IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

LAND APPEAL NO 26984 OF 2023

(Arising from Land Application No. 16 of 2023 of the District Land and Housing Tribunal for Singida)

AGNES AMASI MTINANGI ..... APPELLANT

VERSUS

ZAKAYO DANIEL MAHANJO..... RESPONDENT

JUDGMENT

Date of the last Order: 20/05/2024

Date of the Ruling: 18/06/2024

LONGOPA, J.:

The appellant and respondent were parties to a Land Application before the District Land and Housing Tribunal for Singida on dispute of ownership of 2.5 acres of land located at Mpipiti Village, Mudida Ward within the District and region of Singida.

It was alleged that the appellant had entrusted the land to one Magdalena Jumbe in 1973 to use it with agreement to hand over the same later, but the respondent has refused to hand over the land following death

of Magdalena Jumbe to whom the land was entrusted. The late Magdalena Jumbe died in 2013. On 13th October 2023, the trial Tribunal entered judgment and decree against the appellant for failure to prove to the required standard of balance of probabilities that she was entitled to ownership of the disputed land. The trial Tribunal declared the respondent as the rightful owner of the disputed piece of land. It is on account of this decision, the appellant on 10th November 2023 preferred this appeal.

The appellant was aggrieved by the whole of the decision and orders of District Land and Housing Tribunal for Singida at Singida dated 13th day of October 2023 by Hon B. COLEX, Chairperson, thus appeals against such decision and orders on the following grounds: -

1. *That, the trial Tribunal erred in law and fact by making a decision and entered a judgment against the appellant and declared the respondent a lawful owner of the suit land without taking into consideration that the respondent was a mere invitee, invited by Magdalena Jumbe to the suit land.*
2. *That, the trial Tribunal erred in law and fact by holding that the appellant failed to call material witness without taking into consideration that the material witness was summoned and testified to the same, also other material witnesses were summoned by the appellant but the trial Tribunal rejected them to adduce evidence*

hence rendered the appellant to have been denied a right to be heard.

3. *That, the trial Tribunal erred in law and fact by failed to make proper evaluation, analysis and examination of evidence adduced by both parties and their summoned witnesses hence resulted into erroneous decision.*
4. *That, the trial Tribunal erred in law and fact by making a decision and entered a judgment against the appellant without taking into consideration that the appellant proved his claim to the required standard (balance of probability).*

It was the appellant's prayer that on account of all these grounds of appeal this court be pleased to allow the appeal with costs, and quash the judgment and order of the District Land and Housing Tribunal thereof.

On 20/05/2024, the parties appeared before me for viva voce hearing of the appeal. The appellant enjoyed the legal services of Mr. Jackson Mayeka, learned advocate while the respondent appeared in person fending for oneself.

The appellant commenced with additional ground of appeal that is on the failure of the trial Tribunal's Chairperson to append signature to the testimony of every witness in the proceedings. It was submitted that

testimonies of PW 1 on page 5, PW 2 on page 6, DW 1 on pages 9-10 as well as testimonies of DW 2 and DW 3 lacked signature of the trial Tribunal's Chairman.

It was reiterated that failure to append signature to the testimony of a witness is contrary to the requirements of Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 R.E. 2019 that calls for appending of signature for every witness's testimony. The appellant cited the case of **Joseph Elisha versus Tanzania Postal Bank**, Civil Appeal No. 157 of 2019, at page 7 where the Court of Appeal of Tanzania stated that failure to append signature affects the authenticity of the proceedings. It was argued that failure to sign the testimony of each witness makes the proceedings to be tainted thus we pray that the whole of the proceedings of the District Land and Housing Tribunal be quashed. Thus, the judgment and decree cannot stand, and the remedy is to remit the matter to the trial Tribunal for re-hearing or proper recording of the evidence.

On the first ground relating to ownership declaration of the respondent, it was submitted that the respondent was only invitee to the land. The respondent was not a child of Magdalena Jumbe and the grandchild of Magdalena Jumbe testified that the land was leased to one Magdalena Jumbe. It was an error on part of the trial Tribunal to disregard the testimony of PW 2.

Regarding the second ground of appeal relating to failure to material witnesses, it was submitted that that the material witnesses were called but the Tribunal refused that she should not testify as she had heard the other witnesses testimonies. Thus, the appellant was denied the right to be heard and the appellant blamed trial Tribunal for failure to guide the parties that witnesses should not be in court while other witnesses of the same party are testifying. The failure to inform parties about the witnesses not to participate in hearing of other witnesses affected the case of the appellant. This breached the right to be heard. This ground on the right to be heard is fundamental and it is enshrined in the Constitution whereby every person is entitled to be afforded the right to be heard.

