

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IRINGA DISTRICT REGISTRY

AT IRINGA

LAND CASE APPEAL NO. 55 OF 2022

NAZALENO SENDWA (Suing as legal Representative of the Estates of the Late **BERNAD SENDWA**)

..... APPELLANT

VERSUS

SHAIBU KAMATE.....

RESPONDENT

(Being appeal from the Judgment and Decree of the District Land and Housing Tribunal for Iringa at Iringa)

(Hon. A. J Majengo, Chairperson)

Dated the 26th August, 2022

in

Land Application No. 14 of 2020

JUDGEMENT

Date of last order; 16/08/2023
Date of Judgement; 22/09/2023

S.M. KALUNDE, J.:

The appellant, Nazaleno Sendwa (Suing as a Legal Representative of the Estates of the Late Bernad Sendwa) was a losing party in Land Application No..14 of 2020 before the District Land and Housing Tribunal (**A. J. Majengo. Chairman**) sitting at Iringa (the **trial tribunal** dated 26th August 2022.

Being aggrieved by the decision of the trial tribunal, he is before this Court on appeal.

Before the trial court, the appellant as the administrator of the estates of his late father one Bernad Sendwa sued the respondent for trespassing into his late father's land measured 10 acres. The land in dispute is situated in Mkawaganga in Mbigili Village within Lugalo Ward, Kilolo District in Iringa Region. Due to the foregoing, the appellant claimed for an order that, the land in dispute was formerly owned by Bernad Sendwa and now is vested under the control of the applicant as the administrator of the estates of the late Bernad Sendwa. The respondent declared to be the trespasser to the disputed land. An order for permanent injunction against the respondent, general damages to be assessed by the tribunal as well as interest and costs of the suit. This fact was disputed by the respondent on the ground that, the said land in dispute belongs to him after inheriting the same from his parents.

In its decision, the trial tribunal found that the respondent herein who was the respondent before the trial tribunal succeeded to prove his ownership over the disputed land and thus ruled in favour of him on the ground that, the applicant's

case (the appellant herein) has no merits. and denied him all relief(s) prayed, now this appeal.

It is to be noted at the outset that on 05th October, 2022, the appellant lodged a four- ground memorandum of appeal with this court. Apart from that, on 29th May, 2023 his advocate filed a Amended Memorandum of Appeal comprising the following four grounds:

1. That, the honourable chairman erred in law by failing to append his signature at the end of the evidence of each of the witnesses.
2. That, the honourable chairman erred in law and fact in failing to evaluate critically the strong evidence given by PW1, PW2 and PW3 hence, he reached wrong decision.
3. That, the honourable chairman erred in law and fact in giving weight to the evidence of the respondent and his witnesses which was contradictory and had variance with the facts pleaded in the written statement of defence.
4. That, the honourable chairman erred in law and fact in failing to give reasons of not concurring with the assessors' opinion which were very strong and sound.

At the hearing of the appeal, the appellant was represented by **Mr. Jally Mongo**, learned advocate whilst the respondent was unrepresented, thus stands himself for his rights. By consent of the parties, this appeal was disposed by written submissions. Both submissions were dully filed in accordance with the order of the Court, hence the present judgement.

Before venturing into the part's submission, I have discovered that, the appellant's counsel decided to abandon ground number four, consolidate ground number two and three and argued ground number one separately. However, on my part, I will concentrate much on the first ground of appeal which clearly concerned with the issue of *whether the trial was properly conducted by the trial tribunal owing to the fact that the Chairman did not append his signature at the end of each witness's evidence* and I am settled that, this ground is enough to dispose this appeal

Submitting in the first ground of appeal **Mr. Mongo** argued that, the trial Chairman did not append his signature after recording the evidence of each witness. Failure to do so contravened **Order XVIII, Rule 5** of the Civil Procedure Code,

Cap 33 R. E 2019 (the **CPC**) which require the trial chairman to sign after the end of the evidence of each witness.

