THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT – LAND DIVISION

(MUSOMA SUB REGISTRY)

AT MUSOMA

LAND APPEAL No. 11 OF 2023

(Arising from the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 120 of 2016)

MGANGA BENJAMIN SANYA ..... **APPELLANT**

Versus

1. **MASATU KOTI MGANGA**
2. **MAPESA KOTI MGANGA**
3. **ALISI NGERENGERE SAGANDA**

..... **RESPONDENTS**

JUDGMENT

05.06.2023 & 08.06.2023

Mtulya, J.:

Mr. Mganga Benjamin Sanya (the appellant) was aggrieved by the decision of the **District Land and Housing Tribunal for Mara at Musoma** (the tribunal) in **Land Application No. 120 of 2016** (the application) hence preferred the present appeal with three (3) reasons of appeal, in brief, namely: first, the tribunal entertained a matter which was already determined on 7th June 2019 by the same tribunal in the same application; second, the tribunal had refused the appellant to produce exhibits from clan members; and finally, the Chairman of the tribunal had declined to append signature on every end of witnesses' statements.

The appellant was summoned to appear in this court on 5th June 2023 to clarify his reasons of appeal and being a lay person without any legal representation, he had very brief submission. In the first complaint, the appellant submitted that the tribunal had produced two (2) judgments on the same subject matter and same application. The first judgment was between the appellant and two (2) persons, **Mr. Masatu Koti** and **Mapesa Koti** pronounced by **J.T. Kaare** on 7th June 2019, whereas the second judgment was between the appellant and three (3) persons, **Mr. Masatu Koti**, **Mapesa Koti** and **Alisi Ngerengere** delivered on 25th December 2022 by **Kitunguru, E.**

The appellant submitted further that the tribunal had refused him to tender and admit necessary documents from the clan members during the hearing proceedings of the tribunal. Finally, the appellant submitted that the tribunal's Chairman had declined to append signature on every end of the witnesses' testimonies which is contrary to the law.

The respondents on their part had decided to invite the legal services of **Mr. Emmanuel Paul Mng'arwe**, learned counsel, to reply the reasons and submission of the appellant. According to Mr. Mng'arwe the reasons of appeal registered by the appellant have no merit. In his opinion there are no two (2)

decisions of the tribunal, but only one (1) delivered on 15th December 2022. According to him, the tribunal had delivered *ex-parter* decision on 7th June 2019, but the decision was set aside in **Misc. Application No. 780 of 2019** hence the application started afresh. To Mr. Mng'arwe, following the fresh suit, on 19th December 2019, the appellant was granted leave to join **Alisi Ngerengere** (the third respondent) for want of interest on the disputed land and accordingly joined her in the application.

Regarding the second reason, Mr. Mng'arwe submitted that the record of the tribunal is silent on the prayer of the appellant to tender necessary documents during hearing proceedings. In his opinion, even if that was the case, the documents would have been refused for want of notice and service to the other party. In order to substantiate his submission, Mr. Mng'arwe cited the enactment in Regulation 10 (1) & (3) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations**, 2003 GN. No. 174 of 2003 (the Regulations).

Concerning the last complaint, Mr. Mng'arwe's thought that the learned Chairman of the tribunal had signed every end of the witnesses' statements. According to him, the appellant is just suspicious and assumed that the testimonies were not authenticated by the Chairman.

Rejoining the submission of Mr. Mng'arwe, the appellant contended that there is no record of the set aside order in the proceedings of the application. According to the appellant, if there is no display in the proceedings, the order is illegal and the second judgment is illegal. The appellant explained further that on 27th June 2022, he prayed to tender necessary documents, but he was declined by the tribunal without justifiable cause. Finally, the appellant submitted that the Chairman did not sign every end of witnesses' testimonies.

