

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA

LAND APPEAL NO. 104 OF 2021

(Arising from decision of the Housing Tribunal for Mara at Musoma Land Application No. 26 of 2016)

ISRAEL RYANA

(Probate Administrator of the

Estate of the Late Ryana Mhoya Kanza) **APPELLANT**

VERSUS

MUTOKA SAGARYA.....1ST RESPONDENT

KASUSU SAGARYA.....2ND RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

This is an appeal against the judgment and decree of the District Land and Housing Tribunal (DLHT) for Mara at Musoma in Land Application No. 26 of 2016.

The appellant, Israel Ryana (administrator of the estates of the late Ryana Mhoya Kanza) sued the respondents, Mutoka Sagarya and Kasusu Sagarya for trespassing into his father's land which is located at Mwikoro village Kigumu hamlet within the district of Butiama in Mara region. The appellant further stated that the suit land is measuring 50 X 304 meters.

It was the appellant's evidence before the trial tribunal that his late father acquired the suit land in 1974 during vijiji operation scheme and thereafter he continued using it until when he died. He said that after Mhoya's death, his family continued to use the land for cultivation. He further said that the late Ryana Mhoya was buried in the suit premises. During cross examination, the appellant said that Ryana Mhoya died in 1974.

To supplement his evidence, the appellant called other two witnesses namely, Wambura Sarabanja (PW2) and Juma Kili (PW3).

In contrast, the respondents vehemently disputed the appellant's claims. 2nd respondent, Kasusu Sagarya who stood as DW1 told the trial tribunal that the suit land is her property. She said that her late husband Mgulu Mhoya bought it from Wambura Sarabange. She proceeded that she and her late husband continued to use the land peacefully until when her husband passed away. Her testimony was supported by 1st respondent Matoka Sagaya (DW2) and Wiliamu Byasiku Ndege (DW3).

In the end, the trial Chairman was convinced by the evidence brought by the respondents. He thus entered judgment in favour of the respondents.

The appellant was not satisfied with the findings and order of the trial tribunal hence appealed to this court. He filed a petition of appeal containing the following grounds;

- 1. That, the trial tribunal chairman erred in law when recorded the witness evidence without appending his signature at the end of each witness' testimony**
- 2. That, the trial tribunal's successor chairman erred in law when failed to assign reason for taking over the matter to its finality while the prosecution case was heard by another chairman.**
- 3. That the trial tribunal erred in law by making the decision basing on evidence which was obtained after visiting the locus in quo while the proceedings do not reflect the visit at the locus in quo**
- 4. That the trial tribunal erred in law and fact for deciding the matter in dispute in favour of the respondent whose evidence was tainted with contradictions while the appellant's case before the trial tribunal was proved to the balance of probabilities.**
- 5. That the trial tribunal erred in law and fact for delivering the case in favour of respondent while the 2nd respondent failed**

to avail all required elements for the defence of adverse possession to stand as well the trial tribunal did not discuss all elements of for adverse possession principle to stand in connection to the available evidence.

6. That the trial tribunal erred in law and fact by deciding in favour of the respondents while the appellant's evidence was watertight comparing to respondent's evidence which was weak.

At the hearing of this appeal, the appellant was represented by Maula Tweve, learned advocate whereas the respondents appeared in person, unrepresented.

At the outset Maula Tweve, indicated that she would combine the 4th, 5th and 6th grounds and argue them conjointly.

The learned appellant's counsel commenced with 1st ground which challenges the tribunal's failure to append signature on the witnesses' testimony. She contended that is a legal requirement that after taking a witness' testimony the chairman should sign. She continued that in this case this was not done as all the witnesses' testimonies were not signed. The counsel stressed that this was in contravention of Order XVIII rule 5 of the

CPC. **She also referred the court to the case of Joseph Elisha vs Tanzania Postal Bank**, Civil Appeal No. 157 of 2019, CAT at Iringa at page 7 to bolster her argument. The counsel concluded that failure to authenticate the testimony is fatal.

On the 2nd ground, the counsel submitted that the suit was heard by two Chairmen chairmen. She expounded that Hon. Kaare started and later on 08/05/2019 Kitungulu took over before Hon. Makombe succeeded Kitungulu on 17/09/2021. Maula argued that it is a legal requirement that where the adjudicator changes, reasons should be provided. To augment her position, the counsel referred to Order XVII rule 10(1) of the CPC and the case of trial **Inter-Consult Limited vs Mrs Nora Kassanga**, Civil Appeal No. 79 of 2015, CAT at Dar es Salaam.

Submitting on the 3rd ground, Maula lamented that the evidence obtained at the locus in quo was not recorded in the proceedings. In addition. it was her submission that the trial chairman took into account matters which were not testified on. For example, in the judgment, the chairman held that there are buildings in the suit premises. Further, Maula submitted that at page 5 of the judgment, it is stated that there was resurveying and reallocation of the plots whereas respondents testified that they purchased the suit land from one Wambura. While citing the case of **Shija Sosoma vs DPP**, Criminal

Appeal No. 327 of 2017, CAT at Mbeya at page 14, the appellant's counsel submitted that inclusion of matters not born from evidence is incurable.

With regard to 4th, 5th and 6th grounds, the counsel submitted that the Chairman decided the case in total disregard of the appellant's evidence. She complained that the chairman admitted that the respondents had no any documents to prove the case yet he decided in their favour. The counsel continued that the Chairman banked on adverse possession principle while it was inapplicable in the circumstances of the case in that the respondents said that they purchased the suit land.

In conclusion, the counsel prayed the court to nullify the proceedings and quash decision of the trial tribunal, order the matter to start afresh before a different chairman because the chairman took into account issues which were not in evidence and cost of the case to be borne by the respondents.

1st respondent, being a layperson did not much to submit. She prayed the court consider her reply to petition of appeal and finally dismiss the appeal. She recapitulated that there are buildings in the suit premises and the 2nd respondent is living therein.

Having gone through the record, submissions and ground of appeal, I am opined that this appeal can be disposed of on one ground namely, failure to append signature at the end of witness' testimony.

Without further ado, I agree with the appellant's counsel that the evidence of all witnesses was not authenticated. All the three plaintiff's witnesses testified before Hon. Kitungulu whilst the defendants' witnesses' evidence was recorded by Hon. Makombe. Coincidentally, both chairmen committed similar fault. Both plaintiff's and defendant's evidence suffers the same irregularity as the trial Chairmen were not signing at the end of witness' testimony.

The DHLT exercises its duty in accordance with the Land Disputes Courts Act [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 mode of recording the evidence. Therefore, in terms of section 51 (2) of the LDCA, the Civil Procedure Code (CPC) applies. Now, looking at the CPC, the procedure for recording 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."

The said provision makes it 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. The judge or magistrate is required to sign the evidence of each witness. The provision is couched in mandatory form. Thus, it must be complied with.

The rationale of 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, it goes without say that failure by the trial judge or magistrate to append his/her signature after recording the evidence is

fatal and therefore necessarily vitiates the proceedings. See also the case of **Joseph Elisha vs Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 CAT at Iringa.

Reverting back to the case at hand, it is evident that throughout the trial proceedings the learned trial chairmen did not append signatures after recording the evidence of PW1, PW2, PW3, DW1, DW2, and DW3. Thus, in the light of the above decision, the authenticity of the evidence adduced during the trial is questionable. The omission by the trial chairmen to append his signature after recording the evidence of the witnesses is an incurable irregularity.

In the event, I nullify the proceedings starting from the testimony PW1 Israel Ryana to the conclusion of the case. Consequently, I quash the judgment and set aside the decree as they resulted from nullity proceedings. As such, I order retrial of the matter. Since the error on which the appeal has been disposed of was committed by the trial tribunal, I order each party to bear its own costs. Furthermore, I have noted that at one time Hon. Kitungulu recused from this case. As such, for the interest of justice, I order the retrial to be conducted before another chairman other than Hon. Kitungulu.

It is ordered

The right of appeal is explained




A.A. Mbagwa

JUDGE

13/10/2022

Court: Judgment has been delivered in the presence 1st respondent and in absence of the appellant and 2nd respondent this 13th day of October, 2022.


A.A. Mbagwa

JUDGE

13/10/2022