THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 29 OF 2019.

(Arising from Land Appeal No. 20 of 2017, in the District Land and Housing Tribunal for Rungwe, at Tukuyu, Original Land Case No. 5 of 2016 of Lufingo Ward Tribunal).

ANTHONY ROBERT MWAMBINGA.....APPELLANT

VERSUS

NELSON MICHAEL MWASALANGA..... RESPONDENT

JUDGMENT

22/4 & 8/7/2020.

UTAMWA J:

In this second appeal, the appellant is one ANTHONY ROBERT MWAMBINGA (the appellant). He challenges the judgement dated 03/11/2017 (impugned judgement) of the District Land and Housing Tribunal for Rungwe, at Tukuyu (the DLHT) in Land Appeal No. 20 of 2017. The matter originated in Land Case No. 5 of 2018, in the Ward Tribunal of Lufingo (the trial tribunal).

Before the trial tribunal, the respondent NELSON MICHAEL MWASALANGA unsuccessfully sued the appellant, for an alleged

encroaching of a piece of land of one Michael Mwasalanga (the respondent's father). Aggrieved by the verdict of the trial tribunal, the respondent successfully appealed to the DLHT. The appellant was discontented by the impugned judgment of the DLHT, hence this appeal. He was represented by Mr. Ignas Ngumbi, learned advocate whereas the respondent appeared in person (unrepresented).

Initially, the appellant's counsel advanced four grounds of appeal. However, when the matter came before the court on 27/2/2020, he prayed to lodge additional grounds of appeal. The prayer was not objected by the respondent and the court consequently granted it. The appellant's counsel then filed the following three supplementary grounds of appeal:

1. That, the honorable chairman (of the DLHT) erred in law and in fact for failure to take into account the opinion of the wise lady assessors.
2. That, the learned chairman (of the DLHT) erred in law for failure to give reasons for departing with opinions of the wise lady assessors.
3. That, the learned chairman (of the DLHT) erred in law for failure to fully involve the wise assessors in determining the suit.

The respondent resisted all the grounds of appeal. The appeal was argued by way of written submissions.

In his submissions in chief, the counsel for the appellant opted to argue the supplementary grounds of appeal only and abandoned the original ones. He argued the first and second grounds cumulatively. In his submissions, he contended that, the chairman of the DLHT did not consider the opinions of assessors and did not assign the reasons for his departure

from them. That course was contrary to the mandatory provisions of sections 23 (1) and (2), 34 (1) and 24 of the Land Disputes Courts Act [Cap 216 R: E 2002] (to be referred as LADCA in short). These provisions instruct the chairman of the DLHT to require the assessors give their opinion before composing a judgment. He added that, had the chairman considered the opinion of assessors he would have reached to a different decision.

The learned counsel for the appellant further argued that, the violation of section 24 of LADCA was a serious irregularity. To substantiate his contention, he cited a decision of the Court of Appeal of Tanzania (CAT) in the case **Ameir Mbarak and another v. DGAR Kahwili, Civil Appeal No. 154 of 2015 CAT at Iringa** (unreported).

Regarding the third ground of appeal, the appellant's learned counsel submitted that, according to the record, the assessors were neither fully involved nor were called upon to avail their opinion in the presence of the parties. He further contended that, the omission by the chairman of the DLHT offended the mandatory provisions of section 23 (2) of LADCA and Rule 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN. No. 174 of 2003 (hereinafter called the GN in short). He cited the case of **Tubone Mwambeta v. Mbeya City Council Civil Appeal No. 287 of 2017 CAT at Mbeya** (unreported) to support his contention.

The appellant's counsel thus, prayed for this court to set aside the impugned judgment and allow the appeal with costs.

In his replying submissions, the respondent basically defended the impugned judgment. He argued that, the DLHT was duly constituted and the assessors were invited to give opinion. Their opinion were considered, but rejected with reasons. As to the cited **Ameir Mbaraka case** (supra), the respondent argued that, the same is distinguishable since in the matter at hand the assessors gave their opinion while in the **Ameir case**, the assessors did not do so.

Arguing against the third ground, the respondent submitted that, the assessors were fully involved since the record supports this fact. He distinguished the decision in **Tubona Mwambeta** case on the ground that, while in the **Tubone case** assessors did not give any opinion, in the case at hand they did so though they were not called upon to do so in presence of parties. It was thus, argued that, the omission i. e failure by the chairman to call the assessors to give opinion in the presence of parties was not fatal. It was curable under section 45 of the LADCA and under the spirit of Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania of 1977, (the Constitution). These provisions prohibit courts from being unduly tied up by procedural technicalities. He thus, urged the court to dismiss the appeal with costs.