I have perused the record of the present appeal. The record shows that the appellant had filed the application against the first two respondents in the tribunal on 23rd May 2016 praying for a declaration on a rightful owner of the disputed land located at **Nyarigamba Street within Makoko Ward in Musoma Municipality of Mara Region** (the disputed land). The reasons in favor of the declaration are found at the second page of the **Land Application Form** (the Form) in the 5(a) (ii) & (ii) paragraphs of the Form, in brief:

> *That the respondents have illegally trespassed and demolished two houses in the [dispute land] without the consent of the applicant...that the applicant is a legal owner of the land in dispute*

acquired the same through inheritance from his late father Benjamin Sanya Kothi in 2001.

Following the complaint, the parties were summoned to appear before Hon. Chairman Kaare J.T., on 6th June 2016, but Hon. Chairman was absent for official functions of the tribunal. The application was adjourned for several mention dates, until 10th October 2016, when both parties and Hon. Chairman were present. On this day, the appellant had produced several complaints on want of restraint order against the respondents and the ruling was pronounced in favor of the appellant. That ruling was followed by another point of law resisting the *locus standi* of the appellant, but also was overruled by the tribunal for lack of merit.

The application hearing was scheduled on 9th July 2018 and took its course and both parties were prepared to register necessary materials for and against the application. The proceedings were before Hon. Chairman Kaare, J.T. During the hearing proceedings on 10th April 2019, the appellant had prayed to close his case and the prayer was granted. Following the grant of the prayer, the tribunal had ordered for defence hearing on 15th May 2019. However, on the indicated date, the

proceedings could not continue for want of learned counsel for the defence side.

The defence hearing was then set on 16th May 2019, and both parties were present before two assessors **Mrs. Milambo** and **Mr. Matiko**, but the coram was silent on who chaired the seat of the tribunal. However, at the end of the hearing, the following order was issued:

> *...since the respondent have refused to argue their defence, I close it and fix a date for judgment, 7th June 2019*

On the indicated judgment date, the record is silent on whether the judgment was pronounced or not. The record of the day displays presence of Chairman Kaare, J.T. and both parties and absence of the assessors, but nothing was recorded to reflect what exactly transpired on the day. During the hearing of the present appeal in this court, Mr. Mng'arwe submitted that the tribunal did not issue any judgment, whereas the appellant stated that *ex-parte judgment* was pronounced by the Chairman.

The proceedings of the tribunal took its course again on 5th December 2019 for defence hearing without any explanations on what had transpired on the *ex-parte judgment* date. However, on 17th November 2020, during defence hearing, learned counsel

for the respondents prayed the application be placed to another chairman as the respondent had lost confidence in Chairman Kaare, J.T. Following the prayer, Chairman Kaare, J.T. had recused himself from hearing of the application and forwarded the same to Hon. Kitunguru, E. for necessary orders. When the application had reached in the table of Chairman Kitunguru, E., he had just fixed hearing date on 6th January 2021, without any explanation on the shifting hands of the application and the record is silent on the presence of the parties to cherish the right to be heard and comfort on the new chairman.

This is obvious breach of the established law in a barrage of precedents of this court and Court of Appeal (see: **Chacha Zakaria @ Njama & Another v. Republic,** Criminal Appeal No. 20 of 2022; **Ibrahim Zakaria @ Gebwana & Two Others v. Republic,** Criminal Appeal No. 21 of 2022; **Samwel Dickson Enock @ Jeremia Michael Bwile & Two Others v. Republic,** Criminal Appeal No. 116 of 2017; **Abdi Masoud @ Iboma & Three Others v. Republic,** Criminal Appeal No. 116 of 2015; **Mairo Marwa Wansaku v. Simon Kiles Samwel,** Civil Appeal No. 37 of 2020; and **Paschal Kimwaga @ Mahimbo v. Republic,** Criminal Appeal No. 43 of 2022).

Regarding the status of the successor judicial officer, proceedings on record and the way forward, the Court of Appeal (the Court) in the precedent of **Abdi Masoud @ Iboma & Three Others v. Republic**, Criminal Appeal No. 116 of 2015, stated that:

> *In our view* ***it is necessary to record the reasons*** *for re-assignment or change of trial magistrate. It is a requirement of the law and has to be complied with.* ***It is a pre-requisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try case.***
>
> (Emphasis supplied).

