IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 38 of 2022

(Originating from the judgement and decree of Application No.98 of 2021 of the District Land and Housing Tribunal for Mbeya at Mbeya dated 3rd March 2022)

SINANDUGU J. MGINA .....APPELLANT

VERSUS

1. **S.H. AMON ENTERPRISES CO. LTD**
2. **PASCHAL KITENDE** **.....RESPONDENTS**

JUDGEMENT

Date of last order: 19.10.2022

Date of Judgement: 25.11.2022

Ebrahim, J.:

The appellant herein was the applicant in Application No. 98 of 2021 where he sued the respondents herein praying for judgement and decree among other prayers that the Tribunal to declare him as the lawful tenant in Plot no. 10 Block U at Mwanjelwa within Mbeya City. He also prayed for

permanent injunction restraining the respondents from disturbing his business and locking him out of the premises as well as punitive and general damages and costs.

The brief background of the matters as could be gathered from the evidence on record is briefly narrated that the appellant is businessman having a motor vehicle spare parts shop at Soweto since 2006. By then the owner was one Nuru Mti wa Uzima. The owner of the building where his shop is located is the first respondent. The second respondent is the operation manager of the first respondent. In 2017, the 1st respondent purchased the building where the appellant business is located. The appellant was served with 30 days' notice on 04.08.2017 to give vacant possession. However, on 15.08.2017, he was served with another letter from the 1st respondent acknowledging him that he is a lawful tenant and from then he peacefully enjoyed the use of the premises until 28.06.2021 when the 2nd respondent locked his shop on the claim of rent arrears. It is the locking of the shop that led the appellant to sue the respondents.

At the trial Tribunal, the appellant called two witnesses. Himself testifying as PW1; and similarly, the respondents called two witnesses.

After hearing the evidence from both sides, the trial Chairman decided in favour of the respondents giving the reasons that **exhibit P1** (tenancy agreement) was entered between the appellant and one Amani Uwezo Nuru while the owner of the property is S.H. Amon Enterprises Ltd. The trial Tribunal also reasoned that that appellant failed to bring the author of **exhibit P2(**a letter from S.H. Amon Enterprises showing that they have acknowledged the appellant's previous tenancy agreement).

Dissatisfied with the decision of the trial Tribunal, the appellant has preferred the instant appeal raising six grounds of appeal as follows:

1. *That the trial Tribunal erred in law and fact by failure to judiciously analyze and evaluate evidence adduced by the Applicant in connection with the issue before the court.*
2. *That the trial Chairman erred in law and fact by failing to comprehend the Application pleaded by the Appellant and further condemning the Appellant unjustifiably from his personal point of view contrary to the best practice of judicial officers.*
3. *That the trial tribunal erred in law and fact by invoking rules of circumstantial evidence in a case requiring strict proof as the case had serious question to be resolved by the tribunal.*
4. *That trial Chairman erred in law and fact by failure to resolve first and second issue framed for determination by the tribunal against the Appellant and holding that the Appellant is not a lawful tenant*
5. *That the trial Chairman erred in law and fact by disregarding truthful testimony of the Appellant and further using his testimony against his application.*

6. *That the trial Chairman erred in law and fact by relying on the weak and unmerited evidence adduced by DW1 and DW2.*

In essence, save for the fourth ground of appeal that the appellant is complaining about failure to address the 2nd and 3rd issues, the appellant's grounds of appeal is on misapprehension and improper evaluation of evidence.

This appeal was argued by way of written submission. The appellant was represented by advocate Peter Kilanga while the respondents preferred the services of advocate Jalia Hussein. Both parties filed their respective submissions as per the scheduling order. However, I shall not recapitulate their submissions but shall refer to them in the course of traversing the grounds of appeal.

The appellant's counsel began his submission by arguing the 4th ground of appeal that the 1st and 2nd framed issues were not resolved.

