

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA - SUB REGISTRY**

**AT MUSOMA**

**LAND APPEAL NO 72 OF 2021**

*(Arising from Land Case No. 22 of 2018 before District Land and Housing*

*Tribunal for Mara at Musoma)*

**CHACHA WAMBURA ..... 1<sup>ST</sup> APPELLANT**  
**MKAMI MOHONO ..... 2<sup>ND</sup> APPELLANT**  
**CHARLES MAKENE ..... 3<sup>RD</sup> APPELLANT**  
**CHARLES BHOKE.....4<sup>TH</sup> APPELLANT**  
**MUSYOKA NYANTORI ..... 5<sup>TH</sup> APPELLANT**

***VERSUS***

**THE REGISTERED TRUSTEES OF THE**

**SEVENTH ADVENTIST CHURCH ..... RESPONDENT**

**JUDGMENT**

15<sup>th</sup> and 25<sup>th</sup> February, 2022

**F.H. MAHIMBALI, J.:**

Following the judgment of the District Land and Housing Tribunal of Musoma in Land case No. 22 of 2018, the appellants are dissatisfied with the findings of the DLHT and are thus challenging that decision basing on five grounds of appeal, namely: -

1. That, the trial Honourable Chairman erred in law and fact to rely on

the minutes of the village council which were not signed by the participants or members of the village general assembly meeting nor having village official seal and hence its authenticity is doubtful.

2. That the trial Honourable Chairman faulted in his findings for failure to notice that Samwel Makene, Mkami Mhono and Charles Bhoke who were allocated land by village land allocation committee before coming into Operation of the Village Act [Cap 114 R.E 2002] were confirmed
3. That, the trial Honourable Chairman faulted in his finding for failure to notice that the respondent being non-village organization, the Kebesongo Village Council could not have allocated the land to the respondent without recommendation and approval by the Commissioner for Lands.
4. That, the trial Honourable Chairman failed to evaluate the evidence on record and as a result he wrongly reached in his findings of declaring the respondent as the lawful owner of the disputed land.
5. That, the respondent's witnesses were not credible to be believed by the Court as they appeared to give testimony in absence of the permission by the registered trustees of the respondent and relied on

false and fabricated minutes of Kebassongo Village Council Meeting.

6. That, the appellants proved their case on balance of probability and hence the Court ought to have declared them as lawful owners of disputed land.

On these grounds of appeal, the appellant prayed that his appeal be allowed with costs. The trial tribunal's judgement be reversed and in its place the appellants be declared lawful owners of the disputed land.

During the hearing of the said appeal, all the appellants were enjoying the legal services of Mr. Cosmas Tuthuru, learned advocate whereas the respondent was being represented by Mr. Roberth Neophitus, also learned advocate.

Arguing in support of his appeal, Mr. Cosmas Tuthuru submitted that this appeal has a total of six of grounds of appeal. He argued them as follows.

With the first ground of appeal, he submitted that reliance on exhibit P1 was not proper as first, it was secondary document and that its authenticity is questionable. He made reference to this court to the case of ... **Jesa vs Aripia Zonta** (1973) TLR 34 which insisted for use of primary evidence/ the original record in giving evidence. Otherwise, there ought to

have been official seal of the village council. See section 26 (2) of Local Government (District Authorized), Cap 287 R. E. 2019 on the validity of village council.

On the second ground of appeal, he submitted that the trial chairperson misdirected himself when he failed to consider the evidence of DW2, DW4 and DW5 who testified that they had acquired the said land before the coming into force of the village Land Act (see section 16 of the village Land Act). Mr. Samwel Makela established through D.4 exhibit that he acquired the said land prior to the coming into force of the current Village Act. The evidence was not in that support

With the third ground of appeal, his argument has been this that the respondent being registered trustees could not have acquired land by village land council without recommendation and approval by the commissioner for lands (see section 17 (2) of the Village Land Act). As the respondent is a non-village organization, their allocation of land by the village council is only effective and legal upon approval and certification by the Commissioner for Lands. Thus, exhibit P1 is not legally having a force of law.

With ground no 4, he argued together with grounds sections 5 and 6 that the trial chairperson failed to apprehend the facts and evidence of the case. He submitted that as per tribunal's proceeding at page 7, PW1 failed to establish that he was legally mandated to testify on behalf of the respondent. That DW8 established that he was member of the village council and that the application by the respondent was not dismissed. He referred this Court to see the cross examination at the page 26 of the typed proceedings. PW2 Daniel testified that he was chairperson in 2015 (page 8) of the tribunal proceedings. On that basis, he prayed that this appeal be allowed with costs as per his submission.

When prompted by the court on authenticity of the trial tribunal's records for lack of appended signature at the end of every evidence of the witness, he quickly submitted it is true that there is no signature appended by the trial chairperson at the end of every witness's evidence. As there are numerous decisions of the Court of Appeal of Tanzania on that and he being satisfied that all the testimony as per trial tribunal records were not signed by the chairperson, he submitted that the irregularity is fatal and incurable. It is upon this Court to nullify all the proceedings of the trial tribunal.

In his response, Mr. Roberth learned advocate for the respondent, first agreed that all the testimonies taken by the trial tribunal are not signed by the trial chairperson. In his understanding that is fatal. As what is the way forward, he left it for the Court to decide and direct.

Nevertheless, he made the following reply as far as this appeal is concerned.

