

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND APPEAL NO. 40 OF 2022

*(Arising from Land Application No. 31 of 2019 of Shinyanga District Land
and Housing Tribunal)*

**TUNGU NKALA BUNDALA (Administrator of
the Estate of the Late MALASHI NDEGEYA) APPELLANT**

Versus

LUGATA JINYAMA RESPONDENT

RULING

16th & 31st May, 2023

S.M. KULITA, J.

This is an appeal from the District Land and Housing Tribunal for Shinyanga. It was scheduled for hearing today, 16th May, 2023. However, in my perusal over the original case file, before hearing, particularly on the proceedings dated 02/11/2021, 04/11/2021, 11/11/2021 and 07/12/2021, I did notice that the witnesses' statements were not recorded in a narrative form, particularly in the cross examinations whereby the Chairman used to record the evidence shortly on answers only, which makes it difficult for this appellate court to know what exactly the questions were. Some of those

statements, to mention a few, include the following as can be gathered from page 36 of the tribunal's proceedings dated 11/11/2021, in which SU1 was recorded replying questions from the Applicant (Lugata Jinyama) during the cross-examination;

"Hajauza ardhi yake"

"Nilijua hajajua kwani mimi ni mpwa"

"Alirudi kukaa hapo tena"

"Saa hizi anazo heka 5 tu"

The other replies for cross-examination which are difficult to understand in the record includes;

"waligawana mwaka 2008" which is found at page 45 of the proceedings being a reply to the cross examination by SU2.

"Tulishauriwa na Mwanasheria" seen at page 24 of the proceedings which was a reply to the cross-examination by SM1.

Having so noticed, before hearing the appeal on merit, I asked the parties to address me on that. Upon inviting the parties to address the court on that issue, Mr. Audax Constantine, Advocate for the Appellant, the only

party who had turned up to court submitted that, he actually noticed the said defects in the tribunal's proceedings, hence prayed for the court to use its revisionary powers to cure it by nullifying the whole proceedings of the trial tribunal, also to quash and set aside the Judgment, Decree and their resultant Orders.

The fact that, it is not disputable that the proceedings of the trial tribunal is incurably defective for the witnesses' statements not being recorded in a narrative form, the said proceedings are hereby declared a nullity for colliding with the requirement of Order XVIII, Rule 5 of the Civil Procedure Code, hence nullified. For easy of reference, the said **Order XVIII, Rule 5 of the Civil Procedure Code**, provides as I hereby quote;

*"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 is mine)*

For such defective mode of recording the witnesses' testimonies, this appellate court cannot be in a position to exactly know as to what were the questions that led to such short answers seen in the record. I find it a serious irregularity done by the trial Tribunal.

Be it noted that, as per the position of the law, this being the first appellate court, has a duty of stepping into the shoes of the trial court and re-evaluate the evidence in record, in case it finds any fault therein including the analysis of evidence made thereon. See, **Future Century Ltd V. Tanesco, Civil Appeal No. 5 of 2009, CAT at DSM** in which it was held;

"This is a first appeal. The principle of law established by the Court is that the appellant is entitled to have the evidence re-evaluated by the first appellate court and give its own findings"

This case was heard and determined by the District Land and Housing Tribunal which exercises its duties in accordance with the Land Disputes Courts Act [Cap. 216 RE 2019] and the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003. However, both legislations do not provide the mode of recording evidence. Therefore, in terms of **section 51(2) of the Land Disputes Courts Act**, the Civil Procedure Code [Cap.

33 RE 2019] should apply. In the **Civil Procedure Code**, the procedure for recording of evidence has been provided under **Order XVIII, Rule 5** (supra) whose citation has been made herein before, that, it should be in a narrative form.

That being the case, I hereby nullify the entire proceedings and quash the judgement of the trial tribunal and the subsequent orders made thereto. The Applicant in the trial tribunal, **LUGATA JINYAMA** if still interested with the matter, is at liberty to institute a fresh suit before the Tribunal, subject to the requirements of the Law of Limitation Act. It is further ordered that in case the matter is re-filed, it should be entertained by another Chairperson with a new set of Assessors. As the said defect in the proceedings is the fault of the trial tribunal, the matter is hereby **struck out** with **no order as to costs** against any party.




S.M. KULITA
JUDGE
08/05/2023

