IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 259 OF 2018

(Originating from decision of Resident Magistrate Court of Kisutu in Civil Case No. 261 of 2016)

LIGHTNESS LUGALINDA.....APPELLANT

VERSUS

GULF CONCRETE AND CEMENT PRODUCTS CO. LTD..... RESPONDENT

Date of last Order: 10/07/2020
Date of Ruling: 04/09/2020

J U D G E M E N T

MGONYA, J.

This is a first appeal by **LIGHTNESS LUGALINDA** (Appellant) against Gulf Concrete and Cement Production Co. Ltd (Respondent) arising from a Civil Case which culminated into a decree that the Appellant was aggrieved from before the Kisutu Resident Magistrate Court. It was in the Petition that the Appellant stated 3 grounds of Appeal to the effect that:

1. ***The Trial Magistrate erred in iaw and fact for reaching into the decision for ordering the Defendant/ Respondent to repair the damaged house of the Appellant without taking into consideration that, the agreement between two parties was to reconstruct the said damaged house within two months and that the repair of the said house is impossible due to the degree of damage;***
2. ***That, the trial Magistrate erred in law and fact for ordering the Respondent Defendant to repay the Appellant/Plaintiff rent of Tshs. 150,000/= per month while the correct rental cost incurred by the Appellant is Tshs. 400,000/= per month; and***
3. ***That the District Court erred in law and fact for reaching into decision without proper analysis of the evidence adduced by the Appellant/ Plaintiff to the suit.***

Before this Honorable Court the Appellant was represented by **George Masudi** learned Advocate and the Respondent enjoyed the services of **Heriolotu Boniface** learned Counsel. And it was the time of outbreak of the pandemic virus (corona)

that this Court ordered that the Appeal be argued by way of written submission.

It was Mr. Masudi's submission that, the Appellant being aggrieved partly by the decision of the District Court has appealed majorly on two grounds that is the **1st** and **2nd** as per the Petition and it is constructively that the **3rd** ground is abandoned.

In his submission, Mr. Masudi averred that on the **1st ground** of Appeal, the Appellant proved that the Respondent's truck damaged her house and that fact was not denied by the Respondent. And that as a result of that agreement the two entered into a Gentleman Agreement (oral agreement) with the Respondent and the Respondent agreed that Respondent should completely compensate all loss and damages incurred by the Plaintiff and **rebuild/ renovate** a new house within 2 months.

It is in submission of the Appellant's Counsel that sparingly the Respondent failed to renovate the said house in a required construction standard and contrary to professional advice from Codec Engineer who also testified in Court and tendered his expert report on the damaged house.

Moreover, Mr. Masudi submits that the Respondent was reminded to renovate the house according to the expert standard

or else provide the Appellant with costs of rebuilding her house through a demand notice of which the Respondent refused to honor through their letter in reply of the demand notice.

Further, the Appellant's submission states that since the Respondent had defaulted to fulfill his obligation of renovating the said damaged house on time as in accordance to their oral agreement and despite several reminders from the Appellant they prayed that this Court order the Respondent to provide the sum of **Tshs. 98,300,000/=** for facilities as remunerated in Exhibit P4 and the plaint respectively.

Moreover, the Counsel for the Appellant maintained that the Appellant at this stage does not have faith with the Respondent anymore since the Respondent has failed to renovate or build the house as per the professional requirement. Further to that, they even set fire on the Appellant's house when at their watch as testified by the Respondent's Principal officer and their watchman in the proceedings at the time of hearing. In that event, the Counsel averred that, the Respondent has misused the golden chance given by the Appellant as they have agreed.

In referring to the **2nd ground** of appeal the Appellant's Counsel stated that, in accordance to the Court's order for the Respondent to pay the Appellant **Tshs. 150,000/=** per month

as rent for the house she need to rent as a result of the damaged caused by the Respondents vehicle is a misguiding order for the Appellant incurs the cost of **Tshs. 400,000/=** per month as rent and that the Appellant at hearing of the case managed to prove her claim that she has incurred that cost and still incurs the same to date. This fact was proved via Lease Agreement that was tendered before the Court.

