

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

LAND APPEAL NO. 26967 OF 2023

(Arising from Land Application No. 79/2023 of the District Land and Housing Tribunal for Singida at Singida)

JUMA RAMADHANI HAKUMU.....APPELLANT

VERSUS

JUMA ATHUMANI KILINJA.....1ST RESPONDENT

NATIONAL BANK OF COMMERCE (NBC)2ND RESPONDENT

JUDGMENT

Date of last Order: 21/05/2024

Date of Judgment: 28/05/2024

LONGOPA, J.:

The appellant one Juma Ramadhani Hakumu is challenging the decision of the District Land and Housing Tribunal for Singida that entered judgment and decree against the appellant in Land Application No. 79 of 2023.

The appellant was a guarantor of the first respondent one Juma Athumani Kilinja to a loan worth TZS 50,000,000/= since 2012. The appellant offered his Certificate of Title over a house CT No. 7686-DLR, LO No. 115428, Plot No. 464 BLOCK Y, Kibaoni Singida township which is for commercial/Residential use.



In 2020 found that his house was intended to be sold for recovery of TZS 200,000,000/= that the first respondent had obtained loan in 2016 from the 2nd respondent using the same security i.e. Certificate of Title belonging to the appellant. The appellant was challenging this second loan and continued mortgage of his Certificate of Title without his full consent.

The District Land and Housing Tribunal for Singida dismissed the Land Application after being satisfied that there was a confirmation guarantee from the appellant thus lamentations were baseless. This judgment and decree of the District Land and Housing Tribunal aggrieved the appellant who preferred a total of three grounds of appeal, namely:

- 1. That, the trial Tribunal erred in law and fact by giving a decision in favour of the 2nd respondent without taking into consideration that the appellant was not a guarantor of the facility loan taken by the 1st respondent of tune of TZS 200 million in 2016 from the 2nd respondent.*
- 2. That, the Tribunal erred in law and fact for making a decision, and entered judgment against the appellant by relying on Exhibit D1 (confirmation guarantee) which was not signed by the appellant.*
- 3. That, the Trial Tribunal erred in law and in fact for holding a matter in favour of the 2nd respondent while the same failed to analyse, examine and evaluate properly the*



evidence adduced by the parties hence reached to the erroneous decision.

On 21/05/2024, the parties appeared before me for viva voce hearing of the grounds of appeal, the appellant was present and enjoying the legal services of Mr. Jackson Mayeka, learned advocate. The 1st respondent was represented by Mr. Constantino Gwivaha, learned advocate while the 2nd respondent enjoyed the services of Mr. Mazoea Africa, learned advocate. It is on this date of hearing when the learned counsel for applicant applied to this Court to add a new ground of appeal having perused the proceedings of the trial court upon being served with the same. This Court permitted the appellant to argue on that additional ground of appeal.

It was submission of Mr. Mayeka, learned advocate that the additional ground of appeal relates to failure of the trial Tribunal's Chairman to append signature on the proceedings upon completion of recording of the testimony of each witness. He stated that from page 14 to page 18 of the proceedings where the PW 1 was testifying for the appellant's case there was no appending of signatures.

He argued that the same error is repeated for DW 1 and DW 2 as their testimonies are not validated by appending signature of the presiding chairman. According to the appellant, the only exception on this aspect is where orders to admit exhibits or adjourn the matter in which there was

appending of a signature of the Chairperson. It is only on those two instances of admission of documentary evidence and adjournment where appended signature appears.

It was argued by the appellant that failure to append signature violates Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 R.E. 2022 calls for mandatorily signing of the proceedings and appending signature of the trial judge or magistrate.

According to appellant's submission, Section 51(1) of the Land Disputes Courts Act, Cap 216 R.E. 2019 provides for the Regulations applicable to the District Land and Housing Tribunal namely the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No. 174 od 2003. The law is clear that if there is a lacuna then the Civil Procedure Code, Cap 33 R.E. 2019 apply and in the circumstances of this matter the CPC provides for the appending of signature to the testimonies of witnesses.

Failure to append the signature is fatal as authenticity of the evidence becomes questionable. The appellant cited the case of **Joseph Elisha versus Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 on page 7 (TANZLII), to reiterated that the Court of Appeal restated the importance of appending signature is to ensure veracity and correctness of the Court's record.



On whether the same is curable under Article 107A(2)(e) of the Constitution of the United Republic of Tanzania, Cap 2 RE 2019, it was the appellant's argument that such failure to comply is not curable. The Court of Appeal in **Tubone Mwambeta vs Mbeya City Council**, Civil Appeal No. 287/2017 (TANZLII), it was stated that salutary rules of procedure are important for enhancement of justice.

Further, the appellant stated that appending signature is not merely a technicality, but it goes to the root of the matter and that non appending of signature has effect to the whole proceedings. It makes the whole proceedings a nullity. The Court of Appeal of Tanzania has stated in several decisions that evidence that is recorded without appending signature thereto of the presiding officer to validate its authenticity should be expunged from records. Thus, the matter deserves to be remitted to the trial Tribunal for hearing of the same afresh of the whole of evidence of PW 1, DW 1 and DW 2 would be expunged thus there is no testimony remaining on record. For that reason, it was the appellant's prayer that this Court be pleased to use its revisional powers to revise the whole the record, quash the whole of the proceedings and set aside the resultant judgment and decree. It was furthermore reiterated that it is the trial Tribunal that caused all these infractions, thus no party should be condemned to costs in the circumstances.



