IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CIVIL APPEAL NO. 271 OF 2018

SAMWEL KIMARO.....APPELLANT

VERSUS

HIDAYA DIDAS .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

dated 26th day of May, 2015

in

Land Appeal No. 99 of 2014

.....

JUDGMENT OF THE COURT

17th June & 4th July, 2019

SEHEL, J.A.:

The present appeal arose from the tenancy agreement entered on 30th May, 1999 between the appellant and the respondent for a lease of one room at a rental fee of TZS 30,000.00 payable in a yearly lumpsum.

The dispute in this second appeal originates from the District Land and Housing Tribunal at Mwanza (the trial Tribunal) wherein the appellant in his application claimed that he incurred TZS 2.4m for renovating two shop rooms; and building store, two residential rooms, shower, and a

toilet. He also claimed that he refunded the late John Owino TZS 3m being costs incurred for renovating a shop that Mr. Owino was occupying. The appellant therefore prayed for a restraining order against the respondent; a declaratory order that he is a lawful tenant; and an order that TZS 5,460,000.00 advanced to the respondent be applied in deduction of rents.

The respondent after being duly served with the application filed her reply to the application and therein she raised a counter claim where she acknowledged that there is in place a tenancy agreement whereby the appellant initially occupied one room but in the year 2000 the appellant added two more rooms. She further alleged that in March, 2002 the appellant added three more rooms thus making a total of five rooms occupied by the appellant. She claimed that the appellant defaulted in rent payment of TZS 30,000.00 per month and that on 10th January, 2003 the rent was raised to TZS 90,000.00 per month. She thus prayed against the appellant for an order of payment of TZS 11,460,000.00 being rent arrears from 30th August, 2000 to 31st December, 2004; vacant possession; and costs of the application.

The trial Tribunal partly allowed the application by finding that the appellant spent TZS 5.4m as costs for renovation but found the appellant to be in breach of the tenancy agreement thus ordered him to pay the respondent TZS 27,660,000.00 being rent arrears. The trial Tribunal also awarded costs to the respondent. The appellant was aggrieved with the trial Tribunal's decision. He unsuccessfully appealed to the High Court. Undaunted with such setback, he filed this appeal. The appellant raised seven grounds of appeal, namely:-

1) The High Court Judge erred in law and fact in holding that the court was not supposed to visit the locus in quo to verify controversial information as regards the number of the rooms which the appellant rented despite the fact that it was the first court of record and that the lowest court did not visit the locus in quo despite the prayer to that effect.

2) The High Court Judge erred in law when she held that there was notice of the increase of rent without evidence on record.

3) That the High Court Judge erred in law and fact in awarding the whole claim in the counter claim of the respondent and

deciding the case against the evidence on record when she did not consider the evidence of the respondent that the appellant made further payment of up to shillings 9,000,000/= after lump sum payment of the first year and that the said sum ought to be regarded as rent.

4) That the High Court Judge erred in law and fact in ruling that the appellant is the one who breached the contract and condemned him to pay costs while it is the respondent who breached the said tenancy contract.

5) That the High Court Judge erred in law in not finding that the Chairman of the District Land and Housing Tribunal went wrong in awarding claims which are not part of pleadings and are not specifically prayed for.

6) That the High Court Judge erred in law when she held that the discrepancy in the letter dated 10th January, 2003 bearing the day of service to be the 10th January, 2002 was a clerical error while the respondent did not say so anywhere in her evidence or the submissions filed by his advocate.

7) That, the High Court Judge erred in law in holding that the order Madam Longway, Judge did not nullify and that the execution proceeding and steps which had taken place subsequent thereafter.

At the hearing of the appeal, Mr. Barnaba Luguwa, learned advocate, represented the appellant and Mr. Deocles Rutahindurwa, learned advocate, represented the respondent.

Prior to the oral hearing of the appeal, both learned advocates filed their respective written submissions as required by rule 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009. The appellant in his written submissions filed on 9th day of January, 2019 abandoned the first ground of appeal thus remained with six grounds of appeal. However, at the hearing of the appeal and in due course of submitting on the grounds of appeal, Mr. Luguwa further abandoned grounds number six and seven of appeal.

