IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A., And KITUSI J.A.)

CIVIL APPEAL NO. 163 OF 2019

ELIGIUS KAZIMBAYA.....APPELLANT

VERSUS

1. **PILLI PRISCA MUTANI@PILLI PRISCA YANGWE MUTANI**
2. **PETER PAUL KAZIMBAYA**

.....RESPONDENTS

[Arising from the Judgment of the High Court of Tanzania (Land Division), at Dar es Salaam]

(Teemba, J.)
Dated the 22nd day of April, 2016
in
Land Case No. 101 of 2011

.....

JUDGMENT OF THE COURT

24th November & 4th December,2020

MKUYE, J.A.:

In the High Court of Tanzania (Dar es Salaam Registry) PILLI PRISCA MUTANI @ PILLI PRISCA YANGWE MUTANI, (the 1st respondent herein) had sued PETER PAUL KAZIMBAYA and EUGIUS KAZIMBAYA, 2nd respondent and the appellant, respectively, seeking for a number of reliefs, that is to say:

(a) A declaration against the defendants (2nd respondent and appellant) jointly that the

house number 437 under plot number 437 Mwenge Village is the property of the plaintiff1 (the 1st respondent).

(b) An order of vacant possession of the house by the plaintiff (1st respondent) against the 2nd respondent (appellant), his relatives and/ or representative.

(c) Payment of mesne profits by the 2nd defendant (appellant) from September, 1995 to the date of Judgment at the rate of Tshs. 200,000/= per month.

(d) Costs of the suit.

(e) Interest on the decretal sum at the Court rate of 12% from the date of judgment until payment in full.

Upon a full trial the trial court entered judgment in favour of the 1st respondent and awarded such reliefs as follows: -

1. The plaintiff (1st respondent) is hereby declared to be the owner of the property in dispute.

2. The 2nd defendant (appellant) and/or his relatives are ordered to give vacant possession.

3. The plaintiff (1st respondent) is entitled to Tshs. 200,000/= per months as mesne profit to be paid by the 2nd defendant (appellant) from September, 1995 to the date of judgment.

4. The plaintiff (1st respondent) is awarded interest on the decretal sum at the Court rate of 7% from the date of judgment until payment in full.

5. The 2nd defendant (appellant) is also condemned to pay costs of this suit.

The brief facts leading to this appeal are that:

The appellant and 2nd respondent are brothers and as at August, 1995 were neighbours at Mwenge Cooperative Village occupying houses number 438 and 437 respectively, both in the estate known as Mwenge Cooperative Society (hereinafter to be referred as the Society). On 18th August, 1995, the 2nd respondent sold house no. 437 to the 1st respondent at a consideration of Tshs. 2,000,000/= whereupon a sale agreement and transfer deed were executed and a letter introducing the purchaser (1st Respondent) was written to the Secretary of the Society for purposes of effecting transfer.

Upon such sale of house number 437, the appellant emerged claiming that the suit house belonged to him. He entered a caveat on the

sale with the Mwenge Housing Cooperative Society. It would appear that the 2nd respondent by then was not occupying the said house but it was being used by the appellant.

After completing the initial transfer processes, the appellant refused to vacate the said house claiming that he was the owner; and thus the 1st respondent failed to obtain vacant possession. This led the 1st respondent to file in the High Court Land Case No. 101 of 2011 for the reliefs alluded to earlier on.

The appellant being dissatisfied by the High Court's decision, has appealed to this Court. He raised three grounds of appeal but on the hearing date the counsel for the appellant abandoned the third ground of appeal thus argued the first two grounds as hereunder: -

1) *That the honorable Judge erred in law by granting mesne profits of Tshs. 200,000/= per month as from 1995 to the date of judgment without proof.*

2) *The honorable Judge erred by holding that the sale of the disputed land between the appellant and the 1st respondent was valid in the absence of complying with legal formalities.*

When the appeal was called on for hearing, the appellant was represented by Prof. Cyriacus Binamungu learned counsel; whereas the respondents enjoyed the services of Mr. Joseph Rutabingwa, also learned counsel.