Arguing the point, advocate Kiranga relied on a number of cases to cement his argument that it is mandatory for the trial tribunal to determine all framed issues. Among the cited cases, it is the Court of Appeal case of **Joseph Ndyamukama Vs NIC Bank Tanzania Ltd & Two Others**, Civil Appeal No. 239 of 2017 where the Court cited with approval the case

of **Kukal Properties Development Ltd Vs Maloo & Others** (1990-1994) EA 281 where it was held that:

"A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure".

He also relied on the case of **Mantra Tanzania Limited Vs Joaquim Bonaventure**, Civil Appeal No. 145 of 2018 which held the position that *the appellate court cannot step into the shoes of the lower court to assume the duty of resolving the relevant issue which was not decided.*

Responding to the submission by the Counsel for the Appellant, Counsel for the Respondent referred to **Order XX Rule 5 of the Civil Procedure Code, CAP 33 RE 2019** in arguing that while the general rule is that all issues framed have to be determined; if one issue is sufficient to determine the matter to finality then there is no need to determine other issues.

In rejoinder, Counsel for the Appellant cited the Court of Appeal case of **Alisum Properties Limited Vs Salum Selenda Msangi,** Civil Appeal No.39 of 2018 where it was held that failure to decide on every issue before the trial court, renders judgement defective.

Indeed, the position of the law is clear that the trial court/tribunal is required to make a finding of every framed issue. I fortify my position by

the principle held by the Court of Appeal in the case of **People's Bank of Zanzibar Vs Suleiman Haji Suleman** [2000] TLR 347.

Similarly, the law i.e., **Order XX Rule 5 of the Civil Procedure Code, Cap 33 RE 2019** provides as follows:

"*In suits in which issues has been framed, the court shall state its finding or decision, with the reason therefore,* ***upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit***" (Emphasis added).

Discerning from the above positions of the Court of Appeal and the law, it is clear that the judgement of the trial court or tribunal must determine the issue(s) of controversy between the parties. In other words, all issues of controversy must be answered and clearly reflect within the context of the judgement.

In saying so and gathering from the positions of the cited cases, it is not suggested that in a case where the related issues have been condensed and determined together, the same amounts to flouting of procedure. The flouting of procedure comes to failure to determine the relevant issue in resolving the parties' dispute. As practice would dictate, one or two issues can as well be determined together.

Now coming to our instant case, as records would show, the trial Tribunal in addressing the issues in controversy before him at page 2 of the typed judgement stated as follows:

> *"Hoja ya msingi ilikuwa kuangalia kama mdai ni mpangaji halali katika chumba hicho cha biashara na kama wajibu maombi walikiuka mkataba wa upangaji kwa kutaka kumuondoa mdai katika nyumba hiyo".*

(Whether the applicant is the lawful tenant; and whether the defendants breached the terms of tenancy agreement by evicting the applicant).

The following were the four issued framed for determination before the trial Tribunal:

1. Kama mdai ni mpangaji halali wa mdaiwa 1*(whether the applicant is a lawful tenant of the 1st defendant)*
2. Kama mdaiwa 1 na 2 walikuwa na haki ya kumwondoa mdai.*(Whether the 1st and 2nd defendants were legally justified to evict the applicant)*
3. Kama mdai amepata hasara yoyote. *(Loss (if any) suffered by the applicant).*
4. Nafuu zipi wahusika wanastahili. *(Relief(s) if any parties are entitled to).*

From the 1st and 2nd issues, the trial Tribunal was required to determine on the tenancy status of the applicant to the 1st defendant; and depending on

the answer to the 1st issue, then comes the determination as to whether the defendants had legal mandate to evict the applicant.

Reading in its context from the issues of controversy posed by the trial Tribunal reflected above, it is clear that the Tribunal condensed the 1st and the 2nd issues together.

After posing the above two questions, the trial Tribunal went to evaluate the evidence presented before him in response to the above two issues and made its findings that according to the tenancy agreement tendered by the applicant i.e., **exhibit P1,** Amani Uwezo Nuru the person whom the appellant entered into agreement with, is not the lawful owner of the commercial building but the 1st respondent. The trial Tribunal at page 6-7 of the typed judgement made a decision that the appellant could not prove that he is a lawful tenant of the 1st respondent, the consequences of which that he should vacate the premises.

The trial Tribunal therefore answered the first and second issues in controversy that the appellant is not a lawful tenant of the 1st defendant and he should vacate the premises.

In view of the above, I hasten to agree with the counsel for the respondents in respect of the 4th ground of appeal that the two issues were duly determined by the trial Tribunal. The cited case of **Joseph Ndyamukama Vs NIC Bank Tanzania Ltd & Two Others (supra)** is distinguishable with the circumstances and facts of this case because in the cited case the trial judge only made a finding on one issue and held that the sale of the mortgaged property was lawful and declared the 2nd respondent the lawful owner of the disputed premises but left other four issues in controversy un-determined. Those issues included the crucial issue as to whether the appellant discharged the loan with the first respondent.

From the above therefore, I find the 4th ground of appeal to be unmeritorious and I dismiss it.

Coming to the remaining grounds of appeal, the appellant in essence is complaining on the failure to analyze and evaluate the evidence properly and the weight accorded to it. In so doing, I shall consider the remaining grounds of appeal together by re-visiting and re-evaluating the entire evidence on record and subject the same into objective scrutiny; and if merited arrive to this court's own findings of fact. I am inspired by the

position stated in the case of **Shah Vs Aguto** (1970) 1 EA 263 citing with authority the case of **Peter Vs Sunday Post** (1958) EA 424 where it was held at page 492 that:

> *"It is a strong for an appellate Court to differ from the finding on a question of fact of a judge who tried the case and who has had the advantage of seeing and hearing the witness. An appellate court has, indeed jurisdiction to review the evidence in* ***order to determine whether the conclusion originally reached upon that evidence on records and find out whether the appellant's defence can stand or otherwise****".* [Emphasis added].

Similar position has been illustrated by the Court of Appeal of Tanzania in the cases of **Leopold Mutembei Vs Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017; and **Jamal A. Tamim Vs Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 (both unreported) to name but a few.

Submitting in support of the appeal both in chief and in rejoinder, counsel for the appellant stated that the trial chairman disregarded his evidence and five exhibits tendered by the appellant as well his evidence and that of the witnesses. He referred to **exhibit P1** being a contract from year 2016 to 2023 which the respondents replied via **exhibit P2** recognizing the

appellant as a lawful tenant, introducing Mr. G. Kyaruzi and listing his phone number. He referred this court to the persuasive case of **Ramadhani Mtulia Mwenga Vs Shaweji Salum Mndote and Ismail Namtaka**, Land Appeal No. 50 of 2019 at pg 8 (HC –Land Division) where it was held that:

> "*The position of the law is that, generally failure or improper evaluation of evidence inevitably leads to wrong or biased conclusions resulting into miscarriage of justice. From that premise, it has been held that failure to consider the defence case is fatal and usually vitiates the decision*".

Counsel for the appellant further cited the case of **Leonard Mwanashoka v R**, Criminal Appeal No. 226 of 2014 (unreported) which was quoted with approval in the cited case of **Ramadhani Mtulia (supra)** on what it entails in consideration of, or evaluation of evidence and it held thus:

> *"It is one thing to summarize the evidence for both sides separately* ***and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain****. Furthermore,* ***it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation*** *and another thing not to consider the evidence at all in the evaluation or analysis."* [Emphasis added].

