IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA
LAND APPEAL NO. 62 OF 2021

(Arising from the Decision of Mwanza District Land and Hosing Tribunal in Application No. 241 of 2019)

GREGORY PASCHAL MADATA ---------- APPELLANT

VERSUS

ASHFA KANJI ---------- RESPONDENT

JUDGMENT

Last Order: 04.08.2022
Judgment Date: 22.09.2022

M. MNYUKWA, J.

This is a first appeal challenging the findings of the District Land and Housing Tribunal of Mwanza (trial tribunal) which is lodged by the appellant. As the respondent is also dissatisfied with the decision of the trial tribunal, he filed the cross appeal.

In his petition of appeal, the appellant advanced four grounds of appeal which are;

1. *That in view of the fact that the Application No 241 of 2019 the subject of this appeal was founded on a breach of contract*

between a tenant and a landlady then the trial tribunal erred in law in entertaining the same without jurisdiction.

2. *That the District Land and Housing Tribunal failed to appreciate, take into account and afford adequate evaluation of the evidence that was adduced by the appellant to facilitate it at arriving the decision in his favour.*

3. *That the trial tribunal erred in law in proceeding ahead to award the respondent reliefs which were not prayed for in the suit.*

4. *That having concluded that the appellant had suffered damage as a result of closure of his shop by the respondent for a period of 61 days the trial tribunal erred in law in disregarding to award the losses suffered by him for failure to serve his loan from Mkombozi bank.*

On her part the respondent presented the Memorandum of cross appeal with four grounds namely;

1. *The trial chairperson erred in law and fact by ordering the appellant (respondent in the trial court) to pay to the instant respondent (applicant in the trial court) Tshs.*

36,360,000/= as at 10th September 2021 instead of Tshs. 39,000,000/= which was dully proved by the respondent.

2. *That trial chairperson erred in law by allowing part of the appellant's counterclaim while the appellant had totally failed to prove his claim of special damage.*

3. *That the trial chairperson erred in law by holding that distress for rent by the respondent was unlawful on the ground that distress was done while the case was pending and without court/tribunal order.*

4. *The trial Magistrate erred in law for his failure to award costs to the instant respondent and by awarding costs to counter-claim by the appellant.*

The brief facts that have given rise to this appeal as per the records in the trial tribunal goes that; the respondent in this appeal was a landlady to the appellant. She registered a claim to the trial tribunal against the appellant for breach of extended tenancy agreement dated 11th May 2019.

It is on record that, the respondent owned a business premises situated at Nkomo street, Plot No 111/112 Block "S" within Mwanza which she used to let to tenants and that, one among the tenants was the

appellant. It is alleged that, the appellant has been in constant breach of the tenancy agreement which resulted the respondent to have failed to enjoy the fruits of her business. That, on the said extended tenancy agreement, the appellant failed also to honour the agreement which resulted to the filing of the suit before the trial tribunal in which the respondent claimed payment of special damages or outstanding rent by the appellant to the tune of Tshs. 10,200,000/=, vacant possession of the business premises by the appellant, general damages to be assessed by the trial tribunal, mesne profit of Tshs. 1,200,000/= per month for each utilized month up to finalization of the case, 12% interest with decretal sum from the date of judgement to full satisfaction of the court and any other relief the court may deem fit and just to grant.

When served with the application, the then respondent who is the appellant by now, filed the written statement and a counter claim in which he stated that, he took loan from Mkombozi bank amounting to Tshs. 120,000,000/= to be injected in business whose operation was done in the business premises owned by the respondent. He admitted to have executed the agreement for extension of lease agreement and in that agreement the appellant agreed and promised to pay a total of Tshs. 9,000,000/= to respondent at the end of June 2019, being rental arrears

for previous contract and that in implementing his promise he paid to the respondent Tshs. 5,000,000/= as part of the claimed amount who acknowledged receipt of the same. The appellant disputed Tshs. 9,000,000/= to be the remaining amount after payment of Tshs. 5,000,000/= and also disputed the allegation that he breached the lease agreement. The appellant further claimed on the act of the respondent who initiated the claim before the trial tribunal to close his business premises while the case was pending. He alleged that the disputed business premises was closed from 11th June 2020 to 10th August 2020 when the same was reopened by the Order of the trial tribunal hence denied him to access to do business. It was alleged by the appellant that the closure of the business resulted him to incur loss of Tshs. 36,600,000/= from sale and Tshs. 9,999,900/= which is the loan reimbursement as he failed to repay it as scheduled.

