IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., KITUSI, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 166 OF 2018

PARVIS GULAMALI FAZAL ..... APPELLANT

VERSUS

NATIONAL HOUSING CORPORATION ..... RESPONDENT

[Appeal from the Judgment of the High Court at Mwanza]

(Ebrahim, J.)

dated the 21st day of July, 2016

in

Land Case No. 06 of 2011

JUDGMENT OF THE COURT

29th November & 3rd December, 2021

KITUSI, J.A.:

Parviz Gulamali Fazal, the appellant, lost at the High Court sitting in Mwanza where he had sued the respondent the National Housing Corporation, a corporate body established under the National Housing Corporation Act Cap 295. It is common ground that the respondent, which deals with provision of housing, inherited some of her buildings from the erstwhile Registrar of Buildings that existed under the law then. The house on Plot No. 22 Block "T" in Rwegasore street in the city of

Mwanza, the subject of the suit at the High Court and before us, is one of those buildings.

There is also no dispute that in 1970 the house belonged to the appellant, and the question whether he built or purchased the house from another person is of little relevance. On 21/5/1971 under the Acquisition of Buildings Act, 1971 the Government acquired the house. However, the appellant has since continued to occupy the first floor which is the residential part of the building, as a tenant, leaving the ground floor consisting of shops, under the control of the respondent.

The appellant's case is that he deserves to be treated as and to enjoy the rights of an Ex - Owner of the house. The basis for the appellant's such claim may be gathered from the following paragraphs of the plaint: -

> *6. That in the year 1971, the house was acquired by the Government and the Plaintiff was compensated to the tune of Shillings 244,812/= which was paid by way of Government Bonds Commencing 1975 onwards for 15 years. A copy of notification of the same and the Bank of Tanzania certification are attached herewith and marked* ***"Annexture TLC 3"*** *collectively with the leave of the court.*

7. *That on the question of Rent, at first the Plaintiff was not paying rent for the flat he occupied. This was because he was a previous owner, and a letter with Ref. No. R/M2/99/20/KSM dated 11/2/1997 from the then Assistant Registrar of Buildings Mwanza informing the Principal Secretary Treasury evidencing that fact is herewith attached and marked* ***"Annexture TLC 4"*** *with the leave of the Court.*

8. *That surprisingly, on 26th July, 1982, the Branch Manager of the then Registrar of Buildings informed the Plaintiff that he was supposed to pay monthly rent for the flat he was occupying and that he was in arrears to a tune of Tshs. 45,894/10. The informing letter is herewith attached and marked* ***"Annexture TLC5"*** *with the leave of the Court.*

9. *That the Plaintiff obliged by paying the money and as an acknowledgement the said Manager wrote a letter with thanks and the Plaintiff was not indebted any more. Attached herewith is acknowledgement letter which are marked* ***"Annexture TLC 6"*** *with the leave of the Court.*

10. *That from the time, though painfully, the plaintiff has been paying the standard rent for the flat he is occupying as a paying tenant while indeed he should be treated as previous owner and thus not liable to pay the house – rent. A summary of rent payment is*

attached herewith and marked ***"Annexture TLC 7"*** *with the leave of the court.*

11. *That from the foregoing, it is clear that the Plaintiff deserves to be treated as the previous owner of the said premises, which indeed he is, and therefore enjoy the rights of that status. Copies of. letters Ref. No. R/MZ/99/20/KSM of 11/2/1974 and R/MZ/99/51/SMW of 18/8/1980 certified that fact. They are attached herewith and marked* ***"Annexture TLC 8"*** *with the leave of the court.*

The reliefs that were prayed for by the appellant are also better reproduced verbatim.

1. *Declaration that the Plaintiff qualifies as a sub title holder of the house situated on Plot No. 22 block "T" Rwegasore Street, Mwanza City.*

2. *Plaintiff to be given a sub-title as an ex-owner of the suit premises i.e Plot No. 22 block "T" he is now occupying.*

3. *The Defendants be ordered to involve the Plaintiff in the development arrangements of the plot in dispute since he is an ex-owner and therefore any arrangement or agreement reached on that plot without involving him be declared a nullity.*

4. *Plaintiff be reimbursed the rent he paid which amounts to Tanzania Shillings Eleven Million plus (Tshs. 11,000,000/=).*

5. *The Defendant pay interest at bank rate from the first payment of the said rent up to the day of judgment and thereafter at court rate from the day of judgment to the final payment.*

On the other hand, the respondent was uncompromising, which is clear from part of paragraph 5 of the written statement of Defence (WSD) where she stated; *"The question of being an ex-owner does not arise here or at all, basically because the Plaintiff was fully compensated during the acquisition of the suit premises, which compensation marked the end of his ownership over the same, and turned him to a tenant of the Defendant in respect thereof. Strict proof to the contrary thereof is hereby requested for."*

In his testimony, the appellant (PW1) stated that after the acquisition of his house which he learnt through a newspaper, he agreed to be refunded, and he was told that the refund would go into Treasury Bonds for a term of 15 years during which he would be receiving interest of Tzs. 12,000/= per annum. He confirmed receipt of the interest of Tzs. 12,000/= per annuum and that in 1986 he was paid the

principal amount of Tzs. 244,000/=. He however complained that prices of houses had by that time gone high therefore he could not buy another house for his residence.

