

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 54 OF 2023

(Originating from Maswa District Land and Housing Tribunal Land Appeal No. 61/2022)

NGUKUMBI ISEMEAPPELLANT

VERSUS

TUBI MBASA.....1st RESPONDENT

NKINDA TOLA..... 2nd RESPONDENT

TOLA MACHOBOLO.....3rd RESPONDENT

RULING

27th October, & 8th November, 2023

KAWISHE, J.:

The appellant unsuccessful sued the respondents in the District Land and Housing Tribunal of Maswa. Dissatisfied with the decision of the Tribunal, he filed an appeal to this Court challenging the decision of the Tribunal.

Briefly, the facts of the case before the Tribunal concerned a piece of land of seven acres located at Itinje Village, Lubiga Ward, Meatu District within Shinyanga Region. The appellant claimed before the Tribunal that

the piece of land belongs to him and that the first respondent without any colour of right sold it to the second respondent who is currently cultivating it with his son, the third respondent. The respondents denied the allegations. The Tribunal heard the matter and determined it in favour of the second and third respondent. To that effect, the case was dismissed with costs. The appellant preferred the appeal with four grounds before this Court. The grounds of appeal will not be determined due to the point of law raised by Mr. Audax Constantine, the appellant's counsel which will be discussed shortly.

The appellant prayed that the judgment of the trial Tribunal be quashed and set aside and the appellant be declared as lawful owner of suit land.

On the date scheduled for hearing of this appeal, the appellant was present and enjoyed the service of Mr. Audax Constantine learned counsel, while the 1st, 2nd and 3rd respondents appeared in person and unrepresented.

Before the hearing of this appeal, the learned counsel for the appellant raised a concern on a legal issue. He banked his matter on the provisions of Order XXXIX Rule 2 of the Civil Procedure Code Cap. 33

R.E 2019 (the CPC). He prayed to this Court to allow the parties discuss a legal matter which is not part of the grounds of appeal.

Getting started, Mr. Audax stated that, the Chairman of Maswa District Land and Housing Tribunal did not sign at the end of the evidence given by the witnesses. He referred to Order XVII rule 10 of the CPC, R.E 2019 as amended by the (Civil Procedure Code) amendment of the 1st Schedule Rules 2021 GN No. 760 of 2021 and argued that, the evidence of witnesses together with other issues, the one who is recording the evidence being a judge or magistrate must sign at the bottom of the evidence.

Mr. Audax referred to the case of **Yohana Mussa Makubi & Another vs. Republic** (Criminal Appeal 55 of 2015) [2018] TZCA 80, the Court of Appeal at Mwanza, quoted in **Joyce Ngulimi vs. Kwandu Ngweso and 6 Others** (Land Appeal No. 21 of 2022) [2023] TZHC 20743 at Shinyanga (unreported). In the case of **Yohana Mussa Makubi & Another vs. Republic** (supra) the Court of Appeal stressed that, the evidence of a witness must be signed in order to authenticate it. Mr. Audax further stated that, since the Tribunal did not sign the

evidence, the evidence is not evidence and does not form record of the proceedings of the Tribunal.

Mr. Audax averred that, such an omission causes the proceedings and the decree pronounced to be null. He prayed to this Court to invoke the provisions of section 43(1)(b) of the Land Disputes Courts Act, Cap. 216 R.E 2019 to nullify the proceedings, and the decree and set them aside. He further submitted that, since the default goes to the root of the matter, even this appeal is incompetent before this court. Thus, the appeal be dismissed and make no orders as to costs since it is a default of the Tribunal.

The 1st respondent submitted that bearing in mind that the default was caused by the Tribunal and they do not know the law, they are ready to start afresh because the Tribunal erred in the process. The 2nd respondent stated that, they do not have mistakes, the error was occasioned by the Tribunal, let the matter be returned to the Tribunal. The 3rd respondent stated that, if the matter is being returned to the Tribunal in order to follow the law, he has no objection.

Having heard the submissions from Mr. Audax the appellant's counsel and the respondents, I perused the records available in order to satisfy myself on the legal issue raised. I found out that, the trial Tribunal tried the case in accordance with the provisions of the Land Dispute Courts Act, (supra), and the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003. Both the pieces of legislation do not provide for the mode of recording evidence. Thus, in terms of section 51(2) of the Land Disputes Courts Act, (supra) the Civil Procedure Code, Cap. 33, R.E 2019 should apply. From the CPC, the procedure for recording evidence is provided for under Order XVIII rule 5. For easy of reference, the provision is replicated hereunder:

"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 I stated earlier, I perused the Tribunal's record which shows that from 4th April, 2023 to 19th July, 2023 the Hon. Chairman recorded the testimonies of witnesses. Whereby, the appellant had 4 witnesses during the hearing of the case whilst the respondents had 5 witnesses.

Through the perusal, I noted that, the chairman during the recording of the testimonies of the witnesses did not append his signature at the end as required by Order XVIII rule 5 of the CPC (supra).

The Court of Appeal seated at Mwanza in **Yohana Musa Makubi vs. R**, (supra) concerning appending signature at the end of recording of a witness' testimony, the Court held that:

"In light of what the Court said in WALII ABDALLA KIBWATA's and the meaning of what is authentic can be safely vouched that the evidence recorded by 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 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; such evidence does not constitute part of the record of trial and the record before us ..."

For the reasons foregoing, the Court of Appeal made further observation on the failure of the trial judge to append his or her signature after recording witness' evidence. It 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 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."

In the case of **Joyce Ngulimi** (supra), the High Court observed that, the quoted principles apply to both criminal and civil cases. Thus, the appeal at hand follow suit. Reference is also made to the decision of the High Court at Mwanza in **Buninga Buyoya vs. Charles Machombo**, Land Appeal No. 45 of 2021 (Land Appeal 45 of 2021) [2022] TZHC 755.

Given the reasons adduced above, I am obliged to exercise the revisionary powers bestowed to this Court under section 43(1)(b) of the Land Disputes Courts Act, Cap. 216, R.E 2019. By so doing, I hereby nullify the proceedings of the trial Tribunal commencing from 4th April, 2023 to the end.

Having nullified the proceedings, consequently, I quash and set aside the judgment and the decree thereon. To that effect, I order immediate re-trial of the case commencing from the proceedings of the aforementioned date. In order to dispense justice accordingly, it is ordered that the matter be heard and determined by another chairman. I make no orders as to costs.

It is so ordered.

DATED at SHINYANGA this 8th day of November, 2023.



**E.L. KAWISHE
JUDGE**

Court: Ruling delivered in Chambers this 8th day of November, 2023 in the presence of Mr. Audax Constantine advocate for the appellant and in absence of the respondents.



**E.L. KAWISHE
JUDGE
8/11/ 2023**