IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 85 OF 2014

ABG AFRICAN LINK TRADERS LIMITED.....PLAINTIFF

VERSUS

JITEGEMEE TRADING COMPANY LIMITED.....1ST DEFENDANT

YONO AUCTION MART 4 COMPANY LIMITED .....2ND DEFENDANT

JUDGEMENT

Date of Last Order: *06/09/2019*
Date of Judgment: *29/10/2019*

MLYAMBINA, J.

In this Judgment, the court has been asked to decide on five issues:

1. What were the key agreed terms and condition under the lease agreement?
2. Whether there was any breach of the agreed terms.
3. Whether the eviction (if any) of the plaintiff from the leased premises was lawful.
4. What loss (if any) did the plaintiff suffer as a result of the breach and eviction.
5. What relief (s) are the parties entitled.

The plaintiff alleged that the cause of action against the 1st defendant flows from the intention by the 1st defendant to breach

the lease agreement arising from the 1st defendant's demand for payment of rent and subsequent issuance of a 14 days-notice against the plaintiff and threat to frustrate the said agreement upon default.

The plaintiff pleaded that, by a lease agreement dated 1st August, 2008 executed between the plaintiff and the 1st defendant, the plaintiff has been occupying the 1st defendant land having an area of about 50,000 squares on commercial purpose situate along Msimbazi valley near Buguruni Area Ilala Municipality.

It was claimed by the plaintiff that the contract required the plaintiff to inject its money to make the desired and agreed development on the disputed land which under any circumstances was limited to USD 880,000.00 and the same was to be recovered back through conversion thereof into agreed rent.

According to the agreement, as alleged, the plaintiff was given three years' time before the 1st defendant could begin to make calculations of rent payable there under.

The plaintiff was of allegation that, it was an implied term that the construction on the land at issue could be subject to availability of a certificate of title to the said land or certified copy thereof accompanied by a site plan, all together forming a setoff essential

documents in obtaining a building permit from the relevant authority.

The plaintiff has asserted that, although the lease agreement was executed in August, 2008 it was not until in December, 2012 when the 1st defendant supplied to the plaintiff the requisite copy of certificate of title to the land at issue and soonest thereafter the plaintiff had to apply for a building permit which paved the way towards developing the disputed land in accordance with the underlying plans.

The plaintiff plaint reveals that, parallel to obtaining a building permit in early 2013, the plaintiff commenced construction in an endeavor to develop the disputed land as agreed and therefore the grace period of three years began to run as against the plaintiff in the end of 2012 when the 1st defendant availed to the plaintiff the certificate of title of the disputed land. As such, the grace period was to expire at the end of 2015.

Thereafter, the 1st defendant was to appoint a valuer to establish the magnitude of the development on the disputed land. That the plaintiff developed the disputed land as agreed and later on appointed the valuer to establish the magnitude of the development. The valuer made valuation and it was established

that the amount used in development was at the tune of TZS 1,568, 348, 800/=.

Before completion of the construction, the plaintiff was ordered by the National Environmental Management Commission (NEMC) to demolish part of the structure constructed especially the block fence wall on ground that it was built within the prohibited and reserved area near and along the Msimbazi River Bank. Thus, NEMC reduced the leased area by 20,000 square metres. It is only 30,000 square metres of the disputed land that has remained for the intended development envisaged under the said lease agreement.

Following NEMC move, the plaintiff notified the 1st defendant and requested for additional land in place of the land condemned as free of construction but the 1st defendant refused.

The plaintiff went on the plead that the construction had to go on before being stopped by the order of the 1st defendant for a reason that the plaintiff has not paid rent in total neglect of the fact that the cost incurred by the plaintiff in making the agreed construction. Hence, development of the disputed land amounts to rent paid in advance which is yet to be exhausted as per the agreement.

It was further pleaded by the plaintiff that the 1st defendant was made aware and reminded by the plaintiff of the fact that the lease

agreement which binds the parties thereto was executed in respect of Plot No. 2360 while the 1st defendant brought in to the plaintiff a certificate of title which shows that the land at issue was plot no. 1010 and the reason as far as the 1st defendant is concerned was due to change of land use from being a farm to the present status. Triggered by the afore anomalies, it was alleged that, the plaintiff advised for amendment and or addendum to the lease agreement to take on board the changes and other short falls including counting of the grace period and the diminished size of the demised land at issue but the defendant turned down such important request.

On 25th October, 2014, the 1st defendant acting through the services of the 2nd defendant issued a notice requiring the plaintiff to pay rent to the tune of TZS 108, 306, 987.57/= within 14 days. Failure of which the defendant was to take untold measures against the plaintiff without additional notice, the action which threatened and put the plaintiff at the edge of suffering for no good and justified cause.

The plaintiff alleged that contrary to the lease agreement on 22nd February 2017 the 1st defendant using the service of the 2nd defendant invaded the land developed by the plaintiff and evicted the plaintiff therein causing damage to the plaintiffs' properties.

Whereof, the plaintiff prayed for judgement and decree against the defendants as follows:

a) For a declaration that the defendants act of evicting the plaintiff from the disputed land was unlawful and in breach of the lease agreement.
b) For refund of all costs incurred by the plaintiff in developing the land in issue which amount to TZS 1,568,922,320.00/=
c) loss and damages of properties amounting to TZS 694,000,000,00/=.
d) General damages TZS 500,000,000.00/=.
e) Costs of and incidental to the suit; and
f) Any other relief (s) that the honorable court may deem fit.

In their joint Written Statement of Defence (WSD) the defendants disputed the claims and went on to state that, it was expressly agreed in the lease agreement that any valuation would be approved by the land lord (the 1st Defendant) and the defendants are not privy to the valuation attached to the plaint.

It was replied by the defendants that it was the duty of the plaintiff to adhere to the environmental guidelines when doing construction and the area to be rented did not shrink by 3000 square metres as alleged.

The defendants admitted to had issued notice requiring the plaintiff to pay rent as per leave contract and to had threatened the plaintiff with eviction according to the defendants, the eviction was voluntary.

The 2nd defendant deployed his men at the demised premise as show of force and intention. Upon seeing them, the plaintiff voluntarily vacated the premises by driving out his vehicles and moving out other effect. Thus, the purported damage is a fakery since the 2nd defendant did not touch the said vehicles belonging to the plaintiff nor did he physically remove any properties from the demised premises. The defendants therefore prayed for dismissal of the suit with costs.

In this matter, the plaintiff was represented by counsel pascal Kihamba and Mulamuzi Byabusha. The defendants were represented by Emmanuel Augustino learned advocate.

At the hearing, the plaintiff paraded two witnesses to prove its case. The defendant brought one witness.

I will analyse the evidences, exhibits and pleadings in the light of the framed issues. The first issue. The first issue calls upon the court to consider the key terms to the agreement. For the sake of this dispute, clause 1,2,3,5,6 and 8 are considered to be key terms. For avoidance of doubt, I will herein after reproduce them:

1. *The tenant will level the area and construct a brick fence on the area of 50,000 square meters before construction of go downs and other auxiliary buildings*
2. *That, the leveling costs, construction costs of the brick fence go downs and auxiliary buildings shall take three years from the date of signing this agreement and shall be approved by a valuer appointed by the landlord and shall not exceed 880,000 USD.*
3. *The total costs incurred by the tenant shall be recovered from the rent to be paid.*
4. *The rent shall be 1 USD per square meter per month for the developed area and for the undeveloped area shall be 0.10 USD to be reviewed after very two years this amount is exclusive of VAT.*
5. *The effective starting date of the payment of the annual rent will be 1st august, 2011.*
6. *All costs to be incurred in obtaining approval from appropriate authorities for this construction shall be borne by the tenant who will also at his own cost maintain a valid insurance policy covering the buildings against loss arising from fire and other causes.*

As regards the second issue, it is apparent from the evidence that the demised premise was a registered land. It was part of Plot No. 3360 Msimbazi Valley Buguruni area. As a registered plot, the lessee could not undergo the agreed construction without necessary building permit. The same could not be granted without having attached requisite title deed and other important documents including the agreement and site plan.

PW2 Abubakary Ahmad Mmadu Director of operation of the plaintiff deponed that, the 1st defendant delayed to give them a title which could enable the plaintiff to apply for building permit. According to PW2, the title was given to the plaintiff in 2010. There is nothing in record to evidence that the plaintiff had sought for the title to process the building permit as soon as they entered lease agreement.

Worse indeed, the parties entered into a lease agreement for industrial activities contrary to the land use of plot No. 2360 which was a farm by then. As per the evidence of DW1 Kinabo Charles Ngayoma, land use of Plot No. 2360 was changed from a farm to a Plot for industry in 2009. That means, the whole lease agreement was contrary to the land use of Plot no. 2360 by the time the said lease agreement was executed. It follows therefore true that the

1st defendant had no title deed to give the plaintiff for industrial development prior 2009.

As per evidence of PW2, the plaintiff got the building permit on December, 2012 after their application dated April, 2010. As such, the plaintiff could not affect the agreed development within three years from the date of executing lease agreement. That was beyond control of the plaintiff.

According to clause 2 of the agreement, it was the landlord (1st defendant) to appoint the valuer. There is no evidence in record to establish that the 1st defendant appointed the valuer.

The 1st defendant has alleged that the plaintiff never effected development as agreed. However, in record there is nothing to establish that the 1st defendant ever served the plaintiff with notice for breach of the terms of lease agreement. The only notice was for demand of rent due.

It is the findings of this court that the 1st defendant was in breach of the lease agreement on the following accounts.

One, the 1st defendant executed lease agreement for industrial development while aware that Plot No. 2360 Msimbazi valley Buguruni Area Ilala Municipality by 2008 was for farm purposes.

Two, the 1st defendant delayed to give the plaintiff with title deed timely in order for the plaintiff to process for building permit,

thereby breaching the time within which the plaintiff could complete the agreed construction.

Three, the 1st defendant never appointed the valuer to make valuation of the effected development.

Four, the 1st defendant never served the plaintiff with notice for violation of the lease agreement terms apart from that of demanding rent due, even without knowing exactly how much were spent by the plaintiff.

Five, the effective date of paying annual rent could not start from 2011 for obvious two reasons first, the plaintiff had a grace period of three years second, the plaintiff was given Title Deed which allowed industrial activities in 2010, a title of which was obtained by the 1st defendant in 2009. In the premises of the above, it follows therefore that, the eviction of the plaintiff was unlawful.

On the fourth issue, it is evident that the plaintiff's loss alleged was caused with two factors. The first factor was due to unlawful eviction by the defendants. That fact, as observed earlier, it remains true. The second factor was due to order from NEMC and natural disasters. I find this factor to be useless because it is the requirement of the law under *Section 57 (1) of the Environmental Management Act, 2004* that no human activities should be

conducted within 60 metres of river banks *Section 57 (1) (supra) provides* states:

> *"subject to subsection 2, no human activities of a permanent nature or which may by their nature, likely to compromise or adversely affect conservation and or the protection of ocean or natural lake shorelines, river bank, water dam or reservoir, shall be conducted within 60 metres".*

The plaintiffs were of evidence that they spent USD 880,000/= But it is undisputed that the plaintiff was evicted in December, 2016. The defendant asserted that the plaintiff was supposed to pay rent due USD 660,000. That covers from August 2011 to December 2016.

The fact that the plaintiff obtained building permit in 2012 at the fault of the 1st defendant, rent due has to be calculated from 2015 after excluding the three years grace period for the developed area. Therefore, instead of claiming USD 660, 000, for the year 2011 to 2016, the 1st defendant was entitled to claim the sum of USD 264,000 as rent due.

Taking into consideration that the plaintiff's loss of USD 880,000 was partly accessioned by its ignorance of developing the legal prohibited area, I find the plaintiff would be entitled to refund of the loss at the tune of USD 440,000/=.

However, the 1st defendant would also be entitled to rent due at the tune of USD 264,000. As such, the plaintiff is entitled to refund of USD 176,000/=.

The fact that the breach of the lease agreement was largely occasioned by the defendant, I find proper to order the 1st defendant pay the plaintiff general damages at the tune of TZS 10,000,000/=.

In the circumstances, the suit is granted with the following orders:

1. The 1st defendant act of evicting the plaintiff is declared unlawful.
2. The 1st defendant is ordered to refund the plaintiff USD 176,000 in TZs form at the time of execution of the decree.
3. The 1st defendant is ordered to pay the plaintiff general damages at the tune of TZS 10 Million.
4. The 1st defendant to pay costs of the case to the plaintiff.

Y. J. MLYAMBINA
JUDGE
29/10/2019

Judgement pronounced and dated this 29th October, 2019 in the presence of counsel Pascal Kihamba for the plaintiff and Emmanuel Augustino for the defendants. Right of Appeal explained.

Y. J. MLYAMBINA
JUDGE
29/10/2019