THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPEAL NO. 36 OF 2019.
(Arising from Application No. 58 of 2019, in the District Land and Housing Tribunal for Mbeya, at Mbeya).

AYASI RASHID MBISA
(Administrator of estate of
Asia Lusani Mwalukaja).....APPELLANT

VERSUS

JAMIL TWALHA RASHID MBISA
(Administrator of estate of
Twalha Rashid Mbisa.....RESPONDENT

JUDGMENT

08/10 & 19/11/2020.
UTAMWA J:

In this first appeal, the appellant AYASI RASHID MBISA (Administrator of estate of Asia Lusani Mwalukaja) challenged the judgement (impugned judgement) of the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT) in Application No. 58 of 2019.

Initially, the appellant preferred three grounds of appeal. He however, successfully applied before this court for filing an additional ground of appeal. Later on, in arguing the appeal he abandoned the original grounds of appeal and argued the additional ground only. The

In her replying submissions, the learned counsel for the respondent argued essentially that, the provisions of the law cited by the appellant's counsel do not set the requirement for the assessors to read their opinion to the parties in court. In the case at hand, the procedure was followed as the chairman accordingly required the assessors to give their opinion as per section 23 (2) of Cap. 216. She added that, the opinion of the assessors were in fact, read to the parties in court. She thus, distinguished the **Edina case** (supra) and the **Tubone case** (supra). She further argued that, the appellant's counsel did not mention any injustice or legal harm caused by the alleged irregularity. In the case under consideration thus, substantive justice was actually, done to parties. What matters much in cases of this nature is substantive justice to the parties as required by section 45 of Cap. 216. This is also the requirement under the principle of overriding objective which requires courts to deal with cases justly and to have regard to substantive justice.

I have considered the single surviving ground of appeal, the record, the submissions by the parties and the law. In my view, the major issues here are two as follows;

1. Whether or not the DLHT offended the provisions of regulation 19 (2) of the GN.
2. In case the answer to the first issue is negative, then what is the legal effect of the violation.

Regarding the first issue, it is clear that, the provisions of regulation 19 (2) of the GN guides that, the chairman of a DLHT, before making his judgement, shall require every assessor present at the conclusion of

hearing a dispute to give his opinion in writing, the opinion may be in Kiswahili. Indeed, these provisions go in tandem with the provisions of section 23 (2) of Cap. 216 which guide that; a DLHT shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgement. The CAT interpreted the above cited provisions of law as requiring the assessors to read their opinion in court and in the presence of the parties as contended by the learned counsel for the respondent; see the **Edina Adam case** (supra) and the **Tubone Mwambeta** (supra). These two precedents, together with the case of t**he General Manager Kikwengwa Stand Hotel v. Abdallah Said Musa, Civil Appeal No. 13 of 2012, CAT** (unreported) underscored that; where a trial before a DLHT 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.

My perusal of the record of the DLHT, did **not show** that the single assessor who was present at the conclusion of the matter (one Ms. Sarah) gave her opinion in court and in the presence of the parties. Owing to the interpretation of the relevant provisions of the law by the precedents of the CAT shown above therefore, it cannot be said that the DLHT properly observed those provisions. I am of further view that, the mere facts that in the matter at hand there are written opinion of the assessor 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 were neither recorded in the proceedings nor made open to the parties in court. The first issue is thus, answered negatively. This answer calls for the examination of the second issue.

The second issue is on the legal effect of the failure to comply with the provisions of the law cited above. The CAT in the **Edina case** (supra), gave an answer to this issue. It held that, the fact that the opinion of assessors of the DLHT were not read in the presence of the parties before the judgment was composed, rendered the same lack useful purpose. The CAT in that case then nullified the proceedings and judgements of both the DLHT and this court for among other things, the fact that the opinion of the assessors were not read in court. It then ordered for a retrial before another chairman and a distinct set of assessors if parties still wished.

In my view, apart from the fact that the decisions by the CAT are binding to this court by virtue of the doctrine of *stare decisis,* its holding is very useful for purposes of an effective dispensation of justice. This view is based on the following reasons; that, without reading the opinion of assessors in court, parties will not properly understand the opinion of assessors and the reasons for the opinion. This omission thus, curtails the parties' right to appeal. In fact, a decision reached without parties knowing the assessors' opinion, lacks transparency. A decision made without transparency is doubtful and cannot be considered as being a result of a fair trial. It is the law that, transparency is vital in the process of adjudication. This court (Moshi, J. as he then was) in **Gilbert Nzunda v.**

Watson Salale, (PC) Civil Appeal No. 29 of 1997, at Mbeya (unreported), held that, justice is never meted out on whims or arbitrarily, it is a question of transparency. It further held that, transparency and justice are inseparable.

Owing to the reasons shown above, the omission discussed above cannot be saved by section 45 of Cap. 216 or by the principle of overriding objective as envisaged by the learned counsel for the respondent. I thus, find that, the omission was fatal to the proceedings and the impugned judgement of the DLHT. This finding provides for the answer to the second issue.

Due to the findings I have made above, I uphold the single ground of appeal for being merited. I thus, make the following orders; I allow the appeal, nullify and quash the proceedings of the DLHT from the date it started the hearing of the matter to the date it pronounced its impugned judgement. I also set aside the impugned judgment. If parties still wish, they can pursue the suit before the DLHT for hearing it afresh. If they opt so, the same shall be heard by another chairman and another set of assessors. Each party shall bear his own costs since it was the DLHT which committed the omission discussed above. It is so ordered.

THE HIGH COURT OF TANZANIA

JHK. UTAMWA.

JUDGE

19/10/2020

19/10/2020.

CORAM; Hon. JHK. Utamwa, J.

Appellant: present in person.

Respondent: present in person.

BC; Mr. Patrick, RMA.

Court: judgement delivered in the presence of the parties, in court, this 19th O, 2020.

JHK. UTAMWA.

JUDGE

26/10/2020.