THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 36 OF 2020.

(From the District Land and Housing Tribunal for Rungwe, at Tukuyu, in Land Application No. 2 of 2019).

ALBERT MWAZEMBE.....APPELLANT

VERSUS

MARTIN MWAKABUTA

(Administrator of the Estate

of Assa Mwakabuta).....RESPONDENT

JUDGMENT

21/4 & 16/07/2021.

UTAMWA, J:

The appellant in this appeal, ALBERT MWAZEMBE challenged the judgment (henceforth the impugned Judgement) of the District Land and Housing Tribunal for Rungwe, at Tukuyu (the DLHT) in Land Application No. 2 of 2019. In that application, one ASSA MWAKABUTA, now deceased (henceforth the deceased) sued the appellant, one ALBERT MWAZEMBE for a piece of land (the suit land). The deceased succumbed to his demise before this appeal was instituted.

Through the impugned judgment, the DLHT decided the suit in favour of the deceased and declared him the lawful owner of the suit land. The appellant was aggrieved by the impugned judgment and thus, preferred this appeal. His appeal was based on the following four ground of appeal according to the Memorandum of Appeal:

1. That, the Chairman of the District land and Housing Tribunal for Rungwe erred in law and fact to give judgment in favour of the Respondent despite the fact that the appellant's evidence was heavier.
2. That, the Chairman of the District land and Housing Tribunal for Rungwe at Tukuyu erred in law and facts to declare the judgment on favour of the Respondent without having sufficient prove that has enjoyed the using the suit land for a long time.
3. That, the Chairman of the Tribunal for Rungwe at Tukuyu erred in law and facts to determine the matter that the Appellant is time barred for interference into the suit land.
4. That, the Chairman of the District land and Housing Tribunal erred in law and facts to deliver judgment and decree which is tinted with illegalities and irregularities.

Owing to these grounds, the appellant urged this court to allow the appeal with costs and quash the impugned judgment of the DLHT. On behalf of the deceased, the respondent MARTIN MWAKABUTA, as the administrator of his estate resisted the appeal.

Though both parties were not legally represented, they opted to argue the appeal by way of written submissions and the court directed them to do so. They filed their respective written submissions timely.

I have considered the grounds of appeal, the arguments by the parties, the record and the law. I am of the view that, in deciding this appeal, it is convenient to firstly consider and determine the fourth ground of appeal. If need will arise, I will also consider the rest of the grounds. Besides, the fourth ground of appeal is based on illegalities and challenges the jurisdiction of the Chairman in deciding the matter without properly involving the opinion of the assessors. An issue of jurisdiction is, in law, a fundamental one.

In supporting the fourth ground of appeal, the appellant argued in his written submissions (from page 4 to 6) thus: the impugned judgment was tainted with illegalities and irregularities that rendered it null and void. This was because, it offended the law which requires the assessors to give their opinion at the conclusion of the hearing. Such opinion should be shown in the proceedings and the judgment of the DLHT. However, in the case at hand, the opinion are not recorded in the proceedings of the DLHT and are not in the impugned judgment. They were also not read to the parties in court. Moreover, there was no any opinion that was given by the assessors. The impugned judgment did not thus, satisfy the law. He supported the contention by the judgment of this court in the case of **Martha A. Mwakinyali and another v. Hamisi Mitogwa, Misc. Land Application No. 13 of 2013, High Court of Tanzania, at Mbeya**

(unreported). The appellant thus, urged this court to nullify and quash the impugned judgement for the omissions.

In his replying submissions regarding the fourth ground of appeal, the respondent countered the contentions made by the appellant on the grounds that, the assessors gave their respective opinion according to the law. They were two and opined in favour of the deceased. The appellant did not prefer any rejoinder submissions, hence this ruling.

The major issues on the fourth ground of appeal are therefore, as follows:

i. Whether or not the Chairman of the DLHT duly considered the assessor's opinion in composing the impugned judgment as per the law.

ii. In case the answer to the first issue is negative, then what is the legal effect of the irregularity?