Besides, Mr. Mongo Submitted further that the trial Chairman did not sign even after closure of Applicant case at page 4 to 19 when, he closed his case and also the defence case which was opened and then closed from page 21 to page 28. According to him, the effect of failure to sign proceedings is to render the proceedings not authentic as it leaves unanswered questions on who took such evidence, who recorded the same ,failure to establish its guinueness and hence such evidence does not constitute the part of the records of the court, he insisted that, the Chairman /judge/magistrate must append his signature at the end of each testimony of every witness and the failure to do so nullify the proceedings, he invited this court to refer the case of **Greenwaste Pro Limited vs. Mwajabu Ally**, Civil Appeal No. 370 of 2020, CAT at Dodoma , and the case of **Iringa International School vs. Elizabeth Post**, Civil Appeal No. 155 of 2019, CAT at Iringa (both unreported)

Therefore, he contended that, the trial Chairman was wrong to rely his findings on the wrong proceedings which does

not form part of the records of the court to decide that the respondent is the lawful owner of the land in dispute. Simply he urged this court to follow what was decided in the given authorities by nullifying the proceedings and judgment of the trial tribunal because it is as good as the appellant was victimized without evidence. Further that this court should proceed to quash the said proceedings, set aside the judgement and decree and order a retrial before another Chairperson and thus, allow this appeal with costs.

On his part, regarding the first ground of appeal, the respondent conceded to the illegality of the trial tribunal's proceedings, however, he contended that the said defect is curable under **Section 45 of the Land Disputes Court Act, Cap 216 R. E 2019** which states that,

“ No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or

*improper admission or rejection of evidence
has in fact occasioned a failure of justice''.*

To back up his argument, the respondent urged this court to invoke the overriding principle so as to deal with the merits of the case and do away with the technicalities, he invited this court to the decision of the Court in the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT at Mwanza (unreported). According to him, non-appending of the signature at the end of the evidence of each witness does not occasion any miscarriage of justice. Hence, he prayed for this court to dismiss the appeal at hand with costs.

I have considered the submissions by the learned counsel for the parties and as I said earlier, i think the first ground of appeal is capable of disposing this appeal. In the first ground, the main complaint raised in the Amended Memorandum of Appeal and conceded by the respondent with some explanations was that, the trial Chairman did not sign the proceedings after recording the evidence of the witnesses. I had an opportunity of going through the original record of trial tribunal and i had a similar observation. In the circumstances,

there is no dispute that the trial Chairman did not sign after recording witnesses' evidence.

It is my observation from page 9 of the trial tribunal's proceedings that the trial Chairman having recorded the evidence of PW1 (Nazaleno Bernad Sendwa) did not sign. From page 16 of the proceedings having recorded the evidence of PW2 (Gabriel E. Mwamganga), the same applies, after the evidence of PW3 ((Dostea Jacob Sendwa), there is no signature of the trial Chairman. Not only that, but also, there is no signature was appended after closure of the prosecution case. Besides, just as it was the case with the evidence of PW1, PW2 and PW3, the trial Chairman did not sign after recording the respondent's evidence and his witnesses. The only signatures in the proceedings are found after the order fixing the adjournment date or Judgment date on page 19, 28 and 29 of the trial tribunal's proceedings and after the delivery of the judgement. The effect of failure to append signature in the proceedings was stated by the Court of Appeal of Tanzania in various cases including **Yohana Mussa Makubi and Another vs. R**, Criminal Appeal No. 556 of 2015, CAT at Mwanza and **Iringa International School vs. Elizabeth Post**, Civil Appeal

No. 155 of 2019, CAT at Iringa (both unreported). For instant in the case of **Yohana Mussa Makubi** (supra) the Court observed as follows:

*"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."*

The Court of Appeal went on stating 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 therefrom."

In the light of the above quoted decision, I entertain no doubt that since the proceedings of the trial tribunal were not signed by the trial Chairman after recording evidence of witnesses for both sides, they are not authentic. As a result, they are not material proceedings in determination of the current appeal. In the circumstances, I wish to reiterate what is stated in the quoted decision in **Yohana Mussa Makubi** (supra), that failure by the trial Judge to append her signature after taking down the evidence of both PW1 and the appellant is an incurable irregularity in the proper administration of criminal justice in this country.

I am aware with the principle emanated from the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph** (supra), however in this appeal, there are more serious issue than that of the said technicalities which is authenticity of the trial tribunal's proceedings and hence, the law has to be followed as it is, otherwise, it will open room for other trial Chairman/ judge/ magistrate to ignore that legal requirement to take certain legal steps. In the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017, CAT at Arusha at page 14, the Court of Appeal observed that,

'Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case'

As I have said earlier, I shall not venture to determine other grounds (2, 3 & 4) of the appeal argued by the counsel for the parties. Therefore, I allow the first ground of appeal, henceforth this appeal with costs, nullify the proceedings and judgment and set aside all orders of the trial tribunal emanated

therefrom. However, for the interest of justice, I remit the court records to the trial tribunal for the suit to be heard *de novo* by another Chairman.

It is so ordered

S.M. KALUNDE

JUDGE