In his rejoinder submissions, the learned counsel for the appellant basically reiterated the contents of his submissions in chief.

I have considered the rival arguments by the parties, the record and the law. It is clear that, the rival submissions revolve around the non-involvement of assessors and their opinion in making the impugned

judgment. Now, for the purpose of convenience, I will determine the grounds of appeal cumulatively. There are thus, the following two issues to be answered by this court:-

i. Whether or not the DLHT in the matter at hand offended the mandatory provisions of section 23 (1) and (2) of the LADCA and regulation 19 (2) of the GN.
ii. In case the first issue is answered positively, then the second issue will be; what are the legal consequences of the omissions.

Starting with the first issue posed above, the provisions of sections 23 (1) and (2) of the LADCA require the DLHT to be composed of a chairman and not less than two assessors. The assessors shall be required to give out their opinion before the chairman reaches the judgement. Regulation 19 (2) of the GN also underlines the need for the chairman to require every assessor present at the conclusion of the hearing to give his opinion in writing, which said opinion may be in *Kiswahili*.

In answering this issue, I also had to peruse the record of the DLHT. This is due to the reason that, court records are presumed to be serious and genuine transcripts on what had transpired in court, and cannot be easily impeached, unless there is evidence to the contrary; see **Halfani Sudi v. Abieza Chichili, [1998] TLR. 527**. The results of my scrutiny of the record of the DLHT show that, after the hearing of the appeal i.e on 27/8/2017, the chairman ordered for the judgment to be on 26/10/2017 (see at page 7 of the typed proceedings). He did not require the assessors sitting with him to give their opinion. This fact is also vindicated by the original proceedings (handwritten). The respondent's

argument that the assessors were invited to give their opinion as indicated at page 4 of the judgment was not thus, supported by the record. In fact, at page 4 of the judgment the chairman paraphrased the opinion of assessors. My perusal further shows that, there are two handwritten papers which suggest that, the two assessors had given their respective opinion in writing.

Nonetheless, the impugned judgement indicates that, the chairman neither agreed with the opinion of the assessors nor disagreed with them. He did not also give reasons for the departure.

Owing to the above reasons, I am of the following views: that, the mere facts that there are written opinion of assessors in the record of the DLHT and that, the chairman paraphrased such opinion in the impugned judgment, did not suffice in law. This is because, such opinion of assessors were neither recorded in the proceedings nor made open to the parties in court. Moreover, the chairman did not require the assessors to give their views in court as shown above. It cannot therefore, be judged that the chairman actually recorded and considered the opinion of his assessors before making the impugned judgement. The first issue is therefore, determined positively to the effect that, the DLHT in the matter at hand offended the mandatory provisions of section 23 (1) and (2) of the LADCA and regulation 19 (2) of the GN. This finding triggers the examination of the second issue.

As to the second issue on the legal effect of the oversight committed by the chairman of the DLHT, the answer is provided in some precedents

made by the CAT. In **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017, CAT at Mbeya** (unreported) for example; the CAT considered a situation that was akin to the situation at hand. In that case, the record of the proceedings of a DLHT did not show that the assessors were accorded an opportunity to give their respective opinion as required by the law. The chairman had also merely made reference to the opinion of the assessors in the judgement. The CAT in that case discussed the provisions of section 23 (1) and (2) of the LADCA and regulation 19 (2) of the GN. Following its previous holding in the **Ameir Mbaraka case** (supra), the CAT (in the **Edina Adam case**- supra) held as follows: it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgement. In these circumstances, it is considered that, the assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity.

Again, as rightly put by the learned counsel for the appellant in the matter at hand, in the **Ameir Mbaraka case** (supra), the CAT resolved that, the omissions (like those mentioned above) go to the root of the matter and occasions a failure of justice, hence lack of fair trial. The chairman of a DLHT alone cannot validate such violation of the law since he does not constitute a tribunal. It further held that, lack of assessors' opinions renders the decision a nullity and it cannot be resuscitated by seeking fresh opinion of assessors. It follows thus, that, the argument by the respondent that the **Ameir Mbaraka Case** (supra) is distinguishable from the matter under consideration cannot be tenable.

Furthermore, the CAT in the **Edina Adam case** (supra) took strength from the cases of **Tubone Mwambeta** (supra) and **The General Manager Kikwengwa Stand Hotel v. Abdallah Said Musa, Civil Appeal No. 13 of 2012, CAT** (unreported) and held that; where the trial has to be conducted with the aid of assessors, they must actively and effectively participate in the proceedings so as to make meaningful their role of giving opinion before the judgement is composed. It further held that, since regulation 19 (2) of the GN requires every assessor present at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to known the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict.

The CAT in the said **Edina Adam case** (supra) ultimately set the following guidance which I quote for a readymade reference:

> "We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19 (2) of the Regulations, the chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed.
>
> For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose."

The CAT in that case (the **Edina Adam case**) then nullified the proceedings and judgements of both the DLHT and this court. It then

ordered for retrial before another chairman and a distinct set of assessors if parties still wished.

Though the above quoted guidance by the CAT was made in respect of trials before a DLHT, in my settled opinion, the same applies *mutatis mutandis* when the DLHT exercises its appellate jurisdiction. This is so because, the guidance is intended to *inter alia*, promote fair trial/fair hearing to parties. The right to fair trial is a fundamental right of the parties before the DLHT as a court of law. It is enshrined under article 13 (6) (a) of the Constitution. This right must thus, be strictly observed in trials and appellate proceeding of the DLHT. I underscored the same stance in the case of **Tulinagwe Salatiel Amulike (Administartor of the Estate of the Late Osia Amulike Mwamginga) v. Joseph Kayuni, Land Appeal No. 41 of 2018 High Court (T) at Mbeya, dated 20/11/2019** (unreported) and I repeat it in the case at hand.

In my concerted view, the circumstances in the **Edina Adam case** (supra) are totally similar to the circumstances of the matter at hand. The guidance in that precedent thus, squarely applies to the case at hand. Indeed, it must be noted here that, under the English common law doctrine of *stare decisis* (doctrine of precedent), which is also applicable in our legal system, decisions made by the CAT as the highest court in the court system of this land (like the one in the **Edina Adam case**), are binding to courts and tribunals subordinate to it including this court; see the decision by the CAT in **Jumuiya ya Wafanyakazi Tanzania Vs. Kiwanda cha Uchapishaji cha Taifa [1988] TLR 146**.

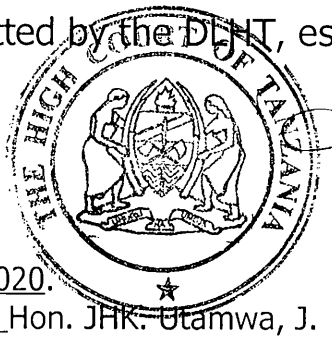
The argument by the respondent that, the omission discussed above is curable under section 45 of LADCA is weak for the following reasons: The spirit under section 45 of the LADCA was underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported Judgment dated 10 October, 2018). In this case, the CAT underlined the principle of "Overriding Objective" that has been accentuated recently in the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. The principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice.

However, the principle of Overriding Objective, in my concerted view, did not come to absorb the violations of each and every rule of procedure. It is not thus, a broad-spectrum antidote for every procedural error. That principle cannot, in fact, be applied mechanically to suppress or bulldoze other significant legal principles or rules the purposes of which are also to promote justice and fair trials. This is the envisaging that was articulated by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure. In my settled opinion therefore, the irregularities discussed above, cannot be cured by resorting to the principle of Overriding Objective.

Now, owing to the holding by the CAT in the **Edina Adam case** and its other decisions cited above, I answer the second issue posed herein

above as follows: the legal effect of the omissions committed by the chairman of the DLHT were fatal and rendered its proceedings and the impugned judgment a nullity.

The finding I have just made herein above is legally forceful enough to dispose of the entire appeal in favour of the appellant. Nevertheless, I will not grant all the reliefs prayed by him. I therefore, allow the appeal and make the following orders: that, the proceedings of the DLHT from the point it started the hearing of the appeal to the point it concluded that hearing are declared a nullity and are accordingly quashed. The impugned judgement is set aside. If parties still wish, the appeal shall be heard by another chairman of the DLHT and a different set of assessors. Each party shall bear his own costs since the omissions that led to this decision were committed by the DLHT, especially the chairman. It is so ordered.



J.H.K. Utamwa
Judge
08/07/2020.

08/07/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant: present in person and Mr. Steward Ngwale, advocate.
Respondent; present.
BC; Mr. Patric Nundwe, RMA.

Court: judgment delivered in the presence of both parties and Mr. Steward Ngwale, learned counsel holding briefs for Mr. Ignas Ngumbi, learned counsel for the appellant, in court this 8th July, 2020.

JHK. UTAMWA.
JUDGE

08/07/2020.