IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 18 OF 2021

(Originating from District Land and Housing Tribunal for Mtwara at Mtwara in Land Application No. 20 of 2021)

ABDEHEMANI A. PARATU..... APPELLANT

VERSUS

BAKARI K. MKANUNU.....RESPONDENT

JUDGMENT

7th Oct & 14th Dec. 2021

DYANSOBERA, J.:

The respondent Bakari K. Mkanunu successfully sued the respondent one Abreheman A. Paratu before Mtwara District Land and Housing Tribunal in Land Case No. 26 of 2020 filed on 11th day of May, 2020 over a breach of lease

agreement. Before the said court, the respondent was claiming both special and general damages as well as costs of the suit.

In a judgment delivered on 28th day of April, 2021, the appellant was declared to be liable to the breach of the contract and ordered to pay to the respondent a sum of Tshs. 3, 744, 100/= as special damages, Tshs. 2, 000,000/= as general damages. He was also condemned to meet costs.

The appellant was aggrieved by the said decision and has appeleaded on the following grounds of appeal:-

1. That the Honourable Chairman erred in law and fact by relying on Exhibit P 1 to reach his decision without considering the validity of the said document
2. That the Honourable Chairman erred in law and fact for not considering the evidence adduced by the appellant.

The case for the respondent established that in 2016 the respondent and the appellant entered into an oral lease agreement whereby the appellant leased the respondent a piece of land which was empty so as to operate bar business. It was agreed that after commencing the development of the plot land they would sign a written lease agreement. The monthly rent was agreed to be Tshs. 50, 000/= to be deducted from the total costs of the construction of the

bar building on the leased plot and after the total costs were exhausted, the respondent would be paying in cash. The respondent argued that he incurred Tshs. 5, 694,100/= as costs. He supported this argument by producing the *Taarifa ya gharama za ujenzi wa bar, counter, choo na stoo* (exhibit P 1). The respondent has made use of the premises for thirty nine months. Before the Tribunal, he claimed a balance of Tshs. 3, 744, 000/=which equals to seventy five months. A photograph of the said building was also produced in the Tribunal (exhibit P 3). The respondent complained that the appellant, without any colour of right and without involving him, issued notice to give vacant possession (exhibit P 2). This, the respondent termed as a breach of the lease agreement.

As to how he suffered damage, the respondent stated that his business died, he had been affected psychologically and financially in that his house he had mortgaged to secure the loan to operate the bar business has been sold by the Tanzania Postal Bank PLC. Further that he had failed to discharge family responsibilities such as payment of school fees and meeting education costs. He contended that he had four children who are schooling.

In his defence, the appellant admitted that the respondent was his tenant from 2016 to 22019 and had leased him premises to operate the bar. He

argued that the monthly rent was Tshs. 100, 000/=. He contended that the respondent has paid nothing from 2016 to 2019. On 14th day of April, 2019 he asked the respondent to give vacant possession of the suit premises. The respondent vacated but his structure (mdule) is still on the premises. It was in the appellant's evidence that the respondent went to the VEO at Hiyari to complain that he was claiming from him Tshs. 700, 000/= covering costs for the structure. The appellant argued that the lease agreement did not state that the costs of the structure would cover the rent. The respondent then sued him before Mayanga Ward Tribunal which ordered the appellant to pay Tshs. 2, 000, 000/= as damages for breach of lease agreement. The appellant denied liability. His appeal to the District Land and Housing Tribunal which ordered a re-trial. The appellant maintained that he was not liable for the breach of the lease agreement and instead, claimed from the respondent Tshs. 4, 000,000/= as arrears of rent.

The District Land and Housing Tribunal was satisfied that the respondent had proved his claims on preponderance of probabilities.

Before me, the appellant was represented by Mr. Alex Msalenge, learned Advocate while the respondent appeared in person.

Supporting the appeal Mr. Msalenge submitted as follows. On the first compliant on exhibit P1, he said that the trial court arrived at the decision relying on that exhibit without taking into account the validity of the document which lacks date, name and address of the document. There was no receipt attached to the document to support the purchase of the suit property. The said document (exhibit P1) has its contents dissimilar with exhibit P3. The record – proceedings show that the contents were not read out after their admission-Exh P1 and the same applied to exhibits P2 and P3. It is settled law that whenever it is intended to introduce any document in evidence it should first be cleared for admission and be actually admitted before it can be read out. Failure to read out documentary exhibit is fatal. Mr. Msalenge cited the case of **Hassan Said Talib v. R**, Crim. Appeal No. 95 of 2019 (Mtwara) quoted in the case of **Mwijage Jackson v. Elisabeth Lwegonwa and 5 Ors**, Land Case Appeal No 40 of 2020 at P.4. According to him, the document relied upon especially exhibit P1 were wrongly admitted. The remedy is to expunge from the record. If these documents are expunged, we remain with oral evidence and this leads to the second ground that the appellant's evidence was not considered. Counsel pointed out that the judgment should be based on critical analysis and evidence addressed by witness. It ought to contain in objective

