

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**AT MBEYA**

**MISC. LAND APPEAL NO. 18 OF 2018.**

*(From the District Land and Housing Tribunal for Mbeya, at Mbeya in Land Appeal No. 89 of 2016. Originating from Land Case No. 46 of 2016 of Mawindi Ward Tribunal).*

**DICKSON MDOE.....APPLICANT**

**VERSUS**

**SAID MTANDA.....RESPONDENT**

**JUDGMENT**

**30. 9 & 27. 11. 2020.**

**UTAMWA, J.**

In this second appeal, the appellant DICKSON MDOE, challenged a decision of the District Land and Housing Tribunal for Mbeya at Mbeya (DLHT). The appellant was the respondent in the DLHT, but he was the claimant in the ward tribunal. Before the ward tribunal, the dispute was on a piece of land measuring 9 × 70 paces. 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 five grounds of appeal through his counsel, Mr. Fortunatus Mwandu. The grounds of appeal can however, be condensed into four as follows:

1. That, the DLHT chairman, erred in law and fact by deciding against the appellant though he had cogent evidence than that of the respondent.
2. That, the DLHT chairman erred in law and fact in not including the opinion of one assessor and for disregarding the opinion given by another assessor.
3. That, the chairman erred in law and fact for holding that, the seller and the buyer (appellant) had common desire to take the respondent's land.
4. That, the chairman erred in law and fact for failure to consider the point of non-joinder of necessary party (seller) which was raised by the respondent.

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

My adjudication plan is to start determining grounds of appeal which raise legal issues. This is because, if they will be upheld, they will dispose of the entire appeal without even testing other grounds of appeal.

Now, I start with the second ground of appeal. Regarding this ground, the appellant's counsel submitted that, the opinion of the assessor,

one Ms. Sara was not included in the decision of the DLHT though she was involved in the hearing of the matter. The DLHT chairman included the opinion of only one assessor, Mr. Kangele. He however wrongly disregarded the same without assigning any reason for such departure. He supported the contention by citing section 24 of the Land Disputes Courts Act, Cap. 216 R.E 2002, (Now R.E 2019) herein referred to as LADCA. These provisions require the chairman of the DLHT to take into account the opinion of assessors or to give reasons if he departs therefrom.

Furthermore, the learned counsel for the appellant submitted that, the DLHT chairman did not read over the opinion of assessors before the parties as required by Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003 (henceforth the GN). To cement his contention, he also cited the case of **Sikuzani Saidi Magambo and Another v. Mohamed Roble, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania (CAT) at Dodoma** (unreported). He thus, prayed for this court to nullify the judgment of the DLHT.

On the other side, the counsel for the respondent argued, regarding the second ground of appeal that, the DLHT chairman did not include the opinion of the assessor, Ms. Sara because she did not participate the in the hearing of the appeal to its end. She also contended that, the chairman gave the reasons for his departure from the opinion of the assessor, Mr. Kangele.

Additionally, the counsel for the respondent contended that, the assessor's opinion was read before the parties. She further contended that, the provisions of the law and the precedent cited by the counsel for the appellant are irrelevant and do not apply to the matter at hand. She thus, prayed for this court to dismiss the appeal with costs.

In his rejoinder submissions, the appellant's counsel underscored what he had argued in the submissions in chief. He however, added that, the opinion of the assessor, Ms. Sara was very important since she fully participated in the hearing of the matter, save when the DLHT visited the *locus quo*.

I have considered the submissions by the parties regarding this ground of appeal, the record of the DLHT and the law. In my view, the contention between the parties can be resolved by determining the following four issues:

- i) Whether the DLHT failed to include the opinion of the assessor, Ms. Sara.
- ii) Whether the chairman of the DLHT assigned reasons for his departure from the opinion given by assessor, Mr. Kangele.
- iii) Whether or not the DLHT in the matter at hand offended the mandatory provisions of regulation 19 (2) of the GN. No.174 of 2003.
- iv) In case the third issue is answered positively, then what is the legal consequence of the omission.

Regarding the first issue, I perused the proceeding of the DLHT and noted, as rightly submitted by the appellant's counsel that, the assessor

Ms. Sara was present when the matter was heard on 25/7/2016. However, on the same date the matter was adjourned for the DLHT to visit the *locus quo*. The assessor, Ms. Sara did not attend when the DLHT heard the matter at the *locus in quo*. Now, the relevant question is this; whether under such circumstances it can be legally ruled that the chairman of the DLHT actually, committed the irregularity complained of, herein above. In my opinion the answer is negative. This is because, section 23 (3) LADCA allows the Chairman to conclude the matter despite the absence of one assessor who was present at the commencement of proceedings. For that reason, I agree with the counsel for the respondent that, the said assessor Ms. Sara did not fully participate in the hearing of the matter. The first issue is thus, answered negatively.

