

TANZANIA / JUDGMENT

ONESMO

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IN THE HIGH COURT OF TANZANIA DODOMA SUB-REGISTRY AT DODOMA LAND APPEAL NO.
13829 OF 2024 (Arising from Land Application No. 233 of 2020 in the District Land and Housing
Tribunal of Dodoma) ONESMO NGOWI..... APPELLANT VERSUS
RAYMOND L. CHANGALA..... RESPONDENT

JUDGMENT

13T September & 29h November, 2024 MUSOKWA, J. The appellant herein above, together with one Aviti Raphael Kesi who is not a party in this matter, were the respondents in Land Application No. 233 of 2020 in the District Land and Housing Tribunal at Dodoma (DLHT). According to the records of the DLHT, the respondent herein successfully filed and prosecuted the aforementioned application seeking for orders to be declared the lawful owner of the disputed land, located at Zuzu Ward, Pinda Street, in Dodoma Region. Aggrieved by the decision thereof, the appellant has preferred the instant appeal basing on the following grounds of appeal reproduced hereinafter verbatim: -

1. That, the trial Tribunal erred in law and fact in failing to properly analyze the evidence on record thus reached into erroneous decision. i 2 That, the trial Tribunal erred in law and fact in holding that the disputed land was originally under the supervision of ZIRDEA without ascertain whether or not the said ZIRDEA is a legal entity capable of owning and disposing off landed property on its own capacity.
3. That, the trial Tribunal erred in law and fact by declaring the respondent herein a lawful owner of the disputed land basing on respondent's contradictory evidence and taking into account that no documentary proof was given by the respondent on how he acquired the disputed land. Upon leave being granted by this court, the appellant lodged the following additional ground of appeal: - That the trial tribunal erred in law for failure to append the signature on the proceedings upon completion of recording of the testimony of each witness. The appellant was represented by Mr. Constantino Gwivaha, learned advocate and the respondent enjoyed the services of Mr. Emmanuel Baruti, also learned advocate. This appeal was argued by way of written submissions, and both parties complied with the scheduling order. For reasons that will be evident in the ensuing paragraphs, I will confine myself to the submissions of the parties that solely relate to the additional ground of appeal. In addressing the additional ground of appeal which is considered as the 4th ground of

appeal, the counsel for the appellant asserted that the 2 proceedings of the DLHT are marred with irregularities due to failure by the trial Chairman to append his signature after recording the testimony of each witness. In support of his position, the appellant's counsel cited sections 51(2) and 56 of the Land Disputes Courts Act Cap. 216 R.E 2019, (LDCA). The cited provisions provide for the regulations that are applicable for matters before the DLHT. Proceeding further, it was submitted that the District Land and Housing Tribunal Regulations, G.N. No. 174 of 2003 (the Regulations), contain the rules of practice and procedure for matters before the DLHT. Further that, where the Regulations are silent, then the Civil Procedure Code, Cap. 33 R.E 2019 (CPC) comes into play. According to Mr. Gwivaha, the Regulations are silent on the modality for recording evidence during trial before the DLHT. Thus, in the circumstances, the provisions of the CPC are applicable. The learned counsel argued that, Order XVIII Rule 5 of the CPC provides for the procedure of recording evidence during trial. The provision requires a magistrate or judge to append his signature upon closure of the testimony of each witness. The cases of Geofrey Raymond Kasambula vs Total Tanzania Limited, Civil Appeal No. 320 of 2019

[2020] TZCA 747; Attu J. Myna vs VFAO Motors Tanzania Limited, Civil Appeal No. 269 of 2021[2022] TZCA 187; Yothan Yona vs Republic, Criminal Appeal No. 13 of 2021[2023] TZCA 17693; and Juma 3 Ramadhani Hakumu vs Juma Athumani Kilinja and Another, Land Appeal No. 26967 of 2023 (unreported), were preferred in support of this point. It was further the submission of the learned advocate for the appellant that in the case at hand, and as per the records of the DLHT, the testimonies of SMI from pages 3 to 8; SM2 from pages 9 to 13; SM3 from pages 16 to 19; and SM5 from pages 24 to 26; were not properly recorded as the signature of the trial Chairman of the DLHT is missing. The appellant alleges further that no signature was appended when recording the examination in chief and cross examination of the witnesses. Additionally, the signature of the trial Chairman is not appended at any stage, throughout the entire testimony of SM4; as indicated at pages 19 to 21 of the typed proceedings of the DLHT. In addition to the aforementioned, the recording of the evidence adduced by the defence is also tainted with irregularities. This is reflected in the typed proceedings of the DLHT, when recording the testimonies of SUI at pages 28 to 32; and SU2 at pages 32 to 37 of the DLHT's proceedings. The signature of the trial Chairman is not indicated at various stages of the proceedings when recording the evidence. Emphatically, Mr. Gwivaha contended that the entire testimonies of SMI, SM2, SM3, SM4, SM5, SUI and SU2; were improperly recorded by the DLHT for lack of signatures by the trial Chairman. In consequence whereof, the appellant prayed that this court should invoke its revisional powers and issue necessary orders as the means to rectify the observed irregularities. The orders sought were to quash and set aside the proceedings, judgment and decree of the DLHT. In reply to the additional ground of appeal, the respondent's counsel Mr. Baruti, contended that, the records clearly demonstrate that the Chairman of the DLHT duly appended his signature after recording the testimony of each witness. Further that the said signature appears alongside the orders of the DLHT which follow the conclusion of the testimony of each witness. The

learned advocate cited the case of Yotham Yona vs Republic, Criminal Appeal No. 13 of 2021 [2023] TZCA 17693 to cement his position. According to the respondent's counsel, and being an alternative submission, he stated that in case this court confirms the existence of the alleged procedural irregularities, this court should order a re-trial by the DLHT. In support thereof, Mr. Baruti referred to the case of Yotham Yona (supra), which was cited with approval in the case of Fatehal Manji vs Republic [1996] EA 343. Mr. Baruti submitted that in the said case, it was held that retrial is only warranted when the original trial is deemed illegal or fundamentally defective. After considering the submissions of the parties, the records of the DLHT, as well as applicable laws, the pertinent issue to be determined by this court is whether or not the proceedings of the DLHT were properly signed by the trial chairman. The provision of Order XVIII Rule 5 of the CPC stipulates that: - "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 aforementioned provision which is couched in mandatory terms, requires the recording of the evidence of each witness during trial. Further that the trial judge or magistrate should append his signature thereto. In the case of Geoffrey Raymond Kasambula (supra), the Court of Appeal of Tanzania (CAT) held at page 10 as follows: - "Also, times without number this court has emphasised that failure to append a signature to the witness's 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. 6 As a result, they are not material proceedings in determination of the current appeal, "[emphasis added] Furthermore, in the case of Attu J. Myna (supra) cited by the counsel for the appellant, the CAT observed the following at pages 9 to 10: - "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. See also section 210 (1) (a) of the Criminal Procedure Act (CAP. 20 R.E 2019). There is plethora of courts 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, [emphasis added] Additionally, the CAT in the case of Yothan Yona (supra), cited in approval in the case of Yohana Mussa Makubi and Another vs Republic, Criminal Appeal No. 556 of 2015[2018] TZCA. In this case, the CAT observed that: - "In light of what the court said in Wa/ii Abdalla Kibwita's and the meaning of what is authentic, can it be safely

vouched that the evidence recorded by the trial judge 7 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." [emphasis added] According to the above cited cases, failure by the trial judge, magistrate or Chairman, as the case may be, to append his signature upon recording the testimony of each witness, is an incurable irregularity and vitiates the whole proceedings. In the case at hand, I am satisfied that the chairman of the DLHT, omitted to append his signature at various stages of recording the testimonies of some of the witnesses called by both the appellant and the respondent herein. For the purpose of transparency, the trial Chairman did not 8 append his signature particularly after SMI, SM2, SM3, SM4, SM5, Sill and SU2 had concluded their testimonies. I am of the view that this does not offer assurance that the trial proceedings are authentic and not tainted. Consistent with the cited decisions on this aspect, it is obvious that the omission amounted to an incurable irregularity. As a result, I find that the omission vitiated the entire proceedings of the DLHT and thus they are a nullity. As this ground of appeal suffices to dispose the appeal at hand, I will not belabour to address the other grounds of appeal. Consequently, in exercise of the powers vested in this court under sections 42 and 43(1)

- (b) and (2) of the LDCA, I hereby nullify the proceedings, judgement and decree of the DLHT in Land Application No. 233 of 2020 and order an expeditious retrial by another Chairman and a new set of assessors. No order as to costs as the irregularity was occasioned by the DLHT. It is so ordered. DATED at DODOMA this 29th day of November, 2024. I.D. MUSOKWA JUDGE 9 Judgment delivered in the presence of the appellant and his advocate Mr. Hamisi Hamisi; and in the presence of the respondent and his advocate Mr. Emmanuel Baruti. I.D. MUSOKWA JUDGE 10

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