IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(LAND DIVISION)

LAND APPEAL NO. 74 OF 2009

(Original Land Application no. 348 of 2007, District Land and Housing Tribunal Kinondoni)

ABUBAKAR MKAKILE.......................................APPELLANT

VERSUS

ALEX MAGANGA...1ST RESPONDENT

DIRECTOR OF DAR ES SALAAM

CITY COUNCIL..2ND RESPONDENT

N.E.SIKANDER..3RD RESPONDENT

JUDGEMENT

Latifa Mansoor J

The Appellant was the 2nd Respondent in Land Application No. 348 of 2007 before the District Land and Housing Tribunal for Kinondoni "the Tribunal". The factual background of this matter is that the 2nd Respondent herein issued three letters of offer in respect of one plot situate at Plot No. 685 Block C, Mbezi Beach Dar es Salaam "the suit premises". The first offer was given to N.E Sikander (the 3rd Respondent herein) on 8/03/1986, the second offer was given to Alex Maganga (the 1st Respondent herein) on

30/08/1990 and the third offer was given to Mr. Abubakar Mkakile (the Appellant herein) on 2/7/1993.

The Appellant has developed and is in possession of the suit premises since 1993. The Tribunal had declared the 1st Respondent to be the lawful owner of the suit premises and ordered the eviction of the Appellant from the suit premises. The Appellant decided to appeal against the decision of the Trial Tribunal; he is represented by Advocate Audax Kahendaguza Vedasto "Audax". The grounds of appeal raised in the memorandum of appeal are seven, and this appeal was argued by written submissions.

In a well argued submissions by Advocate Audax, in support of ground No. 1 and 2 of appeal, he said, the Trial Tribunal failed to adjudicate on a counter claim which was filed by the Appellant at the Trial Tribunal. He said the judgment of the Trial Tribunal dated 28/4/2009 did not consider at all the counter claim, thus the trail before the Trial Tribunal suffered partial trial. He said, the Appellant who was the 2nd Respondent at the Trial Tribunal filed a defense which included a counter claim against the Applicant (now the 1st Respondent), the then 2nd Respondent and the 3rd Respondent. As against the 3rd Respondent N.E. Sikander, the Trial Tribunal had ordered exparte hearing. While the 1st Respondent herein did not make any reply on this ground, the 2nd Respondent, Dar es Salaam City Council had said that the Trial Tribunal was right not to consider the counter claim because the Appellant had no cause of action against the 2nd Respondent and that a counter claim cannot be raised against the co-defendant. In rejoinder to this ground, Advocate Audax submitted that Order VIII r. 10 of the Civil Procedure Code clearly states that:

"10(1) where a defendant, by a written statement of defense, sets up any counterclaim which raises questions between himself and the plaintiff along with another person (whether or not a party to the suit), he may join that person as a party against whom the counter claim is made."

He said that the wording of this section allows a person who raises a counter claim to join any other person even though that person was not a party to the suit. The other person includes the co-defendants or respondents. The Trial Tribunal allowed the Appellant to join S.K Sikander in the suit, and since a counter claim is a cross suit brought by the defendant against the plaintiff, the law does not restrict that a cross suit be against the plaintiff alone, it could be against the plaintiff or against the co-defendant or both or any other person not a party to the suit. It should be noted though that, a counter claim should arise out of the same set of facts as those in the complaints/plaint. Since a counter claim is a cross suit, the Trial Chairman ought to have determined the cross suit as well. I do not think the Trial Chairman of the Tribunal was correct in first giving the judgment of the 1st Respondent's claim before hearing the counter claim. It has not been suggested by the Trial Chairman of the Tribunal as to why he did not entertain the counter claim. Before deciding what order to make on this ground of appeal, it is necessary to consider the other grounds of appeal.

On ground No. 3 Advocate Audax had submitted that there was a triple allocation on the suit premises done by the 2nd Respondent. The Trial Tribunal was wrong to turn the case of double allocation or in this case a triple allocation to a case of customary title or a deemed right of occupancy. He said the Trial Tribunal had awarded the 1st Respondent ownership of this plot because he was the customary holder of the land before the land was surveyed and given to the 3rd Respondent. He said the 1st Respondent filed a claim before the Trial Tribunal and the cause of action was double allocation and not deemed right of occupancy. He said parties must be bound by their own pleadings and the Trial Tribunal ought to have restricted itself to the pleadings of the parties. To support his arguments he cited the case of Arusha Tailoring vs. Pucci (1967) HCD 424, and a case of Makori Vs Joshua (1987 TLR 88, where it was said that parties are bound by their pleadings and can only

succeed according to what he averred in his plaint and proved in evidence, hence he is not allowed to set up a new case.

He said the Tribunal ought to have determined a double allocation case and not a new case which was raised by the Tribunal itself and not by the parties. In countering this, the City Solicitor, of Dar es Salaam City Council had said that, yes the parties are bound by their pleadings, but the court is not.

The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. The court is duty bound to determine matters and issues raised in parties' pleadings. When pleadings are complete, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof so stated and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change or set up a case not stated except by an amendment of the pleadings. Since the 1st Respondent (Applicant before the Trial Tribunal) did not plead for ownership of the suit premises on the basis of customary or deemed right of occupancy but on a letter of offer granted to him by the 2nd Respondent herein, it cannot be permitted to depart from what clearly appears to have been his case as stated in his Application Form. The cause of action in the Application Form filed by the 1st Respondent before the Trial Tribunal clearly states and I shall quote:

Cause of Action/Brief statement of facts constituting the claim

1. Double allocation of the plot Number 685 Block C Mbezi Beach Dar es Salaam as shown by Annexes P1-P2-P3-P4-P5 and P6.

2. 2nd Respondent occupation in the Plot No. 685 Bloc C Mbezi Beach Dar es Salaam as per Annex P6;

3. Special damages, loss of use of building materials in the plot No. 685/C Mbezi such as concrete bricks and aggregates amounting to Twenty Five Million Shillings (25,000,000)

On the reliefs prayed, he prayed to be declared the lawful owner of the suit premises, eviction order against the Appellant herein, demolition order, damages and costs. There is nowhere in the pleadings where the 1st Respondent had pleaded to be the owner of the suit land by virtue of the deemed right of occupancy. The 1st respondent was claiming of a right of occupancy granted to him by the 2nd Respondent, and the cause of action was clearly a double allocation. The Trial Tribunal should have confined itself to the pleadings of the parties and the issues framed and not to set up a new case for any party.

On a question of double allocation Advocate Audax for the Appellant had said that since there are three letters of offer, and since the only letter of offer which was duly accepted was the offer of the Appellant, the Trial Tribunal should have declared that the duly granted and accepted Letter of Offer was that of the Appellant. He said that the Letter of Offer could not be a complete grant of title to the ownership of land unless clauses 6 of the said three letters of offer were complied with. Clause 6 states as follows:

> **"6. UNLESS this offer is accepted and all fees paid within 30 days from the date of this letter the offer shall lapse"**

He said, it is only the Appellant who had complied with the above cited condition of the Letter of Offer. The Appellant had accepted the Letter of Offer; he tendered in evidence the exchequer receipt which was a document for accepting the offer. The only offer which

was accepted was that of the Appellant, and so the contract for grant of land was completed only as between the Appellant and the 2nd Respondent. The Appellant took possession of the land since 1993, he applied for a building permit, he paid the government rent and property tax, and all these documents were tendered in evidence before the Trial Tribunal. He submitted that all obligations of a lawful offeree of land have been performed by the Appellant. He said no seed of like events in respect of other offers. None of the Respondents have properly addressed the issues raised by the Appellant on this ground.

I completely agree with the Counsel for the Appellant that the Letter of Offer is not a complete grant of a Right of Occupancy unless it is accepted by the Offeree. Since it is on record that the Appellant had accepted the Offer by complying with the conditions of the Letter of Offer set out in it, his contract was completed and the grant of right of occupancy to the Appellant was complete. The Appellant has a better title to the rest of the offeree.

On double allocation, I also agree with the Appellant Counsel that, if the Tribunal had to go by the principles of the first allocated offer is the valid offer, then Trial Tribunal was to hold that the offer given to N.E Sikander was the valid offer since it was granted earlier than the two offers of the Appellant and the 1st Respondent. It is also in evidence that N.E Sikander has abandoned the land, he never appeared in any proceedings before the Trial Tribunal despite being served through a newspaper, and it is also in evidence that the Appellant is in possession of the land since 1993 and has constructed a house with the permission of the 2nd Respondent herein. It is on record that the 2nd Respondent has issued a building permit to the Appellant, and the construction of the building in the disputed plot was done lawfully. I shall refer to the case of Mohamed Hassan Hole vs. Keya Jumanne Ramadhan, Civil Appeal No. 19 of 1992 (unreported), where the judges were hesitant in taking away the land which was occupied and developed by a

person uninterrupted for more than 12 years and reasoned that a person who has abandoned the land cannot succeed in a claim for land after 12 years and to do that would be to unjustly benefiting the person who wants to reap another person sweat. I also agree with the two cited cases by the Appellant's Counsel, the case of Saidi Ndambucha vs. Ally Mohamed Kipengele (1997) LRT 49, and the case of Nasoro Uhadi vs. Mussa Karunge (1982) TLR 302, where in both these two cases the courts were of the opinion that no dispossession order could be made against a person who have acquired land and occupied it over a long time, and developed it. The Appellant has been in possession and occupation of the land for over 12 years. The Appellant did not invade or trespassed into the land, he was properly granted the letter of offer by a competent authority and has properly accepted the offer, he has developed the land and so he cannot be dispossessed the land by a person who has not complied with the conditions of the Letter of Offer and is not in occupation of the land and has not developed the land at all. To do that would be not only unjust but also against the principles of allocation of land as per the Land Regulations.

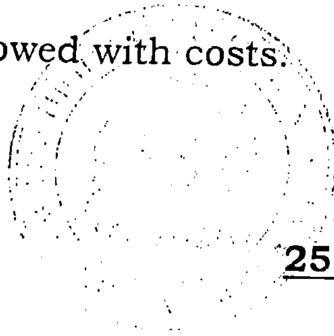
Since this Court declares the Appellant the owner of the disputed land and also declares that his Letter of Offer is the better offer since it was properly accepted, there is no reason for this Court to determine ground No. 6 of the grounds of appeal on compensation of improvements made on the disputed land. Had this Court pronounced that the land belongs to some other offerree than him, then it would have been proper for the Court to determine the issues on compensation for the unexhausted improvements made on the land by the Appellant with the permission of the 2nd Respondent. As for the compensation of Tshs 25,000,000 claimed by the 1st Respondent in his submissions, I agree with the submissions of the Appellant that, since the 1st Respondent had preferred a review over this item, and since he failed during review, he cannot as of right appeal against the decision emanated from

review. Since the order on review was on rejection, the order is not appealable. In any case the 1st Respondent has not filed any cross appeal before this Court and therefore cannot determine a ground which was raised on submissions. The appeal before this court is that of the Appellant only and this ground as raised by the 1st Respondent cannot be considered.

On ground No. 7 of the grounds of Appeal, I agree with the submissions of the Appellant that before the Trial Tribunal the 1st Respondent had won a case against the Appellant and the 2nd Respondent and it was wrong for the Trial Tribunal to condemn the Appellant alone for payment of costs to the 1st Respondent. In any case it was the 2nd R espondent as the issuing authority which caused all this confusion, and any order for costs should have been directed to it.

Accordingly, for the above given reasons this appeal is allowed with costs and I declare the Appellant the rightful owner of the suit premises situate at plot No. 685 Block C, Mbezi Kinondoni District and I order perpetual injunction restraining the Respondents from entering the suit premises or making or causing any interference with the Appellant's possession and ownership of the suit premises.

Appeal allowed with costs.



Latifa Mansoor J

25 SEPTEMBER 2012