In expounding the remaining grounds of appeal, Mr. Luguwa submitted on ground two that the notice on rent increase though issued but it was never received by the appellant as there is no endorsement of

acknowledgment. Mr. Luguwa faulted the appellate judge by taking a one line sentence from the proceedings while, he argued, she should have read the whole proceedings. He pointed out that in the same proceedings and most specifically, in the next sentence which the High Court relied upon in reaching its decision, the appellant categorically denied to have received any notice from the respondent. He argued that by reading a single sentence, the High Court came to a wrong conclusion that the appellant had prior knowledge of the rent increase. In that respect, Mr. Luguwa urged us to read closely the testimony of the appellant as it appears at pages 125 to 126 of the record of appeal.

Submitting on the third ground of appeal, Mr Luguwa contended that the respondent in her testimony admitted to have good relationship with the appellant, that the appellant was paying rent, that the appellant had no rent arrears and that the respondent received a total sum of TZS 9m from the appellant, though paid in instalments. It was the view of Mr. Luguwa that the trial Tribunal and the High Court ought to have deducted the said amount from TZS 11,460,000.00, claimed by the respondent in her counter claim. He further submitted that both the trial Tribunal and the High Court ordered the respondent to refund the appellant TZS

5,460,000.00 meaning, that the appellant overpaid the respondent a total sum of TZS 2,940,000.00. Mr. Luguwa further argued that the best the trial Tribunal and the High Court could have done was to order for the refund of excess money paid by the appellant and not to award the full amount claimed by the respondent in her counter claim of TZS 11,460,000.00.

On the fourth ground of appeal Mr. Luguwa contended that the evidence before the trial Tribunal proved that the respondent breached the contract as the appellant was removed from the premises on the allegation of rent arrears while it is on record that the appellant had been paying rent. In drawing the analogy of submission from ground number three of appeal, Mr. Luguwa contended that the respondent at no point in time was in rent arrears since he overpaid the respondent a total sum of TZS 2,940,000.00.

Lastly on the fifth ground of appeal, Mr. Luguwa submitted that the respondent in her counter claim pleaded for TZS 11,460,000.00 and in her testimony prayed for payment of TZS 11,460,000.00 but the trial Tribunal awarded her TZS 27,000,000.00. Mr Luguwa stressed that parties are

bound by their pleadings. For this reason, he went on to argue that it was wrong for the trial Tribunal to award an amount which was not claimed and it was wrong for the High Court to confirm such an award. With these submissions, Mr. Luguwa prayed for the appeal to be allowed with costs.

On his part, Mr. Rutahindurwa supported the decision of the High Court that upheld the findings of the trial Tribunal that there was communication on rent increase. He supported his argument by making reference to Exhibit R6, a letter written by the respondent addressed to the appellant. He said the said exhibit R6 informed the appellant on the increase of the rent from TZS 30,000.00 per month to TZS 90,000.00 per month with effect from 30th August, 2003. Further, he contended that the issue whether the letter was acknowledged or not is a matter of fact and not a point of law to be raised in the second appeal.

On the point by the appellant that the respondent acknowledged receipt of TZS 9m as such it has to be regarded as rent, Mr. Rutahindurwa submitted that the appellant neither pleaded in his application nor made a prayer for payment of such amount when he was testifying before the trial Tribunal. He argued that the record, as per the testimony of the

respondent, shows that the appellant requested to renovate the house at his own expenses since he wanted to remove Baba Sadam alias Mwarabu.

For breach of contract, Mr. Rutahindurwa replied that consideration in the tenancy agreement is by way of payment of rent. He contended that since the appellant was in arrears of TZS 11,460,000.00 as found by the trial Tribunal and later confirmed by the High Court then the trial Tribunal was correct in holding that the appellant was in breach of the contract.

On the issue of awarding damages that were neither pleaded nor proved, Mr. Rutahindurwa on the first instance was adamant that it was right but upon being probed by the Court as to whether it was legally correct to award damages which were neither pleaded nor claimed, he conceded to the ground that the damages were wrongly awarded.

We have given due consideration to the submissions made by the learned counsels for the parties. We wish to point out from the outset that the third and fifth grounds of appeal are closely connected. They both relate to the issue of awarding specific damages not claimed for. Consequently they will be considered together. The second and fourth grounds of appeal will be dealt separately. We will start with the second

ground, followed by the combined third and fifth grounds of appeal and finally to the fourth ground of appeal.

The issue on the notice on rent increase was introduced by the respondent in her counter claim. It was claimed and testified by the respondent that in the year 2003 the rent increased from TZS 30,000.00 per month to TZS 90,000.00 per month and notice of such change was issued to the appellant. The appellant, on the other hand, disputed any acknowledgement of the notice on rent increase. It was the testimony of the respondent, at the trial Tribunal, that, she notified the appellant and other tenants about the change of rent and that the appellant did not comment on such notification. The respondent also tendered Exhibit R6 to substantiate her testimony that the notice was issued.

The appellant, on the other hand, at pg 125 of the record of appeal denied the allegation. He testified, quoting him *ipssima verba*, as follows:

> *"I did not agree to the increase of rent since I had already paid Mr. Owino about 3m."*

But at page 126, he said:

"Your honor, the landlady did not give me written notice of the rent increase."

We have closely scrutinized the above two statements, and, we appreciate that, in his second statement, the appellant was explicit that he did not receive any formal written notice. It is for this reason, and we completely concur with the submission made by Mr. Luguwa that, exhibit R6 does not have any endorsement from the appellant. However, despite his refusal, the appellant at page 125 of the record, testified, and we wish to quote him again "*I did not agree to the increase of rent....*". on this statement, the learned first appellate Judge said (page 449 of the record of appeal):

"Therefore it is vivid that the appellant had knowledge of the rent increase but did not agree to it for his own reasons."

Mr. Luguwa throughout his submission vehemently protested against this finding. Here, we think, we should pose and ask, was there a legal requirement for issuance of formal written notice that would justify the adamant position of the appellant that he had no notice on the rent increment despite the fact that he was fully aware of it.

Our reading of the provisions of the Land Act, Cap 113 R.E 2002 (the Act), apart from section 79 (4) of the Act, that requires a party who wishes to terminate a periodic tenancy agreement, like the one at hand, to issue a notice there is no any other similar provision for issuance of notice on rent increase. Further, even section 79 (4) of the Act is silent on the mode of issuance of such termination notice. It does not prescribe whether it should be written or oral. In absence of any statutory requirement, then it remained a matter of contractual arrangement between the parties, as rightly, submitted by the learned advocate for respondent. As per the facts, it is not disputed, that, the parties herein entered into a lease agreement on 30th August, 1999. It is also not disputed that the rental charges per room was TZS. 30,000.00 per month. The contentious issue here is the increased amount of TZS. 90,000.00, that, the appellant argued had no notice.

We have alluded herein, that, there is a lease agreement in place. That agreement was tendered and admitted as Exhibit R6 and it appears at page 56 of the record of appeal. It simply reads:

"MKATABA WA KUPANGISHA CHUMBA CHA BIASHARA

Mimi mama Moshi nimempangisha chumba cha biashara Ndugu Samuel Kimaro wa P.OBOX 7265 Mwanza kwa gharama ya shilingi 30,000 kwa mwezi. Hivyo, amelipa shilingi 360,000 kwa mwaka mmoja leo tarehe 30/8/1999.

Sahihi ya mwenye nyumba.....sgn.....

Sahihi ya shahidi.....sgn.....

Sahihi ya mpangaji.....sgn.....

Sahihi ya shahidi.....sgn....."

It is discernible from the above, that, the lease agreement lacks details on renewal, termination, and/or variation of the terms. It is silent on the requirement of issuance of a written notice on rent increase. Nonetheless, both the trial Tribunal, after hearing the evidence ruled that the appellant had knowledge and the High Court, after reviewing the evidence of the trial Tribunal arrived at the same conclusion that the appellant was aware of rent increase. As such, the question whether the appellant was notified orally or through formal written notice, is purely based on facts and not law. This being a second appeal, we refrain in interfering with lower courts' concurrent findings of fact. We held the same view in the case of **Amratlal Damodar Maltaser and Another t/a**

Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel [1980] T.L. R 31 where at page 32 we said:

> *"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

The appellant, in the instant appeal, has failed to show either a misapprehension of evidence, or a miscarriage of justice or violation of some principle of law or procedure that would justify this Court to interfere with the concurrent findings of fact on issuance of notice on the increase of rental charges. We find no justification on the appellant's complaint at this second stage of appeal.