He therefore prayed the trial tribunal for declaration that the respondent act of claiming Tshs. 9,000,000/= without deducting Tshs. 5,00,000 is unlawful, a declaration that the respondent is in breach of the lease agreement with appellant, an order compelling the respondent to pay Tshs. 46,599,000/= being loss of business and denial to repay his loan as scheduled, payment of the general damages to be determined by

the trial tribunal, costs of the suit and any other order as may be just to be issued by the trial tribunal.

After hearing the application from both parties, the trial tribunal allowed the claim and counter claim presented by the parties to the extent that, the appellant has to pay Tshs. 36,600,000/= as arrears for rent from the date the parties entered into lease agreement up to the date of the decision, to give vacant possession of the business premises to respondent. On the counterclaim, the trial tribunal ordered the respondent to pay Tshs. 130,000/= per day as a loss incurred by the appellant when the rented business premised were closed, instead of Tshs. 600,000/= as claimed from 11/06/2020 to 07/08/2020 and that the appellant should not pay rent of two months which is the period within which his business premises was closed.

The above decision aggrieved both parties to the case, while the appellant filed the appeal, the respondent filed the cross appeal as shown above in their respective grounds of appeal and cross appeal.

During the hearing of the appeal and cross appeal, the appellant enjoyed the legal services of Mr. James Njelwa while the respondent afforded the legal services of Dr. George Mwaisondola and the hearing of and cross appeal was done by way of oral submissions. As there was

appeal and cross appeal, I opted to hear the appeal first and then followed by the cross appeal.

Arguing in support of the appeal, the appellant counsel abandoned the 2nd ground of appeal and argued separately the 1st, 3rd and 4th grounds of appeal. In his submission to the 1st ground of appeal, he argued that, the trial tribunal erred in law and fact to hear and determine the matter which it has no jurisdiction. He submitted that, the main controversy between the parties centered on the breach of lease agreement. He added that, the Application filed before the trial tribunal shows that, there was a landlady and tenant relationship between the parties and that there was allegation that a tenant failed to pay rent and that one among the relief prayed for was for the appellant to give vacant possession on the disputed premises. He then remarked that, The Land Disputes Courts Act, Cap 216 R.E 2019 is not applicable if the dispute is concerning lease agreement and therefore the trial tribunal had no jurisdiction as the jurisdiction is vested to the District Court.

He went on to refer Part IX of the Land Act, Cap 113 R.E 2019 from section 77 to section 123 which provides for tenant and lease agreement. He also pointed out specifically section 107(1)(a) of the Land Act, Cap 113 R.E 2019 to say that the law provides on where to file the dispute

concerning lease agreement. To buttress his position, he cited the case of **Anord Moshi & Another v Shirwa Company Limited and Another,** Land Case No 125 of 2019, HCT Land Division at Dar es Salaam. He retires by praying this court to nullify the proceedings and judgement of the trial tribunal as it entertained the matter without jurisdiction.

On the third ground of appeal, the appellant claimed that, the trial tribunal granted relief to the respondent which was not prayed. He submitted that, throughout the proceedings as reflected on page 42 and 44, the respondent claimed to be awarded Tshs. 29,560,000/= as special damages, though surprisingly the trial tribunal awarded Tshs. 36,360,000/= as special damages, different from what was prayed for by the respondent. He went on that, it was wrong for the trial tribunal to award the relief that was not prayed for. He referred to the case of **Dr. Abraham Israel Shuma v National Institute for Medical Research and Another,** Civil Appeal No 68 of 2020 to support his argument.

On the fourth ground, it was Mr. Njelwa's submission that, it is evident in the trial tribunal that, the appellant took loan from Mkombozi bank to inject in his business and unjustifiably the respondent closed its business which resulted the appellant to fail to service his loan. He added that, surprisingly, the trial tribunal did not order compensation on the

amount of loss incurred by the appellant despite the fact that the appellant failed to do business on the dates in which his business was closed. He therefore prays the court to enter judgment for the appellant.

Responding, the counsel for respondent started to submit on the first ground of appeal which is jurisdictional issue. He admitted that, the dispute centered on lease agreement as reflected on page 36 and 58 of the trial tribunal proceedings where the relationship of the lessor and lessee is not disputed. He acknowledges also that Part IX of the Land Act Cap 113 R.E 2019, starting from section 77 to section 110 and not section 123 as submitted by the appellant. He averred that section 123 and 107(1)(a) of the Land Act is not applicable in the circumstance of our case at hand. He went on to state that, the trial tribunal was clothed with jurisdiction to entertain the dispute as it did, as it is provided for under section 33(1)(a)(b) of the Land Disputes Courts Act, Cap 216 R.E 2019. He added that, since the respondent claimed for the vacant possession of the disputed land, it is the trial tribunal which was vested with the power to hear and determine the dispute. He retires by stating that, for that purpose the case of **Anord Moshi** is distinguishable in the circumstance of our case at hand.

On the third ground of appeal, it was Dr. Mwaisondola's submission that, the evidence testified in the trial tribunal by the respondent, shows that the debt was Tshs. 29,000,000/=. However, when the appellant testified as reflected on page 56 and when cross examined as reflected on page 64 shows that he was still on the disputed area which the respondent wished to evict him and by that time the total rent was Tsh. 36,360,000/= and when the judgment was delivered, the total rent was Tshs. 39,160,000/=. He retires by submitting that, it was proper for the trial tribunal to award the said relief because it was prayed by the respondent.

On the fourth ground of appeal, he submitted that, the loss purported to be incurred by the appellant is the loss of the company as the appellant tendered the bank statement of the company and not his bank statement. He argued that as the agreement was entered between the appellant and the respondent and not the company, it is his submission that the appellant failed to prove loss before the trial tribunal. He cited section 15 of the Company Act, Cap 212 R.E 2019, to say that the loss of the company is not the loss of the shareholders. He therefore prayed the appeal to be dismissed with costs.

Rejoining, the appellant's counsel mainly reiterates his submission in chief and added that the respondent's counsel admitted that the dispute on tenant as it is covered by section 107(1)(a) of the Land Act is supposed to be dealt with in the District Court. He added that, the respondent did not state in her evidence that she should be paid rent up to the finalization of the case and that's why, they maintained their position that the trial tribunal awarded the relief that was not prayed for.

In cross appeal, Dr. Mwaisondola advanced four grounds of cross appeal. On the first ground of cross appeal, he claimed that the trial tribunal awarded Tshs. 36,360,000/= instead of Tshs. 39,1600,000/= as accumulation of the total arrears of rent to be paid by the appellant from 30/09/2019 up to 24/09/2021 when the judgment was delivered.

On the 2nd ground of cross appeal, he submitted that, the appellant claimed to have suffered loss and the trial tribunal ordered the respondent to pay him a total amount of Tshs. 130,000/= per day for 61 days which is equivalent to Tshs. 7,930,000/=. He disputed this compensation on the reason that the appellant failed to prove that he had suffered loss since Exhibit SUK 1 and SUK 4 shows that, the business of Matumaini Enterprises was perhaps suffered loss and not the appellant as there was no proof to prove the same.

On the third ground of cross appeal, the counsel for respondent submitted that, distress for rent is provided for under section 102(1)(2)(3) of the Land Act, Cap 113 R:E 2019 was done peaceful and does not require court order. The counsel referred to page 40, 47, 66, and 70 to reflect on how distress for rent was peaceful done. He concluded by stating that, the trial tribunal erred to state that distress for rent was not done peaceful.

On the fourth ground of cross appeal, he submitted that the trial tribunal erred for its failure to award costs, interest and damages to the respondent, he therefore prayed for this court to award interest and damages and costs for the cross appeal in this court and the trial tribunal.

In rebuttal, Mr, Njelwa submitted that, the calculation has to be done by the trial tribunal if prayed and he added that, Tshs. 39,000,000/= is not the amount prayed for by the respondent and therefore this ground has no merit.

In replying the second ground of cross appeal, he submitted that, the appellant proved the loss by receipts. That, the loss was incurred by him during the time when the respondent denied the appellant to access the business premises. He added that, proof of loss was exhibited by receipts which was admitted as Exhibit SUK4 collectively in which the

counsel for respondent did not object its admissibility. He remarked that, failure to object the Exhibit tendered is clear admission that the claim was proper.

On the third ground of cross appeal he submitted that, the closing of the shop was not peaceful that's why there were two padlocks for the landlady and the tenant and that closing of the shop was done by a broker who was not the broker of the court.

On the fourth ground of cross appeal, the counsel for appellant briefly submitted that, the party cannot be granted a relief which was not prayed for. As the costs of the suit was not prayed for, it was for the court not to award it. He therefore, prayed for the cross appeal to be dismissed with costs.

Rejoining, Dr Mwaisondola reiterates what he had submitted in chief and added that, they have cross examined the receipts, Exhibit SUK4 collectively belonged to Matumaini Enterprises and that, two padlock was kept to prevent theft and that its true that, costs were not specifically prayed for in the application but it was prayed when the respondent testified.

From the above competing submissions, I will now determine this appeal in which I will have one issue to tackle which is, whether the appeal

and cross appeal presented before me has merit. In answering this issue, I will start by determining the first ground of appeal separately as it touches the issue of jurisdiction of the trial tribunal. If my findings on this issue will be on negative, then I will proceed with third grounds of appeal which intertwined with the first ground of cross appeal, then I will proceed with the third ground of cross appeal then I will determine the fourth ground of appeal which is intertwined with the second ground of cross appeal and finally I will determine the fourth ground of cross appeal.

Before I embark to determine the merit of appeal and cross appeal in the manner I have enlisted above, I am mindful that, this is the first appellate court in which I have the duty to reevaluate the evidence on record and examine the findings of the trial tribunal to see if the decision reached stands, if not, to make the required findings. This principle of law has been long established in different case laws such as the case of **Registered Trustees of Joy in The Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017, CAT at Tabora, in which the Court of Appeal quoting with authority the case of **Standard Chartered Bank Tanzania Ltd vs National Oil Tanzania Ltd and Another,** Civil Appeal No. 98 of 2008 (unreported) where it was held that;

"The law is well settled that on the first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (Peter v Sunday Post, 1958 EA 424; William Diamonds Limited and Another v R, 1970 EA1; Okeno v R, 1972 EA 32)"

(See also the case of **Leopold Mutembei vs Principal Assistant Registrar of Tittles, Ministry of Lands, Housing and Urban Development & Another,** Civil Appeal No. 57 of 2017 and **Mary Agnes Mpelumbe(In her capacity as Administratrix of the Estate of Isaya Simon Mpelumbe) vs Shekha Nasser Hamud**, Civil Appeal No. 136 of 2021.)

Now coming to our appeal and cross appeal at hand, I find it pertinent to start determining the first ground of appeal by citing the decision of the Court of Appeal in the case of **Isaya Linus Chungula (as administrator of the Estate of the late Linus Chungula v Frank Nyika (as Administrator of Estate of the late Aheri Nyika),** Civil Application No 487/13 of 2020 which among other things it pointed out that:

".... Jurisdiction is fundamental as it goes to the very root of the court's authority or power to adjudicate matters before it. It is also trite position of the law that issues of jurisdiction can be raised at any time or stage of proceedings..."

In our case at hand, the appellant raised the issue of jurisdiction for the first time in this court as one of the grounds of appeal. He averred that, the trial tribunal has no jurisdiction as the court which has jurisdiction is the District Court as per the provision of section 107(i)(a) of the Land Act, Cap 113 R.E 2019. This argument was strongly disputed by the respondent's counsel who averred that, since the dispute also concerned the eviction of the appellant in the disputed commercial premises, it is the trial tribunal which has jurisdiction to entertain the same.

My careful perusal of the available court record, it is apparent that, the issue in dispute which is claimed by the respondent is all about the breach of the tenancy agreement by the appellant and the eviction of the appellant from the disputed business premises so as to give vacant possession as shown on paragraph 7(i)(ii) of the Application filed in the trial tribunal. The question for determination is, whether the nature of the dispute is a land dispute or not, in order to determine whether the trial tribunal has jurisdiction to entertain the dispute or not.

In the persuasive decision of this court in the case of **Exim Bank (T) Limited v Agro Impex (T) & Others,** Land Case No 29 of 2008, His Lordship Mziray, J held that:

"Two matter have to be looked upon before deciding whether the court is clothed with jurisdiction. One you look at the pleaded facts that may constitute a cause of action. Two you look at the reliefs claimed and see as to whether the court has power to grant them and whether they correlate with the cause of action."

As the counsel of the appellant insisted that, the trial court was not clothed with jurisdiction by virtue of section 107(i)(a) of the Land Act, Cap 113 R.E 2019, I find it relevant to reproduce the said section for easy reference:

"Section 107(1) An application for relief may be brought to a district court

(a) In a proceeding brought by the lessor for an order of termination of the lease."

The above section clearly provides that, if the proceedings is brought by the lessor for an order of the termination of the lease, it is the District Court which have jurisdiction. However, in our case at hand, it is undisputed that there was a lessor and lessee relationship and that there was breach of the lease agreement in which the respondent claimed that the appellant breached it. Again, apart from the breach of the lease agreement in which the respondent claimed for compensation as arrears

for rent, she also prayed before the trial tribunal to make an order of vacant possession of the disputed business premises.

Persuaded by the decision of this court in the case of **Exim Bank (T) Limited v Agro Impex (T) & Others,** (supra), I entirely subscribe that, the test for determining whether a dispute is a land dispute or not is by looking the pleaded fact which constitute the cause of action and the relief claimed. In our case at hand, the pleaded fact as gathered from the application is on breach of the tenancy agreement and the relief claimed is the vacant possession of the disputed business premises.

Furthermore, in another persuasive decision of this court in the case of Charles **Rick Malick v William Jackson Magero,** HC Civil Appeal No 69 of 2017, when facing with the situation of determining the issue of jurisdiction, it stated that:

> *"As I understand the law, interests and rights on land may be proprietary or possessory. While possessory rights are temporary duration, proprietary rights are of a more permanent, ultimate and residuary nature. Proprietary interests is generally speaking a right in rem whereas possessory interests a right in person. In my opinion therefore, the expression "matters concerning land," would only cover proceedings for protection of ownership and/ possessory right in land."*

In our case at hand, parties are in agreement that, there is a relationship of lessor and lessee among them and that the source of the dispute is a possessory right in nature as the respondent claimed compensation for arrears of rent. Alongside, the respondent also claimed vacant possession of the disputed business premises as one of the reliefs which is proprietary rights as it is permanent and ultimate.

It is without doubt, section 167(1) of the Land Act, Cap 113 R:E 2019 provides that, it is land courts which have exclusive jurisdiction to hear and determine all disputes, actions and proceedings concerning land. The corresponding exclusive jurisdiction of the land courts to deal with land disputes is provided for under section 4(1) of the Land and Disputes Courts Act, Cap 216 R:E 2019.

The phrase matters concerning land was well defined by Mlay, J in the case of **Anderson Chale v Abubakar Sakapara,** Civil Appeal No 121 of 2014, as quoted by approval in the case of **Rick Malick v William Jackson Magero,** to mean a matter on which a right on land or interest thereon is in dispute.

As it was rightly submitted by the counsel of the respondent that the dispute at hand is a land dispute as one among the relief prayed by the respondent was vacant possession in order to restrain the appellant

from doing business on the disputed business premises. It is my considered view that, the pleaded fact and the relief claimed demonstrate that the dispute at hand is land dispute as there is a claim of interest which is the dispute concerning land within the meaning of section 167(1) of the Land Act, Cap 113 R:E 2019. For that reason, I find the case of **Anord Moshi** (supra) cited by the appellant is distinguishable with our case at hand because the dispute was based only on the payment of compensation and there was no issue of vacant possession. Consequently, this ground of appeal is without merit and it is hereby dismissed.

Now, turning to the third ground of appeal, which is intertwined with the first ground of cross appeal. It is undisputed that, the rent price was Tshs. 1,200,000/= per month. While the appellant argued that the trial tribunal awarded the relief which was not prayed for as the appellant was entitled to be paid Tshs. 29,560,000/=. The respondent claimed that, the amount that the appellant was ordered to pay the respondent was less than the amount proved by the respondent as of 10th September 2021 in which the respondent claimed that she was supposed to be paid Tshs. 39,000,000/= instead of Tshs. 36,360,000/= as ordered.

In answering the above issue, I revised the proceedings of the trial tribunal and examine the evidence of both parties when testifying so as

to see whether the trial tribunal granted the relief which was not prayed. First of all, I take note that when the respondent filed the application before the trial tribunal, the amount claimed as per the Application was Tshs 10, 200,000/=. Upon going into records, PW1 testified at the trial tribunal as reflected on page 42 of the trial tribunal proceedings that the arrears were Tshs. 29,560,000/= and by that time it was on 27/01/2021. The same figure, Tshs. 29,560,000/= was stated by PW1 when she was cross examined as reflected on page 44 of the proceedings. On the other hand, DW1 admitted to be indebted on rent arrears by the respondent. In his evidence as reflected on page 61 shows that he was occupying the disputed business premises as he testified that, the court order for the reopening of the disputed business premises was issued on 07/08/2020. It is also on record that, the order for the appellant to vacate disputed business premises was issued when the judgement was delivered on 24/09/2021.

Furthermore, the appellant did not exhibit if after reopening of the shop, he paid any rent despite the fact that, she was using the respondent's business premises. This makes me to believe that, at the time when PW1 testified, the debt was Tshs. 29,560,000/= which the counsel of the appellant stated that, it is the relief which has been stated

by the respondent in her evidence. As there is no evidence that the appellant paid rent from that date she testified up to when the judgement was delivered, which is a period of eight (8) months, it makes a total arrears of rent of Tshs. 9,600,000/=. When added up with Tshs. 29,560,000/= it makes a total of Tshs. 39,160,000/= which is the total arrears of rent to be paid by the appellant. I reach this decision as I believe that it is very unjust for the appellant to have enjoyed the business premises without paying rent as per their agreement which is contrary to section 89(1) of the Land Act, Cap 113 R.E 2019.

On his evidence DW1 admitted to have been indebted Tshs. 16,600,000/= as shown on page 68 of the trial tribunal proceedings, but he did not exhibit as to how he arrived that figure and whether he had any payment from the time the application was made to the time when the trial tribunal reached its decision.

It is the appellant's counsel argument that, the relief awarded to the respondent was not prayed for. He supported his argument with the case of **Dr. Abraham Israel Shuma Muro** (supra). Without any disrespect to him, the circumstances in the above case differs with our case at hand as in our case at hand, the appellant continued to default payment of rent and he was still in occupation and use of the business premises that's why

even the claim from the date of filing application was different from the date she testified and quite different from the date when the Judgement was delivered. For that reason, I find the 3rd ground of appeal to have lack merit and thereby dismissed. As the complaint in this ground intertwined with the first ground of cross appeal, for the foregoing discussion, I hereby find the first ground of cross appeal to be meritious and it is hereby allowed to the extent that the appellant has to pay Tshs. 39,160,000/= as a compensation for arrears for rent.

On the third ground of cross appeal, the respondent complained that the trial tribunal erred in law by holding that distress for rent was unlawful for the reason that, it was done while the case was pending and without tribunal order. While the respondent argued that, distress for rent was lawful as they complied with section 102(1)(2)(3) of the Land Act as the notice was given, and it was the broker who padlock the disputed business premises and the appellant also padlocked the business premises to show that he had consented. On his part, the appellant contested the distress for rent to be lawful as he argued that the same was done contrary to the provision of section 102(1)(2)(3) of the Land Act, Cap 113 R:E 2019.

In the case of **Prosper Evaristo Sanga v Sina Wilson Walonde @ Upendo Walondo and 3 others,** Land Appeal No 04 of 2020, my learned brother Hon. Utamwa, J quoted the meaning of the distress in the Black's Law Dictionary at page 508 to mean:

> *"The seizure of another property to secure the performance of a duty, such as the payment of overdue rent."*

As it was rightly submitted by the counsel of both parties, the distress for rent is provided for under section 102(1)(2)(3) of the Land Act, Cap 113 R:E 2019 which states that:

> *"Section 102(1) Subject to the provision of subsection (3). A lessor may only exercise his right to levy distress for rent after service of a notice in accordance with the provision of section 104*
>
> *(2) Where it is not possible to peaceful exercise a right to levy distress, the lessor should only do so under the order of the court*
>
> *(3) The exercise of the right to levy distress shall only be exercised using a court broker or a broker of the tribunal."*

In our case at hand, the record bears testimony that padlocking of the disputed business premises was not done peaceful as it is alleged by

the respondent who hired the broker to do it. Even if she served the notice as per the requirement of section 107(1) of the Land Act, Cap 113 R:E 2019, still she was required to obtain the order of the trial tribunal as the matter was still pending and the appellant was reluctant, as well as to use the broker appointed by the trial tribunal, as per the requirement of section 107 (2) and (3) of the Land Act, Cap 113 R:E 2019.

The respondent tried to justify that, the padlocking was lawful as the appellant also padlocked the same. I disagree with that assertion because, the exercise of padlocking was done while the matter was still pending before the trial tribunal. In addition to that, the evidence of PW2 bears testimony as shown on page 48 that, he asked the appellant to give cooperation by vacating in the disputed business premises and to padlock it. This is what has been testified by DW1 as reflected on page 61 of the trial tribunal proceedings.

Again, the evidence of PW1 as reflected on page 40 of the trial tribunal proceedings when she testified that, she asked DW1 to close the disputed business premises but he was very mad. All these shows that, padlocking of the business premises was not consented by the appellant. For that reason, one cannot say the same was done lawful since even the requirement of the law as quoted above were not met. I say so because

it is clear on record that the appellant padlocked it after the respondent and perhaps, he has done so for safety purpose.

Thus, it is my considered view that the padlocking was unlawful and therefore, this ground of cross appeal has no merit and it is not allowed.

On the fourth ground of appeal, it is the complaint of the appellant that the trial tribunal erred in law and fact in disregarding to award the losses suffered by him which resulted into failure to service his loan from Mkombozi bank. This ground intertwined with the second ground of cross appeal which contended that the trial chairperson erred in law by allowing part of the appellant's counter claim while he had totally failed to prove his claim of special damages.

Before I determine the above issue, I wish to point out that, it is the trite position of the law that, the one who alleges must prove his allegation. It is also a settled position of the law that in a civil proceeding when any fact is within the knowledge of any person, the burden of proving that fact is upon him. (See section 115 of the Tanzania Evidence Act, Cap 6 R.E 2019). In the case of **Martha Mshote vs Edson Emmanuel & 10 others,** Civil Appeal No 121 of 2019 CAT at Dar es Salaam (unreported) it was held held that:

"... the burden of proof never shifts to the adverse party until the party on who the onus lies discharge the burden."

In our case at hand, the counsel for the respondent faults the trial tribunal decision as it allowed part of the appellant's counter claim while he had failed to prove special damages. This was also a complaint on the part of appellant who alleged that the trial tribunal having found that the appellant had suffered loss as a result of the closure of the shop by the respondent for a period of 61 days, he also failed to appreciate the total amount of loss suffered by him which consequently resulted into failure to service loan from Mkombozi bank.

It is the appellant's argument that, the appellant proved that he had taken loan which was injected in his business as shown on page 61 of the proceedings and that, he had proved that his total sales per day was Tshs. 600,000/= and therefore, she is entitled to be awarded special damages of Tshs. 36,600,000/=. This averment was strongly disputed by the respondent, who claimed that under the lease agreement, the tenant was the appellant and the bank statement tendered by the appellant is the bank statement of Matumaini Enterprises. He went on that, even the exhibit tendered by the appellant to prove loss was that of Matumaini Enterprises and not of the appellant who was the tenant in the disputed

business premises. He therefore prayed for the Exhibit SUK 1 and SUK 4 to be ignored as the same belongs to Matumaini Enterprises.

Before I proceed to determine this ground of appeal, I would like to put it clear that, it is evident in the trial tribunal record that, litigants were executing lease agreement by mutual trust and confidence to each other as some of the obligations were done according to their convenience including the manner of payment and the mode of acknowledging payment. It is also on record that, the respondent knew very well that, the appellant is a tenant on her business premises and that he is a business man who worked for Matumaini Enterprises.

