

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL CASE No. 95 OF 2021

RUBANGO MFUNGO APPELLANT

Versus

NYAFURU ANDREA ESORE RESPONDENT

*(Arising from the District Land and Housing Tribunal for Mara at Musoma
in Land Application No. 48 of 2021)*

JUDGMENT

27 & 27 April 2022

Mtulya, F.H., J:

A land dispute was filed on 1st April 2021 at the **District Land and Housing Tribunal for Mara at Musoma** (the tribunal) in **Land Application No. 48 of 2021** (the application) between Nyafuru Andrea Esero (the respondent) and Rubango Mfungo (the appellant). The application received a reply in Written Statement of Defence (the WSD), but the WSD was attached with a point of preliminary objection (the objection) filed on 3rd May 2021 protesting the competence of the application.

The practice of this court and Court of Appeal allows a point of law resisting competence of the application to be raised at any stage of

proceedings and once registered it has to be determined to the finality before the hearing of the dispute on merit, as the point of law may end the dispute (see: **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999; **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai**, Civil Appeal No. 179 of 2016; and **Director of Public Prosecution v. Labda Jumaa Bakari**, Criminal Appeal No. 45 of 2021). The reasoning of the permission stems from the fact that points of law that question jurisdiction of courts or tribunals in adjudicating matters brought before them go to the root of the matter (see: in **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai** (supra).

Noting of the objection in the application, the tribunal had scheduled the objection hearing date 21st June 2021 as displayed at page 1 of the proceedings of the tribunal in the application dated 7th May 2021. However the learned chairman declined to hear the objection without any registered reasons and proceeded with the hearing of the application on merit, 20th September 2021. After full hearing of the application, the tribunal decided in favour of the respondent. The decision dissatisfied the appellant hence approached this court complaining on four (4) issues to be resolved by this court.

On the 8th March 2022, the appeal was scheduled for hearing in this court and both parties marshaled learned counsels, Mr. Wilson Amos and Mr. Ostack Mligo to argue the appeal. However, as an officer of this court under section 66 of the **Advocates Act** [Cap. 341 R.E.2019] (the Advocates Act), Mr. Mligo, who appeared for Nyafuru Andrea Esore (the respondent), prayed for leave to peruse the record of appeal and was granted more than a month to do so.

Today afternoon when the appeal was scheduled again for hearing, Mr. Mligo took the floor of this court and conceded the appeal arguing that the record of the appeal has two (2) legal faults, namely: first, absence of signature of chairman in the application during recording of testimonies of the witnesses who were brought before the tribunal; and second, failure of the chairman to determine the objection before hearing of the application on merit.

To bolster his argument, Mr. Mligo cited the provision of the law in Order XVIII Rule 5 of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code) contending that evidence of any witness must be taken down in writing and learned magistrates or chairmen must sign the same. This submission was received without protest from appellant's counsel, Mr. Wilson, who briefly submitted that the two (2) issues are legal matters and render the proceedings of the tribunal a nullity for

want of the law regulating points of preliminary objection. In his opinion, this court may quash the decision, decree and proceedings of the tribunal in the application for want of the proper application of the law and order *trial de novo* for interest of justice. It was also fortunate that both learned counsels agreed that each party should bear his own costs, if the proceedings and decision of the tribunal is quashed.

I have perused the record of this appeal and found out that the appellant had replied the application attached with a point of preliminary objection to protest the competence of the application in the tribunal. However, the point was not determined by the tribunal before the hearing of the application on merit. The record shows that the tribunal noted the protest and set hearing date to be 21st June 2021, as displayed at page 1 of the proceedings before the tribunal in the application dated 7th May 2021. However the learned chairman declined to hear and determine the objection without any reasons and proceeded with the hearing of the application on 20th September 2021.

This breached the directives of the Court of Appeal in the precedent of **Consolidated Holding Corporation Ltd V. Rajani Industries Ltd and Bank of Tanzania**, Civil Appeal No. 2 of 2003 and **M/S Tanzania China Friendship Textile Co. Ltd V. Other lady of the Usumbara Sisters** (2006) TLR 70 on the need to determine points of law resisting applications and available remedies, in case the points are

not resolved. As there is directives of the Court of Appeal on the subject, this court has no options rather than to abide with the directives. The record in this appeal shows further that testimonies of all witness were not signed at the end of each witness testimony by the learned chairman of the tribunal in the application. This is contrary to the enactment in Order XVIII Rule 5 of the Code, which has already received support of the Court of Appeal and this court in the precedents of **Joseph Elisha v. Tanzania Postal Bank**, Civil Appeal No. 157 of 2019, **Iringa International School v. Elizabeth Post**, Civil Appeal No. 2019 and **RATCO Company Limited v. Said Salim Said**, Labour Revision No. 5 of 2020.

The reasoning in requiring signature being appended at every end of witness testimony is stated in the decision of **Joseph Elisha v. Tanzania Postal Bank** (supra) that: *the effect of failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings.* The available remedies are explained by the Court of Appeal that: *the failure to append signature at the end of each witness testimony vitiates proceedings.*

This court being custodian of the law and justice will follow the course directed by our superior court. I have therefore decided to quash the proceedings of the tribunal in the application and set aside

the judgment and decree emanated from the fault proceedings. For justice to be done, I remit the record to the tribunal for the dispute to be heard *de novo* before another chairman with different pair of assessors within three (3) months from today, 27th April 2022.

In the present appeal, Mr. Wilson and Mr. Ostack agreed that there are faults in the record and for the need of rectifications of the faults and interest of justice, they both prayed the dispute be remitted back to the tribunal without costs as the faults were not initiated by the parties. I entirely agree with them. I will not award costs to any party in this dispute. Each party shall bear its own costs. Reasons are obvious as were well displayed by learned counsels.

Ordered accordingly.



F.H. Mtulya

Judge

27.04.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, Mr. Rubango Mfungo and his learned counsel, Mr. Amos Wilson and in the presence of the Respondent's learned counsel Ms. Maula Tweve.



F.H. Mtulya

Judge

27.04.2022