With the first ground of appeal, he submitted that the trial tribunal properly relied on the authenticity of P1 exhibit (minutes of the village council). He clarified that as the said minutes were not objected its admission before the trial tribunal, it is legally competent document to be relied upon. It is undisputed that the respondent was dully allocated the said land by the village assembly. Therefore, the respondent was legally justified to hold the said land. The said minutes were thus not secondary evidence as argued. Even if the same was secondary, it complied with the law. The cited case by the learned counsel is inapplicable as secondary evidence is also admissible as per law.

With the second ground of appeal, that Chacha Wambura, Mkani Mihono and Charles Makene were allocated the said land by the village land council, he submitted that is not true considering the evidence on

page 5 and 6 of the typed judgment. However, considering what they testified in the trial tribunal, it is not vivid how the appellants were allocated the said land by the appropriate authority by then prior to coming into force of the village Land Act.

On the third ground of appeal, he replied that the procedure of allocation of village land is clearly stipulated by the Village Land Act. First, it is the village authority which is mandated. However, in the current case, just prior to the legal compliance of approval of the land ownership, this dispute arose. Therefore, at that particular juncture, there was land dispute and ought to be determined as rightly done.

Lastly, on grounds no 4, 5 and 6 it is the submission of Mr. Roberth that as per page 20 of the typed proceedings, there is no proof of what is asserted by DW8 that the application of the respondent was dismissed by the village council. That PW2 had testified what he knew and was rightly considered by the trial chairperson. The argument that the respondent's witnesses were not permitted to testify on its behalf is not a legal requirement. He clarified that a competent witness is one who is possessed with sufficient knowledge on the material facts of the issue for court or tribunal or body's determination. So long as they were not disqualified,

they were competent to testify on what they knew. With this submission, he prayed that this appeal be dismissed with costs.

In his rejoinder submission, Mr. Cosmas Tuthuru didn't bother to submit anything as regards to the submission by Mr. Roberth on the merit of the appeal but relying on the issue raised by the Court on the authenticity of the trial tribunal's proceedings he reiterated that following the fact that there is no appended signature at the end of very witnesses' testimony, he was of the view this appeal also emanates from a nullity proceedings, thus the same is unworthy of consideration.

Considering the legal issue on the authenticity of the DLHT's proceedings in respect of Land case No. 22 of 2018 which is the basis of this appeal, I have decided to address this point exhaustively.

Although the laws governing proceedings before the DLHT happen to be silent on the requirement of the evidence being signed, it is still a considered view of this Court as rightly directed by the Court of Appeal in the case of **Iringa International School Vs. Elizabeth Post**, Civil Appeal No. 155 of 2019 that for purposes of vouching the authenticity, correctness and providing safe guards of the proceedings, the evidence of each witness need to be signed by the trial magistrate, Arbitrator, judge or



chairperson for this matter. On this, inspiration is drawn from the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) and the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) wherein it is mandatorily provided that the evidence of each witness must be signed. Order XVIII rule 5 of the CPC provides as follows:

*"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 supplied]

Further, the Court of Appeal in **Iringa International School Vs. Elizabeth Post** (supra) made reference under section 210(1) of the CPA which provides that:

*"S, 210(1) In trials other than trials under section 213, by or before a Magistrate, the evidence of the witnesses shall be recorded in the following manner-(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and **shall be signed by him and shall form part of the record**"*[Emphasis supplied].

In a countless number of cases **including Yohana Mussa Makubi and Another vs Republic**, Criminal Appeal No. 556 of 2015, **Sabasaba Enos @ Joseph vs Republic**, Criminal Appeal No. 411 of 2017, **Chachas/o Ghati @ Magige vs Republic**, Criminal Appeal No. 406 of 2017 and **Mhajiri Uladi & Another vs Republic**, Criminal Appeal No. 234 of 2020, **North Mara Gold Mine Ltd Vs. Isaac Sultan**, Civil Appeal No. 458 of 2020 (all unreported), the Court of Appeal has insisted that a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings. In Yohana Makubi and Another (supra) the Court held, among other things, that:

*"in the absence of the signature of the trial [Judge] at the end of the 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 questions as raised by the appellants' 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"*

For reasons that the witnesses before the DLHT gave evidence without the Chairman appending his signature at the end of the testimony

of every witness and also on the above stated position of the law, I am of the considered view that the omission vitiated the proceedings of the DLHT. Consequently, in the exercise of the powers of revision conferred in the Court by section 43 (1) of the LDCA, I hereby quash the proceedings both of the DLHT. I also set aside the award of the DLHT as well. Lastly, I order that the matter be remitted to the DLHT for the land dispute in question to be heard de novo before another Chairperson.

Having addressed this issue on authenticity to that much, I have no need to labour on the other grounds of as preferred by the appellant. This is because the legal issue has sufficiently been capable of disposing of this appeal.

As this issue has been raised by the Court and dully concurred by both parties' learned counsel, I make no order as to costs.

It is so ordered.

DATED at MUSOMA this 25<sup>th</sup> day of February, 2022.



F. H. Mahimbali

Judge

25/02/2022

**Court:** Judgment delivered this 25<sup>th</sup> day of February, 2022 in the presence of the Mr. Cosmas Tuthuru advocate for the appellant, Mr. Roberth advocate for the respondent and Gidion Mugo, RMA.

Right to appeal is explained.



F. H. Mahimbali

Judge

25/02/2022