**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO. 257 OF 2021**

*(Originating from Kinondoni District Land and Housing Tribunal in Land Application No. 290 of 2013)*

**RIZIKI SALUM ..... APPELANT**

**VERSUS**

**NMB ..... 1ST RESPONDENT**

**MOHAMED H. MWINYI ..... 2ND RESPONDENT**

**MAGESA BONIFACE KASSANA ..... 3RD RESPONDENT**

*Date of last Order: 18/10/2022*

*Date of Judgment: 27/10/2022*

**JUDGMENT**

**I. ARUFANI, J**

The appellant in the present appeal was aggrieved by the judgment and decree of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (hereinafter referred as the tribunal) delivered in Land Application No. 290 of 2013. The judgment was delivered on 1st October, 2021 by Hon. H. R. Rugarabamu, and the appeal filed in this court by the appellant comprised the grounds listed hereunder: -

1. *That honourable chairperson erred both in law and facts for deciding in favour of the 1st respondent without considering appellant sufficient evidence on the record.*
2. *That honourable chairperson erred both in law and fact for deciding that as the appellant did not put caveat on the property thus failed to demonstrate her interest on the suit land.*
3. *That the Honorable Tribunal chairperson erred in law and fact for not considering the evidence of the Appellant that house subject of the disputes was jointly acquired.*
4. *That the honourable chairperson erred in law and fact for relying on exhibit D- 5 being a spouse consent while the said exhibit has no evidential value.*
5. *That the trial chairperson erred in law and fact for his finding that there was spouse consent in obtaining the loan.*

While the appellant was represented in the instant appeal by Mr. Living Raphael Kimaro, learned advocate, the first respondent was represented by Mr. Leonard Masatu, learned advocate, the second respondent was represented by Mr. Deogratus Tesha, learned advocate and hearing of the matter proceed ex parte against the third respondent as he was duly served but failed to appear in the court. The counsel for the parties prayed and allowed to argue the appeal by way of written submissions.

While preparing the judgment of the instant appeal the court found there are some irregularities in the proceedings of the tribunal which need to be addressed first before going to the merit of the grounds of appeal filed in this court by the appellant and argued by the counsel for the parties. The observed irregularities are to the effect that: -

1. *During hearing of the matter there was changes of trial chairpersons and it was not stated why there was such changes as required by the law.*
2. *When the appellant who was the applicant at the tribunal gave her testimony, the assessors participated in the hearing of the matter were invited to ask questions for clarification form the witness before the witness being cross examined by all respondents and re-examined by his counsel.*
3. *The evidence of all witnesses testified in the matter was not signed at the end as required by the law.*

Having observed the stated irregularities and after seeing they are not within the grounds of appeal filed in the court by the appellant the court invited the counsel for the parties to address the court about its effect to the proceedings of the tribunal which gave birth to the decision the appellant is challenging before this court. The counsel for the appellant told the court that, the irregularities observed by the court are governed by the law.

He stated it is a requirement of the law that evidence of each witness must be signed after being closed. He argued there are numbers of authorities stating where there are changes of trial magistrate or chairperson in a trial of a matter, the reason for that changes must be stated in the proceedings of the matter. He submitted that the observed irregularities renders the whole proceedings of the matter a nullity. He invited the court to nullify the whole proceedings of the tribunal, quash and set aside the decision of the tribunal and ordered the matter to be tried de novo before another chairperson with competent jurisdiction.

On his side the counsel for the second respondent told the court is subscribing to what was stated by the counsel for the appellant. He added that, there are numbers of authorities which states failure to sign the evidence of witness renders the unsigned evidence as if there is no evidence taken. He stated further that, the requirement to state the reason for change of trial chairperson is a legal requirement which if not complied with renders the proceedings a nullity. At the end he concurred with the prayers made to the court by the counsel for the appellant.

Having heard the counsel for the parties the court is now turning to the irregularities observed by the court in the proceedings of the tribunal. Starting with the first irregularity the court has found the proceedings of

the tribunal shows the matter was heard by three different Chairpersons who were (1) R. Mbilinyi, (2) M. Lung'wecha and (3) L. R. Rugarabamu. The court has found while Hon. Mbilinyi heard the evidence of Riziki Salum Bakari who testified as PW1, Hon. Lung'wecha heard the evidence of Mohamed Hamis who testified as DW1 and Hon. Rugarabamu heard the evidence of Msajigwa Raphael Ndaki who testified as DW3.

The court has found the Land Dispute Courts Act, Cap 216 R.E 2002 (hereinafter referred as the LDCA) and Land Disputes Courts (District Land and Housing Tribunal) Regulations, GN No. 174 of 2003 (hereinafter referred as the Regulations) does not provide for what should be done where a chairman of the tribunal has commenced hearing of a case and failed to conclude the hearing. As there is no provision of the law in the mentioned laws governing such a situation, the court has found section 51 (2) of the LDCA requires the tribunal to resort to the Civil Procedure Code, Cap 33 as revised from time to time (hereinafter referred as the CPC) to see what is required to be done. The court has found the relevant law which would have governed the stated situation was Order XVIII Rule 10 (1) of the CPC which states as follows: -

> *"Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made*

*under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."*

The interpretation of the above quoted provision of the law as to what should be done when it occurs a judge or magistrate or chairman of tribunal has failed to conclude hearing of a matter because of any reason has been done by our courts in number of cases. One of those cases is **Kinondoni Municipal Council V. Consult Limited,** Civil Appeal No. 70 of 2016 which quoted with approval the case of **M/S Georges Centre Limited V. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) where the Court of Appeal stated as follows: -

*"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that.* ***The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another."*** [Emphasis added].

From the above quoted excerpt and specifically the bolded part it is crystal clear that a judicial officer who has taken up a case from his or her

predecessor who has begun to hear a case he/she is required to state in the record of the case why he has taken up the case which was partly heard by his predecessor. The rationale for such a requirement was also stated in the case of **M/S Georges Centre Limited** (supra) where the Court of Appeal stated as follows: -

> *"There a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witness which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."*

While being guided by the position of the law stated hereinabove which binds also Chairpersons of the District Land and Housing Tribunal the court has found there is no any reason stated in the proceedings of the tribunal as to why Hon. Lung'wecha, took over the matter which its hearing had already commenced before Hon. Mbilinyi, who heard the evidence of Riziki Salum Bakari (PW1). The court has found it is only Hon. Rugarabamu who put in the record of the tribunal that her predecessor had been transferred to another station.

The question is what is the effect of Hon. Lung'wecha's failure to state why he took over the partly heard case from Hon. Mbilinyi. The court has found the answer can be found in the cases of **Priscus Kimaro V.R**, Criminal Appeal No. 301 of 2013 and **Abdi Masoud @ Inoma and Others V. R**, Criminal Appeal No. 116 of 2015 (both unreported) where the Court of Appeal held that: -

> *"... in the absence of any reason on the record for the succession by a judicial officer in a partly heard case, the succeeding judicial officer lacks jurisdiction to proceed with the trial and consequently all proceedings pertaining to the takeover of the partly heard case becomes a nullity".*

That means the evidence taken from where Hon. Mbilinyi, Chairperson ended is a nullity because the subsequent evidence was taken by a chairman who had no jurisdiction to take the stated evidence. The court has found that, although Hon. Rugarabamu stated the reason for taking over hearing of the matter from her predecessor but that could have not cured the irregularity committed by her predecessor who did not comply with the requirement of the law stated herein above. Therefore, the whole evidence received from where Hon. Mbilinyi ended and the subsequent decision composed by Hon. Rugarabamu basing on the evidence which was taken under the stated irregularity are nullity.

Coming to the second irregularity which states the assessors were invited to ask questions for clarification before the witness being cross examined by all respondents and being re-examined by the counsel for the applicant the court has found section 177 of the Evidence Act, Cap 6 R.E 2019 states clearly that, in cases tried with assessors, the assessors may put any question to the witness through or by leave of the court, which the court itself might put and which it considers proper. The question in the matter at hand is when the assessors may be permitted to put question to the witness. The court has found section 147 (1) of the Evidence Act, Cap 6 R.E 2019 states clearly that: -

> *"Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined".*

To the view of this court and as it has been a practice of the court in many cases tried with assessors, the procedure for assessors to ask questions to a witness for clarification is done after examination in chief, cross examination and re-examination being conducted. The stated view of this court is being bolstered by the view taken by the Court of Appeal in the case of **Mathayo Mwalimu & Another V. R**, [2009] TLR 271 where it was held that: -

*"As at what stage in the trial can assessors ask questions, we think that this depends on the trial judge. In our respectful opinion, however,* ***we think assessors can safely ask questions after the re-examination.****" [Emphasis added]*

From the wording of the above stated opinion of the Court of Appeal the court has found that, although assessors can be allowed to ask question for clarification at any stage of hearing of the matter but to the view of this court the above stated opinion of the Court of Appeal sound plausible to me because the clarification which assessors may seek before re-examination might be made in cross examination by the adverse party or in re-examination which will be done by the party calling the witness. Therefore, to invite assessors to ask questions to the witness before the witness is being cross examined by all adverse parties and being re-examined by the party calling him/her is to the view of this court improper.

With regards to the third irregularity the court has found the evidence of all three witnesses testified at the tribunal before the three mentioned Chairpersons were not signed at the end. The court has found there is no provision of the law in the LDCA and the Regulations governing how the District Land and Housing Tribunal is required to record evidence adduced before it. That being the position of the law the court has found under the guidance of section 51 (2) of the LDCA the District Land and Housing

Tribunal is required to be governed by Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 R.E 2019 (henceforth the CPC) which states as follows: -

> *"**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 wording of the above quoted provision of the law and specifically the bolded part shows clearly that the evidence of each witness testifying before the tribunal is required to be taken down in writing by or under the personal direction and superintendence of the judge or magistrate in a narrative form. After the chairperson taken down the evidence of a witness, he or she is required to sign the evidence of a witness. The task given to the judge or magistrate by the above cited provision of the law which binds also chairperson of the District Land and Housing Tribunal is mandatory to be performed as the law is coached in mandatory form.

The rationale for requiring a judge, magistrate or chairman of the tribunal to sign the evidence of each witness as stated by the Court of Appeal in the case of **Yohana Musa Makubi V. R**, Criminal Appeal No.

556 of 2015, (unreported) is to authenticate the recorded evidence. When the Court of Appeal was dealing with the issue of evidence recorded without being signed by the trial judge in the above cited case it made the following observation: -

> *"... 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 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 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 ..."*

That being the position of the law and after seeing the chairman of the tribunal is also governed by the above quoted provision of the law via section 51 (2) of the LDCA the court has found the proceedings of the tribunal shows the evidence recorded from all witnesses testified in the matter at the tribunal were not signed as required by the above quoted provision of the law. Now the question is what is the effect of the chairpersons of the tribunal to omit to sign the evidence of the witnesses

testified before the tribunal and the subsequent decision arrived by the tribunal. The answer to the above question can be found in the afore cited case of **Yohana Musa Makubi** (supra) where the Court of Appeal stated 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."*

From the above quoted excerpt, it is crystal clear that, as the evidence taken down from all witnesses testified in the matter for its determination which its decision is the basis of the appeal at hand were not signed by the Chairpersons of the tribunal, the court has found the whole evidence used to determine the matter was not reliable as it was not authentic. In the premises the court has found that, as the evidence adduced before the tribunal was not signed as required by the law then, all evidence received by the tribunal and the decision arrived by the tribunal is a nullity.

It is because of the above stated reasons the court has found there is no need of going to the merit of the appeal filed in this court by the

appellant. To the contrary the court has found proper to invoke the revisional powers conferred to it by section 43 (1) (a) of the LDCA to revise the proceedings of the tribunal which has been found is tainted by the irregularities pointed hereinabove.

Consequently, and as rightly prayed by the counsel for the parties the proceeding of the tribunal is hereby nullified and the decision of the tribunal is quashed and set aside. The court is ordering the matter be tried de novo before another chairman with competent jurisdiction. As the grounds caused the court to arrive to the above stated finding were raised by the court suo moto, each party will bear his or her own costs. It is so ordered.

Dated at Dar es Salaam this 27th day of October, 2022


I. Arufani

**JUDGE**

27/10/2022

**Court:**

Judgment delivered today 27th day of October, 2022 in the presence of Mr. Living Kimaro, learned advocate for the appellant and in the presence of Mr. Deogratius Tesha, learned counsel for the second

respondent. The judgment has been delivered in the absence of the first and third respondents. Right of appeal to the Court of Appeal is fully explained.


I. Arufani

**JUDGE**

27/10/2022