IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 333 OF 2019

LAWRENCE MAGESA t/a JOPEN PHARMACY..... APPELLANT

VERSUS

FATUMA OMARY.....1ST RESPONDENT

RIMINA AUCTION MART & COMPANY LIMITED.....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania Land Division at Dar es Salaam)

(Khamis, J.)

dated the 11th day of December, 2018
in
Land Case No. 301 of 2015

JUDGMENT OF THE COURT

30th September & 6th October, 2022

KEREFU, J.A.:

This appeal arose from the tenancy relationship between Lawrence Magesa t/a Jopen Pharmacy, the appellant herein and Fatuma Omary, the first respondent. The said relationship culminated in a suit, Land Case No. 301 of 2015 instituted by the appellant in the High Court of Tanzania, Land Division at Dar es Salaam. In that case, the appellant sued the first respondent and Rimina Auction Mart & Company Limited, the second respondent, jointly and severally claiming for payment of TZS

98,407,407,620.00 being specific value of pharmaceutical properties taken away by the respondents; payment of TZS 10,417,750.00 being specific value of other appellant's items taken away by the respondents; payment of TZS 130,080,545.00 being loss of profit from 6th March, 2014 to the date of judgment. The appellant also claimed for payment of interest, general damages and costs of the suit.

The material facts of the matter obtained from the record of appeal indicate that, the appellant was the tenant of the first respondent in a house No. BG/KW/30 located at Buguruni area within Ilala District in Dar es Salaam (demised premises). It all started in February, 2011 when the duo executed a two years' tenancy agreement at a monthly rent of TZS 400,000.00 starting from 1st February, 2011 to 1st February, 2013. Upon expiry, the said lease agreement was renewed, on the same terms and conditions, for a period of one year from 1st February, 2013 to 1st February, 2014. Again, upon expiry, it was renewed to another period of one year from 1st February, 2014 to 1st February, 2015, but this time with a slight increment on the rent at the tune of TZS 410,000.00. The appellant claimed that, although the said agreement was signed by the parties on 1st February, 2014, the first respondent took it to her advocate for signature and returned it to him on 29th January, 2015. The appellant alleged further

that, upon its return, the lease agreement was altered and a new clause five was added to the effect that, upon expiry, the appellant should give vacant possession of the demised premises to pave way for its renovation. Thereafter, and when the said agreement came to an end, the first respondent hired the service of the second respondent who in turn issued to the appellant a 14 days' notice to vacate the premises. That, on 6th March, 2015, the respondents together with other people invaded the demised premises and took away the appellant's properties. Hence, the appellant decided to institute the suit as indicated above.

It is on record that, after being served with the plaint, both respondents filed their written statements of defence. The first respondent, apart from acknowledging that the appellant was her tenant since 2011 to 1st February, 2015, she disputed all other claims. She stated that after expiry of the appellant's tenure, he illegally continued to occupy the demised premises without her consent until 6th March, 2015 when he was lawfully evicted.

On her part, the second respondent also stated that the appellant was legally evicted from the demised premises after failure to comply with the 14 days' notice issued on him to give vacant possession of the demised premises. The second respondent added that the appellant's properties are

still under her custody as the appellant, despite several demands, had declined to collect them.

From the above pleadings, the following issues were framed; -

1. *What were the terms and conditions of the tenancy agreement between the appellant and the first respondent;*
2. *Who was in breach of the said terms and conditions;*
3. *Whether the means deployed by the respondents to re-possess the demised premises were lawful;*
4. *Whether the respondents caused loss to the appellant; and*
5. *What reliefs are the parties entitled to.*

At the trial, the appellant testified as PW1. In his testimony, he narrated how they entered into the above highlighted three tenancy agreements which were admitted in evidence as exhibits P1, P2 and P3, respectively. PW1 stated that, after signing of exhibit P3, the first respondent (DW1) left with the agreement claiming that she is taking it to her advocate for signature and retained it up to 29th January, 2015 when it was brought to him. That, upon perusal, he discovered that it was altered by inserting clause five to the effect that, upon expiry of the lease, he should give vacant possession of the demised premises. PW1 stated further that, due to the said alteration, he did not take exhibit P3 to his advocate

for signature. However, on 6th March, 2015, while away and without notice, the demised premises was invaded by DW1, her husband, Rose Joseph Masuka (DW2) together with other people who collected his belongings. PW1 lamented that, although DW2 alleged that she issued an eviction notice, the said notice was not served to him and it was wrongly served to the office of *Serikali ya Mtaa* (Local Government Office) at Malapa and not Mivinjeni where the demised premises is located. The list of confiscated properties was admitted in evidence as exhibit P4. PW1 stated further that the matter was reported to the nearby police station, the Tanzania Food and Drugs Authority (TFDA), Pharmacy Council and Tanzania Revenue Authority (TRA). The three letters to that effect were admitted in evidence as exhibits P5, P6 and P7. The evidence of PW1 was supported by Ramadhani Juma Jamaa (PW2), the neighbour who came to witness the incident and Asimwe Josephat Mjunangoma (PW4) who was the shop keeper.

The first respondent who testified as DW1 narrated the chronological account of the matter and specifically on how she entered into three tenancy agreements with the appellant. DW1 testified that, during the second lease, problems started because PW1 delayed to pay the rent. That, instead of paying it on 1st February, 2013, he paid less amount on

14th February, 2013 claiming that he had deducted the TRA withholding tax. DW1 testified further that, in 2014, she wanted a new rent of TZS 600,000.00 and she issued a notice to PW1, but PW1 resisted. On that basis, DW1 instructed her advocate (Nassor & Co. Advocates) to give PW1 written notice (exhibit D2) on her intention to increase the rent. PW1 still resisted and responded (exhibit D3) through his advocate (Nyanza Law Chambers). DW1 testified further that, due to the existing misunderstanding, and upon expiry of the last lease agreement, she instructed the second respondent to issue a 14 days' notice to PW1 to vacate the demised premises.

In her testimony, Rose Joseph Masuka (DW2) confirmed to have been instructed by DW1 to issue a 14 days' notice to PW1, which she did, and also served it to the Local Government Office at Malapa. The said notice was admitted in evidence as exhibit D5. DW2 added that, after expiry of the said notice, the appellant was lawfully evicted and his properties were placed under her custody. Thus, the respondents prayed for the appellant's suit to be dismissed with costs.

Having heard the parties and analyzed the evidence on record, the learned trial Judge found that the appellant had failed to prove his case on a balance of probability. He thus dismissed the appellant's case with costs.

Aggrieved, the appellant lodged this appeal. In the memorandum of appeal, the appellant has preferred five (5) grounds of appeal which raised the following main complaint, that, the learned Judge erred in law and facts by; **one**, finding that the appellant had prior notice before eviction while there was no proof of such service; **two**, finding that the appellant had failed to prove his case to the required standard while all necessary exhibits evidencing the loss incurred were tendered and admitted in evidence; **three**, failing to hold that exhibit P3 was tempered with by the first respondent after inserting a new clause which was not agreed upon by the parties; **four**, concluding that the appellant was in breach of terms and conditions of the lease, while he was not; **five,** blessing the means deployed by the respondents to be lawful contrary to the law.

When the appeal was placed before us for hearing, Mr. Deogratius Mwarabu and Mr. Yahya Njama, both learned counsel entered appearance for the appellant and the respondents, respectively. Pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules (the Rules), the counsel for the appellant had earlier on lodged his written submission which he sought to adopt to form part of his oral submission. Mr. Njama did not file a reply written submission as he opted to address us under Rule 106 (10) (b) of the Rules.

In arguing the first and fifth grounds of appeal, Mr. Mwarabu faulted the learned trial Judge by concluding that the appellant had prior notice of his eviction while there was no proof of service tendered before the court to prove that fact. To clarify on this point, he cited section 110 (1) of the Evidence Act, [Cap. 6 R.E. 2022] (the Evidence Act). He added that, before the trial court, the appellant testified that he was not served with any notice of eviction and he was not aware that on 6th March, 2015 he would be evicted. According to him, it was improper for the learned trial Judge to rely on exhibit D5 served to the Local Government Office at Malapa which was at a different location from the demised premises.

