

TANZANIA / JUDGMENT

okola ogai and another vs abala masiku 2021 tzhc 3320 31 may 2021

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TZHCDECIDED
31 May 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN DISTRICT REGISTRY OF
MUSOMA AT MUSOMA LAND APPEAL NO. 62 OF 2020

1. OKOLA OGAI..... 1st APPELLANT
2. MARY KIMORI..... 2nd APPELLANT VERSUS ABALA
MASIKU..... RESPONDENT {Appeal from the judgment of the
District Land and Housing Tribunal for Tarime at Tarime in Application No. 63 of 2016}

JUDGMENT

10th and 31st May 2021 KISANYA, J,: This appeal emanates from the decision of the District Land and Housing Tribunal for Tarime at Tarime whereby the respondent, Abala Masiku had sued the appellants, Okola Ogai and Mary Kimori for trespassing into his land located at Ngasaro hamlet within Mirare ward in Rorya District without any legal justification. The respondent deposed to have bought the disputed land from the 1st appellant on 18th December, 1995. He also deposed that the 1st appellant re-sold the disputed land to the 2nd respondent who constructed a dwelling house. After a full hearing, the trial tribunal decided the matter in favour of the respondent. He was inter alia, declared legal owner of the disputed land. As a result, the 2nd appellant was ordered to vacate from the disputed land. i The appellants were aggrieved by the trial Tribunal's decision. They have now come to this court on appeal. At first, the appellants had raised four grounds of appeal. However, when the matter came up for hearing, the learned counsel for the appellants decided to submit in support of the following ground only: " That, the trial Chairperson erred in law and fact by presiding over the case without aid or assistance of Tribunal Assessors in place as per requirement of the law." During the hearing of this matter, Mr. Paul Obwana, learned advocate appeared for the appellants while the respondent was duly represented by Mr. Edson Philipo, learned advocate. In their submissions, the learned counsel for both parties were at one that, the proceedings of the trial Tribunal were conducted in the absence of assessors thereby contravening section 23 of the Land Disputes Courts Act, Cap. 216, R.E. 2019 (the LDCA). Therefore, both counsels urged me to nullify the proceedings, quash and set aside the judgment of the trial Tribunal. On his part, Mr. Obwana prayed for costs of the case while Mr. Philipo argued that the respondent should not be condemned to pay costs for the

vitiated proceedings. 2 In the course of composing the judgment, I noticed the trial chairperson did not append his signature after recording evidence of every witness as required under Order XVII, Rule 5 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). Therefore, I called upon the parties to address me on whether the said omission vitiated the proceedings of the trial tribunal. This time Mr. Paul Kipeja holding brief for Mr. Paul Obwana, learned advocate appeared for the appellants while the respondent failed to appear. Mr. Kipeja was of the firm view that failure by the Chairperson to sign evidence adduced by the witnesses vitiated the proceedings. I have gone through the record, petition of appeal and submissions by the learned counsel for the parties. It is my considered view that this appeal can be disposed of by considering the above pointed irregularities in the proceedings of the trial Tribunal. The first irregularity goes to the composition of the District Land and Housing Tribunal which determined the case subject to this appeal. Pursuant to section 23 (1) and (2) of the LDCA, the District Land and Housing Tribunal is properly constituted by the Chairperson and not less than two assessors who are required to give opinion before the Chairperson composes the judgment. It follows that any proceedings conducted in the absence of the said assessors is a nullity. See the case of Sikuzani Saidi Magambo and 3 Kirioni Richard vs. Mohamed Roble, Civil Appeal No. 197 of 2018, CAT at Dodoma (Unreported), where the Court of Appeal held as follows: - "On the strength of our previous decisions cited above, we are satisfied that the pointed omissions and irregularities amounted to a fundamental procedural error that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the Tribunal, as well as those of the first appellate court." Although the irregularity in the above cited case was in respect of failure to read the opinion of assessors in the presence of the parties, I am of the humble opinion that the principle thereto applies where the District Land and Housing Tribunal is not properly constituted for want of at least two assessors. However, the law is clear that if the proceedings have commenced in the presence of the required assessors and one or more of the assessors is or are absent due to sufficient reason, the Chairperson and or the remaining assessor, as the case may be, may continue and conclude the proceedings. I find it apposite to reproduce the contents of section 23 (3) of the LDCA which reads: - "Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence." It is on record that DW3, DW4 and DW5 adduced their evidence in the absence of assessors and that, the judgment of the trial Tribunal was given without hearing opinion of assessors. The reasons for proceeding in the absence of assessors are reflected in the proceedings of 18th February, 2020, where the Chairperson stated: 7 have been hearing this case with two assessors Mr. Machage and Mrs Nyitabe. Unfortunately, their terms expired and they have not been re-appointed. For that reason, I have to proceed to hear the matter under section 23(3) of the Act No. 2 of 2002 R.E. 2002. In view of the above reason, I am satisfied that there was a sufficient reason for the trial chairperson to proceed in the absence of the assessors because the term of assessors who commenced to hear the matter had expired and not renewed from 18th February, 2020. However, it is not known as to when the tenure of the said assessors expired. Otherwise, neither Mr. Machage nor Mrs. Nyitage appeared on the coram of 14th April, 2019

when PW3 Joseph Obare, PW4 Samson Mang'iti, DW1 Okola Ogai and DW2 Mary Benansius Kimoro adduced their evidence. In the circumstances, I find that the trial Tribunal was not properly constituted on 14th April, 5 2019 when the trial was conducted in the absence of assessors. The second issue relates to authenticity of the evidence adduced before the trial Tribunal. Both the LDCA and the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 do not specify the mode of recording evidence before the District Land and Housing Tribunal. Therefore, in terms of section 51(2) of the LDCA, the District Land and Housing Tribunal is required to apply the procedure provided for in Order XVIII, R. 5 of the CPC which provides 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." Reading from the above cited provision, it is clear that the trial Chairperson is required to append his signature after recording evidence of each witness. This requirement assures authenticity of the proceedings of the trial tribunal or court. It is settled law that failure by the trial judge, magistrate or chairperson to append his or her signature after recording evidence of a particular witness is an incurable irregularity. This stance was taken in Yohana Musa Makubi and Another vs R, Criminal Appeal No 6 556 of 2015 (unreported) when the Court of Appeal 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 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. " The records of the case at hand tell it all. The trial chairperson did not append his signature after recording evidence of all witnesses (i.e. PW1, PW2, PW3, PW4, DW1, DW2, DW3, DW4 and DW5). Therefore, guided by the above cited provisions and decision of the Court of Appeal, the proceedings of the trial tribunal were vitiated for want of authenticity. In view thereof, the present appeal cannot stand after arising from the nullity proceedings for want of composition of the trial Tribunal and failure by the trial chairperson to append his signature after recording evidence of each witness. To this end, I find it necessary to invoke the revisional powers vested in this Court by section 43 of the LDCA by nullifying the entire proceedings and quash the judgment of the trial Tribunal and subsequent orders. I direct the matter to be heard afresh immediately, before another Chairperson and with a new set of assessors. Each party shall bear its costs as the ground 7 for retrial was caused by trial Tribunal. It is so ordered. OtyA this 31st day of May, 2021. > E. S. Kisanya JUDGE Court: Judgment delivered this 31st day of May, 2021 in the presence of Paul Kipeja holding brief for Mr. Paul Obwana, learned advocate for the appellants and in the absence of the respondent. E. S. Kisanya JUDGE 31/05/2021 8

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