On the other hand, the Counsel for the Counsel for 1st respondent, Mr. Gwivaha did not seriously challenge the submission of the appellant. It was reiterated by the first respondent that having been satisfied that there is procedural irregularity going to the root of the case, he was not objecting the submission and prayers made thereto.

The counsel for 2nd respondent, Mr. Mazoea Africa took up the issue and stated that it is true that some parts of the proceedings are lacking appending of the signature of the Chairman of trial Tribunal.

He argued that there are several judgments of the Court of Appeal that have cemented that failure to append signature to the testimonies is fatal because it goes to the root of the case namely authenticity of the evidence adduced by the parties cannot be ascertained. That being the case, it was the second appellant's prayer that this Court nullify the proceedings of the trial Tribunal, quash the judgment and order trial de novo of the matter. It was reiterated that miscarriage of justice being caused by the trial Tribunal, this was an appropriate case not to order costs to any party as the omission was not caused nor contributed to by the parties.

Having heard all the parties on this matter, it is pertinent to analyse the available record to find out merit or otherwise of this single ground of appeal that was submitted by all the parties to this appeal.



It is true that Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 R.E. 2019 provides the way evidence of the witnesses must be recorded. The provisions state that:

5. 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 (Emphasis added).

The provision relates to the hearing of suits and examination of witnesses and it requires that trial court must ensure that evidence of each witness is taken down in writing and the trial judge or magistrate appends his signature thereto. The words used in the provisions are "shall be taken down in writing" and "shall sign" are implying the mandatory nature of the provision.

In the case of **Patrick William Magubo vs Lilian Peter Kitali** (Civil Appeal No. 41 of 2019) [2022] TZCA 441 (18 July 2022) (TANZLII), at page 12, the Court of Appeal stated that:



By the use of the word 'shall', the above provision implies that, compliance with section 101 above is mandatory except where there is evidence of existence of extraordinary circumstances making it impracticable for the parties to refer their dispute to the Board.

That being the case, it is lucid that the term shall used in Order XVIII Rule 5 of the CPC calls for strict compliance with the provision in respect of recording the testimony of each witness. I should state at this juncture that where there is cross examination or/and re-examination of a witness, at the end of each stage of examination appending of the signature is a mandatory requirement.

The importance of appending signature to the evidence of each witness has been elucidated by the Court of Appeal in several decisions. For instance, in the case of **Geoffrey Raymond Kasambula vs Total Tanzania Limited** (Civil Appeal 320 of 2019) [2022] TZCA 747 (1 December 2022), at page 10, the Court stated that:

*Also, times without number this Court has emphasized that failure to append a signature to the witnesses' evidence vitiates the authenticity of the evidence taken and it is fatal to the proceedings. We took this stance in the case of **Chacha s/o Ghati @ Magige v. Republic**, Criminal*



Appeal No.406 of 2017 (unreported) when we stated as follows: "...we entertain no doubt that since the proceedings of the trial court were not signed by the trial Judge 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."

Failure to append signature to the evidence of each witness makes the whole testimony to be marred with illegalities as authenticity of the same cannot be established. The implication of failure to append signature vitiates the whole of the proceedings thus making the judgment and decree thereto despite how good the same are to lack basis of the evidence that led to such decision is impugned.

In the case of **Attu J. Myna vs CFAO Motors Tanzania Limited** (Civil Appeal 269 of 2021) [2022] TZCA 187 (5 April 2022), at pages 9-10, the Court of Appeal illustratively stated that:

However, it is our view that the requirement is pertinent in order to safeguard the authenticity and correctness of the record. In this respect, we wish to take inspiration from the Civil Procedure Code [CAP 33 R.E. 2019] whereby signing of witness's evidence is a mandatory requirement. Order XVIII rule 5 thereof provides thus: "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.**" [Emphasis added]. See also section 210 (1) (a) of the Criminal Procedure Act [CAP 20 R.E. 2019]. There is plethora of Court's decisions to the effect that, failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings.*

The effect of failure to append signature in the proceeding was stated by the Court of Appeal in the case of **Yotham Yona vs Republic** (Criminal Appeal No. 13 of 2021) [2023] TZCA 17693 (3 October 2023) (TANZLII), at pages 13-15, 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. 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.

As the legal position on the impacts of failure to append signature vitiates the whole of the proceedings, there is no better choice to this court other than nullification of the proceedings in Land Application No. 79 of 2020 as the evidence of PW 1, DW 1 and DW 2 was recorded in contravention of mandatory requirements of the law. The trial Chairman of the Tribunal did not append signature of each witness' evidence in all the stages i.e. after examination in chief, cross-examination and after re-examination.



That said and done, in exercise of powers vested to this Court under sections 42 and 43(1) (b) and (2) of the Land Disputes Courts Act, Cap 216 R.E 2019, I hereby nullify the proceedings of the District Land and Housing Tribunal for Singida in Land Application No. 79 of 2020. I also set aside the impugned judgment and order expeditious retrial by another Chairperson.

Each party shall bear his own costs since it was the tribunal which committed the irregularities that have brought this appeal to an end.

It is so ordered.

DATED at DODOMA this 28th day of May 2024.



Longopa

**E.E. LONGOPA
JUDGE
28/05/2024**

[Handwritten mark]