

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

LAND APPEAL No. 44 OF 2021

*(Arising from the decision of Mwanza District Land and Housing Tribunal in Land
Case No. 220/2014, Masao, Chairman, given on 14/6/2021)*

SIMON KYARUZI **APPELLANT**

VERSUS

JOYCE KAIZELEGE **RESPONDENT**

JUDGMENT

2 & 23/9/2022

ROBERT, J:-

The appellant, Simon Kyaruzi, filed an action unsuccessfully at the District Land and Housing Tribunal (DLHT) for Mwanza against the respondent, Joyce Kaizilege, alleging trespass into his landed property described as Plot No. 126 Block "B" Kitangiri, Mwanza City which is 450 square meter by size and valued at Tanzanian Shillings Five Million (Tzs 5,000,000/=). Aggrieved with the decision of the DLHT, the appellant preferred an appeal to this Court.

The appellant's case was to the effect that, the respondent who occupies a piece of land next to the appellant, Plot No. 82 Block 'A' Mwinuko Area, allegedly trespassed into the appellant's land by cutting

down trees and extending demarcation marks between them thereby encroaching into the appellant's land. The DLHT decided that the boundary dispute between parties in this case can be resolved by asking land allocation authorities to use the land survey plan of the relevant area to offer accurate description of the boundary between the two parties. Dissatisfied with that decision, the appellant filed this appeal armed with the following grounds of appeal:

- 1. That the learned chairman erred in law and fact when he decided that survey involving all parties was done in 2018*
- 2. That the learned chairman erred in law and fact by ordering resurvey of the plots in dispute when a proper survey had been done in 1987*
- 3. That evidence on the whole was in favour of the appellant rather than the respondent in this case.*

Parties in this appeal were represented by Mr. Alex Banturaki and Mr. Kevin Mutatina, learned counsel for the appellant and respondent respectively. At the request of parties, the Court ordered the appeal to be argued by filing written submissions which both parties complied with as scheduled by the Court.

In the course of perusal of records in this matter, the Court observed that witnesses in this matter were not sworn in by the trial Tribunal before recording their respective testimonies. To make a determination on this

irregularity, I invited parties in this matter to address the Court on the noted anomaly.

Submitting on the said irregularity, Mr. Banturaki argued that, section 4 (a) of the Oaths and Statutory Declarations Act, Cap. 34 requires every witness to be sworn in before giving his testimony. To support his argument, he made reference to the case of **Bulyanhulu Gold Mine Ltd vs Kenneth Robert Fourie, Civil Appeal No. 105 of 2021** (unreported) where he maintained that the Court of Appeal of Tanzania decided that the omission of witnesses to take oath before giving evidence in the case is fatal and it vitiates the proceedings.

He argued further that, since in the present case PW1, PW2, PW3 and DW1 did not make oath before giving their testimony, the entire proceedings are fatal and the case needs to start de novo. Hence, he prayed that the proceedings of the trial Court be nullified and each party should be ordered to carry its own costs as the anomaly noted in this case was not occasioned by the parties.

In response, Mr. Mutatina admitted that records do not indicate that PW1, PW2 and PW3 took oath before giving their respective testimonies. However, records indicate that DW1 took oath before testifying.

He submitted further that, the remedy of the omission to take oath before testifying is found in the case of **North Mara Gold Mining Ltd**

vs Khalid Abdallah Salum, Civil Appeal No. 463/2020 (unreported)

at page 15 where the Court of Appeal expunged the testimony of witnesses who did not take oath and ordered a specific rehearing of the said witnesses only. In the circumstances, he prayed that, the testimony of PW1, PW2 and PW3 be expunged and trial de novo be ordered in respect of witnesses whose testimony was given without taking oath, the judgment of the trial Court be quashed and the a new judgment to be composed.

In a brief rejoinder, Mr. Banturaki insisted that apart from the testimony of PW1, PW2 and PW3, the testimony of DW1 at page 40 of the proceedings do not indicate that the said witness took oath before giving his testimony. He explained that, proceedings indicate that the trial Chairman recorded the Court Clerk to have said "DW1 testified under oath". He maintained that, the said statement by the Court Clerk does not indicate that the witness was sworn in as required.

From the submissions of parties, it is not disputed that section 4 (a) of the Oaths and Statutory Declarations Act, Cap. 34 R.E.2019 imposes mandatory obligation to carry out the duty of administering oath before taking an oath. It is also not disputed that in the present case, PW1, PW2 and PW3 testified without taking oath. Similarly, judging from the proceedings of the trial Tribunal at page 40, it is not clear if DW1 also made her statement under oath since records indicate that the trial Court

simply recorded the Court Clerk to have said "DW1 testified under oath". This Court finds it unsafe to rely on the said recorded statement by the Court Clerk as a proof of the fact that the trial Tribunal administered the making of an oath by DW1 as required. That said, the task before this Court is to determine the remedy available for an omission by witnesses to make oath before giving evidence.

In the case of **Bulyanhulu Gold Mine Ltd vs Kenneth Robert Fourie** (supra), the Court of Appeal of Tanzania when dealing with a similar matter in respect of the evidence recorded in the CMA proceedings where a witness gave testimony without oath or affirmation being administered, gave a general position on issues of taking evidence from witnesses in all courts and remarked that:

"...we think it is appropriate, to lay ground as for the Court's position generally, on issues of taking evidence from witnesses in all courts. Before taking evidence from a witness in a court of law, it is mandatory for a judicial officer presiding over the proceedings to administer oath to a witness before the latter can adduce his or her evidence. This is a deep-rooted rule of court practice that is now a traditional legal norm in this jurisdiction. That is what this Court reaffirmed in the case of Attu J. Myna v. CFAO Motors Tanzania Limited, Civil Appeal No. 269 of 2021 (unreported)"

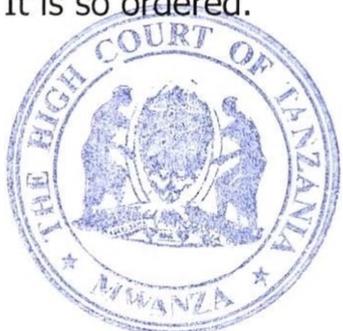
As for the way forward, the Court of Appeal in the cited case adopted the style in its earlier case of **North Mara Gold Mine Limited v. Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020 (unreported) where the

Court expunged the unsworn evidence, nullified the award of the CMA, quashed the judgment of the High Court and ordered for rehearing of testimonies of the said witnesses followed with composing the award of CMA.

In the present case, records indicate that three witnesses testified for the appellant (PW1, PW2 and PW3) and only one witness for the respondent (DW1). This Court having made a finding that no oath or affirmation was administered to all witnesses as required by the law, it follows that the evidence so recorded is as good as no evidence.

Guided by the cited authorities above, I proceed to expunge the unsworn evidence of PW1, PW2, PW3 and DW1, quash and set aside the judgment of the District Land and Housing Tribunal and order that the original record in Land Application No. 220 of 2014 be remitted to the District Land and Housing Tribunal of Mwanza for rehearing of the testimonies of PW1, PW2 PW3 and DW1 in accordance with the law followed by composing of the judgment before any Chairman with competent jurisdiction to rehear the matter.

It is so ordered.



A handwritten signature in black ink, appearing to read "K.N. Robert".

K.N.ROBERT
JUDGE
23/9/2022