

# **IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

## **LAND APPEAL NUMBER 2 of 2010**

**(Originating from the Judgment and Decree of the District Land Housing Tribunal for Kinondoni District at Magomeni-Application No. 432 of 2008-J.T. Kaare-Chairman)**

**CORNEL LEMA.....APPELLANT**

**VS**

**RAJABU MAHMUDU.....RESPONDENT**

### **JUDGEMENT**

**Date of last Order:** 17-04-2011

**Date of Judgment:** 02-05-2011

**JUMA, J.:**

Cornel Lema and Rajabu Mahmudu are the appellant and the respondent respectively in the present appeal. At the trial District Land Housing Tribunal for Kinondoni District, Rajabu Mahmudu was an applicant whereas Cornel Lema was the respondent. In this present appeal, the appellant Cornel Lema is relying on three grounds of appeal contending that the trial District Land Housing Tribunal erred in law and fact,

- 1) by failing to evaluate the evidence of PW1 and PW2;
- 2) by failing to consider testimonies before him and as a result failed to calculate rent which was the root of the application before him;
- 3) by ordering vacant possession without considering the contents of the pleadings filed by the respondent.

A recitation of the factual background leading up to this appeal is necessary to an understanding of the issues arising from the three grounds of appeal. By an

application dated 16<sup>th</sup> October, 2008 and filed on the same date at the trial District Land Housing Tribunal, respondent herein who was an administrator of the estate of the late Asha Mbaruku claimed against the appellant herein for payment of rent arrears from January 2004 up to the time when respondent would get the vacant of a house Number 100 situated at Plot Number 16, Iddrissa Street Magomeni in Dar es Salaam. The respondent had in addition claimed rent arrears of TZS 45,000/= per month calculated from January 2004 till the time the appellant pays and vacates the suit premises.

Further, the respondent had claimed that the legal owner of the house located at Plot Number 16, Iddrissa Street Magomeni is the late Asha Mbaruku who died on 27<sup>th</sup> April 2008 and the respondent was appointed to be the administrator of the estate of the deceased Asha Mbaruku. Respondent also claimed that before her death, the late Asha Mbaruku had entered into some verbal agreement with appellant under whose terms the appellant built a small hut for his business purpose and was also to pay a monthly rent of TZS 45,000/=. According to the respondent, in 2003 the appellant agreed to pay a sum of TZS 90,000/= and also vacate the suit premises. And instead of living up to that undertaking, the respondent claims that the appellant neither paid any rent since January 2004 nor did he give vacant possession of the suit premises.

Records of the trial District Land Housing Tribunal shows that on 11<sup>th</sup> March 2008 the appellant Cornel Lema filed his reply wherein he strongly disputed that he was in arrears of the rent, and denied the existence of any verbal agreement between himself and the late Asha Mbaruku. At the conclusion of an ex parte hearing, the presiding Chairman of the District Land and Housing

Tribunal delivered his judgment on 3<sup>rd</sup> December 2009 wherein he ordered the appellant to vacate the suit premises. In his judgment, the trial tribunal chairman also declined to order the appellant to pay the rent arrears because, the agreement between the appellant and the deceased Asha Mbaruku was oral and no one could be certain about the rent the two had agreed to enable the tribunal to carry out any calculations.

When this appeal first came up for hearing on 17<sup>th</sup> March 2011; the appellant appeared in person because his counsel was tied up in another case. The respondent came marshalled up a representation by Mr. Innocent Tairo, the learned Advocate. In the absence of the learned counsel for the appellant, I directed the hearing of the appeal should proceed by written submissions. Both sides complied with their respective submission schedules. Appellant's written submissions were filed in his behalf on 31<sup>st</sup> March 2011 by the Ganrichie & Co Advocates. On 13<sup>th</sup> April 2011 Innocent Tairo, the learned Advocate filed the respondent's replying submissions.

Submitting on the alleged failure to evaluate evidence of PW1 and PW2, appellant contended that once the trial chairman had from evidence of PW1 and PW2 found that the appellant had spent TZS 2,000,000/= for construction of a hut, he should have used the sum as a yardstick to calculate the rent arrears. In his replying submissions on this ground, respondent noted that it was clear from the evidence of PW2 that the appellant was their tenant since 1980; and it was around that time when the appellant used his TZS 1,300,000/= to erect a hut. According to the respondent, this TZS 1,300,000/= was in 2004 deducted from the monthly rent. Respondent further submitted that after the deduction, the appellant still refused to pay rent.

In his second ground of appeal the appellant contended that the tribunal failed to consider testimonies before him and as a result failed to calculate rent. To all intents and purposes this ground is similar to the first ground which centres on failure to evaluate the evidence of PW1 and PW2. I will consider the first two grounds together.

From the submissions on the first ground and second grounds of appeal, I am of the opinion that the trial tribunal chairman properly and adequately evaluated all the evidence before him. It is clear from the records that the appellant did not enter any appearance when the application was called up for hearing on 28<sup>th</sup> October 2009. The application therefore went ahead *ex-parte* when the tribunal heard PW1 and PW2. Again, the issue before the trial tribunal was not so much about rent arrears alone. At the trial tribunal, the respondent herein had two basic prayers, i.e. he prayed for rent arrears and also prayed for vacant possession of suit premises. While the trial tribunal chairman found that the evidence was not sufficient to enable him to order the appellant to pay rent arrears, there was sufficient evidence that the house belonged to the late Asha Mbaruku and ordered vacant possession. The tribunal chairman was correct to conclude that the uncontroverted evidence tendered by the PW1 and PW2 conclusively established that the house at Plot Number 16, Ididrisa Street at Magomeni belongs to the late Asha Mbaruku and under administration by the respondent. The respondent is as a result entitled to immediate and exclusive possession of the suit premises. The first and second grounds of appeal therefore fail and are hereby dismissed.

In his third ground of appeal, appellant contended that the trial tribunal should not have ordered vacant possession without considering the contents of the

pleadings filed by the respondent. Submitting in support of this ground, appellant contended that the fact that the application was heard *ex parte*, it was not automatic for the respondent to win without proving that respondent was entitled to arrears in rent and vacant possession. According to the appellant, the tribunal chairman should not have ordered a vacant possession because without settling the issue of the cost the appellant incurred when he erected the hut. In his replying submissions on this ground, respondent pointed out that the tribunal sufficiently evaluated the evidence and properly ordered a vacant possession of the suit premises. According to the respondent, the appellant's status as a tenant did not change with his construction of a hut in a suit premises.

In my re-evaluation, it is clear from the records that when the application came up for hearing at the trial tribunal on 28<sup>th</sup> October 2009 the appellant herein failed to appear. In my opinion the trial tribunal correctly ordered the application to proceed *ex parte*. Again, the law is settled that failure by the appellant to appear during the hearing of an application the respondent herein was not automatically entitled to get all what he had claimed in his pleadings without proving the claim to the required standard of proof. There a number of decisions of this court restating the law governing the consequence of the defendant failing to appear. In the case **K.G. Dewji Limited vs. Caritas Kigoma – HC Civil Case No.24 of 1997 (Tabora)** Masanche, J. (as he then was) said-

*"There is a notion, wrong surely, that where defendant does not make appearance in a case, the plaintiff would readily get the sum claimed. As I say, this is a wrong notion. Even where a case is not contested, the plaintiff must prove the case on the balance of probability required in a Civil Case."*

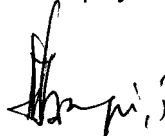
My re-evaluation of the records of the trial tribunal, the three grounds of appeal and evidence before the trial tribunal supports the decision by the trial tribunal to order vacant possession of the suit premises. Testifying as PW1, the respondent narrated how he had reported the appellant's failure to pay rent to the area's local government office; and still the appellant refused to vacate the house and pay the rent. Kanunu Mahmudu also testified as PW2. She informed the trial tribunal that the appellant had been a tenant at their house since 1980.

Further, PW2 confirmed that her late mother did not have any written tenancy agreement with the appellant. That the appellant had at first rented one of the rooms, he later had an oral agreement with her late mother whereby the appellant erected a hut. And after making these further developments, the appellant has refused to pay any rent to date. PW2 informed the tribunal that it was estimated that the appellant had used TZS 1,300,000/= to effect further development on the house. But that the appellant had put the estimate at TZS 2,000,000/=.

PW2 also confirmed that the dispute was referred to the area local government offices but still the appellant did not pay rent and he is yet to vacate the house. With respect, after taking into account the fact that agreement between the late Asha Mbaruku and the appellant was not written, the tribunal chairman was correct when he declined to make any finding on rent on the basis of evidence of PW1 and PW2. I am satisfied that there was sufficient evidence before the tribunal chairman to establish that the late Asha Mbaruku was the owner of the suit premises. This third ground of appeal is without merit.

Appellant should not prevent the rightful owners of the house he is occupying from demanding an immediate vacant possession.

It follows from the above that the trial tribunal reached a correct decision to order the appellant to vacate the suit premises. And having considered all matters placed before this court, I do not find any merit in this appeal. It is hereby dismissed and appellant shall also pay the costs. It is so ordered.



**I.H. Juma**  
**JUDGE**  
**02-05-2011**

**Delivered in presence of: Cornel Lema (Appellant) and Rajabu Mahmudu (Respondent).**



**I.H. Juma**  
**JUDGE**  
**02-05-2011**