Having declined to interfere with the concurrent findings of the lower courts, we are remained with a conclusive fact that the appellant had notice on the increase of the rent, from TZS 30,000.00 to TZS 90,000.00 with effect from 30th August, 2003 as evidenced by exhibit R6. This finding of fact takes us to the next issue of specific damages.

It is settled law that specific damages must be specifically pleaded and proved. In **Masolele General Agencies Vs. African Inland Church Tanzania [1994] 192** the Court of Appeal of Tanzania held:

> *"Once a claim for specific item is made, that claim must be strictly proved, else there would be no difference between specific claim and general one. The trial judge rightly dismissed the claim for loss of profit because it was not proved."*

In the instant appeal, the appellant, in his application before the trial Tribunal, pleaded and prayed for the payment of TZS 5.4m being cost for renovation and refund made to Mr. Owino. Both the trial Tribunal and the High Court granted the prayer and ordered the respondent to refund the appellant TZS 5.4m. The respondent did not appeal against that finding, thus, we refrain from interfering with the said award.

On the other hand, the respondent, in her counter claim, pleaded and prayed for the payment of TZS 11,460,000.00 being rent arrears from 30th August, 2000 to 31st December, 2004. The trial Tribunal instead of awarding the amount pleaded and prayed for, it awarded an amount which was neither pleaded nor proved. It awarded the respondent TZS

27,660,000.00 calculated from 1st September, 2000 to 7th January, 2008, beyond the period claimed by the respondent, and the High Court proceeded to confirm that award. With all due respect to the trial Tribunal and to the High Court, the amount of TZS 27,660,000.00 was neither pleaded nor proved. It is trite law that parties are bound by their pleadings. In **Cooper Motors Corporation (T) Ltd Vs. Arusha International Conference Centre** [1991] T.L.R. 165 the respondent was awarded by the High Court special damages in excess of what he was claimed and we said:-

> *"It was wrong for the trial judge to award special damages which were more than what the respondent had claimed."*

The reason behind that requirement is expressly stated in **Charles Richard Kombe t/a Building Vs Evarani Mtungi & 2 Others**, Civil Appeal No. 38 of 2012 (Unreported-CAT) when we said the following:

> *"It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is*

contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight."

Consequently, it was wrong for the trial Tribunal and the High Court to award an amount that was neither pleaded nor proved. It is for this reason we find merit in the appellant's complaint. We have resolved that the appellant had notice. Therefore, going by the trial Tribunal record, most specifically, Paragraphs 4 to 10 of the counter claim, the arrear of rent, accrued from 30th August, 2003 to 31st December, 2004, is TZS 11,460,000.00. Accordingly, we set aside the award of TZS 27,660,000.00 and substitute with TZS 11,460,000.00 that was pleaded, claimed and proved by the respondent.

As regards the breach of the lease agreement, in view of the evidence on record we do not think the complaint has to exercise our minds so much. There is ample evidence from the appellant that he was in rent arrears, thus, in breach of the lease agreement. The record of appeal

shows that the appellant appeared before the trial Tribunal on 28th day of April, 2014 and gave his testimony to the effect that in 2002 he paid TZS 3m to John Owino and that, such amount paid to Owino should offset the rent arrears of TZS 30,000.00 per month. Further, in his Demand Notice tendered at the trial Tribunal by the respondent, Exhibit R1, the appellant acknowledged the outstanding amount of TZS 2,860,000.00 as rent arrears from 30th August, 2000 to 30th August, 2003. Taking into account all these strands of evidence, prove that the breach was on the part of the appellant. The appellant rented the rooms from the respondent but failed to pay for them for reason that he wanted to offset, the monies, paid to Owino and advanced to the respondent, from rent arrears.

With due respect to the argument of Mr. Luguwa, that, the appellant overpaid the respondent TZS 2,940,000.00 as such he cannot be in arrears. The fact that the appellant incurred TZS 5.4m for renovation and the respondent acknowledged receipt of TZS 9m does not obliviate the appellant's responsibility to pay rent. In fact, as Mr. Rutahindurwa correctly submitted the appellant was under a legal obligation to pay rent as consideration for occupation of the respondents' rooms, lawfully leased

to him. With that said, we hold that this ground of complaint is also without any substance and it is rejected.

In the end, the appeal is allowed to the extent explained herein and given the outcome of the appeal, we order that each party shall bear its own costs. It is so ordered.

DATED at **DAR ES SALAAM** this 1st day of July, 2019.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL