IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 282 OF 2019

MOHAMED ABOOD as the Attorney of
WALID ABOOD SALEHE .....APPELLANT

VERSUS

D.F.S EXPRESS LINES LTD.....RESPONDENT

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

(Munisi, J.)

dated the 30th day of July, 2019
in
Land Case No. 81 of 2016

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JUDGMENT OF THE COURT

10th & 23rd February, 2023.

SEHEL, J.A.:

This is a first appeal. It emanates from the decision of the High of Tanzania, Land Division at Dar es Salaam (Munisi, J.) in Land Case No. 81 of 2019 that dismissed the appellant's suit.

The brief facts of the case giving rise to the present appeal are such that: the appellant owns a building commonly known as "**Morani House**" situated at Plot No. 35, Maktaba Street, Ilala, Dar es Salaam. It happened that the respondent rented the entire 3rd floor of that building

at a monthly rent of United States Dollars Nine Hundred Only (USD 900.00) whereby he paid twelve (12) months' rent as advance payment. According to the plaint, on 25th August, 2015, the appellant and the respondent concluded a written lease/tenancy agreement. That, the said lease agreement was for two years commencing on 1st September, 2015 and remained valid up to 30th August, 2017. That, clause 4 of the lease agreement provides that any early vacation or immature termination by the tenant entitled the landlord payment of the outstanding rent charges in full and 50% of the service charges till the end of the contract. The appellant averred that, while the lease agreement was still in force, the respondent unilaterally vacated the premises on 19th July, 2016 without giving notice and paying the outstanding rent and service charges. That, despite several demands, the respondent declined thus necessitated the appellant to file a suit against it before the High Court. Before the High Court, the appellant sought for the following orders:

> *"1. A declaration that the respondent breached the lease/tenancy agreement dated 25th August, 2015.*
> *2. Payment of unpaid rent of USD 10,800.00 for 2016-2017.*

3. *Payment of service charges of USD 3,000.00.*
4. *Payment of costs incurred in undertaking repairs of electric wires, cables, replacement of broken wash basin, toilet and removal of air-conditioners at a total sum of TZS. 3,960,950.00.*
5. *Payment of interest of 1% per day on the outstanding sum of USD 10,800.00 from 30th August, 2016 to the date of full payment.*
6. *General damages for inconveniences caused estimated at USD 5,000.00.*
7. *Interest on the decretal sum at the court's rate.*
8. *Costs of the suit.*
9. *Any other reliefs".*

On the other hand, the respondent denied to have been indebted. It also denied to have concluded any written agreement. Nonetheless, it admitted to have rented the appellant's premises and vacated on 24th June, 2016. It also admitted that the rental charges were USD 900.00 per month plus monthly service charges of USD 500.00. It is noteworthy, to point out here that, the evidence of the first respondent's witness was to the effect that, oral notice to terminate the lease agreement was issued to Mr. Awadh, the manager of the premises and the keys were

handed to him. It was further the evidence of DW1 that the three (3) months' rent was forfeited.

Upon conclusion of the pleadings and preliminaries, the High Court framed four (4) issues for determination. For the first issue that whether there was any lease agreement, the High Court observed that the appellant and the respondent executed a lease agreement on 25th August, 2015 and the same was tendered as proof thereto, exhibit P2. It therefore answered this issue in the affirmative.

For the second issue, whether the respondent breached the lease agreement, the High Court interpreted clauses 2 and 3 of the lease agreement that payment of rent was agreed to be yearly (twelve months). It further observed that the appellant confirmed payment of one year rent to the tune of USD 16,800.00 at the signing of the agreement. It also observed that the respondent left the premises on or about June, 2016 while the first year of the agreement was still running and forfeited a rent of about 3-4 months. In that respect, it held that there was no breach because the respondent had issued an oral notice to Awadh the manager of the premises to vacate but the appellant failed

to call him as a witness hence adverse inference was drawn against the appellant.

Regarding the third issue as to whether the appellant suffered any loss as a result of breach of the said lease agreement, the High Court found that he did not suffer any loss because there was no breach of the lease agreement and that the appellant failed to prove expenditure for the alleged repairs. At the end, as stated earlier, the High Court dismissed the suit without any order as to costs.

Dissatisfied with the High Court's decision, the appellant preferred the present appeal challenging the said decision with the following seven (7) grounds:

> *"1. The trial Judge erred in law and in facts for failure to analyze the Tenancy Agreement admitted as Exhibit "P-2" mainly clauses 1, 2, 3, 4 and 16 thus reaching an erroneous decision.*
>
> *2. The trial Judge erred in law and in facts for Ruling out that there was no breach of the Tenancy Agreement while as per clause 4 of the Tenancy Agreement; the lessee was supposed to pay rent in full in case of premature termination of the Tenancy Agreement.*

3. *The trial Judge erred in law and in facts for failure to understand that the Lease Agreement was for two years and the defendant paid advance payment of 1 year with the outstanding balance of 1 year rent which was supposed to be paid by the defendant following her premature vacation and or termination of the Lease Agreement as per clause 4 thereof.*
4. *The trial Judge erred in iaw and in facts for failure to analyze the pleadings thus relying on the afterthought testimonies of "DW" and "DW2" who alleged to have handed over the premises to one Awadh while in fact no such allegation or fact is stated in the defendant's Written Statement of Defence.*
5. *The trial Judge erred in law and in facts in Ruling out that one Awadh was a material witness to be called to testify thus drawn a negative inference thereof.*
6. *The trial Judge erred in iaw and in facts for failure to understand that the witnesses are called to testify regarding the issues in dispute arisen out of the pleadings.*
7. *The trial Judge erred in law and in facts for refusing to grant the reliefs sought by the plaintiff following the defendant's breach of the Lease Agreement".*

At the hearing of the appeal, Mr. Leonard Manyama, learned advocate appeared for the appellant whereas Ms. Regina Herman, also learned advocate appeared for the respondent.

In his submission, Mr. Manyama clustered the seven grounds of appeal into two. The first cluster was in respect of the 1st, 2nd, 3rd and 7th grounds of appeal where the appellant faulted the learned trial Judge for failure to hold that there was a breach of contract and failure to award the reliefs sought. Secondly, the appellant complained in the 4th, 5th and 6th grounds of appeal that the learned trial Judge erred in drawing adverse inferences to a matter not pleaded in the respondent's pleading.

Submitting on the breach of contract and the reliefs to be awarded, Mr. Manyama argued that both parties were at one that there was a lease agreement and the respondent paid a one-year rental fee amounting to USD 16,800.00, facts which were also appreciated by the learned trial Judge at page 89 of the record of appeal. He added that the said lease agreement was tendered and admitted as exhibit P2. Referring to Clauses 1, 2 and 4 of the said lease agreement appearing at page 71-74 of the record of appeal, Mr. Manyama contended that the lease

period was two years with automatic renewal for the same period of time unless a written notice of six (6) months is issued prior to expiry of the agreement. That, the rental fees have to be paid twelve months in advance and the period of the lease commenced on the 1st day of September, 2015 ending on the 30th day of August, 2017.

He submitted that the respondent terminated the agreement prematurely and vacated the premises on 19th July, 2016 without paying the remaining one-year rental and service charges and neither did it issue the requisite notice as required by clause 4 of the lease agreement. It was therefore, Mr. Manyama's submission that the respondent breached clauses 2 and 4 of the lease agreement. He prayed to the Court for the appeal to be allowed and urged it to award the appellant the reliefs sought before the High Court.

In her reply, Ms. Herman submitted that the appellant failed to prove the claims he sought before the High Court as required by the provisions of section 110 of the Evidence Act, Cap. 6 R.E. 2022. Elaborating her argument, she referred us to paragraph 11 of the plaint where the appellant listed the prayers sought before the High Court. She argued that though the lease agreement was admitted as exhibit P2, it

was wrongly received by the High Court because the respondent objected to its admission on grounds that no stamp duty was paid and it was not signed by the respondent. When the Court referred Ms. Herman to page 54 of the record of appeal where the objection was raised, she readily conceded that the objection was in respect of not being witnessed by an advocate and not about not being signed by the other party. She however insisted that, the first witness for the respondent one Ally Kassim (DW1) told the High Court, during cross examination, that he was never issued with a contract and this is reflected at page 64 of the record of appeal. In that respect, it was her submission that the appellant failed to prove that the lease agreement was for two years. In any event, she argued that the respondent forfeited its three month's rent thus the appellant has no claim whatsoever against the respondent. Basing on that submission, Ms. Herman implored us to dismiss the grounds of appeal.

From the submissions of the learned counsel for the parties it is not disputed that the respondent rented the appellant's premises at a monthly rental fee of USD 900.0]0 plus service charge of USD 500.00 per month. Further, both parties are at one that the respondent paid

advance rental fee of USD 16,800.00 and that it vacated the premises on 19th July, 2016 leaving behind three months paid up rental and service charge fees. The contentious issue that stands for our determination is whether the claim for breach of agreement is justified on account of the respondent's early vacation from the premises.

Before we dwell into the issue, we first wish to deal with the preliminary issues raised by the counsel for the respondent in respect of the lease agreement tendered and admitted as exhibit P2. It was the contention of Ms. Herman that exhibit P2 was not signed by the respondent and stamp duty was not paid hence it cannot be relied upon. Perhaps we should point out here that, this being the first appellate Court, we are entitled to re-appraise the evidence and draw our own inference as we are empowered to do under Rule 36 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules).

On our appraisal of the entire record of appeal, we noted that when the appellant wanted to tender the lease agreement, the counsel for the respondent objected to its admission on two-fold. **First**, the stamp duty was not paid; and **secondly** the agreement was not witnessed by an advocate. The learned trial Judge overruled the

objections and admitted it as exhibit P2 without assigning any reason for overruling the objection. We wish to point out here that we shall not deliberate on the second limb because it is settled law that factual matters not raised during trial cannot be raised and determined at the appellate stage. Having thoroughly gone through the lease agreement at page 71-74 of the record of appeal, we observed that exhibit P2 found at page 74 of the record of appeal was signed on behalf of the landlord by Mohamed Abood Al-Boasy, that is, the appellant and on behalf of the tenant, that is, the respondent, there is a signature and an official stamp of DFS Lines Limited. With this clear evidence on record, we are satisfied that exhibit P2 was duly signed and executed by both parties.

On the argument that no stamp duty paid, we wish to point out that the exhibit shows stamp duty plus penalties were paid after the judgment of the High Court was delivered. This means that at the time it was admitted in evidence, the stamp duty was not paid. The ensuing question was whether the failure to pay stamp duty invalidated the proceedings of the High Court. Luckily, this Court in the case of **Elibariki Mboya v. Amina Abeid**, Civil Appeal No. 54 of 1996 (unreported) was faced with almost similar scenario. In that appeal, the Court was invited

to consider whether the High Court was right in law to have allowed the appeal on the ground that exhibit A, the contract of sale, having not been duly stamped with stamp duty, was not valid and should not have been admitted in evidence. The Court held that the High Court erred in law because non stamping of the instrument did not constitute a basis for faulting the decision of the lower court as per the provisions of section 73 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). Accordingly, the Court allowed the appeal and made an order that the respondent to pay the chargeable duty on the contract of sale.

The same applies in the present appeal. Rule 115 of the Rules which is *pari materia* with section 73 of the CPC requires the Court to do substantial justice, it should not reverse or vary any decree nor remanded any case on account of among others, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court. In that regard, we find that failure by the appellant to pay the chargeable stamp duty at the time the lease agreement was admitted in evidence cannot be a basis for this Court to vary or reverse the decision of the High Court. Let say, if, at the time of the hearing of the appeal, the appellant would not have paid the

chargeable stamp duty, what we could have done was to order him to pay the same before proceeding with the hearing of the appeal. Therefore, in totality, we do not find merit on the submission made by Ms. Herman in respect of the validity of the lease agreement.

We now revert back to the issue whether there was breach of the lease agreement. We have found herein that the appellant and the respondent duly signed a written lease agreement, exhibit P2. The signing of such agreement signified that the parties agreed to be bound by its terms and conditions which is in line with a cardinal principle of the law of contract that parties are bound by the terms and conditions of the agreements they enter on their own free will -see: **Uniliver Tanzania Ltd. v. Benedict Mkasa Trading as BEMA Enterprises**, Civil Appeal No. 41 of 2009; **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018 (both unreported) and **Abuaiy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288

For instance, in the case of **Abuaiy Alibhai Azizi** (supra) the Court held:

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-*

performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and not principle of public policy prohibiting enforcement."

Now, what were the terms and conditions of the lease agreement in regard to the period, commencement date, early termination and or vacation of the premises and late payment. Clauses 1, 2, 3, 4 and 7 of the agreement shed some light. For ease of reference, we reproduce the clauses hereunder:

"1. The landlord shall lease to the tenant, the entire third floor of the building located at Plot No. 35 Maktaba Street for two years commencing from the first day of September, 2015 at a monthly rent of United States Dollar nine hundred only.

2.The rent shall be payable twelve months in advance.

3.The tenant shall provide the Landlord with twelve months advance rent upon signing of this agreement.

4. This contract is automatic renewable for the period of time (two years) unless a written notice of six months is given prior to expiry of

this lease agreement. In case of a tenant vacating the premises / immatureiy terminating the contract, he be obliged to pay rent in full and 50% of the service charges till the end of the contract.

5. Not relevant.

6. Not relevant.

7. Without prejudice to the last preceding clause, any late payment of rent shall attract interest at the rate of 1% per day on the sum outstanding."

It follows from the above that the lease agreement was for a period of two years which is automatically renewable. It further provides that, in case of early termination or vacation of the leased premises, the tenant ought to pay the landlord rent in full and 50% service charges. It should be noted that the issuance of notice to vacate the premises does not override the requirement to pay full rent plus 50% service charges. The agreement under clause 2 requires the tenant to pay the rent in twelve months in advance and failure to pay in time 1% interest on the outstanding amount is chargeable per day.

In the present appeal, we have stated that both parties are in agreement that the respondent vacated the premises on 19th July, 2015

and that it only paid a one-year rent of USD 16,800.00. This means that the respondent prematurely terminated the lease agreement. It also failed to pay rent and 50% service charge in advance. Obviously, such acts are contrary to the terms and conditions stipulated under clauses 2 and 4 of the lease agreement which the respondent freely entered into. In that regard, we find merit to the grounds of appeal and hold that the respondent breached the terms and conditions of the lease agreement. The issue of reliefs will be discussed later.

We now turn to the complaint that the learned trial Judge erred in drawing adverse inferences on a matter not pleaded. Mr. Manyama argued that the issuance of oral notice to Mr. Awadh was not pleaded by the respondent in its written statement of defence, it cropped up during the defence hearing thus the appellant could not bring any evidence to counter such allegation. It was his submission that the defence was an afterthought and that it was unfair for the High Court to draw adverse inferences on a matter that were not put into the attention of the appellant. Mr. Manyama fortified his submission by referring to us the decision of this Court in the case of **Allan Duller v. Republic**, Criminal Appeal No. 367 of 2019 where the Court held that adverse inferences

can be drawn where there is no sufficient reason advanced for failure to call a witness who was within reach.

Ms. Herman admitted that the issue was not pleaded but contended that the appellant had an opportunity to cross examine the witness on the allegation of oral notice given to Mr. Awadh.

This issue should not detain us much because it is admitted by the counsel for the respondent that it was not part of the pleadings. This Court has repeatedly held that generally, parties are bound by their pleadings and they cannot be allowed to depart from their pleadings unless by way of amendment and with leave of the court. Nonetheless, a court may allow evidence to be called, and may base its decision on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for determination. That apart, where any evidence is adduced by the parties that is not backed up or is at variance with the pleadings, justice demands that the unpleaded issue be ignored – see: **James Funke Ngwagilo v. Attorney General,** [2004] T.L.R. 161, **Scan Tan Tours Ltd v. The Catholic Diocese of Mbulu,** Civil Appeal No. 78 of 2012, **Peter Ng'homango v. Attorney General**, Civil Appeal No. 114 of 2011 and

Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others, Civil Appeal No. 38 of 2012 (all unreported). Since the issue of issuing oral notice to Mr. Awadh was not pleaded by the respondent in its Written Statement of Defence, we are in agreement with the learned counsel for the defence that the High Court ought not to have considered because it was an afterthought. For that reason, we find that the 4th, 5th and 6th grounds of appeal have merit.

Lastly, to what reliefs is the appellant entitled, considering what we held herein that the respondent breached the lease agreement, it is our finding that the appellant was entitled to unpaid rent at the tune of USD 10,800.00 for 2016-2017 and 50 % service charge at the tune of USD 3,000.00. We also award the claim of 1% per day on the outstanding sum of USD 10,800.00 from 30th August, 2016 to the date of judgment because it is specifically provided under clause 7 of the agreement. We therefore award these claims. The claim for costs incurred for undertaking repairs and general damages at the tune of USD 5,000.00 were rightly rejected by the High Court because no evidence was adduced to substantiate the same.

In the end, we find merit in the appellant's appeal. Accordingly, the appeal is partly allowed with costs to the extent explained herein. We therefore proceed to quash and set aside the judgment and decree of the High Court.

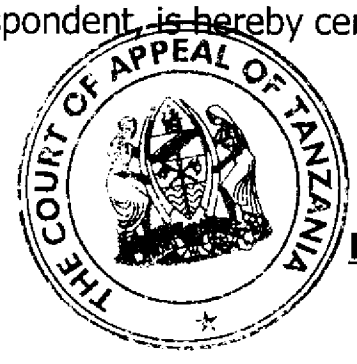
DATED at **DAR ES SALAAM** this 22nd day of February, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2023 in the presence of Mr. Leonard Manyama, learned counsel for the Appellant and also holding brief for Ms. Regina Herman, learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL