IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 93 OF 2022

(Originating from Land Application No. 41 of 2016 before Maswa District Land and Housing Tribunal)

LEAH DAUDI CHANANJA .....APPELLANT

(administratrix of estates

of the late Hamis Chananja)

VERSUS

MATULANYA BUYUNGE.....1ST RESPONDENT

MPENGI SAMSON .....2ND RESPONDENT

NGELEJA MNEBI .....3RD RESPONDENT

MAYALA MASUKE.....4TH RESPONDENT

MINZA NTANIKO .....5TH RESPONDENT

GAPI SALUME MSWANZI.....6TH RESPONDENT

IDAHILO MASUKE .....7TH RESPONDENT

ISACK PAUL .....8TH RESPONDENT

MUSSA SULEMANI .....9TH RESPODENT

KULENGWA PHULANO .....10TH RESPODENT

RAPHAEL SANANE .....11TH RESPONDENT

JUDGEMNT

18th July and 11th August 2023

F. H. MAHIMBALI, J

The appellant herein unsuccessfully sued the respondents before the DLHT of Maswa vide Land Application No.41 of 2016. The background

of the case is that, the appellant, claimed that the parcel of land in dispute was the property of her late father who acquired it in 1985.

The appellant was unhappy with the decision of the tribunal, she has then preferred this appeal before this Court with limb of five grounds of appeal namely;

1. *That the trail chairman erred in law and facts for taking the evidence of all witnesses on both parties procedurally.*
2. *That the trial tribunal erred in law and facts for proceedings with the matter illegally.*
3. *That the trail chairman erred in law and facts for improper admission of exhibits D1, D2, D3, D4 and D5 to form part of defence evidence.*
4. *That, the trial tribunal improperly delivered assessors opinion.*
5. *That, the trial tribunal erred in law and facts for failure to properly assess the evidence of the appellant and her witnesses.*

During the hearing of the appeal, the appellant had legal services of Mr. Emmanuel Butamo learned advocate, while the respondents enjoyed the legal service of Mr. Nasimire learned advocate.

Mr. Emmanuel Butamo, abandoned ground No.5 and then proceeded to argue on the rest of the grounds.

Mr Emmanuel submitting on the 1st ground of appeal averred that the evidence of the trial tribunal was un procedurally recorded. He further stated that, as per trial tribunal's proceedings when recording the evidence of witnesses, there was no signing after the end of each witness that was contrary to Order XVIII Rule 5 of Civil Cap 33 R: E 2022.

Mr. Emmanuel further argued that, as there was no appending of signature after each witness's testimony, it affected the authenticity of DLHT's proceedings. He referred this Court to the case of ***Uniliver Tea Tanznaia Limited versus David John, Civil Appeal No.413 of 2020 (CAT)*** and the case of: ***Mange Chuma versus Ndosela Mbasa and Mijingo Mboje, Land Appeal No.87 of 2021.***

On the side of the respondents Mr. Nasimire on the first ground of appeal submitted that, there is no law which provide for such scenario when recording evidence before the DLHT.

Order XVIII Rule 5 of the CPC provides such a scenario. However, Section 51 (1) paragraph (a) of the Land Disputes Courts Act, clearly provides CPC is not strictly applicable in land matters.

Further, under Section 45 of the Land Disputes Courts Act, what is insisted there is substantial justice, unless the error has occasioned failure of justice. He further averred that in the case at hand it was not mentioned

how the appellant was prejudiced by that course of the trial tribunal and so the omission is not fatal.

Now, as regards to the omission by the Chairman to append a signature at the end of the testimony of each witness, it is clear from the records that the all witnesses from both sides (PW1,PW2,PW3, DW1,DW2, DW3, DW4, DW5, DW6, DW7, DW8, DW9, DW10 and DW11) when finished giving their testimonies the Hon. Chairman did not append his signature.

Although the law governing proceedings before the DLHT happen to be silent on the requirement of the evidence being signed, it is still a considered view of this Court that for purposes of vouching the authenticity, correctness and providing safe guards of the proceedings, the evidence of each witness need to be signed by the chairman.

On this, I need to draw inspiration from the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) and the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) wherein it is mandatorily provided that the evidence of each witness must be signed. Order XVIII rule 5 of the CPC provides as follows:

> "*The evidence of each witness shall be taken down in writing, in the language o f the Court, by or in the presence and under the personal direction and superintendence of the*

judge or magistrate, not ordinarily in the form o f question and answer, but in that o f a narrative and the judge or magistrate shall sign the same. "

Further, under section 210(1) of the CPA it is provided that:

"S, 210(1) In trials other than trials under section 213, by or before a Magistrate, the evidence o f the witnesses shall be recorded in the following manner- (a) the evidence of each witness shall be taken down in writing in the language o f the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part o f the record"

In a countless number of cases including ***Yohana Mussa Makubi and Another vs Republic, Criminal Appeal No. 556 of 2015, Sabasaba Enos @ Joseph vs Republic, Criminal Appeal No. 411 of 2017, Chacha s/o Ghati @ Magige vs Republic, Criminal Appeal No. 406 of 2017 and Mhajiri Uladi & Another vs Republic, Criminal Appeal No. 234 of 2020***, ***North Mara Gold Mine Limited versus Isack Sultani, Civil appeal No.458 of 2020,*** (all unreported), the Court of Appeal insisted that a signature must be appended at the end of the testimony of every witness and that an omission to do so is

fatal to the proceedings. In ***Yohana Makubi and Another*** (supra) the Court held, among other things, that:

> *"in the absence o f the signature o f the trial Judge at the end o f the testimony of every witness; firstly, it is impossible to authenticate who took down such evidence, secondly, if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellants' counsel, thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; fourthly, such evidence does not constitute part o f the record of trial and the record before us"*

For reasons that the witnesses before the DLHT gave their evidence and the Chairman did not append his signature at the end of the testimony of every witness and also on the above stated position of the law, I find that the omissions vitiated the authenticity of the proceedings of the DLHT.

On the second ground of appeal, Mr Emmanuel submitted that the DLHT proceeded with the matter illegally. He contended that at page 19 of the trial tribunal's proceedings, there was an information given to the DLHT by one Maswali Kamata Buyunge that he was appointed administrator of the 1st respondent. Unfortunately, instead of amending

the pleading to include the said Maswali Kamata Buyunge, the DLHT proceeded with the hearing of the matter. That was improper as per the law.

Mr Emmanuel prayed before this Court to fault the proceedings of the trial tribunal and order accordingly.

Mr. Nasimire replied on the second ground of appeal that, he had not seen any irregularity committed by DLHT. The said Maswali Kamata Buyunge correctly represented the deceased. It was sufficient to tender the said form No. IV. Therefore, there was no any miscarriage of justice.

I have gone through the trial tribunal's records specifically at page 19 complained by appellant's counsel the same provides that;

> *" Mr Maswali Kamata Buyunge- niliteuliwa kuwa msimamizi wa mirathi wa mdaiwa wa kwanza na ninayo hati ya uteuzi huo"*
>
> *"Baraza – kwa kuwa msimamizi wa mirathi kwa mdaiwa wa kwanza ameteuliwa napanga shauri kwaajli ya kuanza kusikiliza"*

I entirely agree with Mr Emmanuel that, the trial tribunal erred to proceed with the matter without directing the parties to amend the

pleadings to include the names of the so appointed administrator of one Matulanya Buyunge (the deceased). The names of the appointed administrators of the estate would have been reflected on the apparent face of the application.

The effects of omission by the Hon. Chairman renders the matter prosecuted while the 1st Appellant had no legal representation of the suit and so vitiates the proceeding of the trial Tribunal.

On the third ground Mr Emmanuel fortified that there was improper admission of exhibits D1 – D5, the exhibits which formed part of the defence evidence. He stated that it is cardinal principle of the law that before exhibit is tendered, it is first introduced to the court, availed to the opposite party, then admitted and upon being admitted it was supposed to be read over to the parties. He further averred that, according to the proceedings of the trial tribunal, such procedures were not complied with. He referred this Court at page 40, 41, and page 43 of the trial tribunal proceedings to that effect.

He also cited the case of ***Chacha Matani@ Nyarasi versus Republic, Criminal Appeal No.151*** of 2019.

Moreover, Mr Emmanuel conclude that the remedy to such defect is the proceedings to the admission of the said exhibits ought to be expunged from the records.

Responding to the third ground of appeal, Mr Nasimire contended that the alleged complaints by the appellant's counsel are not in existence. He referred this court at page 40, whereby he alleged that exhibits D1 and D2 were read over and explained equally at page 41, exhibit D3 was read over. He therefore argued that the referred case laws are irrelevant.

It is the established principle that the Law of Evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person. That has been the position of in many cases including, ***Robinson Mwanjisi and Three Others v. R, [2003] TLR 218, Mwinyi Jamal Kitalamba @ Igonzi and Four Others v. R, [2020] T.L.R. 508 and Huang Qin and Xu Fujie v. R, Criminal Appeal No. 173 of 2018 (unreported).***

For instance, ***in Mwinyi Jamal Kitalamba*** (supra) at page 509, the Court observed that:

> *"(i) Failure to read the exhibit after being admitted the omission is fatal as it contravenes the fair right of an accused*

person to know the content o f the evidence tendered and admitted against him. It was wrong and prejudicial."

After careful consideration of the grounds of complaint, the records of the tribunal and submission of the learned counsel for the parties, the issue for determination is the propriety or otherwise of the trial.

At the outset, I wish to point out that, I agree with Mr. Emmanuel that, Exhibits D2, D3, D4 and D5 as reflected on page 40, 41, 43 of the typed proceedings, were admitted without being cleared for admission. The either party was not given an opportunity to respond on it before being admitted by the tribunal.

For instance, at page 41 of the proceedings;

"baraza; – Kimepokelewa kama kielelezo D3 baada ya kusomwa na shahidi"

The proceedings do not provide as to whether the other party was accorded with the audience to respond on the exhibits before being admitted. This was irregular as emphasized in the case of ***Robinson Mwanjisi and Others versus Republic, (supra).*** Where the court held that;

"Where it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it can be read out"

In my considered view, the essence of reading the respective exhibits is to enable the either party to understand what is contained therein in relation to complaint against them, so as to be in a position of making an informed and rationale defence. The upshot of which, denies the appellant an opportunity of knowing and understanding the context of the exhibits.

On that regard, exhibits D1 -D5 since were admitted without being cleared for admission by giving rights to the other party to respond on each one of them, my conclusion is that the said exhibits were wrongly admitted and so are expunged from the trial tribunal records. Nevertheless, I have to make it clear that the requirement of reading documentary exhibit after its admission is strictly speaking applied in criminal trials. In civil cases, the requirement is less restrictive.

Lastly on the fourth ground, Mr Emmanuel submitted that, the trial tribunal improperly delivered the assessors opinion. As per section 23 (1) of the Land Disputes Court Act, Cap 89 RE 2019, clearly provides the legal position of the assessors' opinion be recorded. Therefore, failure to reflect

the assessors' opinion in the proceedings renders it nullity. He also averred that as per trial tribunal proceedings at page 56 what was recorded is a general statement that their opinions were read over and so was not sufficient rather ought to be recorded. He cited the case of ***Hosea Andrea Mushongi versus Charles Gabagambi, land Appeal No.66 of 2021 (HC).*** Mr Emmanuel finally prayed the appeal be allowed, proceedings and judgment be quashed and set aside for being nullity.

Mr. Nasimire on the fourth ground of appeal submitted that assessors' opinions were read over and explained. The same are in tribunal records. He finally averred that the proceedings of DLHT were in compliance with Section 23 (2) of the CPC and Section 24 of The Dispute Land Courts Act. Mr Nasimire then pressed for the dismissal of the appeal with costs.

It is on record that, from 20th July, 2021 to the completion of the trial on the 16th November 2022, the chairperson sat with two assessors, namely, Ms. Mageuza , and Ms. Kulwa. The chairman then adjourned the matter and fixed for hearing assessors' opinion on 29th day of November 2022, where by the Hon. Chairman held that;

> " *Baraza – shauri linakuja kwa maoni ya wajumbe na wote wamseoma maoni yao*"

In other words, assessors' opinions were not put in the trial records, nowhere to be seen the reflection of assessors' opinions.

With that regard I find it apposite to reproduce the contents of provisions of section 23 (1) and (2) of the Land Disputes Courts Act, Cap 216 RE 2019. The said section provides that:

> *"23(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors;*
>
> *and (2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment"*

In addition, Regulation 19 (1) and (2) of the Regulations impose a duty on a chairperson to require every assessor present at the conclusion of the trial of the suit to give his or her opinion in writing before making his final judgement on the matter.

The said Regulations 19 (1) and (2) provides that:

- *(1) " The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgement on the spot or reserve the judgement to be pronounced later;*

(2) Notwithstanding sub-regulation (1) the chairman shall, before making his judgement, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili"

The above provisions have been considered and interpreted by the Court in several occasions. See for instance cases of ***General Manager Kiwengwa Stand Hotel v. Abdallah Said Mussa, Civil Appeal No. 13 of 2012; Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015; Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 of 2017; Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017 and Y.S. Chawalla & Co. Ltd v. Dr. Abbas Teherali, Civil Appeal No. 70 of 2017.***

Specifically i*n* ***Ameir Mbarak and Azania Bank Corp*** (supra) when the Court noted that the record of the trial proceedings did not show if the assessors were accorded the opportunity to give their opinion as required

by the law, but the chairperson only made reference to them in his judgment as in the current case, observed that:-

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

Likewise, in **Tubone Mwambeta** (supra) in underscoring the need to require every assessor to give his opinion and the same be recorded and be part of the trial proceedings, the Court observed that:-

> *"In view of the settled position o f the law, where the trial has been conducted with the aid of the assessors...they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed...since Regulation 19(2) o f the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to*

know the nature o f the opinion and whether or not such opinion has been considered by the Chairman in the final verdict."

In the matter at hand, as I have vividly demonstrated above when the chairperson of the Trial Tribunal closed the defence case, adjourned the matter and scheduled it for hearing assessors' opinions, but it is on record that, though, the opinions of the assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is not clear as to how and at what stage the said opinion found their way in the Tribunal's judgement.

On the strength, I am satisfied that the pointed omissions and irregularities amounted to a fundamental procedural error that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal.

Having observed the same, my conclusive view is that this appeal has been brought with sufficient cause and consequently is hereby allowed.

The proceedings, judgement and decree of the trial tribunal are hereby quashed and set aside. For the pointed out legal errors, the matter be remitted to the trial tribunal for retrial by different Hon. Chairman with different set of assessors.

No orders as to costs.

It so ordered.

DATED at SHINYANGA this 11th day of August, 2023.

F. H. MAHIMBALI
JUDGE