Counsel for the appellant also cited that High Court case of **James Bulolo and Another Vs Republic** [1981] TLR 283, hon Rubama, J (as he then was) on the failure to consider evidence of defence; and the Court of Appeal case of **Tanzania Breweries Limited Vs Anthony Nyingi** [2016] TLS 99 at pg 99 which it held that:

> *"In principal if a court of law decides to accept or reject a party's argument, it must demonstrate that it has considered the same and set out the reasons for rejecting or accepting it. Otherwise, a decision becomes an arbitrary one".*

He concluded that the trial chairman failed to consider evidence and testimony adduced by the appellant and relied solely to the respondent's testimony which resulted to biased decision. He thus prayed for the appeal to be allowed with costs.

Responding to the arguments levelled by the counsel for the appellant, counsel for the respondent quoted various excerpts of the judgement of the trial court in particular pages 4-7 to show that the trial Tribunal analysed and evaluated the evidence of both parties during the hearing of the case. He contended further that the trial chairman also considered all five exhibits but in the process of analysing the evidence, he found that there were some facts which were not disputed by the parties. He gave an

example of the observation by the Tribunal on the fact that the dispute is on the tenancy agreement and the fact that the appellant is not the owner of the disputed premises.

Counsel for the respondents further invited this court being the first appellate court to evaluate the evidence on record and make its own findings. He relied on the case of **R.D.P Pandya Vs Republic** [1957] EA 336 which held that:

> *"...it is a salutary principle of law that a first appeal is in the form of re-hearing where the Court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion..."*

Counsel for the respondents distinguished the cited cases of **Ramadhani Mtulia, Leonard Mwanashoka and Makubi Dogani** with the facts of the instant case and urged the court to find that they are irrelevant and not applicable to the instant matter. He argued also that the cases of **James Bulolo and Another**; and the case of **Tanzania Breweries** are irrelevant and not applicable in the instant case.

He however, invited the court to consider that the appellant had a burden of proof to call a material witness in terms of **section 110(1) and (2) of**

the Evidence Act, Cap 6 RE 2022 and that the court should draw an adverse inference against the appellant for failure to call Mr. Gratian Kyaruzi the author of exhibit P2.

In conclusion, he citing the case of **Hemedi Saidi Vs Mohamed Mbilu** (1984) TLR 113 in bringing the point that the weight of evidence is measured by its quality; and that if for undisclosed reasons a material witness is not called, the court is entitled to draw an adverse inference against a party that was supposed to call such a witness. He prayed for the appeal to be dismissed with costs.

The appellant herein testified at the Tribunal **(PW1)** that he came to know the 1st respondent year 2017 when he purchased the building that he is doing his business of selling motor vehicle spare parts. He also knows the 2nd respondent as the operation manager of the 1st respondent. He testified that he entered into tenancy agreement with the first landlord which was for seven years i.e., 2016-2023 **(exhibit P1)** for the rent of Tshs 500,000/-per month. He admitted to have received a letter and notice dated 04.08.2017 from the 1st respondent **(exhibit P2 - collectively)** as the new owner of the disputed premises wanted him to give vacant possession. Again, he received another letter on 15.08.2017 from the 1st

respondent acknowledging that he is a lawful tenant and from then he continued to enjoy the peaceful occupation of the premises until 28.06.2021 when the 2nd respondent locked him out of his shop. However, the Tribunal ordered the shop to be opened **(exhibit P3)**. PW1 told the court that the act of locking his shop occasioned loss to his business. He tendered his TIN Number certificate, business licence, vehicle registration cards, efd receipts and Business Licence Tax (**exhibit P4**).

Robert Mwambela, WEO testified as **PW2.** He admitted to know both the appellant and the 2nd respondents and that on the night of 28.06.2021, the 2nd respondent involved him in locking the shop of the appellant. He said the 2nd respondent told him that the appellant has not paid rent. However, the shop was opened on 29.07.2021 following an order from the Tribunal. He said that the disputed premise is the property of the 1st respondent.

