

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

**LAND APPEAL NO. 21 OF 2022**

**JOYCE NGULIMI** (*Administrator of the  
estates of the late Ngulimi Nchimashalo*) .....**APPELLANT**

**VERSUS**

<b>1. KWANDU NGWESO</b>	}	..... <b>RESPONDENTS</b>
<b>2. MILU NDULU</b>		
<b>3. NGALA KIHANDA</b>		
<b>4. MBULA NSULWA</b>		
<b>5. WILIAM NSULWA</b>		
<b>6. ELISHA HUMU</b>		
<b>7. MAGASU NSULWA</b>		

[Appeal from the decision of the District Land and Housing Tribunal of  
Maswa.]

**(Hon. J.T. Kaare, Chairman.)**

dated the 29<sup>th</sup> day of March, 2022  
in  
**Land Application No. 51 of 2019**

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**RULING**

*31<sup>st</sup> July & 10<sup>th</sup> August, 2023.*

**S. M. KULITA, J.**

This is an appeal from the District Land and Housing Tribunal (DLHT) for Maswa. The story behind this appeal in a nut shell is that, the appellant sued the respondents at the said Tribunal over 11 (eleven) acres of land situated at Bundilya, Isanga Ward within Bariadi District in Simiyu Region. During trial the appellant stated that, she had inherited the disputed land from her late father one Ngulimi Nchimashalo who had got it from his late father Nchimashalo Ng'wasi in 1952. In their defense, the respondents were of different views that, they are the owners of the disputed land, giving reasons of purchasing the same, some others by being given by "Serikali ya Kijiji" and some of them alleged to have been living in it for a long time without being interfered.

On account of respondents' defense, the trial tribunal entered judgment in their favor of the Respondents herein except the 5<sup>th</sup> respondent who never appeared to defend in the said case.

That decision aggrieved the appellant, hence this appeal with three grounds. In their reply, the respondents herein arose one ground of preliminary objection which is to the effect that, the appeal is incompetent for not joining the 5<sup>th</sup> respondent's name as it appears in the trial proceedings.

On 18<sup>th</sup> May, 2023, regarding the prayer made by the respondents' counsel and agreed by the appellant's counsel, the Preliminary Objection was scheduled for hearing through written submissions.

Consequently, the court made an order to that effect. The schedule as fixed by the court was that, the respondents were ordered to file their written submission by 1<sup>st</sup> June, 2023, the appellant was ordered to file her reply submission by 15<sup>th</sup> June, 2023 and rejoinder, if any, was to be filed by 22<sup>nd</sup> June, 2023.

Unfortunately, the respondents filed their written submission out of the scheduled date. Worse still, it was filed without leave of the court. It was the respondents' submissions that, they filed their submission out of time as the counsel was attending Criminal Session in Mwanza and that, filing it out of the court's order has not prejudiced the appellant, hence not fatal. Reliance was made to the case of **Tanzania Venture Capital Fund Limited vs. Igonga Farm Limited [2002] TLR 302.**

In rebuttal, the counsel for the appellant submitted that, being in court session did not bar the respondents or their Advocate to apply for extension of time to file their written submissions out of time. He stressed further that, parties are bound to abide with the court's orders and the court is bound to enforce the timetable for litigations. To cement that

position, the case of **Amratlal Damodar vs. B. Jariwalla [1980] TLR 31** was cited by the said counsel.

The issue is; what does that mean in law when one fails to file her written submission according to the scheduled order? The answer is not far from fetching. In the same High Court cases, as cited by the respondent, **Harold Maleko v. Harry Mwasanjala, DC Civil Appeal No. 16 of 2000, HC-Mbeya** (unreported) in which Mackanja, J. (as he then was) held that;

*"I hold therefore that the failure to file written submission inside the time prescribed by the court order was inexcusable and amounted to failure to prosecute the appeal. Accordingly, the appeal is dismissed with costs."*

Again, in the High Court case of **Olam Tanzania Limited v. Halawa Kwilabya, DC Civil Appeal No. 17 of 1999** it was held;

*"Now what is the effect of a court order that carries instructions which are to be carried out within a predetermined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the*



*system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. So, if a party fails to act within prescribed time he will be guilty of in-diligence in like measure as if he defaulted to appear.....This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."*

Furthermore, in the High Court case of **Andrea Njumba v. Trezia Mwigobene, PC Civil Appeal No. 1 of 2006, HC Mbeya** (unreported) it was also held;

*"If a party fails to act within the time prescribed, he will be guilty of diligence in like measures as if he has defaulted to appear and submissions which were filed out of time will not be acted upon."*

The same position has been enshrined in the case of **Mobrama Gold Corporation Ltd v. Minister of Energy and Minerals and Others [1998] TLR 425.**

Armed with the above cited cases, it is therefore a position of the law that failure of the respondents' side to file their written submission is

tantamount to non-appearance on the day fixed for hearing of a case. Such failure renders this Court not to act on those submissions which have been filed out of time.

