IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPEAL NO. 1 OF 2012

From the Decision of the District Land and Housing Tribunal of **ILALA** District at **ILALA** in Land Case Appeal No. 25 of 2011 and Original Ward Tribunal of **SEGEREA** Ward in Application No. 90 of 2010

ALLY SUDI .....APPELLANT

VERSUS

EMMANUEL SWAI .....RESPONDENT

JUDGMENT

FIKIRINI, J:

Aggrieved by the decision of the District Land and Housing Tribunal, the appellant one Ally Sudi appealed to this court raising the following grounds of appeal:

1: *That, the Chairman erred in law and fact for upholding the decision of the Ward Tribunal without bothering to visit the locus in quo.*
2. *That, the chairman erred in law and in facts for upholding the decision of the Ward Tribunal which did not consider the fact that the respondent is the*

one who breached the contract as categorical established and proved by the appellant.

3. *That, the Chairman erred in law and in fact for upholding the Ward Tribunal's decision which disregard the appellant's witnesses testimonies and evidence adduced thereto, and*
4. *That, the chairman erred in law and in fact for reaching to a decision without giving reasons for the decision.*

The respondent Emmanuel Swai contested the appeal by filing reply to the petition of appeal while the appeal itself was argued by way of written submission and herein below is the summary of what was in the submissions filed. It was the appellant submission that the Tribunal did not consider the evidence of DW5 one Joha Sudi regarding the boundary wall erected by their neighbor one Moses Nkuba. The appellant referred this court to the case of Ndesamburo v. Attorney General [1997] TLR 137.

The appellant as well challenged the Tribunal's decision for not complying with Order XX Rule 4 of the CPC Cap. 33 R.E. 2002, that there were no reasons given for the decision. Further in his submission the appellant raised the issue of the respondent's failure to erect a toilet he promised he would. He as well challenged the Tribunal's failure to visit the locus in quo and therefore relied on the sketch map drawn by the Ward Tribunal.

Further in his submission the appellant refuted the statement that easement was to be used by other people

rather by the parties in this appeal. For the foregoing submission it was the appellant's prayer that the appeal be allowed and the decision of the District Land and Housing Tribunal be quashed.

Briefly responding to the above submission, it was the respondent's reply that the Tribunal's decision was correctly arrived at based on the agreement entered on the 24th September 2009 (K-1). It was his further submission that it was the appellant who breached the agreement and bit gun as submitted above. With that submission he concluded that the appeal had no merit and prayed for the same to be dismissed with costs.

I will consider the grounds of appeal seriatim starting with the first ground that of the District Land Tribunal not visiting locus in quo. The evidence on record is that the respondent bought a piece of land from the appellant's siblings namely Chande, Joha and mariam Sudi. The said transaction was concluded after the issue of easement leading to the respondent to be bought land was sorted. This is evidence by K-2 dated the 24th September 2009. The said agreement was concluded and signed by the appellant, respondent, Chande Sudi, Joha Sudi and other witnesses. There was no doubt about the area and its size. Based on the above evidence on record I am of the settled view that there was no ambiguity which necessitated a visit of locus in quo by the District Land Tribunal. In my view revisit to the locus in quo can only be done if the lower court records and not clear and hence necessitating revisiting of the locus in quo. Otherwise the practice is discouraged lest the visiting court be part of the case rather than adjudicator.

The principal enunciated by the Court of Appeal decision in the case of Nizar M.H. Ladak v. Gulamal Fazal Jan Mohamed, [1980] TLR pg 29, is relevant to the situation at hand. I accordingly adopt it.

Another reason whereby visit of locus in quo could be entertained is when the District Land and Housing Tribunal is complying with section 34 (1) (b) (c) of the Courts (Land Disputes Settlements) Act, 2002. Section 34 (1) (b) and (c) states:

> (b) receive such additional evidence if any, and
> Make such inquiries, as it may deem necessary.

In this particular appeal there was no such demand. There was no order for calling and receiving additional evidence and there was equally no inquiry preferred. The visit of the locus in quo was therefore not necessary. The first ground of appeal is therefore without merit and consequently dismissed.

Coming to the second ground which was in relation to the breach of contract. The appellant in his submission did not highlight the specific contract breached. However, there was a complaint that the respondent did not fulfil his promise rebuilding the toilet. This in my view might be what annoyed the appellant. But my question is was that part of the agreement? Close reading of the agreement. In my view that was just a promise in Endeavour of fostering good relationship since the appellant and his relatives on one side and the respondent on the other were now

becoming neighbours. Otherwise as far as K-2 is concerned there was no binding agreement as far as erecting a toilet is concerned. This is what K-2 says:

> *"Ndugu wote kwa pamoja wanakubaliana na kuridhia kuacha eneo kwa ajili ya njia ya gari ikiwa ni njia pamoja ya kuingilia kwa mnunzi lenye ukubwa wa fut 10 na kusogeza choo. Njia hiyo ni matumizi ya kila mtu".*

The respondent not fulfilling his promise in my view did not call for the appellant's reaction of entering the 10ft easement and proceed with construction, in my view the appellant's action was a breach of the contract and not otherwise.

Furthermore, it is my considered opinion that the appellant overreacted. Assuming rebuilding of the toilet was an issue still his reaction would not have sorted out the issue. Unless the appellant had something else in mind but if not, I was expecting him to inquire from the respondent as to his commitment of rebuilding the said toilet. The next level would have probably been to go back to the local authority. This is because it is at the local authority office where their agreement got sealed. The local authority would definitely have called the respondent and asked him as to why he was not fulfilling his promise.

Alternatively, the appellant would have sued the respondent though I do not see for what, but still that could have been the best approach compared to entering

the area left as an easement and proceed with construction. This did not read to me as a temporary measure but a permanent one. And to me this is a breach of contract and not what the appellant raised later in course of trial. The second ground of appeal in my view lacks merit and accordingly dismissed it.

The third ground in my view is not supported by any evidence. Upon perusing the record it is indicates that the chairman evaluated the evidence adduced. As for the testimony of Joha Sudi specifically, it is true nothing was said about the evidence but it could be because that evidence did not have weight. This witness' evidence was slightly different from the rest regarding the erected wall in the suit land/easement. I have been wondering as to that peculiarity. I was expecting to hear the same story from the appellant, Chande Sudi, and Abdallah Gundu having the same story. One, because in one way or another were involved in transacting the land which an easement subject of this appeal was given as part of the transaction. Second, the boundaries involved in the said transaction in my view where not that complex to have one person come up with a different story from the rest of the group.

It could be in the appellant's view Joha's evidence was the best, but that has not been my position. My position is the appellant himself should have his own credible story as he is the one who crossed into the easement and not wait for Joha to come to his rescue. It what Joha stated is what was actually in place then the rest of the witnesses would have the same story including the appellant himself. In my view even if Joha's evidence was to be considered still the

outcome would have been the same that the appellant breached the agreement by encroaching into an easement agreed on and continued with construction. The third ground therefore fails as well.

Finally, as to the fourth ground that of decision without reasons, I have satisfied myself that the Chairman's decision had complied to the requirements of Order XX Rule 4 of the CPC, Cap. 33 R.E. 2002.

For the foregoing it is my considered opinion that this appeal has no merit and I consequently proceed to dismiss it with costs.

It is so ordered.

Judgment Delivered this 30th day of August 2012 in the presence of parties.

P.S. FIKIRINI

JUDGE

30TH AUGUST, 2012