Regarding the second issue, this should not also detain me since it is clear from the judgment (impugned judgment) at page 2 that, the chairman gave his reason for not agreeing with the opinion of assessor Mr. Kangele. The reason he gave was that, though the assessor had opined that the suit land belonged to the appellant, he had not opined if the respondent had trespassed on the land. The second issue is thus, answered positively.

Concerning the third issue, I am of the view that, though the appellant's counsel cited Regulation 19 (2) of the GN only, it is common ground that, these provisions have to be read together with section 23 (1) and (2) of the LADCA. These provisions of section 23 (1) and (2) of the LADCA require the DLHT to be composed of one chairman and not less than two assessors. It 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 opinion in writing, which said opinion may be in *Kiswahili*.

In answering the third issue therefore, I had to peruse the record of the DLHT. The results of my scrutiny were these: after the hearing of the appeal, the chairman of the DLHT did not require the assessor sitting with him to give his opinion. In fact, at the end of the hearing, he just fixed the date for the judgment, (see at page 8 of the typed proceedings). This fact is also vindicated in the original proceedings (handwritten). My perusal further shows that, there are two handwritten papers in the record of the DLHT. This suggests that, the assessor (Mr. Kalege) had given his opinion in writing. It is also clear that, the impugned judgement, as I hinted earlier, indicates that, the chairman actually considered the opinion of the assessor though he did not agree with him.

Owing to the above explained contents of the record of the DLHT, I am of the following views: that, the mere facts that there is a written opinion of the assessor in the record of the DLHT, and that, the chairman considered such opinion, did not suffice as compliance with the law. This is because, such opinion of the assessor was neither recorded in the proceedings nor made open to the parties in court. Moreover, the chairman did not require the assessor to give his views in court as shown above. It cannot therefore, be judged that the chairman actually recorded and considered the opinion of his assessor before making the impugned

judgement. The omissions just mentioned above thus, 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 made by the CAT in the cases of **Edina Adam Kibona v. Absolom Swebe (SHELI), Civil Appeal No. 286 of 2017 CAT at Mbeya** (unreported) and **Tubone Mwambeta Vs. Mbeya City Council, Civil Appeal No. 287 of 2017 CAT at Mbeya** (unreported). The third issue is thus, answered positively. This finding attracts the examination of the fourth and last issue.

As to the fourth issue on the legal effect of the above discussed 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 respective DLHTs did not show that the assessors were required to give their respective opinion as guided by the law. The Chairmen had also merely made reference to the opinion of the assessors in the 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 Mbaraka and Azania Bank Corp Ltd v. Edgar Kahwili Civil Appeal No. 154 of 2015, CAT, at Iringa** (unreported), it held 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. The CAT then 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 mention above 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 the tribunal. Lack of opinion of assessors renders the decision a nullity and it cannot be resuscitated by seeking fresh opinion of assessors.

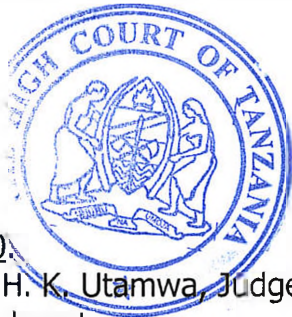
It follows thus in my view, that, the argument by the respondent's counsel that the precedents and provisions of the law cited by the appellant counsel do not apply to the matter under consideration, is not forceful.

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* (the 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 fourth issue as follows: that, the omissions committed by the chairman of the DLHT 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 remaining grounds of appeal. Otherwise, I will be performing a superfluous and academic exercise which is not the core objective of the process of adjudication. I will not thus, consider the rest of the grounds of appeal.

That being the case, I hereby allow the appeal to the extent explained above. 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 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  
27/11/2020

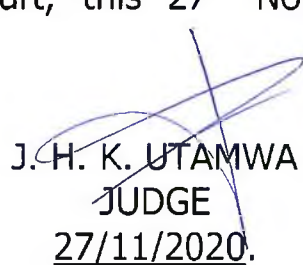
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CORAM; J. H. K. Utamwa, Judge.

Appellant: absent.

Respondent: Mr. Emikigwe, advocate holding briefs for Ms. Martha Gwalema, advocate.  
BC; Mr. Patrick, RMA.

Court: Judgment delivered in the presence of Mr. Emikigwe Mwasumbi, learned counsel who holds briefs for Ms. Martha Gwalema, learned counsel for the respondent, in court, this 27<sup>th</sup> November, 2020. The absent appellant be notified.

  
J. H. K. UTAMWA  
JUDGE  
27/11/2020.