IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

CIVIL APPEAL NO. 13 OF 2009

(Originating from Civil Cause No. 269 of 1995, of the Resident

Magistrates' Court of Dar es salaam, at Kisutu)

ALEX MAGANGA.....APPELLANT

VERSUS.

1. AWADHI MOHAMED GESSAN .....1ST RESPONDENT
2. DIRECTOR, DAR ES SALAAM CITY COUNCIL..... 2ND RESPONDENT

JUDGEMENT

13/12/2012 & 29/08/2014.

This is a first appeal against the judgment of the Resident Magistrates Court of Dar es salaam at Kisutu (trial court) dated 16/12/2008. Before the trial court the appellant, ALEX MAGANGA sued against the two respondents, AWADHI MOHAMED GESSAN and DIRECTOR, DAR ES SALAAM CITY COUNCIL (first and second respondent respectively), for various reliefs based on the claim that the first respondent had encroached his land on plot No. 65 Block C, Mbezi (Dar es salaam) herein after called the suit land, which said land was erroneously allocated to him (first respondent) by the second respondent. In its impugned judgment, the trial court in effect decided against the appellant, hence this appeal.

The appellant who fights sole without any legal representation in this appeal, preferred 9 grounds of appeal couched in a layman's language, but having the following connotations;

1. That the trial magistrate misdirected himself by applying in his judgement, repealed Land Laws instead of the current Land Law of 1999.
2. That the trial court erred in law and fact in finding that the appellant was a squatter in the suit land.

3. That the trial court erred in fact in not finding that the first respondent was responsible for hindering compensation the process of which had been commenced by.the Ministry of Land in favour of the appellant.
4. The trial magistrate erred in denying the appellant compensation for un-exhausted improvement.
5. That the trial court erred in fact in not finding that the appellant had suffered damages from 1995 for harangues, embarrassments and psychological trauma caused by the first respondent following the dispute on the suit land.
6. The trial magistrate erred in fact in holding that Mbezi area was declared a planning area in 1966 instead of 1979.
7. That the trial magistrate erred in law by relying on precedents that contradict the written laws.
8. The trial magistrate erred in law in finding that there was no cause of action against the second respondent for not being connected to the case.
9. The trial magistrate erred in law in under estimating the appellant's house in the suit land as a mere hut.

For these grounds the appellant urged this court to award him the following reliefs;

i. The judgment dated 16/12/2008 be quashed.
ii. The first defendants offer and title over the suit land be declared a nullity.
iii. The appellant be declared the rightful owner of the suit land.
iv. That the appellant be granted damages at the tune of Tanzanian Shillings (Tshs.) 30 million only.
v. The appellant be granted costs of this appeal payable by the first defendant.

Parties agreed to argue the appeal by way of written submissions, and the court accordingly directed so. In his written submissions however, the appellant apparently opted to argue grounds of appeal numbered 1, 2 and 7 herein above. He also argued on what seems to be an additional ground of appeal, that the trial magistrate erred in fact and law in accepting the submissions by the second respondent that he had no case to answer for want of cause of action against it. He seemingly dropped the rest of the grounds of appeal.

As my adjudicating plan, I opt to firstly test the additional ground of appeal related to the issue of "no case to answer" on the part of the second respondent. In case need will arise, I will also examine the rest of the grounds of appeal and the submissions by the parties related to them. The main reason for this plan is that, from the prevailing circumstances of this appeal, the additional ground of appeal is capable of disposing of the entire appeal in case it will be upheld, without any consideration to the rest of the grounds of appeal. The issue related to that

additional ground of appeal is therefore, *whether or not the trial court rightly decided on the aspect of the "no case to answer" on the part of the second respondent.*

Regarding this additional ground of appeal, the appellant contended that, the trial court erred in finding that the second respondent had no case to answer since, it was the same second respondent who had caused the impugned double allocation of the suit land as exhibited in the evidence, vide exhibits P. 3-6, and P. 10-12. He added that, before the trial court the preliminary objection by the second respondent that there was no cause of action against him was overruled (by Khaday, Principal Resident Magistrate), hence the second respondent could not raise the issue of no case to answer again.

In his replying written submissions, Mr. Mtanga learned counsel for the first respondent did not substantially address himself to this aspect. The second respondent however, through its counsel argued thus; whether or not the second respondent had a case to answer does not affect the fact that the appellant's deemed right of occupancy was extinguished by the first respondent's granted right of occupancy. And the fact that the second defendant did not take over the functions of the defunct Dar es Salaam City Council, entitled the second respondent to the "no case to answer" finding. He added that the current Dar es Salaam City Council has no any mandate on land matters in the Dar es salaam City, and the decree that the appellant would obtain, could not be executed against the second respondent. According to him, it was thus rightly decided by the trial court that the second defendant had no case to answer.

I will examine the issue posed above starting with the procedure adopted by the trial court in reaching into the decision that the second defendant had no case to answer. If need will arise, I will also consider the merits of that decision. From the record, it is clear that, upon the closure of the plaintiff's case before the trial court, the first defendant made his defence. Before the second defendant could make his defence, he prayed to submit on a "no case to answer. His prayer was granted though the plaintiff had objected it. The trial court then ordered the second respondent to file written submissions is support of his argument on no case to answer (see the original trial court proceedings dated 21/10/2008). This fact is also reflected from the impugned judgment. The learned counsel for the second respondent accordingly filed the written submissions for no case to answer. The trial court then proceeded to record the judgment (subject matter of this appeal) exonerating both defendants from any liability. The record does not however, indicate that the appellant was given (by the trial court) the opportunity to file his replying written submissions to counter the second appellant's written submissions

though he had previously shown resistance to the prayer for making those submissions. The impugned judgment does not also suggest that the appellant was given that opportunity.

In my view, though our civil justice permits a defendant to submit on a "no case to answer" at the closure of the plaintiff's case, in the matter at hand it was procedurally irregular for the trial court to proceed to judgement soon after the written submissions by the second appellant. This court once held that, in a civil case a defendant can, at the closure of the plaintiff's case, submit that there is no case to answer, and a submission of no case to answer in a civil case stands on the same footing as a submission of no case to answer in a criminal case, save that there is a difference in the standard of proof; **Mwalimu Paul John Mhozya v. Attorney General (No. 2) [1996] TLR 229.** This decision followed a previous decision of this court in **Daikin Air Conditioning (E.A.) Ltd v. Harvard University [1996] TLR 1,** which had considered the practice in England and Uganda and found it applicable in Tanzania.

For the above approved practice in criminal and civil justice in our jurisdiction, the procedure to be followed where a defendant wants to submit on no case to answer after the closure of the plaintiff's case in civil trials is this; the defendant makes his submissions in chief supporting his argument that he has no case to answer. The trial court then gives the other parties (especially the plaintiff), the opportunity to react to the written submissions made by the defendant. The trial court will then make a ruling on whether or not the defendant has a case to answer. In case the court finds that he has no case answer it will dismiss the suit (where there is one defendant only). But in case there are more than one defendant the court will dismiss the suit in respect of the defendant who has no case to answer (only), and will proceed with defence in respect of the rest of the defendants and ultimately make a judgement determining the rights of the surviving parties. However, in case the court finds that the defendant who made the submissions has a case to answer, it will proceed with the defence in respect of all the defendant (where they are more than one) or in respect of that defendant who makes the submission (if he is the sole defendant), unless that defendant says he will not give any evidence. Then the trial court will proceed to judgment as well. This was the procedure envisaged in the **Daikin Air Conditioning (E.A.) Ltd** case (supra).

In the matter at hand, it was thus fatally irregular for the trial court to proceed to judgement soon after the submissions filed by the second respondent without first giving the appellant the opportunity to reply to the same, and without it (trial court) making the ruling on the issue of no case to answer. In my settled view, the trial court could have been justified to proceed to judgement in respect of

both defendants as it did, only if both defendants had made their respective defences, which was not the case. My view is base on the spirit embodied under Order XX rule 1 of the Civil Procedure Act, Cap. 33 R. E. 2002, which provides *inter alia* that the court, after the case has been heard, shall pronounce judgment in open court. For this legal base, the written submissions by the second respondent could not be considered in the judgement of the trial court as if it was his defence evidence for, in law submissions by parties to court proceedings do not have any evidential value, see the holding by the Court of Appeal in the case of t**he Assistance Imports Controller (B.O.T) Mwanza v. Magnum Agencies Co. L.T.D. Civ. Appeal No; 20 of 1990, at Mwanza** (unreported)**.** Such submissions could therefore, be properly considered in the ruling deciding whether the second defendant had a case to answer or not, but such ruling was not made by the trial court.

It follows therefore that, the impugned judgment by the trial court was made pre-maturely. It also denied the appellant's right to be heard as he was not given an opportunity to react against the submissions made by the second respondent, which said submissions were wrongly considered by the trial court as the second appellant's defence, without giving the appellant any chance for cross-examining the second defendant.

I am settled in mind that, the above pointed out course adopted by the trial court breached the Principles of Natural Justice and amounted to an unfair trial/hearing to the appellant. The course was thus against article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution) which instructs that any person whose rights or duties are being determined by the court or any other organ, is entitled to the right to fair hearing. It follows thus that, the lower court grossly misdirected itself for not affording the appellant the right to fair trial.

Neither the Constitution nor any other written law in our jurisdiction defines what is a fair trial. But the Constitutional Court of Uganda once defined the phrase "fair trail" as giving a party to court proceedings the necessary opportunity to canvass all such facts as are necessary to establish his case, in accordance with the law, see in the case of **Major General David Tinyefunza v. Attorney General, Constitutional Petition No. 1 of 1996, in the Constitutional Court of Uganda, at Kampala.** I appreciate this definition and approve it accordingly. The circumstances of the case at hand as demonstrated herein above do not fit into this definition as far as the issue of no case to answer is concerned.

The effect of breaching the Principles of Natural Justice and the denial of one's right to fair trial is fatal. It vitiates the proceedings and the decision resulting from that omission, see the decisions in **Ndesamburo v. Attorney General [1997] TLR 137** and **Agro Industries Ltd v. Attorney General [1994] TLR 43** and **Raza Somji v. Amina Salum [1993] TLR 208.** The law further provides that it is immaterial whether the same decision would have been arrived at in the absence of the omission, that decision must be declared to be no decision, see **General Medical Council v. Spackman [1943] AC 627** quoted with approval in the case of **De Souza v. Tanga Town Council [1961] EA. 377** (at page 388) which is binding to this court. See also the Court of Appeal decision in the case of **Abbas Sherally and another v. Abdul Sultan Haji Mohamed Fazalboy, civil application No. 133 of 2002, at Dar es salaam** (unreported).

For the aforesaid reasons, I find that the course adopted by the trial court in dealing with the issue of no case to answer on the part of the second appellant was a serious misconception of law and a vital misdirection. For this finding I will not even test the merits of the decision in respect of that issue of no case to answer for, the irregularity committed by the trial court is capable of disposing of the whole issue. I therefore, determine the issue posed above negatively to the effect that the trial court did not rightly decided on the aspect of "no case to answer" on the part of the second respondent. I therefore, uphold the additional round of appeal.

Again, for the aforesaid grounds, I am not legally obliged to consider the other grounds of appeal and submissions by the parties since the finding in respect of the additional ground of appeal is capable of disposing of the entire appeal. I consequently set aside the judgment of the trial court, though I will not nullify its proceedings. I will also not grant the other reliefs sought by the appellant in this appeal following the nature of the irregularity committed by the trial court. Instead, I exercise the powers vested on this court under s. 44 (1) (a) of the Magistrates Court Act, Cap. 11, R. E. 2002, as interpreted by the Court of Appeal's decision in the case of **Director of Public Prosecution v. Elizabeth Michael Kimemeta @ Lulu, Criminal Application No. 6 of 2012, at Dar es salaam** (unreported) as giving this court mandate to make directions to the trial court in form of guidance. I thus under such provisions direct that, the record of this matter be remitted to the trial court, which said trial court shall cause the written submissions filed by the second respondent on the issue of no case to answer to be served to the appellant and the first respondent. It (trial court) shall then invite them to file their respective replying written submissions (if they will wish to do so). The trial court will then follow the above suggested procedure by making the ruling (on the issue of no case

to answer) before it will proceed to judgement. The appeal is thus allowed at the above shown extent. Each party will bear his own costs because; the trial court had a hand in causing this appeal by the fatal irregularity it committed. It is so ordered.

JHK. UTAMWA

JUDGE

29/08/2014

29/08/2014

CORAM: Hon. Utamwa, J.
For Appellant; Present in person.
For 1st Respondent; Mr. Mtanga, advocate.
For 2nd Respondent: M/S Chevawe, Advocate.
BC; Mrs. Kaminda.

Court; Judgment delivered in the presence of the appellant in person and Mr. Mtanga advocate, for the first respondent, and M/S. Chevawe advocate for the second respondent, in chambers this 29th day of August, 2014.

JHK. UTAMWA

JUDGE

29/08/2014