

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 45 OF 2021

*(Arising from DLHT of Chato at Chato in Application No. 02 of
2021)*

BUNINGA BUYOYA-----APPELLANT

VERSUS

CHARLES MACHOMBO ----- RESPONDENT

JUDGMENT

Last Order: 24.03.2022

Judgment Date: 30.03.2022

M. MNYUKWA, J.

The Appellant Buninga Buyoya is appealing against the decision of the District Land and Housing tribunal (DLHT) of Chato at Chato in Application No. 02 of 2021 that was dismissed with costs.

In the record, it goes that, the appellant lodged the land application No 2 of 2021 before the DLHT of Chato claiming to be the legal owner of the disputed land measured 90 acres for almost twenty years. He claimed that, he bought the disputed land from Buyoya Lukemampuzi and that he



developed and conducting farming in the disputed land from 1986 to 2017 before he stopped farming activities as he shifted to Biharamulo. It was also averred that, the respondent invaded the disputed land unlawfully and interfere the appellant's enjoyment of land. In proving his case, the appellant paraded three witnesses and tendered one exhibit which is the sale agreement. On his part, the respondent claimed to have acquired the disputed land since 1990 as he purchased from one Odilo Ntaturu, 90 acres of land and by that time the appellant was a teenager of 14 years and that the appellant's family was leasing the disputed land for grazing and farming activities from Odilo Ntaturu. After the disputed land being sold to the respondent, the appellant's family was well informed to vacate the disputed land and the respondent was using the disputed land to date. To prove his case the respondent called four witnesses and tendered the sale agreement.

After full hearing, the chairperson of the DLHT dismissed the application and declared the respondent as the lawful owner of the disputed land.

Dissatisfied with the decision of the DLHT, the appellant lodged the present appeal and advanced seven grounds of appeal which are;



1. *That the trial tribunal erred in law and facts by rendering a decision in favour of the respondent without taking into the consideration that the land in dispute as claimed by the appellant is quite different from the respondent's land duly evidenced by boundary neighbours and its borders as stated in the proceedings plus the judgement itself.*
2. *That the trial tribunal erred in law and fact by finding that the appellant is not the rightful owner of the suit land without determining his legal status as to the ownership of the said land.*
3. *That the trial tribunal erred in law and fact by failing during the visitation at the locus in quo to show measurements of the suit land, and its borders, boundary neighbour and no witness testified on that particular matter.*
4. *That the trial tribunal erred in law and fact by disregarding the appellant's testimony that clearly proved his case to the required standard of proof.*
5. *That, the trial tribunal erred in law and fact by declaring the respondent a lawful owner of the land in dispute while the contract purporting to grant ownership to him is a forged document.*



6. *That, the trial tribunal erred in law and fact for failure to consider that the evidence adduced by the appellant in land case No 2 of 2021 was heavier as compared to the evidence adduced by the respondent.*
7. *That, the trial tribunal erred in law and fact for failure to afford assessors an avenue to give their opinion in writing and that no opinion of assessors was read in presence of parties in said land case No 2 of 2021.*

During the hearing of the appeal, the appellant was represented by Mr. Nasimire, learned advocate while the respondent enjoyed the services of Mr. Mainde, learned counsel. With the consent of the parties and by leave of the court, the appeal was argued by way of written submissions. The court's order required the appellant to file the submission in chief on 14/02/2022, the respondent to file reply to the appellant's submission on 22/2/2022 and re-joinder, if any to be filed on 25/02/2022. I thank parties for filing submission as scheduled. After the submissions of the parties, the matter was fixed for mention to cross check if the parties complied with the court order and thereafter the matter was scheduled for day of judgment.



In the due course of composing the judgement, I went through the submission of both parties and I find the appellant submitted on the manner in which the trial chairperson recorded the testimonies of the witnesses who appeared before her. He went on that the trial chairperson recorded the testimonies of the appellant and his witnesses and then adjourned the matter and recorded the testimonies of the respondents and his witnesses and that in neither occasions the trial chairperson appended her signature at the end of each witness as recorded.

In his reply to the submission in chief, the advocate of the respondent submitted that the trial chairperson adjourned the matter after hearing the appellant's evidence and his witnesses and there is no misdirection for matter to be adjourned as the trial tribunal chairperson proceeded properly with the matter.

Upon revisiting the grounds of appeal, the issue of the trial chairperson to append signature after he had completed of record the witnesses' testimony was not raised as one ground of appeal as the same featured only during the submission. Perhaps that was the reason of the respondent's counsel to have failed to grasp what was intended by the appellant's counsel in his submission as his reply on that issue centered

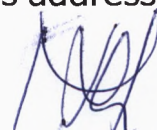


on adjournment, of which he believed to be normal practice of the court to adjourn hearing.

This compelled me to revisit the trial proceedings. After going through the available record particularly the handwritten and typed proceedings, I noticed that the trial chairperson did not append her signature at the end of each witness's testimony. For the sake of justice, though this issue has been featured in the appellant's submission, I decided to summon both party counsels' and required them to address the court on the effect of this omission in the trial conducted before the DLHT. I decided to do so since even if the issue was not raised in the grounds of appeal, still this court have the power to raise it *suo motu*.