On the second ground, Mr. Mwarabu, again, faulted the learned trial Judge for failure to consider the evidence submitted by the appellant, specifically, the list of items taken away by the respondents on 6th March, 2015 (exhibits P4) and the Audited Financial Statement for the year ended 31st December, 2014 (exhibit P5), which he said, clearly indicated the entire stock in the appellant's pharmacy and its value before the eviction. That, if the trial Judge could have considered the said exhibits, would have arrived at a different conclusion. It was the argument of Mr. Mwarabu that, the appellant had proved his case to the required standard.

On the third and fourth grounds, Mr. Mwarabu argued that it was improper for the learned trial Judge to conclude that the appellant was in breach of the lease agreement, while the contentious clause 5 in exhibit P3 was not agreed upon by the parties, but only inserted by the first respondent after the agreement had already been signed. According to him, a party who was in breach of the agreement was the first respondent. He insisted that, if the learned trial Judge could have properly evaluated the evidence on record, he would not have arrived at an erroneous decision and dismissed the appellant's suit. On that basis, he invited the Court to re-evaluate the entire evidence on record, make its own findings, allow the appeal, quash and set aside the decision of the trial court with costs.

In response, Mr. Njama argued in general terms that all what had been submitted by his learned friend are baseless and misleading, because according to him, the trial court had properly analyzed the evidence adduced and tendered before it and arrived at the correct decision and there is nothing to be faulted.

Specifically, on the first and fifth grounds, Mr. Njama argued that since, by 1st February, 2015, the appellant was no longer a tenant of the first respondent but continued to occupy the demised premises without the

consent of the first respondent, his eviction was justified. To bolster his proposition, he cited the case of **Hemmings & Wife v. Stroke Poges Golf Club** [1920] 1 K.B. 720 and urged us to find the two grounds of appeal devoid of merit.

Mr. Njama also disputed the appellant's claim under the second ground of appeal by arguing that the appellant failed to prove his allegations to the required standard. According to him, there was sufficient notice of eviction and also for the appellant to collect his properties from the second respondent, but for reasons known to him, he decided to abandon them.

On the third and fourth grounds, Mr. Njama argued that, although, before the trial court, the appellant alleged issues of fraud that exhibit P3 was altered by the first respondent, he failed to prove the same to the required standard. He referred us to pages 124 to 125 of the record of appeal and argued that, the appellant was aware that he was required to vacate the demised premises as he admitted to have signed exhibit P3 which was clear on that aspect. He argued further that, despite alleging that exhibit P3 was altered, the appellant never complained anywhere or taken any step to remedy that situation. He thus insisted that the appellant had prior notice, as in her evidence, DW2 clearly testified that she served

the eviction notice (exhibit D5) to him through his female employee and placed a copy of it on the outside wall of the demised premises and the other copy was served to the Local Government Office at Malapa. He referred us to the evidence of DW4, a member of Local Government Leadership at Malapa, who confirmed that the notice was delivered to their office because the demised premises was located just opposite the street. Mr. Njama also referred us to exhibits D2 and D3 and then urged us to dismiss the entire appeal with costs for lack of merit.

In a brief rejoinder, Mr. Mwarabu distinguished the case of **Hemmings & Wife** (supra) relied upon by Mr. Njama by arguing that facts in that case are not relevant to the circumstances of the current appeal. He said, in that case, the action was brought by persons occupying the rented property as servants which is not the case herein. He then reiterated his previous prayer that the appeal be allowed with costs.

On our part, having examined the record of appeal and considered the rival submissions made by the parties, we are now ready to determine the grounds of appeal. We wish to preface our discussion by observing that this being a first appeal, we are entitled to review the evidence on record to satisfy ourselves whether the findings by the trial court were correct. This task is bestowed upon us by the provisions of Rule 36 (1) of the

Rules. See also cases of **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development & Another**, Civil Appeal No. 57 of 2017 (both unreported).

Starting with the third and fourth grounds, there is no dispute that the tenancy relationship between the appellant and the first respondent started in February, 2011 to 1st February, 2015, when the last lease, exhibits P3 came to an end. Now, since the controversy between the parties is centered on the contents of that lease, we deem it apposite to reproduce the clauses of the said lease herein bellow:

"1. *That, the lease of the demised premises is for a period of one year effective from 1/02/2014 to 1/02/2015 for a monthly rent of TZS 410,000/= to be paid annually;*
2. *That, the tenant has paid an annual rent of TZS 5,000,000.00 from 1/02/2014 to 1/02/2015 which was received by the landlady;*
3. *The use of the demised premises is strictly limited to the intended business;*
4. *That, the tenant will occupy the demised premises peacefully without any interference from the landlady; and*

5. *That, the lease is non-renewable. Therefore, upon expiry, the tenant should immediately, on 1/02/2015, vacate to pave way for renovation of the premises."*

It is also on record that, upon expiry of the above lease, the appellant did not vacate the demised premises claiming that clause 5 was inserted by the first respondent without his knowledge and that the same was not agreed upon by the parties. We have considered the argument by the appellant which is alleging issues of fraud on the part of the first respondent. The position of the law on allegations of this nature has long been settled. In **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A. 314 at 316, the erstwhile Court of Appeal for East Africa articulated that:

> *"Allegations of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required."*

The same position was reiterated by this Court in **Omary Yusuph v. Rahma Ahmed Abdulkadr** [1987] T.L.R. 169 thus:

> *"...It is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on a higher degree of probability than that which is required in ordinary civil cases..."*

From the above authorities, it is clear that the burden of proof of fraud in civil cases is heavier than a balance of probability generally applied in civil matters. In the instant appeal, it is on record that, apart from alleging that the first respondent has committed fraud by altering and inserting additional clause in the lease agreement, the appellant did not discharge his duty of proving his allegations.

It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act. It is equally elementary that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and the said burden is not diluted on account of the weakness of the opposite party's case. A commentary by the learned authors **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar in Sarkar's Law of Evidence**, 18th Edition 2014 at page 1896 published by Lexis Nexis, persuasively, discussing a section of the Indian Evidence Act, 1872 which is similar to ours stated that:

> "...***the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the*

other party is not required to be called upon to prove his case. ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party****..."*[Emphasis added].

We subscribe to the above position as it reflects a correct legal position in the context of the matter under scrutiny. With respect, we find the submission by Mr. Mwarabu on these grounds to be misconceived. In our considered view, since the burden of proof was on the appellant to prove the alleged fraud, he could not rely on the weakness of the respondents' case. It is on record that, apart from alleging that there was alteration of the lease agreement he once signed, the appellant did not prove as to how and when or even before who such alteration was made. He did not even produce a different lease agreement he alleged to have signed apart from exhibit P3 which is similar with exhibit D4 tendered in court by DW1. It is our settled view that, since the appellant had failed to prove his allegations, there is no justification to fault the findings of the learned trial Judge. We thus find the third and fourth grounds with no merit.

On the first and fifth grounds, it was the appellant's claim that his eviction from the demised premises was not properly done as he was not issued with the eviction notice. To the contrary DW2, who was instructed by the first respondent to evict the appellant, testified at pages 184 to 185 of the record of appeal that:

> *"...the notice was delivered to Mr. Magesa through his female employee at Jopen Pharmacy, Rozena area Dar es Salaam. Magesa was not there as we were told that he was in Mbeya. We therefore left a copy of the notice to the female employee and one of the copies was placed on the wall outside of the pharmacy. The female employee promised to deliver it to Mr. Magesa and we agreed to come next day to get our copy after being signed by Mr. Magesa. The next day, 12/02/2015 we went back to the female employee who replied rudely that she was not our employee and therefore could not cooperate with us. She also stated that her boss was not prepared to vacate and that, his affairs will be handled by lawyers...On 05/03/2015 we went to Buguruni Police Station where we had left a copy of the notice and the office of the Malapa Serikali ya Mtaa where we also served a copy of the notice. The commanding Officer at Buguruni Police Station signed copy of our notice and stamped on it...Serikali ya Mtaa through the street executive officer also signed the notice and stamped on it."*

DW2's testimony was supported by DW1, DW4. The learned trial Judge, having thoroughly evaluated the entire evidence on record concluded at page 261 of the record of appeal that:

> *"The location for affixation of a notice was equally corroborated by PW1, PW2, PW4, DW1 and DW3. In such circumstances, I have no reason to doubt that fact. On account of these pieces of evidence and the law, I am satisfied that the plaintiff was well aware that he was required to vacate upon expiry of a lease on 1/02/2015. I am further of the view that, reasonable and sufficient steps were taken by the defendants reminding him of an obligation to vacate from the premises after expiry of a lease but he neglected and or persistently refused to do so. It follows that the means deployed by the defendants to evict the plaintiff from the demised premises were lawful and justified in the circumstances."*

Having as well scrutinized the entire evidence on record, we agree with Mr. Njama that, the learned trial Judge correctly arrived at the appropriate conclusion that the appellant had prior notice of eviction. Even if, for the sake of argument, we assume that the appellant had no prior notice, as he claimed, still, it is our settled view that, following expiry of his lease agreement on 1st February, 2015, he was required to vacate the demised premises, as from 2nd February, 2015 he was a trespasser and in

illegal occupation of the premises. As such, he was not entitled to any notice before eviction. In the case of **Princess Nadia (1998) Ltd v. Remency Shikusiry Tarimo,** Civil Appeal No. 242 of 2018 (unreported), when faced with an akin situation, we observed that:

> *"We once again agree with the learned advocate for the respondents that since it was proved that* ***the appellant was a trespasser, she had no right to benefit from her wrongful act.*** *At worst, the appellant assumed the risk arising from her unlawful occupation in the premises. Just as* ***she was not entitled to any notice before eviction, she had no right to claim any compensation from the forceful eviction****." [Emphasis added].*

Similarly, in the case at hand, it is our considered view that, since from 2nd February, 2015 the appellant was in illegal occupation and a trespasser in the first respondent's premises, his criticism against the learned Judge's finding on this matter is, with respect, without any justification. As such, we find the first and fifth grounds devoid of merits.

Likewise, and following the authority in **Princess Nadia (1998) Ltd** (supra), we are increasing of the view that, having been in unlawful occupation of the demised premises after expiry of his lease, the appellant

had no right to claim any compensation from the forceful eviction. As such, we also find the second ground of appeal to have not merit.

In view of what we have demonstrated above, we are satisfied that the learned trial Judge properly analyzed the evidence availed before him and reached at an appropriate conclusion and there is no justification to interfere with his decision.

Consequently, we find the entire appeal to be devoid of merit and it is hereby dismissed with costs.

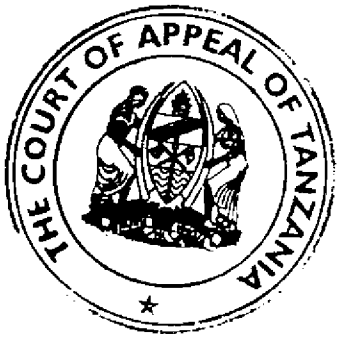
DATED at **DAR ES SALAAM** this 5th day of October, 2022.

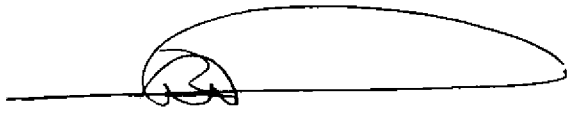
M.A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2022 in the presence of Mr. Deogratius Mwarabu, learned counsel for the Appellant and Mr. Yahya Njama, learned counsel for the Respondents is hereby certified as a true copy of the original.





J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL