

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

LAND APPEAL NO. 81 OF 2022

*(Originating from Singida District Land and Housing
Tribunal in Land Application No. 122 of 2018)*

COSMAS KAUNDA APPELLANT

VERSUS

ATHANAS MSWETI.....RESPONDENT

RULING

25th August, 2023.

HASSAN, J.:

In brief, this appeal nurtured from the decision of the District Land and Housing Tribunal (DLHT) of Singida in the Land Application No. 122 of 2018. Aggrieved by the decision of tribunal, the appellant fore-fronted his appeal to this court yielding two grounds of appeal; to wit: (1) That, the trial tribunal erred in law and fact to declare that the applicant is not entitled to the two (2) acres invaded by the respondent while ignoring the strong evidence produced by the appellant that he is the legal owner of the same allocated by Ujaire Village council on 1998. (2) That, the trial tribunal erred in law and

fact to admit and recognize the forged evidence produced by the respondent that he was allocated two (2) acres by Ujaire Village Council while Ujaire Village Council denied to allocate him such land.

When the matter was called on for hearing, both the appellant and the respondent entered presence in person unrepresented by legal Counsel. Wherefore, before hearing commenced in earnest, the court observed some irregularity in the record of the District Land and Housing Tribunal (DLHT) which triggered the court attention, thus, **One**, the chairman of tribunal did not append his signature in the testimony of each witness after they gave their evidence. **Two**, that whether assessors were actively involved in the decision making by gathering their opinions.

Knowing that it will be time wasting to proceed with hearing of an appeal on the upstretched grounds, thus I invited the parties to address the court on the issues raised by the court. On their part, being unrepresented laymen, and since the irregularity observed was typically a legal issue, they unanimously opted to rest the matter to the court for determination.

Henceforth, in terms of section 43 (1) (b) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], I revisited the proceedings from the tribunals below. Indeed, the same was faulted as it has been earlier on observed.

Thus, the chairman who had presided over the DLHT failed to append his signature in the evidence of parties and all witnesses who were called upon to testify.

In law, the position is very clear. For instance, 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. "

Thus, in time without number the Court of Appeal has addressed the issue of failure to append signature after recording the witnesses' evidence, is a fatal irregularity vitiating the entire proceedings. See **Yohana Mussa Makubi v. Republic, Criminal Appeal No. 556 of 2015; Sabasaba Enos @ Joseph v. Republic, Criminal Appeal No. 411 of 2017; Chacha Ghati @ Magige v. Republic, Criminal Appeal No. 406 of 2017 (all unreported)**; just to mention a few.

For instance, in the case of **Yohana Mussa Makubi v. Republic** (supra), the court held that:

"We are thus, satisfied that, failure by the judge to append his/ her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. Besides, this emulates the spirit contained in section 210 (1) (a) of the CPA and we find no doubt in taking inspiration there from. In view of the stated omission the trial proceedings of the High Court were indeed vitiated and are a nullity and neither did they constitute the record of the trial and the appeal before us. We are thus satisfied that before us there is no material proceedings upon which the appeal could be determined."

Considering what has been surfaced by the apex court, it is my considered view that, such requirement is vital for the assurance of

authenticity, correctness and veracity of the witnesss' evidence. Therefore, in the absence of such signature, it may be difficult to ascertain the truthfulness of the evidence of the witnesses recorded by a person who did not committed himself on what he has recorded.

In the circumstance, it is apparent that the proceedings ought to be nullified and the order meted out be set aside.

Moving on another point, that is, whether assessors were actively involved in the decision making by the Tribunal as required by law. it is also apparent, that, though assessors were involved in the hearing, they were not involved in decision making by giving their opinion after evidence was adduced by both parties and closed. Record shows that on 21st day of September, 2021, when the respondent closed his evidence, the chairman made the following orders, I quote verbally:

"ORDER:

(I) Assessors opinion on 10/11/2021

(II) Parties to be notified (sic)

Sgd.

21/09/2021."

It follows, on 10th November, 2021, the application was called upon for assessors' opinion, and the record reads as follow:

"Baraza:

**Maoni ya wajumbe yamesomwa mbele ya wadaawa
wote pamoja na wajumbe waliosikiliza shauri.**

Amri:

Hukumu 30/11/2021

Sgd

10/11/2021"

Thereafter, the judgment was delivered on 19th day of September, 2022. Looking on the records, it is obvious that there is nowhere in the record of proceedings assessors' opinion were recorded to form part of proceedings. In the upshot, no doubt that the anomalies vitiate the proceedings of DLHT, and thus, it renders the same a nullity.

Undeniably, I came across a piece of paper knotted in the file amongst the documents purported to be an assessors' opinion. However, they were only hanging without any recognition in the record of proceedings. In fact, the same were not admitted by the chairman and be endorsed to be part of the records.

In my view, the omission is fatal and should not be overlooked. To this effect, see the case of **Chantal Tito Mziray & Another v. Ritha John Makala & Another**, Civil Appeal No. 59 of 2018, and **Shemsa Khalifa & Two Other V. Suleiman Hamed Abdallah, Civil Appeal No. 82 of 2012**, (all unreported), whereby when addressing alike issue, the court had this to say:

"We out-right of a considered opinion that, it was improper and substantial error for the high court and all other court bellow to have relied on a document which was neither tendered nor admitted in the court as exhibit. We hold this led to a grave injustice."

At this juncture, it became apparent to my mind thus, a mere declaration of possession or trivial attachment of document in the case file without being, first tendered and then admitted to the court will not salvage the legal battle.

Besides, I am alive that in the 7th page of the judgment, the chairman has indicated that assessors' opinion were considered. However, the said opinion were not recorded anywhere in the proceedings. In that effect, the

law is well settled as in **Ameir Mbarak and Azania Bank Corp Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015** (unreported), when faced with akin situation, the Court held:

"... it is unsafe to assume the opinions of the assessors which is not on the record by merely reading the acknowledgement of the Chairman in the Judgment. In the circumstances, we are of a considered view that, assessors did not give any opinions for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity."

See also; **Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 Of 2017** and **Edna Adam Kibona v. Absalom Swebe (Sheli) Civil Appeal No. 286 Of 2017** (both unreported).

Consequently, in terms of section 43 (1) (b) of the Land Dispute Court Act, Cap. 216 R. E 2019, I make the following orders:

1. Nullify the proceedings from DLHT, quash the judgment and set aside the orders meted out thereof.



2. Order that the matter be remitted to the DLHT for the same to be retried *de novo* before another Chairman and a new set of assessors.
3. Since the issues were raised by the court *Suo motu*, each party should bear its own costs.

Ordered accordingly.

DATED at **DODOMA** this 25th day of August, 2023.




S. H. HASSAN
JUDGE