valuation of entire evidence before it. A case in point is **D.B Shapriya Co. Ltd v. Mek One General Trader and Anor**, Civil Appeal No. 197 2016. He further submitted that the two parties had each his respective evidence 50,000/= and 100,000/=. The judgment does not indicate why the Chairman failed to state why the rent was 50,000/= and not 100,000/=. He pointed out that at p. 7 of the typed judgment it is recorded that claims of Tshs. 5,694,100/= were not refuted by the appellant who said, "Madai ya mjibu rufaa yalipingwa". Mr. Msalenge was of the view that the judgment did not consider the evidence of the appellant in that Section 110(1) (2) of Evidence Act is clear that whoever claiming a legal right should prove that right. The respondent failed to discharge the burden on the claims he had presented.

On general damages which are awardable at the discretion of the court, this court was referred to the case of **A. b Shapriya** where at p.3 where the case of **Ashraf Ahber Khan v. Ravji Varsan**, Civil Appeal No. 5 of 2017, the court reasoned that the person did not adduce any evidence to justify the general damages. Counsel was of the same view that the respondent did not prove how he was affected if at all the breach of contract existed. The proof of the claim was lacking as all documents are questionable and trace the contents

were not read out and have to be expunged, the decision should be vacated and the appeal be allowed. Mr. Msalenge insisted.

Replying, the respondent stated that the case before the trial Tribunal was properly conducted, sufficient evidence given and evaluated. The respondent argued that the fact that he was given the notice meant that he was a lessee. Further that the appellant admitted that notice and said that he is issued it. It was exhibit P2. The same appellant admitted that he, the respondent built a structure bar, photographed the building and admitted that it was built in his area which was vacant. The respondent pressed that he used money to construct it and the appellant was, all along, witnessing.

It was the respondent's further argument that there were amounts which were recorded and the appellant was given them twice and for the third time he refused and instead gave me a notice. He said that there were three exhibits which are important – notice, photograph and money. The respondent maintained that the claims were proved and the agreed rental charge was Tshs 50,000/= insisting that the evidence of the appellant was inconsistent and was and the magistrate believed him to be a liar.

The respondent was emphatic that the appellant breached the contract and was liable for the damages. He said that he is a businessman and is entitled to borrow and when the appellant breached the contract the respondent failed to repay the loan and the children failed to go to school.

In a brief rejoinder, Mr. Msalenge contended that the respondent had to prove and not offer a mere statement. He maintained that the respondent failed to prove his claims.

I have considered the record of the lower Tribunals and the grounds of appeal. In the present matter, it is not disputed that parties entered into an oral contract whereby the appellant leased his premises and the respondent built a structure and conducted bar business. It is also not disputed that the appellant issued to the respondent a notice to give vacant possession before the expiry of the contractual period. The respondent thought that this amounted to breach of contract. Although the appellant denied to have breached the contract, the totality o4f evidence leaves no doubt that the appellant was the breaching party. The Hon. Chairman with the assessors were unanimous that the appellant had breached the contract and was liable for damages. He made reference to the Author of the Book titled MC Gregory on Damages written by Harvey McGregor and the case of **Alfred Fundi v. Gelald**

Mango and Two others, Civil Appeal No. 49 pf 2017 as well as the case of **Harith Said and Brothers Ltd v. Martin s/o Ngao** [1981] TLR 327 on the assessment of damages.

With the evidence unfurled at the Tribunal and the analysis made, I am in no doubt that the respondent had proved his case against the appellant on preponderance of probabilities. The complaints by the appellant in his first and second grounds of appeal have no merit. The decision of the District Land and Housing Tribunal was in accord with the evidence and the law. The appellant has failed to place material upon which such decision can be faulted.

For those reasons, I dismiss the appeal for lack of legal merit.

W.P. Dyansobera

Judge

14.12.2021

This judgment is delivered at Mtwara under my hand and the seal of this Court on this 14th day of December, 2021 in the presence of the appellant and the respondent.

W.P. Dyansobera

Judge