Upon going through the evidence of DW1 as reflected on page 57, he testified that, he is one of the directors of Matumaini Enterprises as exhibited by the Exhibit SUK 2 and that, his business is situated at the disputed business premises owned by the respondent. DW1 testified further by tendering Tax Identification Number certificate (TIN) which was admitted as Exhibit SUK 3 to show that Matumaini Enterprises is located in the disputed business premises. He also exhibited by tendering EFD receipts in the name of Matumaini Enterprises which was admitted as Exhibit SUK 4.

The evidence of DW1 that, he is doing business in the disputed business premises is backed up by the evidence of the respondent PW1 as reflected on page 41 when she testified that, she paid the stamp duty for tenant though he was given a TIN of Matumaini Enterprises instead of the appellant until when they searched at TRA and got the personal TIN of the appellant.

While I agree with the respondent's counsel that in law, the company is a legal person capable of being sued, sue and hold its own property, and that, it is Matumaini Enterprises which incurred loss and not the appellant but in the circumstances prevailing in our case at hand, I beg to differ with him that as the circumstances of this case clearly shows, the appellant rented the disputed business premises but the business that was done, is that of Matumaini Enterprises in which, the appellant is one of the directors. For the peculiarity of the circumstances of this case, I support the holding of the trial tribunal that the appellant got loss when the disputed business premises was closed.

The important issue to be determined is whether the appellant entitled to be compensated to the tune of Tshs. 600,000/= per day for 61 days as the loss incurred when the disputed business premises was closed. As it is reflected on page 59 of the typed proceedings that, the

total sale was Tshs. 600,000/= per day and this is per Exhibit SUK 4 collectively. It is my understanding that, total sale cannot be equated to profit which, one can say that he has incurred loss. This is due to the fact that, profit is obtained by deducting expenditures from the total income which perhaps can be total sale in our case at hand.

It is settled position of law that, it is the duty of the appellant to prove that, indeed he incurred the total loss of Tshs. 600,000/= per day, of which in our case at hand he failed to exhibit the same since the amount of sale cannot be equated with the amount of profit.

Thus, since I am in the same finding that, the appellant incurred loss as the trial tribunal did, I concur with the findings of the trial tribunal that the appellant to be compensated at the rate of Tshs. 130,000/= per day to be an approximated profit which the appellant would have obtained from his business, as the reasonable compensation, for 61 days when the disputed premises was closed. I also agree with the findings of the trial tribunal that, the appellant should not pay rent of two months from the total arrears of rent he is supposed to pay as indicated above. I hold that view because there was unlawful distress for rent. Thus, this ground is partly allowed on the part of the appellant and thereby fail in the cross appeal.

On the fourth ground of cross appeal, the respondent claimed that, the trial tribunal erred not to award costs to the respondent and awarded costs to appellant in the counter claim. Admittedly, the counsel for respondent stated that costs was not specifically prayed for but it was asked when the respondent testified. It was the submission of the respondent's counsel that the respondent also prayed for interest and damages but she was not awarded. The counsel for the appellant submitted that, a party cannot be awarded the relief which she did not ask for. He added that, the respondent did not pray for costs.

From the competing argument of the parties, I wish to point out that giving cots is the discretionary power of the court which has to be exercised judiciously and, in most cases, though not always the costs is awarded to the winner of the case by ordering the losing party to pay. In the circumstances of our case at hand, the claim of the appellant was partly allowed as well as the claim of the respondent, and therefore there was a win-win situation. Also, as per the nature of the dispute itself and the relationship of the parties prior to the dispute, it is my view that it is not just to award costs to any party to the case as the records shows that, they were a landlady and a tenant for more than 10 years and they were doing business under mutual trust and confidence to each other. For that

reason, I am compelled to revise the decision of the trial tribunal of awarding costs to the appellant and I order that each party to bear his own costs. I also waive to make an order for interest, mesne profit and general damages as prayed.

In the final analysis, the appeal and cross appeal is partly allowed to the extent explained here in.

It is so ordered.

Right of appeal explained to the parties.

M. MNYUKWA
JUDGE
22/09/2022

Court: Judgment delivered on 22nd September, 2022 in the presence of the parties.

M. MNYUKWA
JUDGE
22/09/2022