On the third ground that Tribunal erred for its failure to analyse and evaluate evidence thus reaching to a wrong decision thereto, it was submitted that appellant's evidence through PW1 and PW 2 related to how the disputed land was leased to Magdalena Jumbe and the manner in which such land was returned to the appellant. This evidence was not contradicted. It is lucid to point to the same direction on ownership of the appellant's land. It was reiterated that defence testimonies were contradictory as did not state how Magdalena Jumbe owned the land. There were no clan meeting minutes tendered before the Tribunal and witnesses brought by the respondent were contradictory. DW 3 Fatuma Isango stated that the disputed land was given to Magdalena Jumbe. DW 2

Steven Mohamed Jumbe stated to have seen Magdalena Jumbe living in the land in dispute since 1973.

It was further submitted that there was no evaluation of evidence as DW 1 stated to have been allowed or confirmed by the clan meeting but in cross examination he stated that administration of estate of the late Magdalena Jumbe was not yet completed. The land can be obtained by way of inheritance through administration of estate or gift inter vivos, whereas the respondent neither proved any of these means.

On the last ground, it was submitted that the Tribunal erred to decide against the appellant who proved the case to the required standard. The evidence of the appellant managed to prove the required standard that disputed land belonged to the appellant. PW 1 and PW 2 testimonies had effect of proving that disputed that belonged to the appellant. Thus, it was prayed that this Court be pleased to allow this appeal and quash the decision of the District Land and Housing Tribunal and that the appellant be declared the lawful owner of the disputed land. Appellant also prayed for costs of the case as well.

The respondent vehemently resisted all grounds of appeal. It was submitted that regarding the signature of the trial Tribunal's Chairman, it was not correct to say the proceedings were affected. It was argued that to

address the matter before the Tribunal witnesses were called, testified and cross examined by the other party.

The respondent reiterated that there was no denial of the right to be heard. The Tribunal required all witnesses to recuse themselves when the witnesses of the same side were testifying. It is not true that a child of one Magdalena Jumbe was a witness. She informed the Court that she is not a witness that is the reasons she remained in the Tribunal when others were testifying. It is only one Sophia who went out and when her turn came, she testified.

It was argued that PW 2 evidence was that Magdalena Jumbe was given the land by the appellant and her husband in 1974, but it is evidence on record that the appellant was married in 1976 thus could not have given land to Magdalena Jumbe before being married. The appellant and her husband never used the land at any time in 1970s.

It was reiterated by the respondent that Magdalena Jumbe demised in 2013 and the respondent continued to use the land until 2021 when Agnes emerged to claim it. The respondent had used the land since 1993 when Magdalena and her husband were becoming older and the whole land was in use by the respondent throughout that period. It was further stated that children of Magdalena were given their respective land inter vivos.

The respondent argued that the witnesses who participated in the Clan meeting testified to support the testimony of the respondent. The evidence of the appellant was weak, disjointed and unreliable. It is contradictory evidence of the appellant that made the Tribunal to declare the respondent as the rightful owner of the land in question. It was the respondent's evidence that was watertight to warrant the Tribunal to declare respondent as the owner of the land in question. It was respondent's prayer that the appeal be dismissed with costs.

The appellant rejoined very briefly that it is not on record that the respondent used the land since 1993 and that it is also not on record that the land was given to him by Magdalena Jumbe during her survival. These are new facts. What is on record is that Clan meeting did confirm the respondent after demised of Magdalena Jumbe. Thus, the appellant reiterated the submission in chief.

Having heard the rival submissions by the parties, I have dispassionately perused the record of the trial Tribunal with view of analysing the merits or otherwise of the grounds advanced by the parties.

It is important to address the right to be heard in light to failure to call material witnesses. The appellant argued strenuously that the appellant's right to be heard was violated. This was on ground that trial

Tribunal found that appellant failed to call the material witnesses to substantiate the claim that she was the rightful owner of the disputed land.

The right to be heard is one of the fundamental rights that promote the natural justice principles. The impacts of failure to avail the right to be heard is to vitiate the decision of the court. In **Rajabu Yusufu Kirumbi & Others vs Wendo Mlaki & Others** (Civil Appeal No. 137 of 2021) [2024] TZCA 211 (20 March 2024) (TANZLII), at pages 6-8, the Court reiterated that:

> *It is a cardinal principle of natural justice that a person should not be condemned unheard, fair procedure demands that both sides should be heard. Further, the decision reached in violation of the principle of natural justice is void and is of no effect. Our jurisdiction is blessed with authorities which emphasized that, the courts should not decide matters affecting rights of parties without according them their right to be heard. In* ***Mbeya-Rukwa (supra)*** *the Court expressed the position of the law with respect to the right to be heard. It is a fundamental constitutional right. The Court stated: In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right Article 13(6) (a) includes the right to be heard among the attributes of equality before the law and declares in part*

when the right and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing.... Further, the Court in ***Abbas Sherally (supra)*** *emphasized that even if the decision would be the same whether the party was accorded the right to be heard or not, still the court is duty bound to hear the parties before a decision is reached.*

The decision of the Court of Appeal reiterated that the right to be heard is so fundamental that failure to accord such rights makes the findings of the court null and void for contravening mandatory requirements of the law. It impairs the whole of the proceedings and the decision arising out of those proceedings as the basis of such decision is on nullity of the hearing.

The main question is whether the appellant was denied the right to be heard. The record of the trial Tribunal indicates that: first, on 08/06/2023 the applicant's case commenced and PW 1 who is the appellant testified. Second, on the same day, PW 2 one Sophia Ismail also testified. Third, the appellant informed trial Tribunal that he intended to call other witnesses. Third, the Tribunal ordered that hearing would proceed on 18/07/2023. Fourth, on 18/07/2023, the appellant informed the Tribunal that she was not intending to call any other witness and prayed to close the applicant's evidence. Fifth, it is at this juncture, the Tribunal marked

the applicant's case closed. Sixth, the appellant was afforded opportunity to cross examine all defence witnesses.

It is lucid that the appellant was afforded the opportunity to call witnesses to prove the applicant's case and cross- examine all the defence witnesses. That being the case, there is no iota of truth that the appellant was denied the right to be heard. Having so found, it was correct for the trial Tribunal to hold that appellant failed to bring material witnesses namely children of Magdalena Jumbe who the appellant asserted that they had returned the land to the appellant in 2013.

With all the evidence on record of what happened in the proceedings, the appellant cannot be heard lamenting on being denied the right to be heard in the circumstances where they were afforded adequate opportunity to ensure that their right to be heard is categorically observed. It is just an afterthought that should not be condoned by any serious court in administration of justice.

Failure to call material witness entitles the court to draw adverse inference against that party. For instance, in the case of **Charles Samwel vs Republic** (Criminal Appeal No. 78 of 2019) [2021] TZCA 264 (22 June 2021) (TANZLII), at pages 15-16, the Court stated that:

> *Section 122 of TEA states that the Court may draw adverse inference in certain circumstances against the prosecution*

for not calling certain witnesses without showing any sufficient reasons as held in ***Aziz Abdallah vs Republic*** *[1991] T.L.R. 71...the evidence of Martin, the ten-cell leader was very important to substantiate claims by the prosecution that the seizure of the motorcycle was done properly. The evidence of Kevin would have bolstered the evidence of having seen the motorcycle at the appellant's premises and whether the appellant was the one who kept it there or not. The importance of these witnesses was conceded by the learned State Attorney, and no reasons were advanced explaining their absence. We have taken all concerns into consideration, and we are persuaded that this is one case to infer an adverse inference to the failure of the prosecution side to call the two witnesses to testify.*

In the circumstances, the trial Tribunal was correct and acted within purview of the law to find against the appellant as the material witnesses were not called to give their testimonies before the Tribunal. At this juncture, the second ground of appeal lacks merits, and it is hereby dismissed.

The first, third and fourth grounds of appeal can be disposed jointly. All these grounds can be addressed in one main ground of proof of the case to the required standard.

It is settled law in this jurisdiction that it is a duty of the person who alleges must prove and the proof is within the standard of balance of probabilities.

In **Charles Richard Kombe t/a Building vs Evarani Mtungi & Others** (Civil Appeal No. 38 of 2012) [2017] TZCA 153 (24 March 2017) (TANZLII), at page 6, the Court of Appeal observed that:

> *From the above extract it is clear that the learned judge applied the standard of proof applicable in civil as well as criminal matters.* ***We need not cite any provision of law because this being a civil matter, it is elementary that the standard of proof is always on the balance of probabilities and not beyond reasonable doubt*** *(Emphasis added).*

Similarly, in **Anthony M. Masanga vs Penina (mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015) (TANZLII), at pages 10-11, the Court observed that:

> *It is a common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. Now, in the present matter, the issue before*

us is whether the appellant had; in the required standard, discharged his duty of proving that the land belonged to him and not to anybody else. The High Court judge was of the opinion that the appellant failed to discharge that duty. We hasten to agree with him for the reasons we are about to assign.

All these precedents point to one and same direction that the standard of proof is that of balance of probabilities. It is the duty of the person who wishes the court to enter judgment in his favour to prove that a particular fact exists.

The available evidence on record reveals that PW 1 stated that appellant together with her husband leased/gave the land to Magdalena Jumbe in 1976. The evidence of PW 2 was to the effect that Magdalena Jumbe was given the piece of land in 1974 which was before the appellant got married. The evidence of DW 2 was to the effect that Magdalena Jumbe was in occupation of that land in 1973 when DW 2 got knowledge to notice the occupant of land. DW 3 reiterated that she is the one who constructed the building for Magdalena Jumbe in the disputed land. Thus, that land does not belong to the appellant.

It should be noted that evidence of PW 1 is contradicted by PW 2. Thus, the applicant's evidence was materially contradictory in nature. It

pointed to two different directions. In the circumstances of the case the appellant's testimony in totality failed to meet threshold of proof of civil matters.

In the case **Abraham Sykes vs Araf Ally Kleist Sykes** (Civil Appeal No. 226 of 2022) [2024] TZCA 20 (7 February 2024) (TANZLII), at page 10, the Court held that:

> *Suffice it to say that it is well settled that, the one who alleges has a burden to prove the contended fact in terms of sections 110 (1), (2) and 111 of the Evidence Act. In civil cases like the instant one, the standard of proof is on the balance of probabilities.*

It is correct that appellant was the one who alleged that she was the one of the disputed land, but appellant failed to adduce evidence sufficiently to prove the ownership of such piece of disputed land. There was no evidence sufficient to establish that the appellant was the lawful owner of the land and that respondent was invitee as alleged by the appellant.

Trial Tribunal having analysed and evaluated the evidence on record at pages 3, 4 and 5 of the judgment it correctly observed that the appellant failed to prove her case against the appellant. There was no

evidence whatsoever that respondent had leased the land from the appellant after alleged return of the land in 2013. Coupled with explicit contradictory evidence of PW 2 that did not support the evidence of PW 1 on when was the land given to late Magdalena Jumbe. Also, failure to call material witnesses was another aspect necessary to find out that appellant failed to prove her case.

I entirely agree to the decision of the trial Tribunal that evidence of the appellant was weak and unable to establish on balance of probabilities that appellant was the rightful owner of the disputed land. At this juncture, it is my firm view that 1st, 3rd and 4th ground of appeal lack any merits thus they are hereby dismissed for being destitute of merits. Under normal circumstances, I was prepared to dismiss this appeal save for technical ground that I cannot disregard.

In course of arguing the appeal, the appellant raised a ground related to the failure by trial Chairperson to append signature to the testimonies of the witnesses. This is in accordance with Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 R.E. 2019. It provides 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 supplied).

It is mandatory requirement for the trial Judge or magistrate to record testimony of each witness in a narrative form and at the end of the witness testimony the respective trial judge or magistrate must sign to authenticate the validity of such testimony. Failure to do so vitiates the evidence.

In the case of **Geofrey Raymond Kasambula vs Total Tanzania Limited** (Civil Appeal 320 of 2019) [2022] TZCA 747 (1 December 2022) (TANZLII), 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."

It is on record that trial Tribunal's Chairman did not append his signature after recording the testimonies of all the witnesses of the appellant and those of respondent. This failure to append the signature makes the authenticity of the testimonies of the witnesses questionable. It affects the validity of the proceedings that led the judgment and decree subject of this appeal. It is implicitly that judgment and decree of the trial Tribunal are based on the proceedings that are not authentic.

At this juncture, I shall uphold this ground of appeal for being meritorious. I therefore quash the whole of the proceedings from 08/06/2023 to 13/10/2023 for being violative of the mandatory requirement of the law of this jurisdiction regarding recording of testimonies of the witnesses.

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. 16 of 2023. I also set aside the impugned judgment and order expeditious re-hearing of the matter by ensuring that testimony of every witness in every stage of the examination of such

witness is appended with a signature to validate the authenticity of the same.

As the anomaly is fully attributed to the trial Tribunal, I am of the settled view that each party should bear its own costs of this appeal.

It is so ordered.

DATED at **DODOMA** on this 18th day of June 2024

E.E. LONGOPA
JUDGE
18/06/2024