IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA

LAND APPEAL NO. 10 OF 2012

(From the decision of District Land and Housing Tribunal of Mtwara (F. Mdachi, Chairman) in Land Case No. 37 of 2012)

JUDITH NAMANGAYA ..... APPELLANT

Versus

STRAIGHT AUCTION MART AND
COURT BROKERS ..... 1ST RESPONDENT
TANZANIA BUILDING AUTHORITY ..... 2ND RESPONDENT

Date of last order 03/07/2013
Date of Judgment 14/07/2015

JUDGMENT

F. Twaib, J:

The appellant is a retired nurse. She rented a house on Plot No. 92B situated at Railway Area in Mtwara Municipality. Way back in the year 1998 the plot was controlled by the Ports Authority. Later, the control shifted to the 2nd respondent and in the year 2009 the 2nd respondent and the appellant executed a written lease agreement (Exhibit D1) stipulating a tenancy period of one year commencing 1st July 2009, ending on 30th June, 2010 with an option to renew. However the aforesaid lease agreement (Exh.D1) was never renewed by a written document after it expired. The appellant however continued to occupy the suit premises.

On 28th March, 2011 the second respondent served the appellant with a letter dated 17th March 2011 with Ref. No. TBA/MTW/COMM.RENT/VOL.II/05 requiring her to provide vacant possession of the suit premises in the period of three months ending on 30th November, 2011 and required her to pay all house rent due up to that date. The

applicant did not pay heed to the letter. On 24th November 2011 by instructions of the 2nd respondent, the 1st respondent served the appellant with another letter dated 16th November, 2011 requiring her to vacate the suit premises within a period of 14 days. She was warned through that letter that she would be forcefully evicted from the premises if she did not comply. All those letters were admitted in the trial Tribunal and collectively marked D2.

Upon receipt of the 1st respondent's letter of 16th November 2011, the appellant, on 8th February, 2012, filed a land case (subject matter of this appeal) in the District Land and Housing Tribunal of Mtwara, alleging that she is a lawful tenant of the suit premises and that she is eligible to purchase the same.

Her claims were disputed by the respondents. They substantially alleged, through their written statement of defence, that the appellant is not a lawful tenant of the suit premises as her period of lease had expired since on 30th June, 2010 and she had never renewed it. They also averred that the appellant is not eligible to buy the suit premises because she is not a government servant.

Among the issue framed before the tribunal were whether the appellant was the lawful tenant in the suit premises and whether she was entitled and eligible to purchase the same. The tribunal, having considered the first issue in the light of the testimony laid before it, was satisfied that the appellant was not a lawful tenant of the suit premises. On the second issue (whether he was eligible to purchase the suit premises), the trial chairman had this to say at page 6 of his decision:

> *"The second issue is about eligibility and entitlement of the applicant to buy the suit premises. To be honest, I was unable to grasp for what cause this issue arose. It was not specifically pleaded in paragraph 6 (a) of the application which carries facts constituting the cause of action. It appears only in the reliefs' paragraph...and in my view issues for determination of the dispute are normally framed from the facts constituting a cause of action and not from the reliefs. I hereby apply powers vested in me under*

order XIV Rule 5(2) of the Civil Procedure Code, Cap 33 R.E. 2002 and strike it out."

In the end result, the appellant's suit was dismissed with costs. He was aggrieved and lodged the present appeal, relying on the following three grounds:

1. *That the trial chairman erred in law and facts for holding in favour of the respondents and failing to take heed of malicious acts of the respondent of forceful and without lawful justification attempt to evict the appellant from the suit premises.*

2. *That the trial chairman erred in law and fact in holding in favour of the respondents and for failing to consider the documentary evidence adduced before the tribunal by the appellant.*

3. *That the trial chairman erred in law and fact by applying legal technicalities from the Civil Procedure Code, Cap 33 R.E. 2002 and thus failing to recognize the eligibility and entitlement of the appellant to purchase the suit premises. That had he noted the provision of section 51 (1) (b) of the Land Disputes Courts Act, 2002, Act No.2 of 2002 he would have affirmatively determined the appellant's eligibility to purchase the suit premises.*

By consent of the parties and the order of this court (Mgetta, J) dated 3rd July 2013, the above grounds of appeal were argued by way of written submissions and the same were filed in court as scheduled. The appellant was unrepresented. The first and second respondents were represented by Mr. Paul Kimweri, learned State Attorney.

In his written submissions, the appellant's argument on the first ground was that in assessing the evidence, the trial chairman failed to appreciate the fact that the appellant was a lawful tenant in view of the lease agreement concluded in 2009 between the appellant and the 2nd respondent. Further, that the procedure for terminating her lease was not followed as the appellant continued to furnish a lawful consideration (rent) which is and essential ingredients in any contract.

It was submitted further that the appellant had various documentary evidence that she intended to tender during the trial, but whenever he prayed to tender the same, he was told by the tribunal that it was not her time to tender, and the trial ended without tendering the said documents. It was her view that the same was a clear miscarriage of justice, because it infringed on her rights under article 13 of the Constitution of United Republic of Tanzania, 1977.

On the second ground, the appellant submitted that the tribunal erred in not considering the documentary evidence submitted before it. He added that the absence of new written lease agreement does not automatically suggest that the parties were not in a lawful lease agreement because the appellant continued to fulfill her contractual duties by paying rent. He also said that under the law of contract, there is a general rule that no specific format of contract is required for the parties to enter into an agreement, and therefore a lease agreement as any other form of contract can be made orally or impliedly.

She further submitted that in this case the appellant was paying rent as usual and the second respondent accepted the rent of the appellant as evidenced in the receipts and the respondent did not dispute this fact. He submitted that under sections 79 (1) (c) (i) and 82 of the Land Act the original expired lease came into force, when the 2nd respondent accepted rent from the appellant for more than two moths from the date of the date of the end of the original lease.

On the third ground, the appellant argued that the trial chairman used legal technicalities in striking out the issue relating to her eligibility to purchase the suit premises, and wrongly interpreted sections 79 and 82 of the Land Act, 1999. He added that the authority cited by the trial chairman in striking out the said issue was distinguishable from the facts of this case. He finally prayed for his appeal to be allowed with costs.

In opposing the appeal, the 1st and 2nd respondents, through the services of the attorney general's office, filed separate written submissions. In his written submissions,

the first respondent argued that as an auctioneer, he was assigned by the 2nd respondent a duty to serve the appellant with a notice of fourteen days requiring him to vacate the house belonging to the 2nd respondent. He added that the 1st respondent only did what he was directed to do by the 2nd defendant and therefore it was not correct to say that he acted maliciously. He however viewed that in consideration of the testimony of PW1, DW1 and DW2 it is undeniable that the appellant has failed to honor the lease agreement and therefore her appeal should be dismissed with costs.

On his part, the 2nd respondent responded on the first ground of appeal submitted that the appellant breached the fundamental terms of the lease agreement, when she failed to pay the reserved rent as per article 1 of the lease agreement. He supported his view with the holding in the case of **Bettin v. Gye** (187-6)1 Q.B.D 183 and the provisions of section 39 of the Law of Contract Act, (Cap. 345 R.E. 2002). He argued further that the deliberate refusal of the appellant to perform her contractual obligations amounted to a breach of contract and the respondent was forced to put it to an end.

It was further submitted that the claim by the appellant that her documentary evidence was denied by the trial tribunal is based on a false assumption, and that there is proof that she her documentary evidence was admitted. It was also argued that the argument by the appellant that she paid rents as they became due was not true, because on several occasion she was reminded through demand notes (such as demand note dated 17th December, 2010) to pay rent, but failed to pay. On the claim of trespass, the 2nd respondent submitted that the owner cannot trespass on his own property.

On the interpretation of section 82 (1) of the Land Act, the 2nd respondent submitted that in view of that section even in the absence of the said contract the appellant was still under the duty to fulfil her obligation of paying rent, and that there is no evidence given by the appellant to show that she continued to pay rent or even after the expiry of it the original periodic lease.

Counsel concluded the following prayers: First, a declaration that the appellant's possession of the suit premises is unlawful as she has no valid lease agreement with the 2nd respondent in respect of the suit property. Second, a declaration that the

appellant has no right to purchase the property in question, as the 2nd respondent has no interest in selling the same and also the appellant does not meet the requirement to purchase the suit property because she is not a government servant. Third, that the appellant be ordered to provide vacant possession and pay all outstanding rent due, with interest, and finally that the suit be dismissed in its entirety with costs.

In his rejoinder, the appellant reiterated his earlier submissions that the act of the second respondent in accepting rent from the appellant created an assumption under section 82(2) of the existence of the lease contract between them, that periodic lease is created upon proof of payment of rent and there in no requirement for the same to be in writing.

Having examined the parties' arguments and the record of the appeal, the issues falling for consideration are: **First,** whether the trial tribunal erred in not considering the issue of the appellant's eligibility to buy the suit premises. The **second** issue is whether, if the first issue is answered in affirmative, the 2nd respondent had an obligation in law to sell the suit premises to the appellant; and **third**, whether the trial court erred for not holding that the appellant is a lawful tenant of the suit premises.

On the first issue the appellant relied on section 51 (1) (b) of the Land Disputes Courts Act, 2002, for the proposition that is the tribunal chairman had considered it, he would not have strictly applied the Civil Procedure Code, and instead would have entertained her eligibility to buy the suit premises. Section 51 was repealed and replaced by section 20 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2010. The current section 51 (1) (b) of the Act is different. The amending section (section 20 of Act No. 2 of 2010) provides:

> *20. The principal Act is amended by repealing section 51 and replacing for it the following-*
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> > *51 (1) In the exercise of its appellate jurisdiction, the High Court shall apply the Civil Procedure Code and the evidence Act and may, regardless of any other written laws governing*

production and admissibility of evidence, accept such evidence and proof which appears to be worth of belief.

(2) The District Land and Housing tribunals shall apply the regulation made under section 56 ***and where there is inadequacy in those regulations it shall apply the Civil Procedure Code.*** [Emphasis added]

Therefore, in view of the above provision, and taking into consideration the inadequacy of the regulation on the issue, the trial tribunal was at liberty to use the Civil Procedure Code. The only question is whether order XIV Rule 5 (2) of the Code was applicable in the circumstances of the case. In my view the said order allows the court to either amend the issue or strike out the irrelevant issue wrongly framed. The purpose should be to determine the matter in controversy. The trial tribunal did strike out the issue on the ground that the same did not form part of the appellant's cause of action.

I am not in agreement with the trial chairman's reasons for not considering the issue. Firstly, the issue of the appellant's eligibility to buy the suit premises was one of the contentious matters in this case in view of the appellant's letter dated 3rd August, 2011 annexed to the application and the respondent's written statement of defence Secondly, the issue was very relevant in determining the matter in controversy. And thirdly, it was a live issue not only in the pleadings (para 7 of the written statement of defence), but also in the evidence given by the parties during the trial and therefore order X1V rule 5 (2) of the Code was misapplied in striking it out.

With respect, the trial chairman side-stepped his duty to resolve the issue properly framed by wrongly misinterpreting the law and hiding behind unnecessary technicalities. Since there are sufficient materials on the record, I will proceed to resolve the second issue on merits.

The second issue is whether the respondents had an obligation in law to sell the suit premises to the appellant. The appellant (PW1) told the trial tribunal in her testimony that at some point in time she was notified by the respondent that the house was going

to be sold to public servants. She was advised to write a letter to apply to buy the suit premises. She complied with such advice. Thereafter on 14th July 2011 she received a notice of 14 days requiring her to vacate the suit premises. She decided to take the matter to the tribunal. She argued she was not a public servant at the time, but her main concern was that being a Tanzanian, who has been a tenant in the suit premises for along time, she was entitled to buy the same.

In his testimony, Engineer Amos Maro Nyamete testified, *inter alia*, that the appellant did write a letter applying for buying the suit premises. She forwarded that letter through her temporary employer, who commented that she was not a public servant. The witness stated further that they rejected the application as the appellant did not qualify to buy the suit premises.

Undoubtedly, at the material time, even up to now, there is a Government Policy to sell residential quarters to Government employees who are in occupation. In this policy it is not all the Government quarters which are subject to sale. The entire exercise to sell or not sell is purely on the discretion of the Government, in this case the second defendant, but it is expected this discretion to be exercised judiciously. In the instant matter there is no dispute that at the time the appellant applied to buy the property, she was not a public servant.

Can it be said that she is entitled to buy the property on the ground that she is a Tanzanian who has been a long-time tenant, as she claims, under the principle of "*right of first refusal*"? Right of first refusal is a common law principle which gives a sitting tenant pre-emptive rights when the land lord/owner wishes to sell the property to offer first priority to the sitting tenants before giving a chance to any other person. On the applicability of this principle, there are dissenting decisions. For instance the late Mapigano, J **in T.S. International Ltd and 2 others v M/S Jubilee Development Ltd and another** Civil Case No. 53 of 1996 HC DSM (unreported) had this to say:

> *"The proposition that a tenant is legally entitled to a right of first refusal in a sale of premises he occupies is so startling that I am surprised that it has been made. As I understand the law, no such right exists".*

Justice Longway differs with the above positions in the cases of **Kamal Jaffer V. National Housing Corporation and Shehenshah Tower Limited**, Land Case No. 36 of 2006 (unreported) and **HR (1978) Limited & Others Versus National Housing Corporation** Land Case No. 185 of 2005 (unreported). In those two cases Justice Long way maintained that:

> *"The plaintiffs...ought to have been given right of first refusal to redevelop the suit premises because they are long sitting tenants with good financial positions capable of redeveloping the suit premises".*

However Justice Mzilay, J in the case of **Kariakoo Bazaar Limited & Another v National Housing Corporation, Land Case No. 101 of 2005, H.C (Land Division) at Dar es Salaam (Unreported)** tries to harmonize the situation. To him, the application of the common law principle of right of first refusal depends on the circumstances of the case. In other words, to him the right of first refusal is not an automatic right; but may be invoked when there are exceptional circumstances. And one of the circumstances he mentioned is where the tenant during his stay was not in breach of the lease agreement and he is financially capable of buying it. I wish to adopt this later observation, but I should also add that its applicability should not be against public policy.

In our case the policy was that the suit house being government property had to be sold to a public servant. The appellant admitted that she was not a public servant at the time when the 2nd respondent proposed to sell the suit house. Therefore, invoking the common law principle in the circumstances of the case will be against public policy. Therefore the issue as to whether the 2nd respondent had an obligation to sell the suit premises to the appellant is answered in the negative.

The last issue is whether the trial tribunal erred in holding that the appellant was not a lawful tenant. According to the facts it is not in dispute that the original lease agreement (Exh. D1) expired on 30th June, 2010. The appellant claims that despite the expiration of the aforesaid contract, the 2nd respondent kept on receiving rent. It is on that basis that she claims to be a lawful tenant. The fact of receiving rent after the contract had expired was also supported by the 2nd respondent himself through the testimony of Engineer Amos Maro Nyamete (DW1) who *inter alia* stated:

"I pray for this tribunal to order for the applicant to provide vacant possession of the suit premises ***despite that we received her rent*** *the applicant is not our lawful tenant as she has no lease agreement and she isn't eligible to buy the suit premise."*

Though it was not certain as to how many months thereafter the 2nd respondent continued to receive rent. However, by admitting that they were accepting rent after the contract had expired a periodic lease from month to month, the contract is deemed to have been renewed in terms of section 82 (2) of the Land Act. Furthermore section 79 (4) of the Land Act gives a discretion for any party in a periodic tenancy to terminate it by giving the other party notice whose length must be not less than the period of tenancy. A month to month lease created under section 82 (2) of the Land Act, as in our case, is terminated upon giving the other party one month's notice. As rightly found by the trial tribunal, a periodic lease ended on 30th June, 2011 after expiry of notice of three months by the 2nd respondent issued to the appellant on 17th March, 2011. Therefore, the appellant cannot claim to be a lawful tenant basing on the periodic lease any more.

On the strength of the above discussion, I am of the settled mind that the whole of the appellant's appeal is devoid of merits. In the result, it is hereby dismissed with costs.

DATED and DELIVERED at Mtwara this 14th day of July, 2015.

Fauz Twaib
Judge
14th July, 2015