

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MWANZA**

**AT MWANZA**

**LAND APPEAL NO. 62 OF 2020**

**CLEMENT MARUSHWA ..... 1<sup>ST</sup> APPELLANT**

**VENERANDA H. COSMAS ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**ROBERT MAZIBA ..... RESPONDENT**

**JUDGMENT**

19/4/2022 & 18/7/2022

**ROBERT, J:-**

The two appellants, Clement Marushwa and Veneranda H. Cosmas having been aggrieved by the judgment of the District Land and Housing Tribunal for Mwanza (hereinafter referred to as DLHT) preferred an appeal to this Court against the decision of the DLHT.

At the DLHT, the two Appellants filed a case against the Respondent, Robert Maziba, alleging to be lawful Lessees of the suit premises located at Plot No. 219, Block 'T' Makoroboi Street, Nyamagana District based on the lease agreement and claimed for an order restraining the Respondent from evicting them and interfering with their peaceful enjoyment of the disputed premises. The DLHT made a finding that the

Appellants entered into a tenancy agreement with Respondent on 9/10/2017 which started to operate on 1<sup>st</sup> November, 2017 to 30<sup>th</sup> October, 2018 and parties did not renew the contract. The rent for the first and second Appellants herein was TZS 8,000,000/= per year and TZS 1,200,000/= per year respectively. The second Appellant herein never paid rent. The trial Court observed that, there was no contractual relationship between the parties from 30/10/2018 after termination of the tenancy agreement and the second appellant herein was in breach of contract for non-payment of rent. Further to that, the Court observed that both appellants herein failed to appellants herein failed to fulfil their obligation after the termination of contract on 30/10/2018. Consequently, the trial Court observed further that the appellants herein had no cause of action against the Respondent and have nothing to prove their claim and proceeded to order the Appellants to pay the Respondent mesne profits at the rate of TZS 767,000/= per Month from 1<sup>st</sup> November, 2018 to the date when the Applicants are out of the suit rooms, vacate the suit premises within 14 days from the date of judgment, general damages at the tune of TZS 3,500,000/=and payment of all rent arrears. The application was therefore dismissed without costs hence the Appellants filed this appeal armed with six grounds of appeal reproduced below:

- 1. That the trial District Land and Housing Tribunal chairperson erred in law and fact to order the appellants to pay the respondent Tshs 767,000/= Mesne profit*

*per month from 1<sup>st</sup> November 2018 to the date appellants will vacate the rented premises.*

- 2. That the trial District Land and Housing Tribunal chairperson erred in law and fact when she failed to take into consideration the fact that the appellants were lawfully tenants of the suit premises of the respondent.*
- 3. That the Trial District Land and Housing Tribunal chairperson erred in law when she ordered the appellants to pay the respondent Tshs 767,000/= Mesne profit per month from 2018 up to date of appellant vacate from the suit premises when the appellants had already paid the respondent the lawfully agreed rent of Tshs. 1,200,000/= per annum which the appellants had paid the respondent Tshs 8,000,000/= (eight million shillings) for a period of six and a half (6 1/2) years thus from 2018 up to 2025*
- 4. That the trial District Land and Housing Tribunal chairperson erred in law and fact when she ordered the appellants to pay respondent Tshs 3,500,000/= general damages for nothing as the appellant had paid the respondent six and half years annual rent Tshs 8,000,000/= eight million shillings rent for the period between 2018 – 2025 being Tshs 1,200,000/= agreed on annual rent per annum.*
- 5. That the District Land and Housing Tribunal chairperson erred in law and fact when she ordered 2<sup>nd</sup> appellant to pay the respondent Tshs 3,500,000/= being annual rent for three years from November 2017 up to October 2020 and further ordered 1<sup>st</sup> appellant to pay respondent Tshs 16,000,000/= annual rent for two years for the period between November 2018 up to October 2020 when appellants had only rented one shop room for the agreed Rent of Tshs 1,200,000/= per annum of which the appellants had paid Tshs 8,000,000/= being six and a half (6 1/2) year's annual Rent.*
- 6. That the purported tenancy contract of Tshs 8,000,000/= was illegal as the legal contract was that of the 1,200,000/= for which stamp duty was paid at Tanzania Revenue Authority vide TRA Receipt No. 17080054.*

When this appeal came up for hearing, the first Appellant appeared in person and represented the second Appellant under a special power of attorney whereas the Respondent was represented by Mr. Masoud

Mwanaupanga, learned advocate. At the request of parties, the appeal was disposed of by filing written submissions.

In their joint written submissions, the Appellants opted to argue the 1<sup>st</sup> and 6<sup>th</sup> grounds of appeal separately while the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> grounds were argued together.

