. I also quash and set aside the judgment and decree thereon. Consequently, I hereby order **retrial** of the case from the proceedings dated 12th October, 2020. For the interest of justice, it is ordered that the matter be heard before another Chairman with a new set of Assessors. Having considered the circumstances of the case, I make no order as to costs

S.M. KULITA
JUDGE
22/08/2022

DATED at **Shinyanga** this 22nd day of August, 2022.

S.M. KULITA
JUDGE
22/08/2022