It is from the above assertion, It is the Appellant's Counsel assertion that the Appellant complied with the provisions of **section 110** and **112 of the Evidence Act Cap. 6 [R. E. 2002].** Therefore, under those circumstances, the Appellant has the right to be compensated all the costs she incurred unnecessarily to rent a house after failure of the Respondent to pay rent for her alternative house; the same was noted by the trial Court as a cruel act of the Respondent.

Further the Appellant's Counsel submitted that, the finding of the Court that the trial court stated that the Appellant is to be compensated **Tshs. 150,000/=** and not **Tshs. 400,000/=** is wrong since there was no contract tendered in Court that restricted the Appellant to rent a house of her choice. Since before the damage the Appellant had been living her life peacefully with her family and other 4 members enjoying her

house until the fateful act of the Respondent's Vehicle that has caused her to suffer.

It is the Counsel for the Appellant averment that the Appellant should be restored to the position she was, and that if it was not of the Respondent's vehicle to cause damage to her house, then she couldn't have gone through all these. The case of ***KELLIHER &KELLIHER V. DON O'CONNOR & COMPANY, IEHC [2010] 313*** was cited to support the argument.

In countering his colleague's submission, Counsel for the Respondent submitted that, in accordance to the **1st ground** of appeal it is undisputed fact that the Respondent's truck damaged the Appellant's house. It is also undisputed that the Respondent had accepted to renovate the damaged house to its previous condition before the occurrence of the accident within the period of five months as testified by DW1 in his testimony and the agreement was not to renovate the house within **2 months** as alleged by the Appellant.

The Respondent's Counsel further claimed that the construction of the house begun immediately after the Agreement until to the stage of building walls and electrical works until when the Appellant came and interfered with the renovation claiming that the renovation was of low quality and that she wanted

Harvey Tiles instead of iron sheets which were used before. Further, she wanted aluminum windows while the house at the time of the accident had simple windows with mosquito wires. It is from there the technician reported back and failed to continue with the renovation.

Mr. Boniface the Respondent's Counsel maintained that it is the Respondents intention to renovate the said house as directed by the Court and not to pay the amount of money which has been exaggerated since construction of the house which is similar to the damaged house will not cost that amount. Further, the counsel was of the stand the Appellant ought to be warned not to expect to enrich herself from the incidence since the Respondent will reconstruct the damaged house to the state it was before the accident as per their agreement.

It is the Respondent's Counsel submission that, regarding the second ground of appeal that the Respondents had paid rent for the Appellant as per **Exhibit D1** and agreed the amount of rent was **Tshs. 150,000/=** per month and the same was paid for **3 months** starting from **22/5** to **22/08 2016**. The claim of rent of **Tshs. 400,000/=** is an afterthought and plans to enrich herself from the accident as she had accepted the house which was rented for her at the price of **Tshs. 150,000/=.** The

decision to move from the house of worth rent **Tshs. 150,000/=** was on her own will and communicated to the Respondent hence the lease agreement on rent of **Tshs. 400,000/=** tendered by the Appellant had nothing to do with the Respondent.

Having gone through the grounds of appeal and the rival submissions of both parties upon the 1st ground of appeal as argued by Counsel of the parties, the Appellant is aggrieved by the Court ordering the Respondent to repair the damaged house while the agreement was to reconstruct the said house within two months.

The Respondent in contesting this ground averred that the agreement was for the construction to be within 5 months and not two months as stated by the Appellant. Further, there was no dispute in constructing the same, since the repair begun immediately after the Agreement. However, it was the Appellant's own actions that barred the Respondent in repairing the house for requiring a status of reconstruction that was not featured in the house before the accident occurred.

The Agreement spoken of in this matter is in records shown to have been an Oral Agreement which the Appellant in the plaint termed it as a **"Gentleman Agreement"**. The parties both

states that it is undisputed that there was a house that belonged to the Appellant and that the same was damaged after an accident that was caused by the Respondent's truck as evidenced in the photos as received at the trial Court.

From the submission, the parties both reiterate different duration of which they had agreed for the construction of the house and also the mode of meeting the costs of damages. The Appellant claims the agreement was to rebuild the whole house while the Respondent claims to have agreed to repair the damages.

