THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPEAL NO. 35 OF 2019.

(From the District Land and Housing Tribunal for Mbeya, at Mbeya in Misc. Land Application No. 33 of 2018. Originating from Land Case No. 22 of 2018 of Ihahi Ward Tribunal).

NURU MAGURU.....APPELLANT

VERSUS

KENANI NGOGO.....RESPONDENT

JUDGMENT

16. 9 & 15. 12. 2020.

UTAMWA, J:

In this appeal, the appellant NURU MAGURU challenged the decision of the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT), delivered on 12/6/2019. The appellant was the respondent in the DLHT while he was the complainant in the ward tribunal. In the ward tribunal, he sued the respondent, KENANI NGOGO for trespass to a piece of land (farm) hereinafter referred to as the disputed land. Its measurements were not specifically pleaded, but in the record it shows that, it was ½ acre. The appellant won the case in the ward tribunal, but he lost in the DLHT, hence the present appeal.

The appellant preferred a total of four grounds of appeal through Mr. Fortunatus Mwandu, learned counsel. They can however, be condensed into two as follow:

1. That, the DLHT erred in law and fact in failing to properly evaluate the evidence adduced by the parties.
2. That, the DLHT erred in law and fact in relying on insufficient and contradictory evidence of the respondent.

The respondent objected the appeal. He was represented by Mr. Emily Mwamboneke, learned counsel. Parties agreed, and the court ordered them to dispose of the appeal by way of written submissions. The same were accordingly filed.

In his submissions in chief, the appellant's counsel started with points which he argued, raised legal issues. They related to the way documentary evidence was tendered in the ward tribunal. He complained that, the documentary evidence was wrongly admitted. He added that, the chairman of the DLHT departed from the opinion of assessors, especially one Sarah, without giving reasons for the departure. He further complained that, the course offended section 24 of the LADCA and its effect was fatal to the proceedings and the impugned judgement. He supported this contention by the decisions of **James Kipokile v. Enos Kipokile, Land Appeal No. 36 of 2016, High Court of Tanzania, at Mbeya** (unreported) and **Chadiel Mduma v. Denis Mushi, Civil Appeal No. 41 of 2013, Court of Appeal of Tanzania (CAT), at Dar es Salaam** (unreported). The learned counsel for the appellant argued also that, though the same (legal points) were not

among the grounds of appeal, they vitiated the judgment of the DLHT. He thus, prayed for this court to go through the proceedings of the ward tribunal, see the irregularities, nullify the judgments of both the DLHT and ward tribunal and order for trial *denovo*.

On his part the respondent's counsel argued that, the points raised by the appellant's counsel were determined by the DLHT which found that, the same did not prejudice any part as per section 45 of the Land Disputes Courts Act, Cap. 216 R.E 2002 (now R.E 2019) hereinafter referred to as the LADCA.

In his rejoinder submissions, the appellant's counsel reiterated what he had contended in his submissions in chief. He however added that, the irregularities committed by the ward tribunal during the admission of documentary evidence cannot be held as legal.

I have considered the arguments by the parties, the record and the law. Indeed, the appellant's counsel raised the two legal points in his written submissions. They were not part of the grounds of appeal as shown above. However, in my view, this course is permitted by law. This is because, the law guides that, a point of law can be raised at any stage of the proceeding by any party or by the court *suo motu*. Owing to this reason, I will firstly consider and determine the issue related to the legal point on the opinion of assessors. If need will arise, I will also consider the other grounds of appeal. The other legal point related to the production of documentary evidence before the ward tribunal can smoothly be deal with in considering the second ground which relates to sufficiency of evidence, if need will arise. The reason for this plan of deciding is that, the point on the assessors' opinion is very

crucial. It is more so because, it actually, touches the competence of the proceedings before the DLHT and its jurisdiction as it will be demonstrated later.

Now the major issue related to the legal point on the assessors' opinion is whether or not the chairman of the DLHT in fact, considered the opinion of the assessors siting with him in accordance with the law and gave reasons for his departure therefrom. Indeed, the provisions of section 24 of the LADCA which the appellant's counsel cited as the offended law, cannot be read in isolation from section 23 (2) of the same legislation. Section 24 requires the chairman of the DLHT to take into account the opinion of assessors which do not bind him, but, if he differs from them, he is enjoined to give reason for his departure. As to section 23 (2), it obliges the chairman to require the assessors to give out their opinion before he reaches the judgment. Compliance with section 24 thus, depends much on compliance with section 23 (2). One cannot argue that the chairman complied with section 24 if section 23 (2) was not complied with. This is in fact, the view underscored by the CAT in the **Chadiel case** (supra). In that case, the CAT held that, the chairman is obliged to take the opinion of assessors and consider it (see at page 2 of the typed version of the judgment).

In the case at hand, I do not think that the chairman properly complied with section 23 (2) of the LADCA. This is because, the proceedings of the DLHT (at page 8 of the typed version) clearly show that, upon the completion of hearing the parties on 15/05/2019, the chairman of the DLHT fixed a date for the judgment without firstly requiring the assessors sitting with him to give their opinion. There is also no sign that the opinion of the assessors

were recorded in the proceedings and read to the parties in court. Indeed, the impugned judgment shows that, the opinion was referred to by the chairman in the impugned judgment and he gave reason for his departure. In my view, the course taken by the chairman did not comply with the law.

The view just highlighted above is supported by the guidance of the CAT on the proper way of how to comply with section 23 (2) of the LADCA. 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 chairman had required his assessors to give their respective opinion as provided 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 **Ameir Mbarak and another v. DGAR Kahwili, Civil Appeal No. 154 of 2015 CAT at Iringa** (unreported), the CAT (in the **Edina 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 case** (supra), the CAT had 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. The CAT 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 case** (supra) took strength from the cases of **Tubone Mwembeta v. Mbey City Council, Civil Appeal No. 287** (unreported) 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 of the DLHT in the final verdict.

The CAT in the said **Edina 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 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.

It must be noted here that, 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 as in this case. This is so because, section 23 of the LADCA applies to both proceedings in appeals and in trials before a DLHT. Besides, in such appeals a DLHT also sits with assessors like in trials.

The stance of the law highlighted above is a construction of the CAT on section 23 (1) and (2) of the LADCA vide the precedents cited above. I must thus, follow that position of the law. This is because, decisions made by the CAT bind courts and tribunals subordinate to it, including this court. This position of the law is by virtue of the doctrine of *stare decisis*; see also the decision by the CAT in **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146.** The argument by the respondent's counsel that the irregularities committed by the DLHT in the matter at hand can be tolerable under section 45 of the LADCA cannot thus, be tenable.

Now, since the chairman in the case as hand did not comply with section 23 (2) of the LADCA, his purported compliance with section 24 in the impugned judgment by making reference to the opinion of assessors, departing from them and giving reasons thereto, was purposeless. It cannot thus, be said that he in fact, complied with section 24 of the LADCA. I therefore, answer the major issue posed above negatively.

The finding I have just made above is forceful enough to dispose of the entire appeal. It thus, makes it unnecessary to test the other grounds of appeal listed above. Otherwise, I will be performing a superfluous and academic exercise which is not the primary objective of the process of adjudication.

I therefore, make the following orders vide revisional powers vested in this court. I nullify the proceedings of the DLHT from the date when the DLHT started the hearing of the appeal to the day when it set the date of judgement. I also set aside the impugned judgment of the DLHT. If parties still wish, the appeal shall be heard by another chairman and a distinct set of assessors. Each party shall bear his own costs since it was the DLHT which committed the irregularities that have brought this appeal to an end. It is so ordered.

JHK. UTAMWA.

JUDGE

15/12/2020.

15/12/2020.
CORAM; Hon. N. Mwakatobe, DR.
Appellant; Mr. Twamalenke, advocate.
Respondent: Mr. Twamalenke, advocate holding briefs for Mr. Mwamboneke.
BC; Mr. Patrick, RMA.

Court: judgment is delivered this 15th December, 2020 in the presence of Mr. Twamalenke, advocate for the appellant and holding briefs for Mr. amir mwamboneke, advocate for the respondent. Right to appeal is explained.

N. MWAKATOBE
DEPUTY REGISTRAR
15/12/2020.