IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT BUKOBA

LAND CASE APPEAL NO. 31/2015

(From the Decision of the District Land and Housing Tribunal of Bukoba District at Bukoba in Land Application No. 16 of 2015)

LEODGARD TIBAIJUKA.....APPELLANT

VERSUS

1. JOAB KATUNZI
2. JUSTINIAN THEOBARD }**.....RESPONDENTS**

JUDGMENT

30/4 & 10/5 2018

Rumanyika, J

The appeal is against the 27/05/2015 judgment and decree of the District Land and Housing Tribunal. Whereby Leodigard Tibaijuka (the appellant) complained and claimed against, against Joab Katunzi and Justimian Theobard (the 1st and 2nd respondents) for breach of a lease agreement on plot No. 31. National Housing Street Kashai ward in the Municipality of Bukoba (the disputed premises). The 1st respondent being co-tenant while the land lord was the 1nd respondent. He lost the war and battle. He is aggrieved. He is right here.

The seven (7) lengthy and in my view argumentative and duplicity grounds of appeal may boil down and revolve around two points only:-

1. That the DLHT erred in-law and fact not holding that the common tendency agreement was breached by both (the appellant and 2nd respondent).
2. That now that he had a share in the investment on the disputed premises the DLHT chair should not have ordered the appellant get out empty handed.

The appellant appeared in person. Mr. Chamani learned counsel appeared for the respondents.

However when it was called on 30/04/2018, hearing of the appeal wasn't that smooth. There was appellant's more or less a two limb P.O formerly raised by appellant against competency of Mr. Chamani appearing in this case. Leave alone the reply to petition of appeal. As was drawn and filed by Mr. Lameck Erasto learned counsel whose audience had been successfully questioned by him. Mr. Chamani also had his. I heard both. I reserved a ruling and promised to incorporate it in this judgment. Here it is. The P.O is overruled. Reasons*; one*, Mr. Chamani Advocate may have ..... on affidavit that purported such on application for stay of execution. That one is gone long ago. It doesn't have connection with this appeal any long. *Two;* the reply to petition of appeal should not have gone with Mr. Lameck because it given its nature, the pleadings could not have reflected bias or any adverse double deal by the court officer P.O is dismissed.

As for Mr. Chamani's P.O that the verification clause to the petition of appeal was both unlawful and uncalled for (it contravened provisions of Order XXXIX Rule 1 (a) of the CPC Cap. 33 RE. 2002). One was by court order of 11/10/2016 to be removed but he didn't in reply, the appellant submitted that non fatal as it was in order one to a certain facts of the case or appeal for that matter, verification by the appellant was innevitable.

Appeal needed to be struck out (case of Steven Mwanache V. Bruhani Saidi & 2 others, civil appeal no. 11/2002 HC Bukoba unreported).

This P.O also needs not to detain me. In simple and ordinary terms verification may be defined as a short statement that expresses admission, in this case by appellant being author of the petition it could be uncalled for but, as argued by the appellant not fatal. I am declined to find and hold that appending a verification clause to a memorandum or a petition at of appeal for that matter vitiates the pleadings. It is for this reasons that I will part company with my brother Musa, J in the case of **Steven Mwanache (supra).** The P.O is therefore overruled.

Now on the merit part of it, the appellant submitted that had the DLHT chair not misapprehended the evidence, one should have held that the two common tenants if at all commonly breached the tenancy agreement. However still the contract was valid such that one between the respondent was a nullity. Save for the seggregative impugned judgment.

Mr. Chamani submitted that now that there was breach of a fundamental term (name rent defaulted) that one amounted to breach of

contract automatically. Much as also the contract permitted subcontracts. And upon the land lord discharging him, the doors were open and appellant was at liberty to collect his property from the disputed premises. Additionally, Mr. Chamani submitted that the appellant was liable to be dismissed. Much as the appellant didn't state chiefs in the end sought by him. (Cited the Case of **Anastazia Kapongo V. Zabina Said Kanyowa,** Land Appeal No. 60 of 2009 HC Mwanza (unreported).

The appellant's evidence in a nutshell on record will show that on 04/02/2009 the appellant and 2nd respondent (co-tenants) entered a six (6) months renewable lease agreement will the 1st respondent on the other side and ran a carpentry workshop (Exhibit R5), yet the on the same disputed premises. Whereby the 2nd respondent posed and pretended the sole owner of the workshop. Then simply the appellant was thrown away.

In reaching at his conclusion correctly in my view, the trial chair found. I quote;

> *". . . It was the allegation of the 1st respondent at the hearing that he entered into an agreement with the 2nd respondent following* **failure by the applicant to discharge his contractual obligation in paying the agreed amount. . . a letter from the applicant dated 03/08/2013 (marked as exhibit R1)** *requesting him to grant more time (6 days) so that he can pay the rent".*

The pivotal issue is no longer whether there was breach of contract. Given the evidence (Exhibits A-2 and R-1. Whereas in letter dated 03/08/2013 the appellant individually for extension of time ie six (6) day

more to pay rent, and more so in ground sue of appeal as co-tenant admits to have defaulted payment of rent, the 1st in the former document accused them as defaulters of rental charges. Termination of the agreement was no doubts lawful. On this one I will agree with Mr. Chamani and, increasingly hold that for any lease agreement payment of rent is paramount and fundamental term a breach of the contract gets to termination. The issue whether or not the contract had the express clause in immaterial. Nor can in all fairness the defaulting party be allowed to use the omission as a sworn. One could, if need be used it as a shield.

Moreover, as said, the lease agreement at issue was between the appellant and the 2nd respondent on one hand and the 1st respondent on the other yes! But at things being equal, land lords always go for tenants for their choice. The question why he treated the two co-tenants but differently cannot arise. After all as said, and for reasons best to him, the appellant is on record to have individually (no longer jointly) asked for extension of time to pay rent.

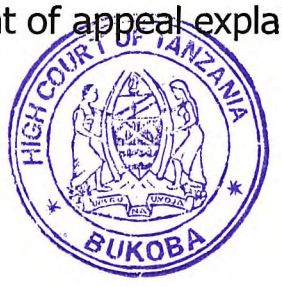
Like it was clear admission that he had sole liability to pay. Ground ONE of appeal dismissed.

However, the appellant may have had some claims out of their joint venture against the co-tenant 2nd respondent. Granted! But didn't in monetary terms state what it was. So that so much now, the lower tribunal may have ordered a refund. In which case however it should have been presented as deferent case all together. Given nature of the subject matter and cause of action. If at all was denied of the property. After all

essentially the appellant did not tell what prevented, him from collecting the same from the disputed premises (according to the 27/05/2015 order of the DLHT).

In the up short appeal is dismissed with costs. The DLHT decision and order(s) are, for avoidance of doubts upheld.

Right of appeal explained



S.M. Rumanyika
Judge
02/05/2018

Delivered under my hand and seal of the court in court. This 10/05/2018 in the presence of the parties.

S.M. Rumanyika
Judge
02/05/2018