IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 33 OF 2020

TAMAL HOTELS AND CONFERENCE CENTRE LTD ..... APPELLANT

VERSUS

DAR ES SALAAM DEVELOPMENT CORPORATION ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania (District Registry) at Dar es Salaam]

(Mutungi, J.)

dated the 4th day of August, 2017
in
Land Case No. 248 of 2013

JUDGMENT OF THE COURT

4th & 22nd November, 2022

KITUSI, J.A.:

This appeal originates from a dispute over a lease agreement between the parties which was adjudicated in Land Case No. 248 of 2013 by the Land Division of the High Court, in favour of the respondent. The appellant who was the tenant in the respondent's business premises to be referred to as Hall A and B, instituted the suit claiming that the said respondent illegally and forcefully evicted her from the premises, causing substantial loss to her. She claimed payment of Tshs. 145,666,900.00 being the total value of cash money and working tools seized by the respondent in the course of the illegal eviction; Tshs 173,480,580.00 being rent paid by the appellant for Hall B which, she

claimed, was not utilized. She also prayed for general damages. The High Court dismissed the suit with costs for want of proof.

The parties were not at issue that on 30/10/2010 they signed a lease agreement in which the respondent agreed to let its two Halls located at Kariakoo area in Dar es Salaam to the appellant for the latter to operate business of bar and restaurant. This agreement which was for 3 years expired on 31/10/2013. Prior to the termination, on 20/8/2013 the appellant had made a written request for renewal.

Before expiry of that agreement, the respondent made an announcement inviting the general public to a tender for another term of tenancy and invited the appellant to take part. The appellant who had earlier on 20/8/2013 made a written request for renewal but received no response, participated in the tender.

On 2/11/2013 the respondent informed the appellant that she had lost the tender, and on the same date she served the appellant with a notice requiring her to give vacant possession. On 9/11/2013 the appellant was evicted from the premises in the course of which a number of tools belonging to her were removed to enable the new tenant to operate business. As we stated earlier, the appellant's suit to challenge the legality of the eviction and for claim of monetary reliefs was unsuccessful.

Mr. Joseph Rutabingwa, learned advocate who had the conduct of the appellant's case both at the trial and before us attacked the decision of the High Court on four substantive grounds. Grounds **one** and **two** are complaints on the illegality of the eviction first on account of refusal by the respondent to renew the lease and secondly on the ground of inadequate notice. The High Court is faulted for not finding in favour of the appellant on these points. Ground **three** is a complaint against the High Court's decision not awarding the appellant Tshs 145,666,900/= as compensation for seized cash and tools. Ground **four** attacks the judgment of the High Court for not awarding Tshs 173,480,580/= being rent that was paid by the appellant for Hall B which the appellant claimed was not utilized. Ground **five** is a general complaint faulting the trial judge for concluding that there was no proof of the suit to the required standard.

In the first ground of appeal, the appellant maintains that she was entitled to a renewal of the lease, and the High Court should have found so. This featured as the first issue at the trial.

There was testimony of Gedonge Khabetile Mwanjokolo (PW1), the Managing Director of the appellant company, that he had communicated to the respondent about business stalls that had been mounted by petty traders, blocking entrance to Hall "B". He stated that the officers of the respondent acknowledged the existence of that problem but promised to

atone the loss incurred by the appellant as a result of not utilizing it, in the subsequent lease. PW1's testimony was that he was given assurance of a renewal of the lease as such he was surprised when he saw the notification inviting the public to tender for the business premises. He stated that he approached an officer of the respondent known as Manumbu to register his concern and that Mr. Manumbu told him that the tendering process was just a formality and urged him to participate.

In arguing this point and others, Mr. Rutabingwa elaborated the written submissions which he had earlier filed. He argued with regard to the issue of renewal, that apart from the assurance given by Mr. Manumbu, PW1 had earlier written a letter to request for renewal of the lease, but the respondent did not respond. The learned advocate insisted that in view of clause 2 to the lease agreement which provides for a renewal, the respondent's silence should be taken as being acceptance to the appellant's request for a renewal.

The respondent led evidence of Cyprian Ferdinand Mbuya (DW1) its Human Resource and Administrative Manager, to counter the appellant's version. He disputed PW1's contention that the appellant was running Hall "B" at a loss, citing the appellant's application for renewal of the lease as indication that she was running the Hall at a profit. In any event, he testified, the appellant could have invoked her right of termination of the agreement, which she did not.

On the automatic renewal provided by clause 2, DW1 stated that being a government institution, the respondent is bound by procurement laws so the tender process was unavoidable. He said that the appellant took part in the process but did not win.

The respondent appeared through a team of learned attorneys. Messrs. Edwin Joshua Webiro, Ayoub Sanga, Bahati Mabula and Ms. Zamarad Johanness, all learned State Attorneys. Messrs. Webiro and Sanga are the ones who addressed the Court. They argued that the appellant was aware of the process of granting tenancy because he originally became a tenant upon winning the original tender and that his participation in the subsequent tender confirms that fact. It is only that he was not successful this time around.

They also argued that Clause 2 of the agreement cannot override the procurement laws by which the respondent is bound. They further pointed out that government operates on paper so in the absence of a written promise by the respondent, there was no proof of the alleged assurances that were allegedly given to the appellant on a possible renewal of the lease. Reading clause 2 of the agreement they submitted that the clause uses the word *"may"* which is permissive and, in any event, renewal under that clause is subject to the mutual consent of the parties.

On the renewal of the lease on the basis of clause 2, the High Court decided the point against the appellant because, it reasoned, such renewal was to be by mutual consent. In our considered view, the appellant has not placed before us sufficient material to make us fault the trial court and decide the point in her favour. The fact that the respondent did not reply to the appellant's written request for renewal and instead advised her to take part in the tender, cannot be consistent with the contention that she gave her consent. The appellant's contention that she interpreted the respondent's silence as amounting to acceptance of the renewal request is surprising in view of its overt invitation to the appellant to take part in the tender. We agree with the learned State Attorneys and the learned judge, that renewal under Clause 2 of the agreement was conditional upon there being mutual consent. The fact that the appellant's written request for renewal was not responded to could not mean acceptance on the part of the respondent as suggested. The appellant did not lead evidence to show that there was mutual consent.

The other reason advanced by the appellant for holding the eviction illegal is the alleged preferential treatment that was given to one Godlove Raphael Dembe (DW3). DW3's company won the tender and became the tenant after expiry of the appellant's lease and her eviction from the premises. Relevant to this issue, DW3 testified that

when his lease expired after three years, he was given an extension of one year based on his written request. Mr. Rutabingwa submitted that there is no rationale for two people being subjected to different treatments by the respondent.

There is very little for us to say on the alleged preferential treatment, because we may not be the right forum to address it and there is no evidence for us to decide it one way or the other. Renewal of lease under clause 2 is by mutual consent of the parties and we have no justification for interrogating the respondent's absence of consent in relation to the appellant's requested renewal.

Legality of the eviction is also being challenged on account of the inadequacy of the notice. Section 79 of the Land Act was cited by Mr. Rutabingwa to argue that the appellant having become a periodic tenant was entitled to a longer notice.

There is no dispute from the evidence of PW1 and DW1, that the respondent issued a seven-day notice. Mr. Rutabingwa argued that as the appellant received the notice on 4/11/2013 and eviction was carried out on 9/11/2013, the notice was for five days only. The learned counsel cited section 79 (1) (b) and 79 (4) of the Land Act to argue that a notice of one month, equal to the term of periodic tenancy, was required.

In response Mr. Webiro submitted that section 79 would not be brought into play because that provision envisages a scenario where a lease is subsisting and a termination is contemplated. The learned State Attorney pointed out that the lease in the instant case had come to an end and the letter dated 2/11/2013 (Exh. P4 and D2) was a notification of expiry of the lease; not a notice as argued.

Mr. Sanga argued on the same point that from 1/11/2013 the appellant was a trespasser on the premises, the lease having expired on 31/10/2013, therefore she was not entitled to any notice. He referred us to two of our decisions on the point; **Princess Nadia (1998) Ltd v. Remency Shikusiry Tarimo & 2 Others,** Civil Appeal No. 242 of 2018 and; **Lawrence Magesa t/a Joseph Pharmacy v. Fatuma Omary,** Civil Appeal No. 333 of 2019 (both unreported).

In rejoinder Mr. Rutabingwa sought to distinguish the two cases from the instant. In relation to the case of **Princess Nadia (1998) Ltd** (supra) he submitted that the appellant was a trespasser because she had no lease agreement right from the beginning, unlike in this case. As for the case of **Lawrence Magesa** (supra) he drew our attention to the fact that the lease in that case had no clause for renewal, while in the present case, the lease provided for a possible renewal.

The first question for our determination in this regard is whether the lease under discussion was a periodic one in terms of section 79 of the Land Act. Subsection (1) (a) of section 79 enacts as follows:-

> *"Where in any lease –*
>
> *(c)* ***the term is not specified*** *and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease."* (emphasis ours).

The above provision is capable of only one interpretation in our view, that is, it applies to tenancy agreements whose terms are unspecified. The lease agreement relevant to these proceedings was for three years from September 2010 to October 2013 so there can be no room for arguing, as Mr. Rutabingwa does, that it was a periodic lease as per section 79 (1) (a) of the Land Act, reproduced above.

Alternatively, it was incumbent upon the appellant to establish that her continued possession of the premises was with the consent of the respondent in terms of section 79 (1) (c) (i) of the Land Act. The respondent's lack of consent in the appellant's intended continued stay is unmistakable in her two letters both dated 2/11/2013, one notifying the appellant that she had not won the tender, and another notifying her that the tenancy had come to an end. The second letter required the appellant to give vacant possession by 9/11/2013.

Since in both ways, the appellant has failed to justify her continued occupation of the suit premises, we agree with the respondent's attorneys that she was a trespasser from 1/11/2013. Mr. Rutabingwa tried to distinguish between a trespasser whose entry was unlawful from the beginning for lacking a lease and the instant in which she is considered to be a trespasser due to expiry of contract. He also sought to distinguish between a tenancy which had no option for a renewal and the instant case which had such option. These distinctions are of no avail in our view. From our holding in **Avit Thadeus Massawe v. Isdory Assenga**, Civil Appeal No. 6 of 2017 and; **Geita Gold Mining Limited v. Twaib Ismail & Others**, Civil Appeal No. 103 of 2019 (both unreported) a person whose entry is lawful becomes a trespasser if he continues to occupy another's premises beyond the period permitted. In addition, it is also our conclusion that having taken part in the bidding process, the appellant would be estopped by his conduct in terms of section 123 of the Evidence Act, from again claiming continuation of the lease based on an automatic renewal.

From the totality of the foregoing discussion it is our conclusion that the eviction of the appellant who was a trespasser at the time of the eviction, was lawful. Thus, the first and second grounds of appeal challenging the legality of the eviction have no merit, we dismiss them.

The third and fourth grounds of appeal are on the claimed compensation. In order to avoid the risk of distortion we reproduce the third ground of appeal:

> *"That the learned trial Judge erred on evidence by holding that there was no evidence to verify and/or ascertain the items that were taken out by the auctioneer and that PW1 was not at the scene when the eviction was taking place, whereas there was evidence from both sides that the properties were taken by the auctioneer and PW1 was physically present though he came later and also that the eviction exercise as confirmed by DW1, Cyprian Ferdinand Mbuya took two days to accomplish and that forty two items were listed by them to have been taken out of the leased premises."*

The appellant claimed a total of TShs 145,666,900 *"being cash money and estimated value of perishables and movable properties..."*. She had four witnesses to testify in support of that version and Exhibit P6 showing a list of food items, drinks, tools and TShs 25,115,700.00 in cash, all of which were in the business premises and disappeared with the eviction. Although PW1 was not at the scene when the execution exercise began, he testified that he asked a police officer from the nearby station to go and try to intervene, but it did not work. He also testified that there was a total of TShs 25,000,000/=. TShs

15,000,000/= was money for buying drinks for that day and TShs 10,000,000/= was proceeds of sales for three previous days. PW1 further testified that he prepared a list of all the seized items with estimated values and served it on the respondent. When cross-examined if he subsequently approached the respondent so as to collect the seized items, PW1 stated that he did not do so because he believed the items were no longer in good order.

Wilston Kilobeba (PW2) a police officer supported PW1 version that he was asked to intervene but he could not talk sense into the hired hand carrying out the eviction. Upendo Adamu Bikali (PW3) was the cashier at the appellant's restaurant and bar, the subject of the eviction. She would be expected to tell a lot in terms of what was there and how much was lost. PW3 stated that the daily sales used to range from Tshs 2,500,000/= to Tshs 4,000,000/= which she would hand over to PW1. She said she was there when the eviction was carried out by people who would not allow the workers to secure any item from being taken away. About the cash money, PW3 said it was TShs 25,000,000/= and that she was to spend TShs 20,000,000/= to pay suppliers of drinks. She also stated that it was one Peter, the Manager who was the custodian of records of the assets at the restaurant.