The same position was taken in the Court of Appeal cases namely; **National Insurance Corporation of (T) Ltd & another v. Shengena Limited, Civil Application No. 20 of 2007; Patson Matonya v. The Registrar Industrial Court of Tanzania & another, Civil Application No. 90 of 2011; and Godfrey Kimbe v. Peter Ngonyani, Civil Appeal No. 41 of 2014** (all unreported) in which it was held;

*"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's."*

To that end, I am of the firm views that, this court is bound not to act on the respondents' submissions which have been filed out of the court's order.

Further, though for the reasons stated above, I am not constrained to analyse the raised ground of preliminary objection, for the academic purposes I can say something on it. The record shows that, the 5<sup>th</sup>

respondent never appeared to the case during trial, as a result he lost the case and never appealed on it. But the said deciding factor never prejudiced anyone in this matter. That, non-joining the 5<sup>th</sup> respondent in this appeal has not prejudiced anyone. If nobody is prejudiced with the main deciding factor, obvious the raised preliminary objection is bound to fail. The reason behind is that non-joining of the 5<sup>th</sup> respondent in the appeal has not prejudiced anyone.

Basically, upon overruling the preliminary objection, the matter could have proceeded with hearing the appeal on merit. However, upon going through the memorandum of appeal and the trial tribunal's record, I have noted that the appellant's grounds of appeal number one and number three call for re-evaluation of the evidence. Re-evaluation includes going through the testimonies recorded at the trial tribunal and analysing them.

As long as this is the first appellate court, the same is enjoined with that power of re-evaluating the trial tribunal's evidence, when need arises and come out with its own findings. See, **Future Century Ltd vs. Tanesco, Civil Appeal No. 5 of 2009, CAT at Dar es Salaam** 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"*

It is not in dispute that, this case was heard and determined by the District Land and Housing Tribunal. The said tribunal 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 have provisions on the mode of recording evidence. Therefore, in terms of **section 51(2) of the Land Disputes Courts Act [Cap. 216 RE 2019]**, the Civil Procedure Code [Cap. 33 RE 2019] should apply. Now, looking at the **Civil Procedure Code [Cap. 33 RE 2019]**, the procedure for recording of evidence is provided for under **Order XVIII, Rule 5** which is hereunder reproduced;

*"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."*



As alluded earlier, I passed through the tribunal's record and the same shows that the appellant had brought a total number of four witnesses, while the respondents had a total number of eleven witnesses. Notable issue that is glaring upon the testimonies of all witnesses is that, the Chairman was not appending his signature after he finishes to note down the witnesses' evidence. That is contrary to provision of **Order XVIII, Rule 5 of the Civil Procedure Code** cited above.

While confronted with the same scenario in **Yohana Musa Makubi vs R, Criminal Appeal No. 556 of 2015, CAT at Mwanza** (unreported) the Court of Appeal held that;

*"In light of what the Court said in WALII ABDALLA KIBWITA's and the meaning of what is authentic can it be safely vouched that the evidence recorded by the trial Judge without appending her signature made the proceedings legally valid? The answer is in the negative. We are fortified in that account because, in the absence of signature of trial Judge at the end of 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 question as raised by the appellant's counsel. Thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; fourthly, such evidence does not constitute part of the record of trial and the record before us..."*

For the foregoing reasons, the Court of Appeal went on to hold as follows on the failure of the trial judge to append his or her signature after recording the evidence of each witness;

*"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"*

The above quoted principle applies to both criminal and civil cases. As alluded earlier that in her appeal the appellant seeks to challenge the trial tribunal on evaluation of the evidence in record. In my view, this ground cannot be determined in the circumstances where the authenticity of the evidence adduced during the trial is doubtful.

For the foregoing reasons, I am inclined to exercise the revisionary powers vested to this Court under **section 43(1)(b) of the Land Disputes Courts Act [Cap. 216 RE 2019]**. In doing so, I hereby nullify the proceedings of the trial Tribunal starting from 13<sup>th</sup> September, 2021 to the end. That being the case I quash and set aside the judgment and decree thereon. Consequently, I order an immediate **re-trial** of the case starting from the proceedings of the above mentioned date. For the interest of justice, it is ordered that the matter be heard by another Chairman. Having considered the circumstances of the case, I make **no order as to costs.**



**S.M. KULITA**  
**JUDGE**  
**10/08/2023**

**DATED at Shinyanga** this 10<sup>th</sup> day of August, 2023.



**S.M. KULITA**  
**JUDGE**  
**10/08/2023**