However, the matter was heard by the District Court and I am of the view that since the trial Court was the court of first instance, it was the best Court to have collected the best evidence. It is a trite law that where the decision of a court is wholly based on the credibility of the witnesses, then it is the trial court which is at a better placed to assess, their credibility than an appellate Court which merely reads the transcripts of the record. This position had been explained in the case of ***JUMANNE S/O BUNGINO AND ANOTHER VS. R. (C.A. MWANZA) Criminal Appeal No.137 of 2002 (Unreported),*** where the Court of Appeal quoted from the case ***of ALI***

ABDALLAH RAJABU VS. SAADA ABDALLAH RAJABU AND OTHERS [1994] TLR 132.

However, going through the records and the evidence before the trial Court that is the photographs of the damaged house and the CODEC report and the costs arising from the inspection of the report, considering the damage as seen in the photographs; the Respondent is required to consider the value of the house with the current situation and not the previous time as to when the house was built. The materials that were used at the time the house was build would not be of the same value as present.

Since the Respondent does not dispute that it is its truck that caused the damage, then I do not find any hardship in reconstructing the Appellants house into one that fit human habitation and one that is required to be safe for the entire time of its existence. Remembering that the damaged house was the Appellant's place of residence and was peacefully enjoying the same.

Further, a house is a basic need for any human being and that the Respondent has to respect the fact that the Appellant made efforts to have owned one. From the damage done by the Respondent's truck the Respondent is required to construct a well strong house that will not in future be of nuisance in any manner

to the Appellant. Therefore, if the Construction was not of good quality the Appellant has all the rights to complain and the Respondent is restricted from calling that interference. The house is the Appellants property and the Appellant has all rights to make sure the Respondent reconstructs the house at its best to the condition it was before their truck caused damage.

Basing on the photographs of the house after the damage, the photographs show that part of the front rear and side rears are the ones that were damaged and part of the right rear was untouched. I therefore sail with the trials Court that the Respondent should honor their Agreement by **repairing the damaged part.** To me, since it was not the whole house that was damaged to the ground, it is from the above that **I dismiss the 1st ground of Appeal.**

Referring to the 2nd ground of appeal, it is the Appellants concern that, the Court erred in ordering the Respondent to pay the Appellant the sum of **Tshs. 150,000/=** while the actual expenses incurred in rent is **Tshs. 400,000/=.** The Respondent states that the agreement was to pay for her alternative accommodation while repairing her damaged house and that they had paid for two months at a house worth **Tshs. 150,000/=** Per month. Her expenses shooting to **Tshs. 400,000/=** was in her

own decision and the same was never communicated to the Respondent. And the Lease Agreements to the above effect were tendered in Court.

It is my firm view from the records of the Court that, any agreement agreed between two parties each party has the duty to abide to the terms and conditions of the Agreement. In case of any discomfort upon the agreement, communication ought to be made so as to harmonize the situation.

The acts of the Appellant relocating to another house of different costs of rent from what was agreed and without communicating with the Respondent since the Respondent was the one catering for the alternative accommodation, was improper. It is the Appellant that caused herself hardship and which was never contributed by the Respondent. **This ground is thus dismissed for lack of merits.**

It is my firm view to sail with the decision of the trial Court that the Respondent has the duty to honor the Agreement between them **by repairing the Appellant's house to the condition it was before in good condition to fit human habitant. The same be done within 4 months from the date of this Judgement and pay the rent for the Appellant**

as agreed from the time the Respondent ceased to pay the same to the date of handling the repaired house.

From the above, I find nothing being misdirected or erred by the trial Court**. I thus uphold the decision of the trial Court and dismiss this Appeal with costs.**

It is so ordered

Right of Appeal explained.

L. E. MGONYA
JUDGE
04/09/2020

Court: Judgment delivered before Hon. D. J. Msoffe, Acting Deputy Registrar in chamber in the presence of Mr. George Masoud, Advocate for the Appellant, and Mr. Mabugo RMA, this 04th day of September, 2020.

L. E. MGONYA
JUDGE
04/09/2020