THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPEAL NO. 15 OF 2019.

(From the District Land and Housing Tribunal for Mbeya, at Mbeya in Misc. Land Application No. 92 of 2017. Originating from Land Case No. 38 of 2017 of Chimala Ward Tribunal).

MAISHA MWAIBOFU.....APPELLANT

VERSUS

GEOPHUREY MWANGULUMBI.....RESPONDENT

JUDGMENT

15. 10 & 15. 12. 2020.

UTAMWA, J:

In this second appeal, the appellant MAISHA MWAIBOFU challenged the decision of the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT), delivered on 10/04/2018. The appellant was a loser in both the DLHT and the ward tribunal. The background of this matter goes briefly as follows: The appellant instituted the suit in Chimala ward tribunal against the respondent, GEOPHUREY MWANGULUMBI for trespass to land measuring 11 acres. After a full trial, the ward tribunal

decided in favour of the respondent. It held that, according to the evidence adduced by the parties and their witnesses, it was satisfied that the appellant had legally sold the disputed land to the Company called PEBOL. The Company was under directorship of the respondent. Being discontented by the decision of the ward tribunal, the appellant appealed to the DLHT as hinted above. The DLHT decided that, since the record of the ward tribunal show that, the appellant had legally sold the disputed land to PEBOL (the Company), the appellant had to sue that Company instead of suing the respondent. It thus, dismissed the appeal hence the second appeal at hand.

Initially, the appellant preferred five grounds of appeal. He however, successfully applied before this court for filing additional grounds of appeal. The original five grounds of appeal can be condensed to only two as follows:

1) That the DLHT erred in law and facts in upholding the decision of the ward tribunal though it was based on weak evidence of the respondent.
2) That, the DLHT erred in law and facts by upholding the decision of the ward tribunal though the same was biased in conducting of the case.

The additional grounds of appeal can also be condensed into one ground that, the learned chairman of the DLHT erred in law and facts in failing to consider the opinion of assessors.

When the appeal was called on for hearing the appellant appeared in person and unrepresented. Mr. Isaya Mwanry, learned advocate appeared for the respondent. Mr. Mwanry prayed for the appeal to be disposed of by way of written submissions, the appellant conceded and the court granted the prayer. However, only the appellant filed his submissions. The respondent through his advocate did not file one, though the appellant served him. In this judgment thus, I will not consider the respondent's replying submissions. This course is, in fact, permitted by the law.

My adjudication plan is to start determining the additional ground of appeal. This is because, if it will be upheld it will dispose of the entire appeal without even testing other grounds of appeal.

Regarding this additional ground of appeal, the appellant submitted that, the chairman of the DLHT erred in law in failing to invite the assessors of the DLHT to give their opinion before delivering the judgment (henceforth impugned judgment). He also contended that, the omission committed by the DLHT contradicted the provisions of section 23 (2) of the Land Disputes Courts Act Cap. 216 R.E. 2002, (hereinafter referred to as the LADCA) and Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003, (henceforth the GN).

The appellant contended further that, the opinion of assessors are required to be read before the parties and the record of the DLHT should indicate so. In the matter at hand however, the record of the DLHT shows that, after recording the rejoinder submissions of the appellant, the

chairman fixed the date for judgment. To substantiate his contention he cited the decisions of the Court of Appeal of Tanzania (CAT) in the cases of **Edina Adam Kibona vs. Absolom Swebe (SHELI), Civil Appeal No. 286 of 2017 CAT at Mbeya (**unreported) and **Ameir Mbaraka and Azania Bank Corp Ltd v. Edgar Kahwili Civil Appeal No. 154 of 2015, CAT, at Iringa** (unreported). The appellant prayed for this court to nullify the proceedings and judgment of the trial tribunal and order for retrial. He prayed for this court to allow the appeal and set aside the decisions of both lower tribunals.

I have considered the submissions by the appellant, the record of the DLHT and the law. In my view, the following two issues have to be resolved by this court:

i) Whether or not the DLHT in the matter at hand offended the mandatory provisions of section 23 (2) of the LADCA and regulation 19 (2) of the GN.

ii) In case the first issue is answered positively, then what is the legal consequences of the omission.

Starting with the first issue, the law [sections 23 (1) and (2) of the LADCA] provides that, a DLHT is dully constituted when held by the chairman and the two assessors who 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/her opinion in writing, which said opinion may be in *Kiswahili*.

My perusal in the typed record of the DLHT shows that, the chairman sat with two assessors in hearing of the appeal. However, after the hearing of the appeal, he did not require the assessors sitting with him to give their opinion. As rightly submitted by the appellant, at the end of the hearing, the chairman just fixed the date for judgment; (see at page 9 of the typed proceedings of the DLHT). This fact is also vindicated in the original proceedings (handwritten). My perusal further shows that, there are three handwritten papers which suggest that the two assessors had given their opinion in writing. It is also undisputed that, the impugned judgement indicates that, the chairman actually agreed with their opinion.

Owing to the above explained contents of the record of the DLHT, which said record is as clear as a broad daylight, I am of the following views: that, the mere facts that there is written opinion of the assessors in the record of the DLHT and that, the chairman considered and ultimately agreed with them in the judgement, did not suffice as compliance with the law. This is because, such opinion of the 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 omissions just mentioned above offended the mandatory provisions of section 23 (1) and (2) of the LADCA and regulation 19 (2) of the GN. This view is based on the precedents by the CAT in the **Edina case** (supra) and in **Tubone Mwambeta Vs. Mbeya City Council, Civil Appeal No. 287 of 2017 CAT at Mbeya**

(unreported). The first issue is thus, answered positively that, the DLHT in the matter at hand offended the mandatory provisions of section 23 (2) of the LADCA and regulation 19 (2) of the GN. This finding attracts 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 the **Edina case** (supra) and the **Tubone case** (supra). In those precedents, the record of the proceedings of a DLHT did not show that, the respective chairmen had required the assessors to give their respective opinion as guided by the law. The respective Chairmen had also merely made reference to the opinion of the respective assessors in the corresponding judgements. The CAT in those cases 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 case** (supra), the CAT held (in the two precedent just cited above) as follows: it is unsafe to assume the opinion of the assessors which is not on the record by merely reading the acknowledgement of the chairman in the judgement. In these circumstances, the CAT held that, the assessors did not give any opinion for consideration in the preparation of the tribunal's judgment. This was a serious irregularity according to the CAT.

Again, the CAT in the three precedents just cited above (the **Edina case**, the **Tubone case** and the **Ameir case**) resolved as follows; that, the omissions discussed previously go to the root of the matter and occasion 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

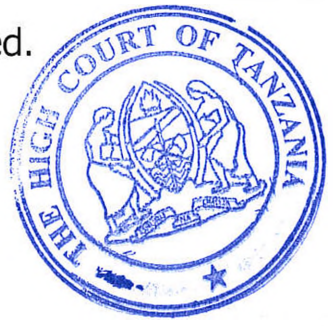
constitute a tribunal. Lack of opinion of assessors renders the decision a nullity and it cannot be resuscitated by seeking fresh opinion of assessors.

In my further concerted view, the circumstances in the **Edina 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 also be noted 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 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**. Now, owing to the reasons shown above, I find the second issue as follows: that, the omissions committed by the chairman of the DLHT in the matter at hand were legally fatal and rendered its proceedings and the impugned judgment a nullity.

The findings I have just made herein above, are legally forceful enough to dispose of the entire appeal without considering the original grounds of appeal. Otherwise, I will be performing a superfluous and academic exercise which is not the core objective of the process of adjudication.

That being the case, I hereby allow the appeal to the extent explained above. I will however, not grant the appellant's prayers, instead I make the orders as follows; 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. Its judgement

is accordingly set aside. If the appellant still wishes, 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

15/12/2020

15/12/2020.
CORAM; Hon. N. Mwakatobe, DR.
Appellant: present.
Respondent: absent.
BC; Mr. Patrick, RMA.

Court: judgment is delivered this 15th December, 2020 in the presence of the appellant and in the absence of the respondent. Right to appeal is explained.

N. MWAKATOBE
DEPUTY REGISTRAR
15/12/2020.