By the order of the court and consent of the learned counsels for both sides, the counsels addressed the court on 24th March 2021 on whether the trial was properly conducted owing to the fact that the chairman of DLHT did not append her signature at the end of each witnesses' evidence.

Addressing first, the appellant's counsel submitted that, failure to append signature has the effect of nullifying the whole proceedings and the said proceedings cannot be authentic and therefore cannot be used by the court to reach its decision. He retires his address by citing the case



of **Masambuko Makelezo @ Elias Kosovo v R**, Criminal Appeal No 433 of 2017 and prayed the court to make necessary orders.

On his part, the respondent's counsel asked this court to apply the overriding objective to cure the irregularity of the chairman of the DLHT for his failure to append signature on each witnesses' evidence since the said principle is introduced in the Civil Procedure Code by the Miscellaneous Amendment Act No 3 of 2018 to ensure that the court focus on substantive justice.

After submissions from the counsel of both parties, I entirely agree with the appellant's counsel submission that, failure to append signature vitiates the whole proceedings. I say so because, appending signature is a mandatory requirement to be complied with, when the testimony of each witness is taken as the same shows the authenticity of the evidence which has been recorded by the trial magistrate, or a trial judge as well as the chairman of the DLHT.

The respondent's counsel prayed this court to use the overriding objective to cure the irregularity of failure to append signature and this court to proceed to consider the evidence taken at the DLHT. With due respect, it is my opinion that appending signature at the end of the



witness's statement is a mandatory requirement that need to be complied with and the same cannot be cured by the overriding objective.

It is my firm view that, one of the tests of evidence which the court may rely on reaching its decision is that, the proceedings must be authentic as the same to be recorded by the person who takes oath before he assumes his responsibility of administering justice. For that reason, I don't subscribe to the submission of respondent's learned counsel that, the same can be cured by the overriding objective as the same cannot be applied to cure every noncompliance with the mandatory provision of law especially when it goes to the root of the matter. This is because, the proceedings are the basis of decision in exercising judicial function.

In the case of **Juma Busiya vs Zonal Manager South Tanzania Postal Corporation**, Civil Appeal No 273 of 2020, CAT at Mbeya (unreported), it was held that:

"...the principle of overriding objective cannot be applied blindly to cure every failure to comply with the mandatory provision of the law."

It is worth to note that, the DLHT is a court within the meaning of section 2 of the Land Disputes Courts Act, Cap 216 R.E 2019, and in



exercising its power, it is governed by the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 in which if there are any inadequacy, the resort is the Civil Procedure Code, Cap 33 R.E 2019 as it is provided for under section 51(2) of the Land Disputes Courts Act. Cap 216 R.E 2019. For easy of reference is it hereunder quoted;

"The District Land and Housing Tribunal shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations, it shall apply the Civil Procedure Code."

Since the above provision requires the DLHT to resort to Civil Procedure Code in case of inadequacy in its Regulation, and based on the fact that the Regulation is used to prescribe the practice and procedure of the DLHT and the same are silent on the procedure of taking the evidence and considering the fact that the DLHT is a court, the provision of Order XVIII rule 5 of the Civil Procedure Code, Cap 33 R.E 2019 need to be complied with when taking parties' evidence. The provision of the mentioned order provides that:

"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 superintendent of the judge or magistrate, not ordinarily in the form of question



and answer, but that of signature and the judge or magistrate shall sign the same."

In our case at hand, both the handwritten as well as the typed proceedings shows that the chairman of the DLHT in neither occasion appended her signature at the end of testimony of each witness. This offends the provision of Order XVIII Rule 5 of the Civil Procedure Code cited above and the said omission is fatal and it is incurable.

When emphasizes on the requirement to append signature at the end of each witness statement, the Court of Appeal of Tanzania when delivering its Ruling on that issue raised by the Court suo motu in the case of **Baraka Imanyi Tyenyi v Tanzania Electric Supply Company LTD and North Mara Gold Mine Limited**, Civil Appeal No 28 of 2019, CAT at Mwanza (unreported) made the following orders:

"Consequently, the omission by the trial judge in the instant case to append signature at the end of each witness's testimony vitiates the proceedings of the trial court. Thus, by our revisional power under section 4(2) of the AJA, we nullify the proceedings of the trial court, quash the judgement and set aside all orders emanated therefrom. However, for the interest of justice, we remit the court record to the trial court for the suit to be heard de novo by another judge. "



Guided by the above decision, I subsequently invoke the power given to this court by virtue of section 43 of the Land Disputes Courts Act, Cap 216 R.E 2019 to nullify the proceedings of the DLHT, quash the judgement and set aside all orders emanated from the Land Application No 02 of 2021 before the DLHT of Chato. I proceed to order the case file be remitted to the DLHT of Chato at Chato for the application to be heard de novo by another Chairperson with a new set of assessors.

Given the fact that the matter has been raised by the court suo motu, I make no order as to costs.




M. MNYUKWA
JUDGE
30/03/2022

Judgment delivered on 30/03/2022 whereby advocates of both parties were present.


M. MNYUKWA
JUDGE
30/03/2022