According to the Court, in the precedent **Priscus Kimario v. Republic**, Criminal Appeal No. 301 of 2013, if reasons are not recorded in proceedings: *it may lead to chaos in the administration of justice* as *anyone, for personal reasons could just pick up any file and deal with it to detriment of justice*. The Court concluded, in capital letters with loud voice, that: ***this must not be allowed***.

Regarding available remedies in situation where a successor judicial officer has failed to give reasons in taking-over proceedings started by another judicial officer, the Court directed

that: *all proceedings of the successor judicial officer are to be nullified, conviction set aside and judgment quashed as the proceedings which produced the judgment have no basis*. There is a multiple of decisions in the Court and this court in support of the move (see: **Ginyoka Gichenoga v. Sideta Shabaqut**, Misc. land Appeal No. 12 of 2022; **Inter-Consult Limited v. Mrs. Nora Kassanga & Another**, Civil Appeal 79 of 2015; **Dativa Nanga v. Jibu Group Company Limited & Another**, Civil Appeal No. 324 of 2020; **Hamisi Miraji v. Republic**, Criminal Appeal No. 541 of 2016; **Donatus Yustad @ Begumisa v. Republic**, Criminal Appeal No. 365 of 2016; **Issaya Mato @ Issa And Another v. Republic**, Criminal Appeals No. 66 & 188 of 2015; **Mathias Kalonga & James Moshi v. Republic**, Criminal Appeal No. 438 of 2015; and **Barnabas Leon v. Republic**, Criminal Appeal No. 309 of 2014).

During the hearing proceedings of the application on 11th February 2021, the Chairman after recording the appellant's testimony, had declined to append his signature at the end of the testimony to authenticate the appellant's testimony. Similarly, it happened: on 11th October 2021, when **Maregesi Charamba** (SM2) was producing his evidence; on 6th June 2022, when **Michael Benjamin** (SM3) was giving his testimony; on 15th

February 2022, when **Ibrahim Muyaga Kibibisanyi** (SM3) was delivering his testimony.

The same decline is indicated during recording of the defence testimonies of: Mapesa Koti Mganga (SU1) on 4th October 2022; **Joseph Koti Mganga** (SU4) on 3rd November 2022; and **Sanya Koti Mganga** (SU5) on 3rd November 2022. The law regulating signature of learned magistrates, arbitrators, chairmen of various bodies, including the land tribunals, when resolving civil disputes is enacted under Order XVIII Rule 5 of the **Civil Procedure Code [Cap. 33 R.E. 2019]** (the Code), and has been interpreted, in the precedent of the Court in **Joseph Elisha v. Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 to mean that it is important to append signature after each witness statement and failure to do so is fatal irregularity to renders the proceedings a nullity.

There is a bundle of precedents in favor of the position the Court and this court (see: **RATCO Company Limited v. v. Said Salim Said**, Labour Revision No. 5 of 2020; **Mhajiri Uladi & Another v. Republic**, Criminal Appeal No. 234 of 2020; **Chacha Ghati @ Magige v. Republic**, Criminal Appeal No. 406 of 2017; and **Iringa International School v. Elizabeth Post**, Civil Appeal No. 2019). In the precedent of **Joseph Elisha v. Tanzania Postal Bank** (supra), the Court, at page 8, observed that:

In the event, the failure by the arbitrator to append signature at the end of each witness's testimony vitiated the proceedings before the CMA...we proceed to quash the proceedings of the CMA and set aside the award as well as the proceedings and judgment of the High Court which upheld that award. For justice to be done, we remit the record to the CMA for the dispute to be heard ***de novo*** *before another arbitrator.*

The reasoning of the Court in arriving that decision is displayed at the same page in the following words:

As demonstrated in this appeal, the testimonies of all witnesses were not signed...not only the authenticity of the testimonies of the witnesses but also the veracity of the trial court record itself is questionable. In absence of signature of the person who record the evidence, it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witness since the recorder of such evidence is unknown...on account of such omission, the entire proceedings recorded...are vitiated because they are not authentic.