Regarding the first issue posed above, I am of the view that, the circumstances of the case call for a negative answer on the following reasons: in the first place, it is clear that, the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003 (henceforth the GN) sets the procedure applicable before a DLHT when conducting original proceedings. Regulation 19 (2) of the GN guides that, before making his judgement, the Chairman of a DLHT 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 those of section 23 (2) of The Land Disputes Courts Act,

Cap. 216 R.E 2019 (Cap. 216). These provisions also 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 Court of Appeal of Tanzania (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; see the cases of **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017, CAT at Mbeya** (unreported) and **Tubone Mwambeta Tubone Mwembeta v. Mbeya City Council, Civil Appeal No. 287** (unreported).

The two precedents just cited above, together with the case of **The General Manager Kikwengwa Stand Hotel v. Abdallah Said Musa, Civil Appeal No. 13 of 2012, CAT** (unreported) underscored further 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. The precedents further underscored that, 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. In fact, the **Martha case** (supra) cited by the appellant in his submissions followed the above cited three precedents.

My perusal of the record of the DLHT however, shows some shortcomings as far as the above highlighted procedure for involving opinion of assessors in a judgment of a DLHT is concerned. It is for

example, clearly indicated (at page 15 of the typed version of the proceedings of the record of the DLHT), that, after the closure of the trial (i. e upon the defence case being closed) on 10th September, 2019 the trial Chairman, in the presence of two assessors (one Amury and Kaponela), ordered as follows:

"1. The defence case is closed. 2. Opinion on 13/09/2019."

In my settled view, the words "opinion on 13/09/2019" were ambiguous. They could not necessarily be interpreted as showing that the Chairman had required the present assessors to give opinion in writing as required by regulation 19(2) of the GN and section 23(2) of Cap. 216 discussed earlier. The quoted words might have also meant that, the Chairman was intending to require the assessors to comply with the law on the said 13/09/2019. Indeed, the phrase "to require" a person to do something, is to demand or command him/her by authority to do so; see The Chambers 21st Century Dictionary, Version 1. 0, Chambers Harrap Publishers, 2003. Again, the provisions cited above are couched in a mandatory form since they use the word "shall." It is thus, conclusive that, the law mandatorily guides the Chairman to command the assessors to give their respective opinion at that stage of the case.

Nonetheless, even if it is presumed (without deciding) that the above quoted words amounted to the Chairman's command to the assessors to give their opinion, that could not suffice the law. This is so because, he did not direct them on the mode of complying with his command, i.e to give the opinion in writing as the law guides.

Moreover, the record indicates that, though there are two handwritten documents which can be presumed as the written opinion of

the two assessors, it is doubtful if such opinion were given a due consideration in the judgment as required by the law. This is because, the record demonstrate that, the impugned judgment was composed by the Chairman (one Hon. Majengo) even before the respective opinions of the two assessors were read before the parties in court as required by the law cited previously. This fact is evidenced at page 17 of the typed version of the proceedings of DLHT (dated 08/01/2020). On that date, the Chairman who had presided over the trial and composed the impugned judgment (Hon. Majengo) endorsed words to the following effect: that, the opinion ought to have been delivered first before the delivery of the judgement before another Chairman since he had been transferred to another work station, but the judgment itself was ready.

Again, at page 18 of the same proceedings (date 27/03/2020), the matter was brought before another Chairman (Hon. Munzerere) who actually delivered the impugned judgment. For purposes of differentiating the two chairmen in discussions under this judgment, the Chairman who presided over the trial and composed the impugned ruling will hereinafter be called the predecessor Chairman. On the other hand, the one who delivered the judgement will be referred to as the successor Chairman.

Now, the proceedings show further that, on the said 27/03/2020, the successor Chairman endorsed as follows:

> "1. Opinion by assessors read over and explained to the parties.
> Judgment delivered per coram"

The quoted text clearly shows that, the successor Chairman delivered the impugned judgment immediately after the reading of the assessor's opinion was performed, hence the veracity of the above highlighted view that, the

impugned judgment was composed even before the respective opinions of the two assessors were read in court as required by the law. It is apparent that the successor Chairman pronounced the judgment because the predecessor Chairman who had heard the matter and composed the judgment had been transferred as hinted earlier.

The above trend demonstrated in the record also shows that, it was not the assessors who read their respective opinion in court. It is clear that, someone else read them on their behalf. It is more so because, the coram on that date did not show that the two assessors were in court on the material date of pronouncing their opinion and the impugned judgment. This was not in accordance with the law cited above which requires the assessors themselves to read their opinion in court as shown earlier.

Moreover, the trend of the record shows that, though the opinions of assessors were read in court after the judgment had been composed as demonstrated above, the same were not read before the predecessor Chairman who had presided over the trial and composed the impugned judgment as required by the law. Instead, they were read before the successor Chairman who neither conduct the trial nor composed the judgment. This irregularity rendered the opinion by the dual assessors purposeless. This is because, according to section 24 of Cap. 216, such opinion are intended to be considered by the Chairman in composing the judgment of the DLHT though they are not binding to him. The same reads thus, and I quote it for the sake of a readymade reference:

> "In reaching decisions the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgement give reasons for differing with such opinion."

Now, owing to these just quoted provisions of law, opinion of assessors of a DLHT must be made before the judgment is composed and not thereafter. Such opinion cannot therefore, be made or delivered simultaneously with the judgment as it was done by the successor Chairman in the matter under consideration.

It follows thus, that, according to the trend demonstrated by the record, it is not clear as to how and when the two handwritten documents which seem to be the opinion of assessors got into the record of the DLHT. It is not also open as to how the Chairman came across such opinion to which he purportedly referred in the impugned judgment as being in favour of the deceased and which he supported. There was thus, no transparency in involving such opinions into the impugned judgment. 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 interpretation of the relevant provisions of the law cited above and the above precedents of the CAT I referred earlier, 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, could not

also meet the requirement of the law due to the irregularities demonstrated above.

Due to the aforesaid reasons, the first issue posed herein above is answered negatively that, the Chairman of the DLHT did not properly consider the assessor's opinion in composing the impugned judgment as per the law. This answer calls for the examination of the second issue.

The second issue, on the legal effect of the irregularities demonstrated above, can be effectively answered by the **Edina case** (supra). The CAT in that precedent 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, caused the same to lack useful purposes. The CAT in that case therefore nullified the proceedings and judgements of both the DLHT and this court. It then ordered for a retrial before another chairman and a distinct set of assessors if parties still wished.

Owing to the reasons shown above, the omissions discussed above also resulted to the want of jurisdiction on the part of the Chairman in deciding the matter. He could not have the requisite jurisdiction to decide the matter alone and without proper consideration of the opinion of the assessors as he did. His decision cannot therefore, be saved by section 45 of Cap. 216. These provisions essentially protects decisions of a Ward Tribunal or a DLHT resulting from abnormalities that do not cause injustice to parties. The impugned judgment cannot also be saved by the principle of overriding objective. This principle basically requires courts to decide matters before them promptly, justly and fairly without being overwhelmed by procedural technicalities. I thus, find that, the omissions at issue were

fatal to the proceedings and the impugned judgement of the DLHT. This finding provides for the answer to the second issue.

Due to the conclusions I have made above, I find it unnecessary to consider the rest of the grounds of appeal since the conclusions are forceful enough to dispose of the entire appeal. I thus, agree with the arguments advanced by the appellant and I consequently uphold the fourth ground of appeal for being merited. I accordingly, make the following orders; I allow the appeal, nullify and quash the proceedings of the DLHT. 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 to do 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.

JHK. UTAMWA

JUDGE

12/07/2021.

Date: 19.07.2021

Coram: Hon. P. Ntumo -Ag-DR.

Appellant: Present

Respondent:

B/C: Patrick Nundwe.

Judgement delivered this 19th day of July 2021 in open chambers in the presence of the parties.

P. Ntumo - PRM

Ag- Deputy Registrar

19/07/2021