Expounding on the 1st ground of appeal that the trial judge erred to award mesne profit of Tshs. 200,000/= without proof, Prof. Binamungu contended that the mesne profit being equal to specific damages was not proved as the 1st respondent did not show how she arrived at the amount of Tshs. 200,000/= per month. He pointed out that the 1st respondent neither stated where she resided nor produced any lease agreement to support her prayer. To support his argument, he referred us to the case of **Cooper Motors Corporation (T) Limited v. Arusha International Conference Center,** [1991] TLR 165 where it was stated that special damages must be strictly proved.

In relation to the 2nd ground of appeal challenging the validity of the sale of the disputed land between the 2nd respondent and the 1st respondent, Prof. Binamungu submitted that since the said land was owned by the Mwenge Cooperation Society the sale of the disputed house had no legal force for failure to comply with certain formalities. The

learned counsel added that as the said sale was done before 1999 it required the consent by the Commissioner for Lands on behalf of the President in terms of section 3(1) of the Land Regulations 1948; and that as the disputed house was in Mwenge Cooperative Society, an approval of the said Society was also required. He referred us to the case of **Wayani Longoi & Another v. Israel Kivuyo,** [1988] TLR 262 to emphasize the requirement of the Commissioner's consent. In this regard, he said, since the 2nd respondent did not prove that the legal formalities were complied with, the Court should find that the transaction between the 1st and 2nd respondents was of no legal force. In the end, he prayed to the Court to allow the appeal with costs.

In reply, Mr. Rutabingwa in the first place prayed to adopt the written submission filed earlier on to form part of his submission. After having done so he argued in relation to the 1st ground of appeal that what the 1st respondent had sought in her reliefs was mesne profit which was not disputed by the appellant his written statement of defence. Mr. Rutabingwa argued further that the essence of the 1st respondent praying for the mesne profit of 200,000/= per month is that though she bought the said house she had to rent another house. Thus, he was of the view

that the trial judge was correct to award such mesne profit on the reasoning she made.

As regards the 2nd ground of appeal, Mr. Rutabingwa submitted that there was no need for the Commissioner for Land's approval of transfer as what was required first was to obtain/acquire membership. He contended that the 2nd respondent followed all the procedures required in transferring or changing membership in the Society only that the appellant had blocked the process by entering a caveat on the disputed land. To support his argument the learned counsel referred us to page 133 of the record of appeal where, when Theodore Kinyamahulu (DW 4) was cross examined by Mr. Rutabingwa, the counsel for the 1st respondent, he said that the 1st respondent wrote a letter applying for membership and paid Tshs. 50,000/= being a share in the Society for a new member. In his view, the sale transaction was done according to the procedure obtaining at that time and that the appellant being a care taker of the 2nd respondent's house (the owner) cannot be protected. He also wondered why the house could not be transferred to the 1st respondent while the appellant himself maneuvered and transferred it to his wife. In this regard, he urged the Court to find that the appeal is devoid of merit and dismiss it with costs.

In rejoinder, Prof. Binamungu reiterated his submission in chief on the proof of mesne profit. He also stressed that transfer was to be effected with the permission of the Society.

In order to have a smooth sequence of events in this matter, we propose to begin with the 2nd ground of appeal concerning the validity of sale of the disputed land between the 2nd respondent and 1st respondent. Among other complaints raised by Prof. Binamungu is failure to comply with formalities and noncompliance with section 3(1) of the Land Regulation requiring approval of the Commissioner for Lands.

On our part, we have considered the arguments from both sides. In the first place we wish to point out that it is common ground that the title of the suit land is under Mwenge Housing Cooperative Society. This is evidenced from the testimonies of PW1, DW1, DW3 and DW4. Also it is not in dispute that plot no 437 was applied in the name of the 2nd respondent as testified by the 2nd respondent, appellant and DW4 from the Society and supported by DW3. For instance, according to DW4, even when the Society suspected the appellant to own two houses it was confirmed that the other house belonged to the 2nd respondent as the appellant was just supervising its construction. Hence, we go along with

the trial court's finding that by then the 2nd respondent was the lawful owner of the house.

However, as the said house was under the title of the Society, the members thereof were lessees. This being the case, any disposition of the land was restricted subject to the formalities which were put in place by the Society as was testified by DW4.

In this case, DW4 at page 130 of the record of appeal explained clearly that in such a case, the seller has to relinquish or terminate his membership and that the buyer has first to acquire membership of the Society by paying a certain amount of money. The evidence bears out that both seller and purchaser approached the Society staff to make the official transfer and they were told about the procedure to be followed as to the change of membership/ ownership including payment of Tshs 200,000/= for religuishment of the 2nd respondent's membership and payment of Tshs 50,000/= by the 1st respondent for joining membership which amounts were paid as per DW4's testimonies. At pages 132 to 133 DW4 confirmed that the 1st respondent paid Tshs. 200,000/= for termination of his membership and the 1st respondent paid Tshs. 50,000/= being an amount for one share in the Society for a new

member and, hence, both seller and buyer complied with the said requirement entitling them to conclude a sale agreement. And indeed, the sale agreement (Exh P1) (titled Transfer of Right of Occupancy of Plot No 437 / house no 437 Mwenge Kijijini Dar es Salaam), was executed in relation to the sale of house no 437 and was signed by both the 1st respondent and 2nd respondent. The Agreement shows that the same was sold at the consideration of Tshs 2,000,000/=. It is unfortunate that before the whole process was completed the appellant lodged a caveat to prevent the transfer alleging that the house belonged to him.

In this regard, we agree with the learned trial judge that, indeed, the 1st and 2nd respondents complied with the requirements set out by the Society and as such the title passed from the seller to the buyer who becomes the owner of the suit land.

As regards the issue of approval by the Commissioner for Lands, we agree with Prof. Binamungu that, that is the requirement under section 3 (1) of the Land Regulations Act 1948 which states: -

> *"A disposition of a Right of Occupancy shall not be operative unless it is in writing and unless and until it is approved by President."*

However, much as that is the position of the law, we think each case has to be determined in accordance to its prevailing circumstances. It is noteworthy that in this case there were other formalities which were to be complied with before even reaching the stage of seeking and obtaining the consent of the Commissioner.

But again, much as initially, the disputed land was under one joint title of the Society as was observed by the trial judge and that the said status changed in 1995 whereby each member could process an individual right of occupancy, in this case such process was vitiated by the appellant who had lodged a caveat to prevent the 1st and 2nd respondents from completing the transfer and change ownership of the property. Thus, we agree with the learned counsel for the respondents that the trial judge cannot be faulted for having found that 1st and 2nd respondents followed all the procedures required for changing membership and ownership of the suit house only that the process was not completed following the caveat which was entered by the appellant.

With regard to the 1st ground of appeal the appellants' complaint is that the trial judge awarded mesne profit of Tshs 200,000/= per month from 1995 to the date of judgment without proof. It is the appellants'

contention that mesne profit being equal to special damages required to be specifically proved. Mr. Binamungu has argued that the 1st respondent did not show how she reached to that figure as no evidence to that effect and no document such as lease agreement were tendered in court to prove the amount prayed for. [See **Cooper Motors (T) Ltd's** case (supra)].

In tackling this issue, we think we need to define the terms "*mesne profit*" and "*special damages.*" In the case of "*mesne profit*" it is defined to mean "*the profits of an estate received by a tenant in wrongful possession and recoverable by the landlord.*" (Wikipedia). According 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****".*
>
> [Emphasis added]

On the other hand, the term "special damages" is defined to mean *"damages that compensate the plaintiff for quantifiable monetary losses such as medical bills and the costs to repair damaged property (direct losses) and lost earnings (consequential damages)."* Wikipedia

In the High Court of Kenya's decision in **Rajan Shan T/A Rajan S. Shah and Partners v. Bipin P. Shah**, Civil Appeal No. 209 of 2011 (unreported) which we find it to be persuasive, the term "mesne profit" was defined as follows: -

> *"The term "mesne profit" relates* ***to the damages or compensation recoverable from a person who has been in wrongful possession of 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 settled principle of law that wrongful possession in the very essence of 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."
[Emphasis added]

From the above definitions, it can be appreciated that the mesne profits are not certainly in the nature of specific damages. They are profits meant to be paid by persons in the unlawful possession of others property for the wrongful occupation to the owners of the said properties.

In this case it is without question that the appellant has been in actual possession of the suit property since September 1995 in the disguise that it was his property after the 2nd respondent declined to own it as it was in remote area. He even transferred it in the name of his wife Mary Kazimbaya. However, in view of our finding above, we are of a considered view that, the circumstances justified an award of mesne profit.

However, we ask ourselves if there was any material warranting the grant of the award of Tshs. 200,000/= as mesne profit. The 1st respondent, apart from pleading for mesne profit in para 8 of the Plaint, she also at page 101 of the record of appeal explained that she had been paying rent while she owned the house. She also prayed for an order that

the 2nd defendant (appellant) pays rent of Tshs. 200,000/= per month from September 1995 to the date she was testifying without more.

The issue which is still unresolved is whether such assertion was sufficient to appreciate the amount of mesne profit to be awarded.

This Court had an occasion of dealing with an akin situation in the case of **Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd**, Civil Appeal No. 15 of 2016 (unreported) in which it was observed as follows:-

> *"We think in fairness to trial judge, DW2s tenuous figures of money which was collected as rent can hardly provide the basis for the determination of definite amounts of mesne profits to cover the period of six to seven years when the respondent was in occupation of the suit property. We take judicial notice of the fact that in a Municipality like Arusha, payments of rents are evidenced by receipts and rents attract municipal taxes and fees which should have been evidenced by documents.*
>
> *We similarly take it that tenants occupying rooms in the suit property had rent agreements ... These agreements were not exhibited before the*

trial court. This Court has on an occasion provided in the case of ***Abdul Hamad Mohamed Kassam and Abdulatiff L. Murukder v. Ahmed Mbaraka,*** *Civil Appeal No. 42 of 2010 (unreported)* ***commented that proof of mesne profits needs evidence because it is not a question of pure law:*** *-*

"... There is no dispute that in law mesne profits is calculated on the basis of the rent payable at the material time. ***But it occurs to us that in the justice of this case, the basis and terms of the leased agreements had to be established first before determining the amount of mesne profits payable in the circumstances. Yet again, this was a matter which needed evidence. It was not a question of pure law."***
[Emphasis added]

Guided by the above authority, we think, the 1st respondent's assertion that she was entitled to Tshs 200,000/= per month without providing a proof of how she arrived at that figure was not sufficient to justify an award the trial court awarded. We are of the view that, much as the 1st respondent would be entitled to mesne profits the same was not proved. Hence, we find merit on this ground of appeal.

In the event, with what we have endeavored to elaborate, we find that the appeal is lacking in merit save for the extent we have shown regarding the mesne profit. Also, given the nature of the matter, we order that each party should bear his/her costs.

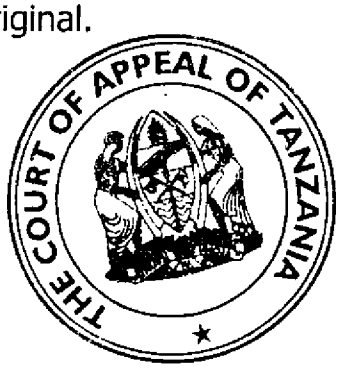
DATED at **DAR ES SALAAM** this 2nd day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 4th day of December, 2020 in the presence of Mr. Burdon Mayage holding brief of Prof. Cyriacus Binamungu, learned advocate for the Appellant and Mr. Erick Simon, learned advocate for the respondent, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL