THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPEAL NO. 13 OF 2013.

(Arising from Land Appeal No. 79 of 2012, in the District Land and Housing Tribunal for Rungwe, at Tukuyu, Original Land Case No. 22 of 2012, in Kyela Urban Ward Tribunal).

1. MARTHA A. MWAKINYALI.....1ST APPELLANT

2. ABEL AMBAKISYE MWAKINYALI.....2ND APPELLANT

VERSUS

HAMIS MITOGWA.....RESPONDENT

JUDGMENT

04/06 & 27/08/2020.

UTAMWA J:

In this second appeal, the appellants are MARTHA A. MWAKINYALI and ABEL AMBAKISYE MWAKINYALI (the first and second appellant respectively). They challenged the judgement (impugned judgement) of the District Land and Housing Tribunal for Rungwe, at Tukuyu (the DLHT) in Land Appeal No. 79 of 2012. The matter originated in Land Case No. 22 of 2012, in Kyela Urban Ward Tribunal (the trial tribunal).

The appeal is based on the following five grounds of appeal:

1. The proceedings of the Ward Tribunal were vitiated by the fact that, the first names of the members of the tribunal were not disclosed during the proceedings and in the decision, hence the mandatory legal requirements of gender was overlooked by the District Land Tribunal by not nullifying the proceedings of the Ward Tribunal.
2. The District Tribunal erred to hold that the suit property was not matrimonial property.
3. Since it was common knowledge that the two appellants were duly married at the material time, the District Land Tribunal erred to approve the disposition of the suit property to the Respondent by the 2nd Appellant without the consent of the 1st Appellant.
4. The District Land Tribunal erred in not holding that the alleged disposition of Land then located on Mpanda Village was inoperative for want of approval of the respective village council and/or the District Land Authority and for failure of the vendee to develop the suit land or to transfer title to himself.
5. The District Land Tribunal erred in holding that the action was time barred as against both Appellants regardless of the fact that, the 1st Appellant first became aware of the suit land on 5/12/2009 and sued both the vendor and vendee before the Ward Tribunal in Land Case No.53 of 2010 which was ordered denovo by the District Land Tribunal in Land Appeal No.112 of 2010. Attached here to collectively as Annexture A are: sale agreement dated 5/5/1994, letter dated 5/9/2006, letter dated 5/12/2009, decision of Rungwe DLHT Appeal No.112 of 2010 and 79 of 2012.

Owing to these grounds of appeal, the appellants pressed this court to make the following orders: to allow the appeal by quashing the impugned judgment of the DLHT and ordering a retrial. Alternatively, the impugned judgment be set aside and order the suit land be judged in favour of the appellants.

The appeal was argued by way of written submissions. The appellants were represented by Mr. Justinian Mushokorwa, learned counsel while the respondent fought sole without any legal representation.

Before I decide this appeal, I feel obliged to firstly consider and make a finding on a crucial point of law that was raised by the appellants' counsel in the course of arguing the first ground of appeal. Actually, this point of law has all the properties of a fresh ground of appeal. The learned counsel argued that, the DLHT did not reveal the written opinion of the two assessors and thus, violated the provisions of section 23 (2) of the Land Courts Disputes Act, Cap. 216 (the Act). Indeed, though this point was not part of the grounds of appeal, it is worthy consideration by this court on the following grounds: the same is a point of law as I hinted earlier and touches the jurisdiction of the DLHT. In law, an issue of jurisdiction is fundamental. The law further guides that, a point of law, especially the one touching jurisdiction can be raised at any stage of proceedings even in an appeal like the one under consideration; see the decision by the Court of Appeal of Tanzania (the CAT) in the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Tanzania Railways Corporation, CAT, Mza Civil Applicatin No. 3 of 2004, at Mwanza** (Unreported). Moreover, the appellant made submissions replying to the point of law

without any complaint of prejudice on the ground that, the same had been raised for the first time at this stage.

Another reason for considering the new ground of appeal is that, the law guides that, courts of law should decide matters before them according to the law and constitution; see also the holding in **John Magendo v. N.E.Govani (1973) LRT. 60**. This is the very spirit underscored through article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution).

Owing to the reasons shown above, I am convinced that, considering that fresh ground of appeal at this stage will not prejudice any party and will be in accordance with the requirement for courts to decide matters according to the law. The parties' rights of fair trial, which is also preserved by the Constitution, will not also be compromised by taking this course.

Due to the reasons shown above, my adjudication plan in this appeal is that, I will firstly consider this fresh ground of appeal. In case I will overrule it, I will also consider the rest of the grounds. If I will uphold it, I will accordingly make necessary orders. This plan is based on the fact that, this ground of appeal is capable of disposing of the entire appeal if upheld, without considering the other grounds of appeal. It also touches the jurisdiction of the DLHT, which said issue must, in law, be firstly determined before this court considers any other issue.

In expounding the new ground of appeal, the learned counsel for the appellants contended that, the proceedings of the DLHT ought to have revealed the written opinion of each of the two members/assessors, but this was not done. Their opinion were merely paraphrased in the impugned

judgment. This course was not in accordance with the guidance of the CAT in the case of **Tubone Mwembeta v. Mbey City Council, Civil Appeal No. 287** (unreported).

The learned counsel further contended that, section 23 (2) of the Act must be read together with section 34 (1) of the same Act which requires a DLHT exercising its appellate jurisdiction to sit with not less than two assessors. Owing to these provisions of the law, the opinions of the assessors of a DLHT must be revealed to the parties and members of the public at large so to achieve active transparency of the assessors' participation. The appellant's counsel thus, urged this court to nullify the proceedings of the DLHT.

In his replying submissions, the respondent briefly argued that, the proceedings of the DLHT show that, both section 23 (2) and 34 (1) of the Act were duly complied with, hence this court cannot nullify the same. In his rejoinder submissions, the appellant's counsel reiterated the contents of his submissions in chief.

Owing to the arguments by the parties, the issues for determination here are two as follows;

i. *Whether the proceedings of the DLHT in the case at hand offended the provisions of the law cited above.*
ii. *In case the answer to the first issue will be affirmatively, then what are the legal consequences of the abnormalities.*

The two issues however, can be considered and answered cumulatively as shown below.

In my view, the arguments by the appellants' counsel are supported by the record and the law. The proceedings of the DLHT indeed, show that, upon the completion of the hearing of the appeal, the Chairman of the DLHT set a date for judgment. The record also shows that, the respective written submissions of the two assessors were duly filed in the record. Again, it is true as argued by the parties that, the Chairman of the DLHT made reference to the opinion of the assessors in the impugned judgment. However, the proceedings of the DLHT do not show that the Chairman required the assessors to give their respective opinion upon the completion of the hearing of the appeal. The opinion are also not recorded in the proceedings of the DLHT. This means that, they were not disclosed to the parties upon the hearing of the appeal.

In my settled opinion, the course taken by the DLHT was contrary to the mandatory provisions of the Act. The provisions of sections 23 (1) and (2) of the Act require the DLHT to be composed of a chairman and not less than two assessors. They also instruct the chairman of the DLHT to require the assessors give their opinion before he composes a judgment. Again, sections 24 requires the Chairman to consider the opinion of the assessors in making the decision though they do not bind him. Violation of these provision constitutes a serious irregularity as underscored by the CAT in the case of **Ameir Mbarak and another v. DGAR Kahwili, Civil Appeal No. 154 of 2015 CAT at Iringa** (unreported) and the **Tubone case (supra).** Furthermore, section 34 (1) of the same Act guides that, in hearing appeals from ward tribunals, the DLHT shall also sit with not less than two assessors.

Owing to the above reasons, I am of the following views: that, the mere facts that in the matter at hand 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 satisfy the 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.

As to 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 the 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 *inter alia*, the provisions of section 23 (1) and (2) of the Act. 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, 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.

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. Opinion of assessors 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, and as rightly contended by the appellants' counsel in the matter at hand, the same applies *mutatis mutandis* when the DLHT exercises its appellate jurisdiction. This is so because, in such appeals it also sits with assessors like in trials. Again, 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.

The view that the requirements discuss above apply in both trial and appeals before the DLHT is further vindicated by the fact that, both provisions of section 23 (related to trials) and 34 (on appeals) of the Act are under the same Part V of the Act which guides on general matters related to District Land and Housing Tribunals since this part has the following heading "THE DISTRICT LAND AND HOUSING TRIBUNAL." In law, headings of the Parts, divisions and sub-divisions into which a written law is divided, form part of the written law; see section 26 (1) of the Interpretation of Laws Act, Cap. 1 R. E. 2002. I underscored the position highlighted above in the case of **Hamenyimana s/o James vs. Republic, Criminal Revision No. 14 of 2015, High Court of Tanzania at Tabora** (unreported).

The usefulness of headings and parts in statutes has also been underscored by scholars. Dworkin, G., in the book of "**Odgers' Construction of Deeds and Statutes**, 5th Edition, Universal Law Publishing Co. Pvt. Ltd, Delhi, 1967, p. 311-312," underscored that, a heading is a prefix to a set of sections of statutes and is regarded as a preamble to them. The sections under a heading must be read in connection to it and interpreted by the light to it. A heading is considered as giving the key to construction of the sections under it, unless the wording is inconsistent with such construction. In my further view, parts, divisions, subdivisions and headings or titles of statutes should be respected and given the meaning intended by the legislature. It is further observed that, this is a practical position of the law to be observed in interpreting statutes generally. Otherwise, there would be no need for the

draftsman to divide statutes into various parts, divisions, subdivisions and headings.

In my further 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.

Owing to the above reasons, the argument by the respondent that, the procedure of the Act was followed in the case at hand is not tenable. I consequently answer the first issue posed above affirmatively that, the DLHT offended the provisions of the law cited above, i. e. sections 23 (2) and 34 (1) of the Act. As to the second issue the answer is that, the violation was fatal to the proceedings and the impugned judgment of the DLHT.

The finding I have just made herein above is legally forceful enough to dispose of the entire appeal in favour of the appellant. I thus, uphold the additional ground of appeal. I will not thus, consider the rest of the grounds of appeal.

I therefore, make the following orders: I allow the appeal to the extent shown above. I also order 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 of the DLHT is also 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
08/08/2020.

08/08/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant: present both.
Respondent; present in person.
BC; Mr. Patric, RMA.

Court: Judgment delivered in the presence of the parties, in court, this 8th August, 2020.

JHK. UTAMWA.
JUDGE

08/08/2020