On their part, the respondent called two witnesses. **Denis Laban (DW1)** a branch Manager of the 1st respondent told the Tribunal that the 1st respondent bought the building in 2017 from CRDB **(exhibit D1)** and when buying it there were tenants from the previous owners including the appellant. Testifying further, he told the court that Gracious Kyaruzi used

to be the 1st respondent employee up to year 2016 but he was not from year 2017. He also said that they have been asking for the rent orally but he did not know the amount of rent that has not been paid by the appellant. **DW2, Pascal Patrick Kitende,** testified that he is the operation manager of the 1st respondent and that the disputed premise was purchased year 2017. He identified the appellant as one of the tenants they found within the building when the 1st respondent purchased the building and that other tenants entered into a new tenancy agreement except the appellant. Responding to cross examination questions, DW2 admitted that YONO Auction Mart acted on behalf of the 1st respondent and that the proclamation of 04.08.2017 by YONO was sent to the appellant. He however, denied that the letter of 15.05.2017 was written by the employee of the 1st respondent.

From the above testimonies and as correctly observed by the trial Tribunal in its judgement, the indisputable fact is that the owner of the disputed building is the first respondent having purchased the same year 2017.

In determining the instant appeal, as invited by both parties, I shall be guided by the principle of law under the provisions of **sections 110 read**

together with section 112 of the Evidence Act, Cap 6 RE 2022 which reads as follows:

> *110.-(1)* ***Whoever desires any court to give judgement as to any legal right*** *or liability dependent on the existence of facts which he asserts* ***must prove that those facts exist.***
>
> *(2)* ***When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***
>
> *112.* ***The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence****, unless it is provided by law that the proof of that fact shall lie on any other person.*
> [emphasis added]

As alluded earlier, the trial Tribunal made a finding that the appellant failed to prove that he was the legal tenant of the 1st respondent and that he was supposed to call one Gratian Kyaruzi to identify exhibit P2.

The appellant's case is that he is the lawful tenant of the shop in a building owned by the 1st respondent after having entered into a tenancy agreement with the previous owner for the period of seven (7) years from 5th Dec 2016 to 04th December 2023 (exhibit P1). The appellant also claims that when the 1st respondent purchased the building, he served him with 30 days' notice from YONO AUCTION MART & CO. LTD dated 04th August 2017 with reference no. YONOS.H.AMON/2017/010 requiring the appellant

to vacate the disputed building and a letter dated 15th August 2017 (**collectively marked as exhibit P2)** acknowledging the receipt of the appellant's tenancy agreement with the previous owner and promised to honor the same until the end of such agreement. The said letter was signed by Grazion Kyaruzi.

Advertently, the notice from YONO AUCTION MART among other things mentioned one G.Kyaruzi and listed his telephone numbers i.e., 0754226132 and 0715226132 as the contact person of the 1st respondent in case the appellant wishes to obtain further information.

It is from the basis of those documents and the acknowledgement from the 1st respondent's representative namely Gration Kyaruzi that the appellant claims that the locking of his shop by the 1st respondent was unlawful.

DW1 told the trial Tribunal that the person named Gration Kyaruzi used to be an employee of the 1st respondent up to year 2016 but he was no longer an employee in year 2017. The similar testimony concerning Gration Kyaruzi was adduced by DW2 who denied the letter of 15.05.2017 to have been written by the 1st respondent employee. Nevertheless, he admitted that YONO Auction Mart acted on behalf of the 1st respondent and that the

proclamation of 04.08.2017 by YONO was sent to the appellant. For ease of reference at page 19 of the typed proceedings while responding to cross examination question, DW2 stated as follows:

"-Taarifa ya YONO Auction Mart ilikuwa inaenda kwa Sinandugu Mgina tarehe 4/08/17.

- YONO Auction Mart walikuwa wanafanya kazi kwa niaba ya S.H.Amon Enterprises Co. Limited."