Sebastian Joakim Kavishe (PW4) testified that he was a supplier of drinks to the appellant and that on 9/11/2013 he had supplied her with

300 crates of beer worth TShs 2,400,085/= which was yet to be paid for when the eviction took place.

The respondent led evidence of DW1 and that of Yusuf Mikidadi Yasin (DW2) to disprove the list (Exhibit P6) and the claim of TShs 145,666,900/=. DW2 the debt collector under whose superintendence the eviction was executed, tendered a list of the seized items (Exhibit D7) which was prepared. DW1 stated that the appellant declined the invitation to collect the seized items. He tendered the invitation letter as Exhibit D3.

The trial Court's finding on this claim was that Exhibit P6 representing the list, was not verifiable and was tendered by PW1 who was not at the scene. The learned judge doubted the contention that there was cash amounting to TShs 25,000,000/=. This claim was dismissed.

Mr. Rutabingwa argued that we should find exhibit P6 authentic because the eviction took two days, which is evidence that there were many items to remove from the premises. The learned State Attorneys for the respondent argued that being a trespasser, the appellant could not benefit from own wrong.

We are conscious of the fact that even the respondent admits that some items belonging to the appellant were seized and taken away for

safe custody. The list prepared by the debt collector who supervised the eviction consisting of 42 items was verified and signed by one Ubwa S. Watuta, Chairman of West Kariakoo Hamlet. We also note that this list has many items of value and which would not be easily perishable, such as, items 20 and 21 showing 193 crates of Soda and item 23 showing 137 crates of beer.

We drew the attention of Mr. Rutabingwa to exhibit D3 written by the respondent requiring her to turn up and collect the seized items, and asked why the appellant declined the invitation. Mr. Rutabingwa's response that the appellant was not sure of the state of the items, was similar to PW1's response to the same question put to him by the defence counsel during cross examination. Counsel also submitted that collection of the items was conditional upon payment of TShs 7,000,000/=.

This ground cannot be resolved on the basis of wits but on the basis of the truth of the evidence as we consider it to be. We are going to consider the following factors; One, invariably all of the items listed in exhibit D7 would not have lost value by 20/11/2013 when the appellant was invited by a letter (exhibit D3) to collect them. The appellant is herself to blame for the loss of those physical items. We shall make necessary orders in this regard in due course. Two, the contention that among the seized properties there was cash amounting to TShs

25,000,000/= has not been proved. According to PW1 part of that money (Tshs 15,000,000/=) had been withdrawn by him from a bank to facilitate payment for supplies. Since PW1 testified that the eviction commenced at around 6.00 to 7.00 am, we are left wondering when was the money withdrawn and kept in the restaurant. There is also a discrepancy between PW1 and PW3 as to how much was for paying the suppliers. We find it queer and improbable that the appellant would refuse the invitation to collect the items including such sum of money for the reason that she was required to pay TShs 7,000,000/=. If that was so, which we do not think it was, then it was a self-inflicted injury. Three, the claim of TShs 145,666,900/= is specific in nature. The appellant who failed to call one Peter who, according to PW3, was the custodian of the records of the assets, has not satisfied us that the claim was specifically pleaded and strictly proved as required by settled law. See **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 137 and **Anthony Ngoo & Another v. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 (unreported).

For those reasons, the third ground of appeal has no merits and we dismiss it.

The fourth ground of appeal is in relation to the claim of TShs 173,480,580/= being rent for Hall B which the appellant maintains she never utilized.

At the trial there was evidence that the lease agreement comprised of two Halls known as A and B which attracted a different rent each. PW1 testified that the appellant had no problem operating her business in Hall A but complained that she could not utilize Hall B because of business stalls that blocked access to it. PW1 testified further that he raised the issue with the respondent who promised to mitigate the loss by awarding the appellant an extension of the lease.

DW1 testified in rebuttal of the appellant's contention. He stated that the appellant operated both Halls and that if there was any problem, the said appellant would have exercised her right of termination of the lease under clause 3. He further testified that the appellant did not exhibit accounts to prove the loss, instead he participated in the second tender which is proof that she still wanted to operate both Halls. DW3 who operated the two Halls after the appellant's eviction testified that both Halls were accessible despite the stalls and there was no loss according to him.

The High Court concluded that there was no proof of the alleged loss and dismissed the claim.

Before us Mr. Rutabingwa submitted that the fact that there was blockage to Hall B was admitted by the respondent but no action was taken. He also submitted that there was no documentary proof of the

loss because all relevant documents were destroyed or taken away during the eviction.

For the respondent it was argued that the appellant did not prove loss by audited accounts and that there was no complaint from her until in March 2013, the last year of the lease.

From the arguments and the correspondences of the parties on this issue, we have found two relevant points. The first is the contents of the letters of correspondence. The second is the timing of the complaint. We shall reproduce the respondent's letter of reply dated 25/7/2013:

> ***"Kumb Na.*** *DDC/T/16/74* ***25****/07/2013*
>
> *Mkurugenzi Mwendeshaji,*
> *Tamal Hotel and Conference Centre Limited,*
> *P.O. Box 67152,*
> ***DAR ES SALAAM.***
>
> ***YAH: OMBI LAKO LA KUBOMOA VIBANDA VILIVYOPO MTAA WA KONGO MLANGO WA KUINGIA NDANI YA UKUMBI WA KIBUKU DDC- KARIAKOO LINAFANYIWA KAZI***
>
> *Rejea kichwa cha habari hapo juu na barua uliyotuandikia yenye kumb. Na. THCC/TA/2013/008 ukiwa unaomba kubomolewa kwa vibanda vyote vilivyojengwa karibu na mlango wa kuingilia ukumbi wa Kibuku Mtaa wa Kongo.*
>
> *Menejimenti ya shirika ia Uchumi la Jiji ia Dar es Salaam (DDC) bado inalifanyia kazi ombi lako pindi likiwa tayari litapelekwa kwenye kikao cha Bodi ya Wakurugenzi wa shirika.* ***Tunapenda kukukumbusha ya kuwa Bodi ya shirika haitaweza kujadili ombi lako endapo bado utakuwa unadaiwa kodi ya pango.***

Hivyo mara upatapo barua unatakiwa kulipa kodi ya pango ya TShs. 40,006,060/= iliyobaki kwa kipindi kinachoishia tarehe 30 Oktoba 2013

Kwa ushirikiano ambao umekuwepo kati ya uongozi wa shirika na wewe ukiwa mpangaji wa Ukumbi wa DDC – Kariakoo, tunamini mara upatapo barua hii utatekeleza jukumu lako la kulipa kodi unayodaiwa mapema iwezekanavyo.

Tunakutakia kazi njema.

Imesainiwa
Rupia C. John
KNY: MENEJA MKUU – DCC

Aione: Meneja Mkuu –DDC"

From the contents of that letter, the appellant was being informed that her complaint would not be tabled for discussion, unless she paid the arrears of rent. It is also evident in the letter that she was being informed that the lease would be ending on 30 October, 2013. The appellant did not lead evidence to establish that she ever paid that rent of Tshs 40,006,060/=, as to be entitled to a refund.

The other point is that the appellant's complaint letter is dated 28/3/2013, just seven months before the expiry of the lease. It justifies our conclusion that if the appellant's smooth running of business in Hall B was curtailed, then she was dilatory in raising this complaint and should not be heard to complain. But in the end, we take DW3's word and hold that proof of loss is lacking. This ground of appeal has no merit and we dismiss it.

We had promised to make orders relating to the uncollected items, because we think, equity would demand us to do so. However, 9 years have passed since the seizure of those items such that if we make any order today it would not make any sense. After all the appellant did not pray that we make any such order.

All said and considered we dismiss this appeal with costs.

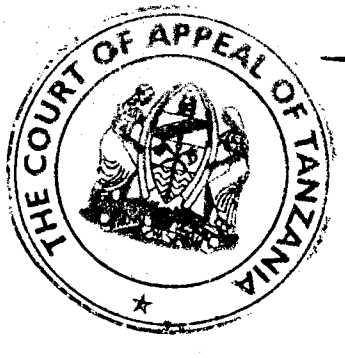
DATED at **DAR ES SALAAM** this 18th day of November, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of November, 2022 in the presence of Mr. Joseph Rutabingwa, learned counsel for the Appellant and Ms. Vivian Method, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL