

TANZANIA / JUDGMENT

paul makoye buhongwa vs michael john kanje 2022 tzhclandd 12320 23 september 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT PAR ES
SALAAM LAND APPEAL NO. 249 OF 2021 (An Appeal from the decision of the Kinondoni District
Land and Housing Tribunal at Mwananyamala in the Land Application No. 199 of 2021, before
Hon. Mjanja, Chairperson) PAUL MAKOYE BUHONGWA
APPELLANT VERSUS MICHAEL JOHN KANJE.....
RESPONDENT

JUDGMENT

Date of Order:19/09/2022 Date of Judgment:23/09/2022 K. D. MHINA, J. This is the first Appeal. It stems from the decision of the District Land and Housing Tribunal (the DLHT) for Kinondoni, where the Respondent, vide Land Application No. 199 of 2021, sued the Appellant for recovery of a parcel of Land (disputed Land) which was allegedly encroached by the Appellant. Briefly, the facts giving rise to the instant appeal are as follows. In the DLHT for Kinondoni, the Respondent sued the Appellant for encroachment of i a parcel of his land measured 20 x 20 meters located at Bane! area, Mbezi Msakuzi within Ubungo District. The record reveals that the appellant purchased a piece of land measuring one acre from one Isaya Hassan Mwakyoma in July 2016. Later that same year, the respondent discovered that the appellant and one Kitua Nzinya Kitua (PW3) trespassed into the suit land. When the respondent reported the matter to the Street Chairman, the two trespassers were summoned to discuss the issue. In that meeting, it was discovered that Silvery Agunda sold the suit land while he was not the owner of the disputed land. After that discovery, Kitua Nzinya Kitua decided to settle the matter amicably with the respondent by re-purchasing the suit land, the same portion of land he had encroached. The appellant initially agreed orally to settle but later declined to honor the agreement. In April 2021, while the respondent had traveled to Moshi, the appellant started to construct a wall fence on the disputed portion of land. The respondent filed the land application to sue the appellant at that stage. On his part, the appellant disputed the respondents claims. He claimed that in 2017, he lawfully purchased a portion of land measuring 15 x 15 meters 2 from one Silvery Agunda at the tune of TZS 3,000,000/. Later, he decided to buy another piece of land measuring 20 x 15 meters at

the tune of TZS 2,000,000/= from the same seller to make a total of 35 x 30 meters parcel of land. He, therefore, insisted that he was the lawful owner of the suit land. In its decision, the DLHT decided the matter in favor of the respondent, based on the ground that the evidence of the respondent was heavier than the evidence of the respondent. Further, the DLHT declared the respondent the lawful owner of the disputed piece of land, and the appellant was a trespasser. Aggrieved by that decision, the appellant raised five grounds of appeal as follows: -

1. That the Tribunal erred in law and fact in deciding the matter in favor of the respondent without properly scrutinizing and evaluating the validity of a purchasing agreement tendered by the respondent herein in relation to evidence adduced by his witnesses; 3
2. That the Tribunal erred in law and facts for deciding the matter in favour of the respondent based on evidence not adduced by the applicant and his witnesses during the hearing;
3. That the Tribunal misdirected itself in holding that the respondent managed to prove ownership of the disputed land in the absence of the clear identification of the boundary of the disputed land on his purchasing agreement;
4. That the Tribunal was based on failure to consider and analyze the appellant's evidence, cross-examination questions, and final submissions and decided the matter in favour of the respondent;
5. That the Tribunal erred in law and facts for directing its mind on the facts which were not proved by any document during the hearing and final deciding the matter in favour of the respondent based on such unproven facts. At the hearing of the Appeal, the appellant appeared in person while the respondent had the services of Mr. Francis Mwita, learned advocate. However, at the hearing, suo mottu, I prompted the parties to satisfy this Court on the competence of appeal before me. I wanted to satisfy myself on 4 whether the trial before the DLHT was conducted correctly. Therefore, I called upon the parties and invited them to address whether or not the Chairman of the DLHT appended his signature after taking the evidence of each witness. On his part, Mr. Mwita, Advocate for the respondent, submitted that the Chairman of the DLHT appended his signature only after taking the evidence . of PW1, but he did not do so for other witnesses. He submitted further that such a technicality could be cured by overriding objective (oxygen principle). He submitted that the principle requires the courts to deal with substantive justice and not be bound by any technicalities. On his part, the appellant, who was a layman, simply stated that in the Tribunal proceedings, the Chairman did not append his signature after taking the evidence of each witness. He had nothing to say regarding the remedies for the said omission. It is noted from the record that at the trial, the applicants (now the respondent) case consisted of three witnesses; Michael John Kanje (PW1), Andrea Evarist Urrio (PW2), and Kitua Nzinya Kitua (PW3). On the other hand, the respondents case consisted of two witnesses; Paul Mazoye Buhongwa (DW1) and Nicholas Elinei Mnyama (DW2). 5 Upon perusing both typed and handwritten proceedings of the trial DLHT, it is crystal clear that the Chairman did not append his signature at the end of each witness testimony. The signature in the proceedings

is only seen in the orders after admitting exhibits or when he was adjourning the hearing. The question is whether there is any guidance under the land laws regime on the matter. In exercising its powers, the DLHT is governed and regulated by the Land Disputes Courts (The Land and Housing District Tribunal) Regulations 2003 ("the Regulations"). The Regulations contain procedures to be applied at the DLHT, but happen to be silent on the Chairman's requirement to append his signature after each witness testimony. I am aware that if there is a lacuna in the Land Disputes Courts Act, this Court can invoke the provisions of the Civil Procedure Code [Cap 33 R: E 2019] ("the CPC") to fill the gap (s). The Land Disputes Courts Act, Cap 206 R: E 2019 ("The Act") offers the way forward on the matter. Section 51

- (2) of the Act provides that; "57 (2) The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code. 6 On this, Order XVIII Rule 5 of the Civil Procedure Code [Cap 33 R:E 2019] (the CPC) clearly states that each witness's testimony must be signed. Therefore, this is an "escape route" for inadequacy under the Regulations. The relevant provision order state 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 provided] The Court of Appeal of Tanzania insisted on the necessity of appending a signature after recording the testimony of each witness. In Yohana Muss a Makubi and Another VR, Criminal Appeal No. 556 of 2015 (unreported), the Court held that the procedure to append a signature is necessary to safeguard the authenticity of the proceedings. The Court put it succinctly; in the absence of the trial (Judge) at the end of the testimony of every witness; Firstly, it is impossible to authenticate who took down such evidence. 7 Secondly, If the made is unknown then, the authenticity of such evidence is put to question. Thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and this; Fourthly, such evidence, does not constitute part of the record of the trial and the record before us. The effect of failure to append a signature at the end of each witness testimony in the proceedings is elaborated by the Court of Appeal of Tanzania in numerous cases. In Baraka Imanyi Tyenyi vs. Tanzania Electricity Supply Co. Ltd and another, Civil Appeal No. 38 of 2019 (unreported), the Court held that the trial judge's omission to append a signature at the end of each witness's testimony vitiated the proceedings of the trial court. See also Iringa International School vs. Elizabeth Post, Civil Appeal No. 155 of 2019; Unilever Tea Tanzania Ltd vs. David John, Civil Appeal No. 413 of 2020; Zubeda Hussein Kayagali vs. Oliva Gaston Luvakule & Another, Civil Appeal No. 312 of 2017, (all unreported). In Teresia Paulo Chuma vs. Nyamonge Kenya Mhenga, Land Appeal No. 10 of 2021 (unreported), the High Court (Morogoro DC) specifically held that; 8 "Failure by the Chairperson to append his signature at the end of the testimony of each witness vitiated the proceedings before the trial District Tribunal." Therefore, failure to append a signature is the procedural irregularity that vitiates proceedings as it goes to the authenticity of the witnesses' evidence. The next question is whether the omission is curable. I am aware

of Section 45 of the Act that the decision of the Ward Tribunal or District Land and Housing Tribunal cannot be altered or reversed on appeal or revision on account of any error, omission, or irregularity in the proceedings before or during the hearing unless the error or omission occasioned a failure of justice. In *Iringa International School (Supra) and Mhajiri Uladi and Another vs. R.*, Criminal Appeal No. 234 of 2020, the Court of Appeal insisted that the omission vitiates proceedings and is fatal incurable because of its necessity in trials. Therefore, following the above findings, the omission cannot be curable by the imports of Section 45 of the Act. In the upshot, I find that the proceedings of the Tribunal were vitiated, therefore a nullity and the resultant Judgment also is a nullity. Consequently, I invoke the provision of Section 43 (1) (b) of the Land Dispute Act, Cap 2016, which vests revisional powers to this court, and proceed to revise the proceedings of the District Land and Housing Tribunal in the following manner:-

- i. The proceedings of the District Land and Housing Tribunal for Kmondomb at Mwananyamala in Land Application 199 of 2021 are quashed, and the Judgment and decree are set aside ii. The case file be remitted to the District Land and Housing Tribunal for Kinondoni at Mwananyamala to be heard de-novo before another Chairperson and a new set of assessors.
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