Evidently, DW2 (the 2nd respondent) acknowledged the notice of 04.08.2017 (Exhibit P2) sent to appellant and that the same was sent on behalf of the 1st respondent. Conspicuously, among the contents of the said notice, is information concerning the contact person of the 1st person namely G. Kyaruzi. As evidence would reveal, DW1 admitted knowing Gration Kyaruzi as he used to be an employee of the 1st respondent only that he worked up to year 2016. It follows therefore that, the mentioning of one Gration Kyrauzi by the appellant was not a mere imagination but indeed he existed as an employee of the 1st respondent. This is confirmed by DW2 by acknowledging exhibit P2- a notice from YONO Auction Mart to the appellant. DW2 neither objected exhibit P2 during its admission in

court or its contents nor were the contents of the notice challenged during the trial. That being the position therefore, the respondents are admitting that in August 2017, Gration Kyaruzi was the contact person of the 1st respondent and the assertion that he was not working with them in 2017 is not true.

The trial Tribunal held that the appellant was the one who was supposed to call Gration Kyaruzi to identify the letter of 15.08.2017 because of the mere denial of his existence by DW1 and DW2. I do not agree with its findings but rather find that he was shifting the burden to the appellant.

Section 112 of the Evidence Act, Cap 6 RE 2022 is clear that a burden of proving a particular fact shall be of that person who wishes the court to believe in its existence.

The appellant submitted before the trial Tribunal a letter written by a person who also happen to be a contact person listed by the agent of the 1st respondent i.e., YONO AUCTION MART. Both letters were attached with the application that was served to the respondent. All the respondent did in their joint Written Statement of Defence was an evasive denial ***(borrowing***

a leaf from Order VIII Rule 4 of Civil Procedure Code, Cap 33 RE 2019) of the allegation of fact instead of responding it as the point of substance.

Again once the appellant claimed by attaching a letter that he received an authorization to continue as a lawful tenant for the duration of his tenancy agreement, the respondents' mere response that it is not true was not enough as their denial meant they disputed the letter and such authorization. It is at that time that the burden shifted to them from the denied fact that it was not their letter and the fact the author of that letter was not their employee at that particular period of time. It was therefore expected from the respondents to bring evidence or either tender a letter showing the date that the said Gration Kyaruzi's employment ended with the 1st respondent bearing in mind that DW1 acknowledged that he was once their employee. More-over, the said letter of 15.08.2017 was not objected during admission or even challenged that it was not authentic. Furthermore, as DW2 claimed that the appellant has not been paying rent, no proof of the sum claimed was tendered in court to prove their assertion and it is even surprising to learn that if at all it was true that the letter of 15.08.2017 was not written by their employee, why wait for almost 3 years

to vacate the appellant whilst their notice from YONO AUCTION MART wanted the appellant to vacate within 30 days?

Flowing from the above therefore, I find that the appellant managed to prove that the 1st respondent acknowledged his tenancy agreement with the previous owner and agreed to let him stay until the end of the tenancy agreement. More so, there is no evidence to disapprove a fact that the letter of allowing him to continue as a tenant from 2016 to 2023 was not from the 1st respondent.

Having found that, the appellant managed to prove his case and in consideration of the disturbances and anguish caused by respondents in locking the appellant out albeit for one month coupled with the inconveniences associated therewith, Tshs. 10,000,000/- as general damages would act as a solace and serve justice to this particular case.

All said and done, I find that the appeal has merits save for one ground of appeal that I dismiss. I allow it by issuing the following orders:

1. That, the appellant is a lawful tenant in the disputed building until the end of his tenancy agreement i.e., 04.12.2023.

2. That, the respondents, their agents, their employee or any person acting for and on behalf of the respondents are restrained from evicting or disturbing the appellant from peaceful enjoyment and conducting of his business at designated shop in the disputed building until the finalization of his tenancy agreement mentioned above (No. 1).
3. The respondents shall pay the appellant general damages to the tune of Tshs. 10,000,000/- (say Tanzania Shillings Ten Million only).
4. The appellant shall have his costs from the trial Tribunal.

Accordingly ordered.

R.A. Ebrahim

JUDGE

Mbeya

25.11.2022