IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO. 21 OF 2022

(Arising from the decision of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 36 of 2016)

CHACHA WAMBURA ..... APPELLANT

VERSUS

NYIRABU GETUNGUYE ..... RESPONDENT

JUDGMENT

26th & 26th September 2022

F.H. MAHIMBALI, J.:

The respondent herein first filed an application no. 36 of 2016 before the District Land and Housing Tribunal for Mara at Musoma (the DLHT) against the appellant. She claimed the appellant trespassed into her land and turned it to be his. The appellant contested the application and at the conclusion the DLHT delivered judgment in favour of the respondent as the rightful owner of the disputed land.

Originally, Hon Kaare, learned trial chairperson (DLHT) in his ambiguous judgment dated 28th April, 2017 had declared the appellant as lawful owner but also stating that respondent's evidence as more

convincing and carrying more weight than the appellant's evidence. This made Hon. M. Moyo, SRM, (Ext. Juris) to quash the judgment of the trial tribunal and ordered re-composition of the judgments so as to clear the ambiguity and comply with the dictate of the law.

In the re-composed judgment (Hon. Kitungulu, Chairperson), declared the respondent herein as the rightful owner of the disputed land. Thus, the basis of this appeal. For the reasons I will explain latter, I wish not to reproduce the said grounds of appeal by the appellant.

During the hearing of this appeal, the respondent appeared in person whereas the appellant was represented by Mr. John Manyama, learned advocate.

While reading the trial tribunal's proceedings, I noticed two apparent errors: firstly, the re-composed judgment being authored by Hon. Kitunguru, Chairperson (Successor Chairperson) instead of Mr. Kaare, trial chairperson. There are no reasons stated by the successor chairperson as to why he succeeded the case and at that stage. Secondly, that the trial chairperson did not append his signature after recording the evidence of the witnesses for both parties.

With these pertinent legal issues which if established vitiate proceedings, I asked the parties to address the court whether the

irregularities contravened **Order XVIII, Rule 10 (1) and Order XVIII Rule 5** of the Civil Procedure Code, Cap 33 [R.E 2019] (the CPC) and the effect of the said irregularities.

On his part, Mr. John Manyama, learned advocate for the respondent without referring to a particular law or any guiding authority, sharply conceded on the issues and submitted that the proceedings are irregular as per law and thus nullity. He prayed that this Court to nullify the proceedings and the decisions thereof.

On his part, the respondent had nothing material to address. He just submitted that if that is the position of the law, then this Court has the right course to take.

Considering the trial tribunal's records and submissions made by both parties, I am of the view that the issues on authenticity of the evidence adduced by the witnesses for both parties and the successor chairperson taking up the matter without assigning reasons are sufficient dispose of this appeal.

I wish first to state at the outset that, the law is settled regarding the succession of judges and magistrates/ chairpersons. It gives them power to deal with the evidence taken before another judge or magistrate where the predecessor judge or magistrate is prevented by

reason of death, transfer or other cause from concluding the trial of a suit. For clarity, Order XVIII rule 10(1) of the CPC provides as follows:

> *"Where a judge or magistrate is prevented by* ***death, transfer or other cause from concluding the trial of a suit,*** *his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."* [Emphasis added].

On this stand, see Court of appeal's decisions in National Microfinance **Bank v. Augustino Wesaka Gidimara T/A Builders Paints & GeneralEnterprises**, Civil Appeal No. 74 of 2016 (unreported) the Court quoted with approval its decision in **M/S Georges Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) at pages 5-6; where it was held as follows with regard to the above provision:

> *"The general premise that can be from the above provision is that once the trial o f a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that The provision cited above imposes upon a successor judge or magistrate an obbligation to put on record why he/she has to take up a case that is partly heard by another. There are number o f reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as*

suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility.

Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court o flaw. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised." [Emphasis added].

A similar view was also considered in **Fahari Bottlers Ltd and Another v. the Registrar of Companies and Another**, Civil Revision No. I of 1999 and **Kajoka Masanga v. Attorney General and Another**, Civil Appeal No. 153 of2016 (both unreported). Therefore, in the case at hand, it was unjustifiable by Mr. Kitungulu, learned chairperson to take over the matter and re-composing of the judgment instead of Mr. Kaare. He must have assigned reasons for doing so, if Mr. Kaare was legally prevented from doing so. Assuming that Mr. Kaare had been transferred, with re-composing of judgment, the tribunal record would have been forwarded to where he is for compliance.

As regards to the second legal anomaly, the DHLT exercises its duty in accordance with the Land Disputes Courts [Cap. 216, R.E. 2019) (the LDCA) and the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003. However, both legislations do not have

provisions regarding the manner of recording of evidence. Therefore, in terms of section 51 (2) of the LDCA, the CPC applies. Now, looking at the CPC, the procedure for recording of evidence is provided for under **Order XVIII, R. 5** which is reproduced hereunder:

> *"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 added].

The said provision makes clear that, the evidence of each witness must be taken down in writing by or under the personal direction of the judge or magistrate in a narrative and the judge or magistrate is required to sign the evidence of each witness. The provision is coached in mandatory forms. Thus, it must be complied with.

The rationale requiring the trial judge or magistrate to sign the evidence of each witness is to authenticate the recorded evidence. This position was underscored in **Yohana Musa Makubi vs R,** Criminal Appeal No. 556 of 2015 when 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."

From the above position mentioned, failure by the trial judge or magistrate to append his/her signature after recording the evidence is fatal to the proceedings. See the case of **Joseph Elisha vs Tanzania Postal Bank,** Civil Appeal No. 157 of 2019 CAT at Iringa.

Reverting to the case at hand, it is evidenced through the trial tribunal's proceedings that the learned trial chairperson did not append his signature after recording the evidence of PW1, PW2, DW1, DW2 and DW1. Therefore, in the light of the above decision, the authenticity of the evidence adduced during the trial is at issue. The omission by the trial chairperson to append his signature after recording the evidence of the witnesses is an incurable irregularity. Therefore, the proceedings of the trial Tribunal from 24th November, 2016 when PW1 started to adduce his evidence is a nullity. It also affected the judgment and decree thereon.

For the foregoing reasons, I shall not dwell into determining other grounds of appeal.

In the event, I am inclined to exercise the revisionary powers vested in this Court as hereby do, nullify the proceedings the trial Tribunal starting from 24th November, 2016, quash and set aside the

judgment and decree thereon. Consequently, I order a retrial of the case starting from the proceedings of 24th November, 2016. For the interest of justice, it is ordered the matter be heard before another chairman and a different set of assessors. Considering the issue that dispose the case has been raised by the Court ***suo moto***, I make no order as to costs.

DATED at MUSOMA this 26th day of September, 2022.

F.H. Mahimbali

JUDGE

Court: Judgment delivered 19th day of September, 2022 in the presence of appellant present in person, Mr. John Manyama advocate for the respondent and Mr. Gidion Mugoa, RMA.

Right of appeal explained.

F. H. Mahimbali

JUDGE