I am aware the Court in the indicated decision of **Joseph Elisha v. Tanzania Postal Bank** (supra) was resolving a provision of labour laws, but had invited the Code, the **Criminal Procedure Act** [Cap. 20 R.E. 2019] and **Labour Institutions (Mediation and Arbitration Guidelines) Rules**, GN. No. 67 of 2007 (the Rules). In the present situation the **Land Disputes Courts Act [Cap. 216 R.E. 2019]** (the Act) and Regulations are silent, but section 51 (2), invites the application of the Code, in case there is *lacunae* on the subject.

In the present appeal, the record is vivid that the chairman heard and recorded witnesses' testimonies in the application without signature at the very end of testimonies to authenticate the testimonies. This is the third legal complaint of the appellant and it is a genuine complaint. The appropriate available remedies in such circumstances are to set aside proceedings and quash judgment of the tribunal which emanated from nullity testimonies.

The second complaint of the appellant on refusal by learned chairman to admit necessary materials which were given to him by the clan members is not reflected on the record. However, during the proceedings of learned chairman Mr. Kaare on 10th April 2019, the appellant had prayed to tender minutes of the meeting held on 8th April 2001 and was admitted by the tribunal

as exhibit P.4., whereas learned chairman Kitunguru, E. on 11th February 2012, had admitted minutes of clan meeting in exhibits P.1 and P.2. The titles of the three (3) indicated minutes in P.1, P.2 and P.4 were not indicated in the proceedings. However, as the contest on admission is overtaken by the fault proceedings for want of signature of the chairman on every end of the witnesses' testimonies, this contest cannot detain this court.

The record shows further that Hon. Kitunguru, after full hearing of the parties, on 28th November 2022, had ordered for a judgment on 15th November 2022 and accordingly pronounced the judgment in favour of the respondents. This is where the complaint of the appellant comes in. He contended during the hearing of the present appeal that the tribunal issued two (2) judgments on the same application. However, as I indicated in this judgment, the proceedings are silent on what exactly transpired on 7th June 2019. This leaves a lot to be desired. There is a bundle of unanswered questions on whether: first, the *ex-parte decision* was delivered; second, whether there was any prayer from the respondents in the application to set aside the *ex-parte order* of the tribunal; and whether the prayer to set aside *ex-parte judgment* was granted by tribunal.

However, the record shows that the tribunal continued with the defence hearing on 5th December 2019, without there being replies of the above indicated questions. This is vivid breach of Regulation 11 (2) of the Regulations.

In the present appeal, record shows a bunch of faults which move into the merit of the application and caused injustice to the parties. Following the errors complained in the first and third reasons of appeal, I am moved to nullify all proceedings, quash judgment and any other order from the application for want of proper application of the law. I further order retrial of the application before different learned chairman of the tribunal to sit with different pair of assessors. The appeal is marked successful without any order to costs. The reasons are obvious that the wrongs were committed by the tribunal, and in any case the contest is still on the course at the tribunal to identify the rightful owner of the disputed land.

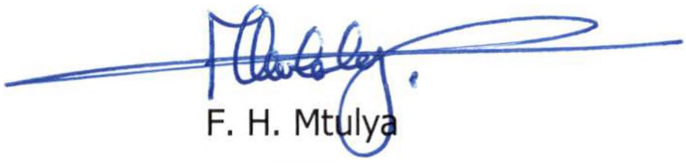
It is so ordered.

F.H. Mtulya

Judge

08.06.2023

This Judgment was pronounced in Chambers under the Seal of this court in the presence of the appellant, **Mr. Maganga Benjamin Sanya** and in the presence of first and second respondents, **Mr. Masatu Koti Maganga** and **Mr. Mapesa Koti Maganga**.



F. H. Mtulya

Judge

08.06.2023