Submitting on the 1<sup>st</sup> ground, the Appellants faulted the trial Tribunal for giving an order for the payment of mesne profits to the tune TZS 767,000/= without proof on how the said amount was reached. They submitted that, as a matter of principle, mesne profit is chargeable once a person prevents the landlord from collecting rent and the intervening person is the one who is collecting the rent. However, in the instant matter, the respondent did not adduce evidence to the effect that the Appellants collected rent from the suit premises and the Tribunal did not explain how the said amount was reached. They made reference to the case of **Tanzania Sewing Machine Co. Ltd Njake Enterprises Limited, Civil Appeal No. 15 of 2016, CAT** at Arusha (unreported) where it was decided that, mesne profit is calculated on the basis of the rent payable at the material time. The appellants maintained that, it was not proper for the trial Tribunal to order for payment of mesne profit while an order for payment of rent was already granted in favour of the respondent. They argued further that, an order for payment of mesne

profit did not identify which of the two tenancy agreements was covered since each appellant had his own agreement.

In response, the learned counsel for the Respondent argued that, according to Black's Law Dictionary, 8<sup>th</sup> Edition by Bryan A. Grdner at page 3824, mesne profit is "a profit of an estate received by a tenant in wrongful possession between dates". Hence, as the contracts between the appellants and the respondent ceased on 30/10/2018 it was legally lawful for an order for payment of mesne profit as appellants were in a wrongful possession of the respondent's premises and in the same path an order for payment of rent was proper.

On the question of calculation of mesne profits, he submitted that mesne profit was submitted on the basis of rent payable by appellants according to the appellants' contracts (exhibit P1 and P3 and DE1). He submitted that, the rents made the total of TZS 9,200,000/= which was divided per 12 months and resulted to TZS 767,000/= per month as mesne profit.

Coming to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> grounds the appellants submitted generally that, they were lawful owners and they never breached the lease agreement but were surprised with the notice to vacate (exhibit DE-3) which was delivered 5/11/2018 immediately after the end of the contract which was subject to renewal and was within the next term

leasing. They maintained that, the Tribunal should have considered the lease agreement for failure to issue the three months' notice for non-continuation of contract as reflected on paragraph J of the agreement and also section 79 (4) of the **Land Act**, Cap. 113 (R.E. 2019).

In response to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal, counsel for the Respondent argued that, the appellants' tenancy expired on 30<sup>th</sup> October, 2018 hence they were no longer lawful tenants. Respondent was supposed to issue three months' notes if he had the intention to terminate the contract as per clause 'J' in both contracts. Hence, Section 79(4) of Cap 113 (R.E.2019) cited by the appellants is misapplied, and instead one month notice issued by the respondent sufficed.

Submitting on the sixth ground, the appellants faulted the trial Tribunal for giving weight on a lease agreements which had no stamp duty on as per the requirement of the 1<sup>st</sup> schedule item No. 34 of the Stamp Duty Act Cap. 189 (R.E 2019). Lack of stamp duty to exhibit DE-1 and DE-2 lack value in court. They cited the case of **Malmo Montagekonsult AB Tanzania Branch Vs Margaret Gama** Civil Appeal No. 86 of 2001 CAT (Unreported) in support of their argument.

In response to this ground, counsel for the Respondent submitted that, the appellants didn't object to the admissibility of tenancy agreements as can be seen at page 30 of the trial Court proceedings.

Hence they are precluded from raising objection at this stage. To support his argument, he cited the case of **Rashid Roman Nyerere Vs R** Criminal Appeal No. 105 of 2014 CAT (unreported).

He submitted that, the appellants exhibits admitted as P1, P2 and P3 were equally not stamped hence cannot benefit from the fact that exhibit DE1 was not stamped while exhibit P1,P2 and P3 tendered by them was equally not stamped. To support his argument, he cited the case of **New Tabora Textiles (T) Limited vs Tanzania Union of Industrial and Commercial Workers (TUICO), Revision No. 5/2016 (unreported)**.

In rejoinder, appellants maintained that they are the legal possessors of the premise since the tenancy agreement was for six and a half years that had not elapsed.

Having heard submissions from both parties and examined the records of this appeal I am now in a position to make a determination of this matter.

Starting from the 6<sup>th</sup> ground, the appellants contended that the trial tribunal misdirected herself for giving weight over the exhibits DE-1 & DE-2 which are the documents admitted in evidence without stamp duty. This Court is aware of section 47(1) of the Stamp Duty Act, Cap. 189 (R.E 2019) which provides that:-

*"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped"*

This Court is in agreement with the Respondent that exhibit D2 (bank statement) is not one of the instruments chargeable with the stamp duty. However, from the records of this case, documents admitted as exhibit P1, P2, and DE-1 are lease agreements which are listed under item 34 of the Schedule to the Stamp Duty Act as instruments chargeable with the stamp duty. The said documents having been admitted in evidence without being stamped was a clear violation of the requirement of the law. I therefore expunge exhibit P1,P2 and DE-1 from the list of exhibits admitted in this case.

Having expunged lease agreements, I will now proceed to deliberate on the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal which the appellants argued generally to the effect that they are lawful tenants and didn't breach the lease agreements. The law requires he who asserts existence of certain facts to prove that such facts exist (see Section 110 of the Law of Evidence Act and the case of **Barelia Karangirangi Vs Asteria Nyalwambwa** Civil Appeal No. 237 OF 2017 (CAT) (Unreported)).

Records in this matter indicates that, each appellant and the respondent had a one-year tenancy agreement which ended in the year



2018 without being renewed. While there is no evidence to prove payment of rent by the second appellant, the respondent tendered exhibit DE-2 (the bank statement) which shows that rent for the first appellant was paid into two instalments for the contract which ended on 30<sup>th</sup> October, 2018.

This Court noted the appellants rejoinder that, the first appellant is a lawful lessee because he paid TZS 8,000,000/= which was consideration for six and a half years (1,200,000 per year). The Court finds this argument untenable as it contradicts the evidence adduced by the first appellant in his examination in chief where he testified under oath that "the agreement was to pay 8,000,000/= per year". The appellants failed to bring evidence to prove that they were lawful lessees in the disputed premises after the tenancy agreements had been terminated without renewal on 30<sup>th</sup> October, 2018. From the facts and law, nothing justifies the appellants' possession of the disputed premise except the consent of the owner. Section 79(1)(c) of the Land Act, Cap. 113 provides that: -

*"the lessee remains in possession of land with the consent of the lessor after the term of a lease has expired,"*

The appellants could remain in possession of land with the consent of the respondent after the lease agreement has expired. In the circumstances, I agree with the submissions of the respondent that the appellants occupies the disputed premises wrongfully.

This Court has noted that appellants claim to be lawful lessees on the argument that the respondent did issue a notice which meets the requirement of the lease agreement especially clause 'J' of both agreements. It is clear that, exhibit P1, P2, and DE-1 (lease agreements) having been expunged from the record of this matter, it is difficult to consider submissions reflecting on the substance of the lease agreement.

Coming to the first ground, the appellants contended that the trial tribunal erred in law and fact to give an order for payment of mesne profit from 1<sup>st</sup> November, 2018 without being proved and in addition to an order for payment of rent and without specifying the tenancy agreement covered in that order.

From the pleadings and proceedings at the trial tribunal nothing is seen to have been argued specifically in relation to payment of mesne profit as the suit was filed by the appellants herein who sought mainly to restrain the respondent from evicting them from the suit premises. However, the trial tribunal having decided that the appellants were not lawful tenants after the termination of their tenancy agreements on 30<sup>th</sup> October, 2018 proceeded to order for payment of mesne profits to the respondent as a relief entitlement to the successful party.

In the persuasive decision of the High Court of Kenya in the case of **Rajan Shan T/A Rajan S. Shah and Partners Vs. Bipin P. Shah,**

Civil Appeal No. 209 of 2011 (unreported) the Court defined the term "mesne profit" as follows: -

*"The term "mesne profit" relates to the damages or compensation recoverable from a person who has been in wrongful possession of the immovable property; **The mesne profits are nothing/ but compensation that a person in the unlawful possession of others' property has to pay for such wrongful occupation to the owner of the property.** It is a settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefor. **As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.**"*

According to section 3 of the **Civil Procedure Code, Cap 33 R.E. 2002** the term "mesne profit" is defined as follows:

*"Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession"*

Guided by the cited authority and provision above, it is clear that mesne profits is compensation that a person in the unlawful possession of others' property has to pay for such wrongful occupation to the owner of the property. Hence, in the circumstances of this case, this Court agrees with the appellants that the trial tribunal having made an order for payment of rent arrears by all appellants in this case, there was no room

for payment of compensation in the form of mesne profit since payment of rent arrears during the period of the alleged wrongful occupation was already covered by an order for payment of rent arrears. In the circumstances this Court expunges an order for payment of mesne profits given by the trial Tribunal.

In the result, this appeal is partly allowed only to the extent of variations made in respect of payment of mesne profits. Apart from the said variations, the decision of the trial tribunal is upheld. In the circumstances of this case, I make no orders as to costs.

It is ordered.



A handwritten signature in blue ink, appearing to read "K.N. Robert", is written over the printed name.

K.N.ROBERT

JUDGE

18/7/2022