The appellant was in possession of letters by government departments showing that there was no unanimity as to his status. One was a letter (Exh. P2) signed by the Assistant Registrar of Buildings, addressed to the Principal Secretary Treasury informing him that the appellant being the former owner, was occupying part of the building free of rent, so he had no arrears. It was dated 11th February, 1974. The other (Exh. P3) was from the Principal Secretary, Ministry of Lands, Housing and Urban Development, addressed to the Registrar of Buildings directing that Ex - Owners of acquired houses occupying buildings for residence only should not pay rent. The third letter (Exh. P4) was signed by the Assistant Registrar of Buildings addressed to the appellant notifying him of increase of rent from nominal Tzs.60/= to Tzs. 162.05 per month. The fourth (Ext. P5) also addressed to the appellant was informing him of arrears of rent of Tzs. 45,894/= showing how that figure had been arrived at. The last (Exh. P6) was an acknowledgment of receipt of payment of Tzs. 45,894/= from the appellant and informing him that he was therefore not in any arrears.

The appellant protested, during cross-examination, that he only paid rent because the government was powerful else, he would not have paid, because he was a co-owner of the house. He referred to Exh. P2 which said he should not be paying rent, as being proof that he was the owner. Then he demanded to be given a sub-title because he is an ex-owner of the house. He conceded that after the acquisition of the buildings there was a special housing Tribunal that had a tenure of ten years, but he never lodged any complaint with it.

During re-examination he blamed the delayed payment as having frustrated his intention of buying another house. He said that the terms and conditions of the acquisition were not explained to him.

One Elias Moses Mluande (DW1) a Real Estate Manager of Operations for the respondent testified mainly on the laws that governed the exercise of acquisition of buildings.

He testified that after the acquisition of houses by nationalization vide Act No. 13 of 1971, the houses were placed under the Registrar of Buildings for management and supervision. The Government gazetted all nationalized houses, and the previous owners were then paid compensation in terms of section 8 of Act No. 13 of 1971. Some left after being paid compensation but others remained in the houses.

Those who remained in the houses entered into agreements of tenancy with the Registrar of Buildings, under section 7 of Act No. 13 of 1971 and they continued to pay rent. The appellant was also a tenant from 1971 and was paid up.

DW1 gave further details of the governing law by referring to section 10 of Act No. 13 of 1971. By this section, the President formed an Appeals Tribunal with the mandate of adjudicating on complaints arising from the acquisition, notice, refusal of compensation amount and manner of payment. He stated that the appellant never lodged any complaint with the Tribunal that lasted from 1972 to 1980.

DW1 alluded to the respondent's Joint Venture Policy 1998 (Exh. D1) which may have prompted the appellant to institute the suit leading to this appeal. He testified that by that policy interested developers were invited to redevelop the existing houses now belonging to the respondent, including the house on Plot No. 22, the subject of these proceedings. The appellant was not among those who applied.

Going further, DW1 referred to the letters (Exh. P1 to P6) and tendered some of them to support the respondent's case. For instance he testified that Exh. P1 was a letter informing the appellant that his house had been acquired and valued at Tzs.244,000/= which he would

be compensated. DW1 said this was in accordance with section 8 of the Act. Exh. P5 was confirming that the appellant's status is that of a tenant and he should pay rent whose arrears had increased to Tzs.45,894/10.

In response to the appellant's claim that he is co-owner or a holder of a sub-title, DW1 tendered the certificate of Title in respect of the house (Exh. D5) to demonstrate the history of ownership as follows: - Zachary D. Souza acquired it on 9/10/1969 Registrar of Buildings acquired it on 13/5/1981 National Housing Corporation, the respondent, from 19/5/1993 to date.

When cross examined as to whether the appellant is an ex owner of the house or not, DW1 stated that ex owners are former owners of the nationalized houses who successfully petitioned the Tribunal to return the houses to them. He concluded that the present appellant is not an ex owner because he never lodged any complaint to the Tribunal let alone succeed. He also attributed this to the fact that the appellant never transferred the house into his name so he never became a registered owner.

Before the High Court the first issue was whether the plaintiff, now appellant, is an ex-owner of plot No. 22 Block "T" Rwegasore Street,

Mwanza City. The learned trial Judge discussed the meaning of that term in ordinary language and was satisfied that it means: *"Someone who had rightful claim of title and he/she does not hold that right or title anymore."* She then identified the meaning of ex-owner as used in the circumstances of this case in the following context. *"that connotation of the term Ex-owner as used in the circumstances of this case is well envisaged in exhibit P5 where the Plaintiff was required to pay standard rent due to the fact that he is not an Ex-owner".* The learned Judge proceeded to reject the appellant's suggestion that exhibits P2 and P3 referred to him as an Ex-Owner, pointing out that exhibit P2 refers to him as a former landlord and exhibit P3 does not even mention his name. In the end, the learned Judge concluded that the appellant is not an Ex-owner, and answered the first issue in the negative.

Relevant to that finding, is the second ground of appeal which raises the following grievance: -

> 2. *The trial Court erred in law and fact by not finding that the appellant deserved to be treated as the Ex - owner of the suit premises/house at Plot No. 22 Block (T) Rwegasore Street in Mwanza City."*

Mr. Twaha Taslima, learned advocate who had acted for the appellant during the trial continued to represent him before us. He had earlier filed written submissions which he adopted as part of his address.

In his submissions, Mr. Taslima drew our attention to portions of DW1's testimonies conceding to suggestions put to him by the plaintiff's counsel that the plaintiff was being referred to as ex-landlord and that he was paying nominal rent of Ts 60/= per month. He also pointed out that even DW1 expressed his surprise at his office's change of the appellant's status from Ex-owner to tenant, after a span of ten years.

Mr. Aloyce Sekule, learned Principal State Attorney submitted in opposition. He was appearing for the respondent along with Ms. Jesca J. Shengena, leaned Principal State Attorney and Mr. Mussa Mpogole, learned State Attorney. Mr. Sekule submitted that section 8 of the Acquisition of Buildings Act No. 13 of 1971 provided for the right of the owner of an acquired house to receive compensation and it provided for the manner of payment. He then pointed out that the appellant received payment through Treasury Bonds for 15 years with interest. He added that having received the compensation, the appellant could not again be an owner of the very house.

In our view, determination of the second ground of appeal depends on generally, certain rules of evidence and, specifically on the Acquisition of Buildings Act No 13 of 1971 which was the governing law. We shall begin with the Act. Nowhere does it define what an Ex-owner is, let alone his rights. Section 4(2) of the Act Provides for the effect of acquisition in the following terms: -

> *"(2) Where any building is acquired under this Act, the building and the right of occupancy in respect of the land upon which the building is situate and all other buildings, houses, outhouses, and other structures upon such land shall, with effect from the effective date, and by virtue of such acquisition notice and without further assurance, vest in the Registrar free of any mortgage, charge, trust or other incumbrance whatsoever, save to the extent hereinafter provided, and the Registrar shall hold the same subject to the directions of the President."*

The above provision is clear that upon acquisition the property would vest in the Registrar free of any incumbrances. The argument by the appellant that he was a co-owner or holder of a sub-title is a suggestion that would offend the above clear provision.

Turning to the rules of evidence, the appellant has stated categorically that he accepted the compensation. He never complained until much later after the Tribunal's term had expired by writing to the President. However, he continued to pay rent as a tenant. The appellant's conduct of paying monthly rent in compliance with the Registrar's directives in Exhibit P5, if anything, constituted a tenancy agreement.

In terms of section 123 of the Evidence Act Cap 6 R.E 2002, the appellant is estopped from reneging what he had committed himself to do. In the case of **Trade Union Congress of Tanzania (TUCTA) Vs. Engineering Systems Consultants Ltd & 2 Others,** Civil Appeal No. 51 of 2016 (unreported), we reproduced the following passage from **Nairobi County Government vs Kenya Power and Lighting Company Limited** [2018] e KLR.

> *"Upon applying the law to the facts of this case, I find that in the circumstances of this case, the doctrine of estoppel applies against the petitioner. The Petitioner is estopped by the said doctrine from turning around and reneging on what it had agreed and committed itself into and even performed its part of the agreement. The Respondent in reliance to the agreement and commitment not only agreed to the arrangement but acted in reliance of the same."*

The supreme Court of South Africa has had an occasion of making more or less similar remarks in the case of **Tap Du Plessis No & Harrry Kaplan No vs Rolfes Limited,** Case No. 500/94 It reproduced a paragraph from **Segal vs Mazzur** 1920 CPD on what it referred to as *the doctrine of election* which, we think, bears relevancy to the circumstances of this case.

> *"Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so ..... If with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; that is, however not a rule of law but a necessary inference of fact from his conduct..."*

In this case the appellant made his election by accepting the compensation and performing obligations of a tenant by paying rent. He also elected not to lodge any complaint with the Tribunal. Section 10 (3) of Act No 13 of 1971 is clear that even complaints of the amount and manner of payment of compensation which are being raised by the appellant now, could be adjudicated by the Tribunal. The full text of that provision reads: -

"10(3) Any person aggrieved by any acquisition notice or the terms of any acquisition notice or the acquisition of any building or the refusal to pay compensation in respect of any building acquired under this Act, or the amount of compensation or the manner in which the compensation is to be paid, may appeal to the Appeals Tribunal within such time and in such manner as may be prescribed."

We agree with the learned High Court Judge that the appellant had recourse to the Tribunal but did not lodge any complaint. And he having conducted himself in a manner suggesting that he had taken that course of action, the appellant is estopped from now claiming that he was not a tenant. The second ground of appeal is dismissed for want of merit.

The third ground of appeal is: -

"3 That the payment Tshs. 244,000/= made by the Respondent after 15 years of the acquisition of the one-story building, the suit premises, was not compensation worth the proper meaning of the word".

Mr. Taslima referred at the appellant's portion of testimony where he stated that the money could have been meaningful had it been paid to him immediately within 2 to 3 months. Then the learned counsel

submitted that with devaluation and inflation, it is absurd to say that the amount paid had the same value 15 years after the valuation. Like in the High Court, the learned counsel cited Article 24 (1) & (2) of the Constitution of the United Republic of Tanzania, 1977 on the right to own property.

In response Mr. Sekule submitted that the information as to the amount and mode of payment was communicated to the appellant through letter Exhibit P1, and he accepted. The learned Principal State Attorney agreed with the Judge's conclusion on the alleged delay in payment and added that after all, payment was made in 1986, two years before expiration of the 15 years.

The High Court Judge, dismissed the alleged unconstitutionality of the payment, pointing out that hers was not a constitutional Court. We entirely agree with the learned Judge but we also note that this matter was not pleaded which offends the settled law that parties must be bound by their pleadings. See the case of **Peter Karanti & 48 Others vs The Attorney General,** Civil Appeal No. 3 of 1988; **Anthony Ngoo & Another Vs Kitinda Kimaro,** Civil Appeal No. 25 of 2015 (both unreported) and **James Funke Gwagiro vs The Attorney General [2004] TLR 161 and**

In this case, when we look at the body of the plaint and the reliefs, the fact that the amount of Tzs 244,000/= was paid in compensation and that it was paid after 15 years, was given as background information towards establishing the truth of the appellant's main concern, that he is a sub-title holder, who deserves special treatment. Had these facts aimed at raising a constitutional issue, the appellant would not have prayed as he did in prayer 3 that: *"That the defendant be ordered to involve the Plaintiff in the development arrangements of the plot in dispute since he is an ex- owner and therefore any arrangement reached on that plot without involving him be declared a nullity".*

However, we will decide on the truth of the complaint. Right away, we wish to state that on the appellant's own testimony, it is not true that Tzs 244,000/- is the only money he received in compensation. He stated under oath that during the time the principal was kept in Treasury Bonds, he was receiving interest of Tzs 12,000/= per year. The doctrine of estoppel which we have referred to above, will question the appellant's attempt to eat his cake and still have it.

The totality of all is that we are satisfied that the third ground of appeal has no merit. We accordingly dismiss it.

Lastly, we consider the first ground of appeal alleging that: -

> *"1 The trial court erred in law and fact by not properly evaluating the evidence adduced in court".*

In a nutshell, this ground seeks to fault the High Court's findings on the issue of Ex-Owner. Mr. Taslima's submissions focused on DW1's concessions during cross-examinations that something was amiss in the office of the Registrar of Buildings and that there were competing views on the status of the appellant. However, the letters, especially Exhibit P2 and P3 were internal communications/correspondences that were not copied to the appellant. Since the appellant was not privy to the alleged competing views, he has no justification for alleging that he was led to believe that he would be treated as an Ex-owner.

We are satisfied that the learned High Court Judge properly evaluated the evidence before her and having re-evaluated it, we have reached at the same conclusions. We find the first ground of appeal lacking in merit and we dismiss it.

Lastly Mr. Taslima submitted that should we be inclined to dismiss the appeal, we should spare the appellant from payment of costs. He

submitted that the appellant is old, frail and impecunious. We are afraid, that is a matter we cannot decide at this stage. We have no means of telling an indigent person from an affluent one just by looking at them. Costs always follow the event unless there is reason to the contrary. We have none.

This appeal is dismissed with costs.

DATED at **MWANZA** this 2nd day of December, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the Presence of Mr. Twaha Taslima, learned counsel for the appellant and Ms. Subira Mwandambo, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL