

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 11 OF 2021

(From original Application No. 261 /2016, District Land and Housing Tribunal for Arusha at Arusha)

YUSUPH MAJHAM KAKWAYA.....1ST APPELLANT

SEVEN IN ONE PHARMACY.....2ND APPELLANT

VERSUS

SAMARADI MDABI..... RESPONDENT

JUDGMENT

23.05.2022 & 18.07.2022

N.R. MWASEBA, J.

The appellants herein above being dissatisfied by the decision issued by the District Land and Housing Tribunal of Arusha at Arusha (herein will be referred to as trial Tribunal) lodged this appeal based on the following grounds;

1. That, the trial chairlady grossly erred in law and fact for holding that there existed a tenancy agreement between the applicant and the respondents basing on heavier evidence of the applicant against the respondent without due consideration that the applicant failed to produce in the tribunal the written tenancy agreement said be in the applicant's possession.

2. That the trial chairlady erred in law and fact for improper evaluation of the evidence in record.
3. That, the trial chairlady grossly erred in law and fact for manufacturing and inventing her own evidence not in record and thereby entered a controversial judgment and decree against the appellants.
4. That, the Hon. Chairlady erred in law and fact for making a decision against the appellant for a case which was not proved by the respondent on the balance of probability.
5. That, the Hon. Chairlady erred in law and fact for awarding general damages to a tune of TZS 2,500,000/= to Respondent without being proved by respondent and the chairlady not assigning reasons.
6. The Hon. Chairlady erred in law and fact for disregarding appellants defence in record.
7. That, in absence of written opinion of the Hon. Assessors in record the chairlady judgment and decree against the appellants is erred both in law and fact.

Briefly the background of this matter is that, the appellants filed a claim against the respondent in 2016 whereby the respondents also filed a counter claim. The trial tribunal found the appellant's claim to be defective, eventually it was struck out and remained with the counter claim where the respondent's claim against the applicants jointly and severally was for Tshs. 17,900,000/= being unpaid rent to the suit

premises for 24th months. At the end of the trial the matter was decided in favour of the respondent with costs hence the instant appeal.

During the hearing of this appeal which proceeded orally. The appellants were represented by Mr. Jacob Marick, learned counsel whilst the respondent was represented by Mr. Salehe Salehe, learned counsel.

The appellants' counsel during the hearing he decided to argue the 1st, 2nd and 6th grounds jointly, the 3rd and 4th grounds were argued together and the 5th and 7th grounds also were argued jointly.

Starting with the 1st, 2nd and 6th grounds of appeal, Mr. Marick told the court that the trial chairperson erred in law and in fact in holding that there existed a tenancy agreement between the parties herein while the evidence support otherwise. The respondent at the trial court alleged that she was an administrator of the estate of the late Maua Juma (See exhibit P1) who entered into agreement with the respondents (See exhibit P3- tenancy agreement) however they failed to prove that the suit premises belong to the late Maua Juma as no title of ownership was tendered. For those reasons he added that even the respondent herein had no locus to sue as administrator over the suit premises.

More to that, Mr. Marick submitted that even exhibit P3 was illegally admitted as it lacks a stamp duty as required by **Section 2 (1) (j) of the Law of Contract Act**, Cap 345 R.E 2019 and **Section 47 (1) of the Stamp Duty Act**, Cap. 189 R.E 2019. It was his view that the chairlady only made assumption to declare the property belongs to the respondent without any concrete proof. Further, he submitted that the respondent alleged the appellants paid advance of Tshs. 3,700,000/= however there was no proof of withholding tax nor proof of the said payment from the appellants to the respondent. He added that the respondent failed to tender at the tribunal a right of occupancy. For the reasons adduced he averred that there is merit on the 1st, 2nd and 6th ground of appeal.

Responding to these grounds, Mr Salehe told the court that the issue before the trial tribunal was whether the appellants beached the tenancy agreement not the owner of the suit premises that's why the following issues were framed;

- i. Whether there was a tenancy agreement between the applicant and the respondents.*
- ii. Whether there was a breach of tenancy by the respondents.*
- iii. To what relief are the parties entitled to.*

Following the raised issues, the respondent managed to prove that there was a tenancy agreement between the appellants and the late Maua Juma (See exhibit P3) and the said exhibit were not objected. As for the issue of right of occupancy the same was not raised at the trial tribunal that's why the respondents did not tender it as exhibit. Moreover, being the administrator of the estate of the Late Maua Juma, the Respondent had locus stand to sue the appellants. Further to that the trial tribunal made its judgment by critical evaluation and analysis of the whole evidence not based on her own assumption. As for the issue of admissibility of exhibit P3 (Tenancy agreement) the same cannot be objected at this time since it was already admitted without objection.

He submitted further that since the appellant never objected their default to pay rent since 2015 the trial tribunal was right to decide the matter based on the strong evidence of the appellant. He cited the case of **Ali Abdallah Rajab v Saada Abdallah Rajab and Others** (1994) TLR 132 and **Omary Ahmed v Republic** (1983) TLR 52 to support his argument. As for the issue of illegality concerning the payment of tax it was supposed to be raised at the earliest stage not at this stage. He averred that the 1st, 2nd and 6th grounds of appeal have no merit.

Turning to the 3rd and 4th grounds of appeal, Mr Marick complained that the trial chairman inverted her own evidence which were not in record in reaching into her judgment in favour of the respondent herein. He submitted that the act of the respondent being appointed an administrator of the late Maua Juma does not give her a locus to institute a case against the appellants and even a 90 days' notice does not show the maker and the addressee.

When he was responding to these grounds, Mr Salehe submitted that the decision of the chairman based on the evidence adduced by the parties at the trial tribunal nothing was added by the chairlady as alleged by the appellants. Regarding the issue of who wrote the demand notice, it was the late Maua Juma who directed their chamber to write the said demand notice to the appellants. Further to that there is no confusion on months as alleged, the affidavit is very clear that the respondent claims against the defendant for Tshs. 17,900,000/= being the rent from Jan 2015 to December 2016 nothing to confuse them there. So, he prayed for the dismissal of the 3rd and 4th ground of appeal.

As for the 5th and 7th ground of appeal Mr Marick complained regarding the general damages awarded to the respondent since no explanation

were given by the respondent on how he suffered the damages enough to be awarded 2,000,000/=. As the same was not pleaded nor prayed for. He added that even the assessor's opinion was not included in the trial court judgment which is contrary to the law.

Before he pens down, Mr Marick invited the court to exercise its powers vested under **Section 95 of the Civil Procedure Code**, Cap 33 R.E 2019 since at the trial tribunal the main case was dismissed for want of prosecution but the tribunal proceeded to determine the counter claim raised by the respondent in the absence of the main case. Dismissing the main case meant even the counter claim had no leg to stand, so the whole proceedings of the trial tribunal need to be dismissed for being void.

Responding to the 5th and 7th grounds of appeal, Mr Salehe submitted that the general damages of Tshs. 2,500,000/= was correctly awarded by the trial tribunal since it is granted by the discretion of the court and the party is not required to prove the same as it was already pleaded in their counter claim. Regarding the issue of assessors, the trial chairlady sat with them and she consulted with them prior to giving her decision. For the issue of counter claim to proceed while the main case was

dismissed the law allows it since counter claim is a different claim from the appellant's claim and it was heard in accordance with the law.

In his rejoinder, Mr Marick reiterated what he had already submitted in his submission in chief and added that, since counter claim is part and parcel of the main case it was wrong for the trial chairman to proceed with counter claim after dismissing the main case.

Having considered the rival arguments advanced by the counsels for the parties and having examined the record, the pertinent issue for determination is whether this appeal has merit. The issue will be determined on the basis of the grounds of appeal filed in this court.

Starting with the sequence adopted by the parties, that is, the 1st, 2nd and 6th grounds of appeal, the counsel for the appellant alleged that there was no valid agreement between the parties herein since the said tenancy agreement lacks the stamp duty as required by the law hence the said exhibit P3 was unlawfully admitted as exhibit and relied upon by the trial tribunal. He further alleged that the evidence was improperly evaluated.

The counsel for the respondent contended that the evidence was well evaluated by the Chairlady and the Exhibit P3 was admitted without objection so it cannot be objected at this stage.

I have gone through the record particularly on the exhibits P3 which is said to be a tenancy agreement. The same is titled:

*"YAH: MKATABA WA UPANGAJI BAINA YA BI MAUA JUMA
MDABI NA BWANA YUSUF MAJUM KAKWAYA"*

Although it is titled as a tenancy agreement, its content speaks differently. It is a letter from Siay Chambers to Advocate Said Amri which shows there was a correspondence between the two learned counsels concerning the subject matter of this suit. Therefore, the same does not fall under the requirement of **Section 47 (1) of the Stamp duty Act.** (Supra). The provision stipulates 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."

A mere letter is not chargeable with duty so the above provision is not applicable to the admissibility of the said document.

Furthermore, Mr Marick learned counsel for the appellant averred that the trial tribunal did not evaluate the evidence properly and did not consider the defence evidence. It is a settled principle that the first appellate court is entitled to re-evaluate the entire evidence before the trial tribunal on record by reading it together and subjecting it to a critical scrutiny. In the case of **Philipo Joseph Lukonde Vs. Faraji Ally Saidi** (2020) TLR, 576 the Court of Appeal held that:

"This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusions."

Being guided by the above decision, this being the first appellate court will evaluate the evidence delivered at the trial tribunal. As it was submitted by the learned counsel for the respondent, looking at the record and the pleadings, the main issue which was supposed to be determined at the trial court was whether there was a tenancy agreement between the parties. To prove her case, the respondent had three exhibits which are; letters of administration (Exhibit P1), A letter from Siay Chambers to Yusuf Majum Makwaya which is titled "*YAH: UVUNJAJI WA MASHARTI YA MKATABA WA UPANGAJI*" (Exh P2). And another letter from Siay Chambers to Advocate Said Amri (Exh.P3). Looking at the exhibit P2, the content of the letter has quoted some of

the paragraphs of the tenancy agreement. However, the said agreement was never tendered in court. The exhibit P3 which is alleged to be a tenancy agreement, it is not but a mere letter as fore stated. Its content does not either fall under the ambit of the content of an agreement. The word agreement is defined by **Black's Law Dictionary 8th Edition** as:

"A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons."

The so-called tenancy agreement (exhibit P3) has not contained any mutual understanding but it is a rival correspondence between parties herein. Thus, there was no any document to prove the tenancy agreement in this case.

The principles of proof of claims are equally applicable, that he who alleges must prove as provided under **Section 110 and 112 of the Evidence Act**, Cap.6 [R.E 2019] that: -

"110 -(1) Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

Before the trial tribunal, there was only one witness testified to prove the case on the side of the applicant/respondent herein as well as one

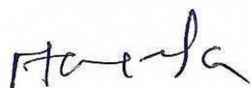
witness testified on the side of the appellants. The respondent's evidence was based on clarifying the exhibits of which does not prove the nature of the agreement between the two parties. On the side of the appellants, they denied to have tenancy agreement with the respondent but with one Hassan Juma Mdabi who is a brother to Maua Juma Mdabi. Therefore, the respondent did not prove her case to the required standard so the 1st, 2nd and 6th grounds of appeal have merit. These grounds suffice to dispose of this appeal therefore there is no need to discuss the remaining grounds of appeal.

Accordingly, this court finds merit in this appeal for the reasons stated herein above and proceeds to quash and set aside the trial tribunal's decision. No order as to costs.

It is so ordered.

DATED at **ARUSHA** this 18th day of July 2022.




N.R. MWASEBA

JUDGE

18.07.2022